

## BALANCING TRADE LIBERALIZATION AND PUBLIC HEALTH PROTECTION UNDER WTO LAW

Fayzullaeva Ozoda Baxrom qizi

Master's candidate in International Law and Human Rights at Tashkent State University of Law.

[ozodafayzullayeva9@gmail.com](mailto:ozodafayzullayeva9@gmail.com)

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**Abstract.** *This study examines the complex connection between member states and the World Trade Organization (WTO), with a particular emphasis on how public health initiatives are implemented inside national borders. It looks at the laws that support WTO regulation of state members, such as General Exception Clauses in WTO agreements like GATT Article XX, TRIPS Article 8 and others, which permit the implementation of public health-related measures without unduly impeding global commerce. The adaptability of TRIPS laws and regulations is emphasized in the Doha Declaration on TRIPS and Public Health. The research also examines several cases in which state laws that violated their charters challenged WTO trade restrictions. With an emphasis on the need for a careful balance between international trade obligations in WTO agreements and public health protection, the article attempts to present a thorough analysis of the link between WTO laws and public health legislation.*

**Key words:** *WTO, public health, International Law, TRIPS agreement, GATT Article XX(b), trade liberalization, health security, access to medicines.*

### I. Introduction

The World Trade Organization (WTO), which was founded in 1995, is a huge organization tasked with overseeing trade-related matters globally and making decisions about what, in essence, constitutes a legitimate trade in accordance with its by-laws. In order to facilitate trade in this globalized world and expedite the process generally so that GDPs can benefit from this streamlined process, the member states that have signed up for the organization largely agree to be bound by the rules and regulations that have been developed by the organization, after consulting with all signatories, in all matters pertaining to trade and commerce. Being a member of the World Trade Organization (WTO) benefits states all over the world since it facilitates trade and makes increased reliance on one another a sign of progress rather than weakness. The WTO's progressive regulations are solely responsible for this.

However, some member states are not always favored by these restrictions, and they find themselves in a tough situation when things go wrong. Although the purpose of these restrictions is to help them, in practice, things do go wrong for them. The same is true of the assumption that the policy drafters of different signatories to the WTO rules and guidelines hold that they are not allowed to create public health policies, which is fatal to the state's progress. On the other hand, the WTO neither permits nor prohibits any state from enacting legislation pertaining to public health. Instead, they have established several strategies for governments to enable them carry out commerce in a way that does not put the general public at risk while nevertheless carrying out vital trade for public health.

However, one question that is being raised is how the WTO has created rules to protect the public health advancements of one state while preserving the extensive and interconnected trade policies and without affecting the regulations and laws of other states that are involved in the trade and that were developed around the WTO. Examining this aspect is necessary to comprehend how the WTO is implementing its trade and commerce policies while permitting the

states to implement their own set of regulations pertaining to public health. In fact, this paper seeks to more thoroughly explore the laws created by the states in the relevant field.

## II. Methodology

The methodology of this research begins with an extensive literature review, drawing on a variety of international legal, normative, and academic sources. This analysis primarily draws on several WTO cases as well as pertinent books, academic articles, and commentary. The arguments were strengthened with the use of additional reference sources, such as reports and websites.

There is a wealth of academic research about the WTO dispute resolution process. This essay, however, will concentrate on how the WTO's jurisprudence developed the "exceptions" to the non-discrimination principle in order to strike a balance between member state sovereignty, commerce, the environment, and health.

## III. The WTO Legal Framework and Public Health

International trade liberalization, the process of removing barriers to trade across borders in goods and services, was encouraged on the grounds that free trade would guarantee political stability, encourage investment, and create jobs, all of which would boost economic growth and improve population health.<sup>1</sup> These justifications served as the foundation for the adoption of trade liberalization as the dominant economic framework, which has been supported and frequently enforced by global financial institutions.<sup>2</sup> The WTO is in charge of negotiating legally binding agreements among its 166 member nations and which together account for more than 98% of global trade in goods and services. This allows the WTO to promote and oversee the multilateral liberalization of global commerce in goods and services.<sup>3</sup>

Historically, trade has long been associated with public health. The earliest "quarantine" procedures to combat infectious illnesses were implemented on the basis of economic efficiency.

The purpose of quarantine at the time was also a mode of transportation for commercial ships. The World Trade Organization (WTO), as a successor to the General Agreement on Tariffs and Trade (GATT) of 1947, has already been a cornerstone of the world economy.<sup>4</sup> Coordinating and advancing global free trade is its primary goal. Free trade, however, occasionally has a detrimental effect on the administration of public health. In the case of monopolies, unrestrained free trade would increase the unequal distribution of natural resources among countries, prompting monopolists to disregard public health in pursuit of commercial gain. For instance, TRIPS is biased to safeguard the interests of wealthy nations due to the disparity in the security of patent rights and drug access between developing and developed nations. Drug patents create trade obstacles that prevent people with illnesses like AIDS from accessing quality treatment, which has an impact on public health. There is still a significant disparity in public health governance between rich and poor nations, notwithstanding the Doha Declaration's later clarification that it strongly supports human interests when they clash with economic gain.

<sup>1</sup> World Health Organization and World Trade Organization (2002) WTO agreements & public health: a joint study by the WHO and the WTO Secretariat. Geneva: World Health Organization/World Trade Organization.

<sup>2</sup> San Sebastian M, Hurtig AK, Rasanathan K (2006) Is trade liberalization of services the best strategy to achieve health-related Millennium Development Goals in Latin America? A call for caution. *Rev Panam Salud Publica* 20: 341346.

<sup>3</sup> World Trade Organization (2019). What is the WTO? - Who we are. [online] Wto.org. Available at: [https://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm).

<sup>4</sup> World Trade Organization (2024). The WTO. [online] World Trade Organization. Available at: [https://www.wto.org/english/thewto\\_e/thewto\\_e.htm](https://www.wto.org/english/thewto_e/thewto_e.htm).

Furthermore, the WTO appears to have exacerbated the gap by asserting that its governance function is insufficient since it prioritizes "profit above all else."

Although trade is the WTO's primary objective, its core principles remain centered on human welfare, such as "promoting the economic development of developing countries and guaranteeing their participation in the expansion of global commerce" and "promoting people's improvement of living standards."<sup>5</sup> Public health concerns may be exempt from free trade under the WTO's general rules, such as the "General Exceptions" to Article 21 of the General Agreement on Tariffs and Trade. By integrating the policies and guidelines of other international organizations into the numerous treaties to which it is a party, the WTO also resolves the dispute between public health governance and free commerce. The principles for international cooperation are also stated out in detail in the third clause of the SPS Agreement. In an effort to resolve any disputes, the WTO also constantly solicits advice and information from other international organizations. Additionally, via constructive dialogue and efficient collaboration, the World Health Organization (WHO) and WTO jointly control public health concerns.

However, the majority of impoverished nations continue to be at a disadvantage due to the WTO system, which has exacerbated the disparity in the governance of public health and the allocation of trade advantages. Eventually, the discrepancy will result in adverse externalities related to global health governance. The supply of improved public health goods and a reduction in pharmaceutical tariff barriers are only two examples of the increased role that developed nations among the States parties should have in public health governance.<sup>6</sup>

WTO members must abide by a number of general regulations as stipulated in the General Agreement on Tariffs and Trade (GATT 1994). The fundamental tenet of WTO regulation is nondiscrimination. Every WTO member must be treated equally with regard to all imported goods, according to the Most-Favored-Nation (MFN) principle. A WTO member must treat local and imported commodities equally under the national treatment principle. Regarding market access for products, all members must keep their planned obligations on tariffs and should not impose tariffs beyond the set levels unless renegotiated otherwise. Furthermore, a WTO member is not permitted to place quantitative restrictions (QRs) on access to market for commodities. Additionally, each member should make sure that its import licenses and other non-tariff barriers (NTBs) do not unnecessarily hinder trade. However, if they meet specific requirements, WTO members may depart from these duties in certain extraordinary situations.

Health policies, such as rules governing food safety, must not impede commerce without a valid reason, according to trade standards. Health advocates fear that these limitations unnecessarily restrict the ways in which governments safeguard health. International trade law provides two main ways to balance these interests. The legislation acknowledges a nation's right to health protection, but it stipulates that health measures must be grounded in research and prevent trade restrictions beyond what is required to mitigate threats. Furthermore, trade agreements have exclusions that allow a government to disregard trade-liberalizing principles, such as the restriction on export limits, if necessary to safeguard public health.<sup>7</sup>

<sup>5</sup> Jiaheng, D. (2021). State Obligations in Public Health Governance. E3S Web of Conferences, 253, p.01027. doi:<https://doi.org/10.1051/e3sconf/202125301027>.

<sup>6</sup> SEA-HSD-244 Distribution: General Globalization, Trade and Public Health: Tools and Training for National Action World Health Organization Regional Office for South-East Asia New Delhi. (2000).

<sup>7</sup> Council on Foreign Relations. (n.d.). Trade Law Confronts an Exceptional Global Health Crisis | Think Global Health. [online] Available at: <https://www.thinkglobalhealth.org/article/trade-law-confronts-exceptional-global-health-crisis>.



Intellectual property (IP) norms included into trade agreements have a direct influence on health regulation. According to international trade law, governments must preserve their intellectual property, including patents.<sup>8</sup> Previously, such responsibilities raised health concerns since patent protection might restrict access to pharmaceuticals and vaccinations. Trade law provides exceptions in this case as well, acknowledging a nation's authority to supersede patent rights by, for instance, a mandatory license to expand access to a patented drug, such antiretrovirals for HIV/AIDS treatment. Both in the broad rules governing imports and exports and in the context of intellectual property, trade law exceptions allow governments to take immediate health-based regulatory actions to ensure that their citizens have access to food, medication, vaccinations, and medical equipment.

#### IV. WTO Agreements Relevant to Health Regulation

##### a) GATT / GATS agreements

Article XX of the General Agreement on Tariffs and Trade (GATT) 1994 and Article XIV of the General Agreement on Trade in Services (GATS) provide general exceptions, which allow a WTO member to perform actions that would otherwise be prohibited under GATT 1994 rules, provided that they meet certain requirements.<sup>9</sup> Article XX of the GATT 1994 creates the general exception for trade in goods, allowing WTO members to take actions to protect public health or plant and animal life. The measures must not, however, be intended to impose unjustified or unreasonable trade barriers between countries with similar situations. WTO parties may be excluded from WTO regulations in a variety of unique situations, as listed in Article XX on General Exceptions.<sup>10</sup> However, any action performed under Article XX must be in accordance with the Chapeau, or introductory phrase, which forbids the misuse of exceptions. The Appellate Body (AB) Report has said that the exclusions in Article XX-paragraphs (a) to (j) apply to all of the GATT 1994's duties, including not just the MFN and national treatment principles but also others.<sup>11</sup>

Any measure that violates GATT 1994 must pass a two-tier test in order to be justified under Article XX:

Step 1: The measure at issue must be justified under one of the specific exceptions - subparagraphs (a) to (j) - stated under Article XX, each of which concerns distinct purposes and has various conditions; and,

Step 2: The measure must be administered in accordance with the provisions of the Chapeau of Article XX. (US – Gasoline, Appellate Body Report, p. 22)

The *US-Gasoline* case demonstrates how the meaning of general exclusions developed in WTO disputes. In this dispute, Brazil and Venezuela challenged the United States' decision to impose more strict reformulated gasoline requirements on overseas refiners than on domestic ones. The US Gasoline rule, promulgated by the Environmental Protection Agency (EPA), permitted the sale of gasoline with defined cleanliness to customers. The United States maintained that such restrictions would reduce air pollution in the country.

<sup>8</sup> World Trade Organisation (2017). WTO | Intellectual Property (TRIPS) - TRIPS and Public Health. [online] Wto.org. Available at: [https://www.wto.org/english/tratop\\_e/trips\\_e/pharmpatent\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm).

<sup>9</sup> Rabiul, M. and Hasan, T. (2018). Role of WTO in Balancing Trade Environment Public Health and Sovereignty. Seventh International Conference on Advances in Social Science Management and Human Behaviour SMHB 2018, pp.43–47. doi:<https://doi.org/10.15224/978-1-63248-160-3-25>.

<sup>10</sup> General Exceptions, Article XX, GATT (1992), [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art20\\_e.pdf](chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf)

<sup>11</sup> US-Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 29 April 1996 (US-Gasoline).

This rule implementing the Clean Air Act sought to reduce air pollution, which is harmful to human health.

The complainants argued that such an action violated GATT Article III, which guarantees equitable treatment of both local and foreign products.<sup>12</sup> Furthermore, the complainants argued that this rule is not justified as a general exemption under Article XX of GATT 1994. In the history of the WTO, the Gasoline Case is noteworthy because the AB established a connection between the Chapeau and GATT Article XX exclusions by adopting a two-tier test. The AB came to the conclusion that as the US regarded imported gasoline "less favorably" than local gasoline, its gasoline regulation violated GATT Article III.<sup>13</sup>

The AB rejected the Panel's logic and came to the conclusion that the US gasoline rule complied with Article XX(g) criteria. However, the AB determined that the provision was still unreasonable under Article XX since, according to the Chapeau of Article XX, it constituted "unjustifiable discrimination" and concealed a ban on foreign commerce. The US modified its emission standards in August 1997 to conform to the AB's decision in the case.

#### **b) Technical Barriers to Trade (TBT) Agreement**

As to the TBT Agreement, every WTO member retains the authority to impose trade restrictions in order to achieve "legitimate objectives." These justifiable goals include keeping people safe and healthy, protecting the health and welfare of animals and plants, protecting the environment, safeguarding national security interests, and stopping dishonest business activities.

The TBT Agreement covers both mandatory ("technical regulations") and optional ("standards") product requirements. Whether at the national or regional level, it encompasses such obligations created by public or private bodies.<sup>14</sup> The implementation of international standards is strongly encouraged by the TBT Agreement. However, members may decide otherwise if they believe that implementing that global norm would not be suitable for achieving certain justifiable goals.

The *EC-Asbestos* case is a significant WTO decision that maintained France's asbestos ban. The dispute was begun when Canada brought France to the WTO challenging France's asbestos prohibition. (Decree No. 96-1133). The asbestos prohibition was implemented in order to safeguard human life from the harmful effects of asbestos.

The AB maintained the panel's conclusion that the French ban was appropriate under GATT Article XX(b), which grants a general exemption to WTO regulations for actions required for human health protection, and that the measure met the requirements of Art. XX chapeau because it did not result in "arbitrary or unjustifiable discrimination" or constitute a "disguised restriction on international trade." The AB, however, overturned the panel's conclusion that asbestos and other, less hazardous substitute fibres are "like" substances under Article III:4 of the GATT and need to be treated equally on the French market. The Appellate Body report concluded, "We strongly believe that information on the health hazards linked to a product may be relevant for evaluating the 'likeness' under Article III:4 of the GATT 1994."<sup>15</sup>

#### **c) Sanitary and Phytosanitary Measure (SPS) Agreement**

<sup>12</sup> Ghafur Hamid, A. and Mahmud, N.A.K.N., 2008. The WTO rules versus multilateral environmental agreements: the search for reconciliation. *Macquarie J. Int'l & Comp. Envtl. L.*, 5, p.57.

<sup>13</sup> Kapterian, G., 2010. A Critique of the WTO Jurisprudence on 'Necessity'. *International & Comparative Law Quarterly*, 59(1), pp.89-127

<sup>14</sup> WHO, W., 2002. WTO agreements and public health. Geneva, World Health Organization and the World Bank

<sup>15</sup> Report of the Appellate Body: European Communities — Measures Affecting Asbestos and Asbestos-Containing Products, WTO Doc WT/DS135/AB/R (12 March 2001).

The SPS Agreement allows nations to limit trade in order to safeguard food safety and protect human life from plant- or animal-borne illnesses (zoonoses). The SPS agreement recognizes members' ability to choose the amount of health protection that they think appropriate and assures that an SPS is not a superfluous, arbitrary, scientifically indefensible, or disguised limitation on international commerce. It grants a member the right to take measures that will result in better levels of health protection or actions that address health risks for which no international standards exist. However, these actions must be scientifically proven. As previously noted, GATT Article XX(b) offers exception for measures essential to safeguard human, animal, or plant life or health, which is immediately applicable. Yet, the SPS Agreement is more specific in this respect, since a key condition is that members be able to explain the measure using scientific data, and there is a risk to health that justifies trade measures that are not based on global norms.

#### **d) Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement**

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)<sup>16</sup> is another piece of legislation that directly falls under the WTO's jurisdiction. It essentially assigns the responsibility of overseeing IP matters and associated subjects at the global level. In order to update the TRIPS Agreement with regard to public health, the WTO presented the Doha Declaration<sup>17</sup> in 2001. This proposal was accepted by the majority of WTO members and went into force in 2001. In order to solve the public health issues facing developing and least developed nations, this declaration emphasized the necessity of the TRIPS Agreement being a component of larger national and international initiatives.<sup>18</sup>

TRIPS rules, which regulate IP commerce between governments and private investors, are essential in conversations concerning public health. Since different nations depend on one another's technologies, IP sharing is prevalent in the fight against several public health issues. It is important to note that Article 85 of the aforementioned article allows all parties to the TRIPS Agreement to create and implement policies that safeguard public health and nutrition and advance the general welfare while remaining compliant with the agreement.

The Doha Declaration made mandatory licensing for pharmaceutical exports necessary. In essence, a compulsory license is granted by the government or another appropriate authority to facilitate the use of a patented invention in the medical field without the patent holder's consent. This is done to promote health and safety while minimizing the hardships experienced by the organization that developed the medicine. According to the declaration, countries with limited or no manufacturing capacity in the pharmaceutical industry may find it more difficult to effectively utilise compulsory licensing restrictions. The proclamation also dispelled the idea that mandatory licensing for the export of patented drugs is a requirement of the WTO and that such an authorization would only be granted in emergency situations, which were also subject to the organization's fancies and whims. The TRIPS Agreement will not prohibit any member state from taking action to safeguard public health, as stated explicitly in that declaration, and the

<sup>16</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, World Trade Organizations, New York (1994).

<sup>17</sup> Doha Declaration, Declaration on the TRIPS Agreement and Public Health, WTO (2001).

<sup>18</sup> WTO, TRIPS and public health, WTO, 8 [https://www.wto.org/english/tratop\\_e/trips\\_e/pharmapatent\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/pharmapatent_e.htm).



World Trade Organization will assist its signatories in addressing any problems that endanger the public.<sup>19</sup>

Finally, the WTO, in its amendment passed on August 30, 2003, made it easier to import drugs and medicines from other countries at lower prices via the compulsory licensing regime, thereby assisting least-developed countries in dealing with the challenges posed by health and safety concerns.

## V. Conclusion

In conclusion, states are entitled to enact robust legislation aimed at safeguarding public health and preventing non-communicable illnesses, contrary to common opinion. Instead, it offers a structure that satisfies the requirements of upholding international trade agreements and protecting public health. General exception clauses, such as those included in GATT Art. XX and GATS Art. XIV, TBT, SPS, and TRIPS Art. 8, permit the implementation of public health measures as long as they are not unreasonable or unjustified discriminatory. The Doha Declaration on TRIPS and Public Health emphasizes the flexibility of TRIPS rules to ensure access to essential medicines, underpinning the importance of public health.

The World Health Organization's (WHO) and WTO's collaboration and cooperative approach further demonstrate their dedication to public health protection. All of these factors together show how the WTO seeks to strike a careful balance between international trade commitments and public health, ultimately promoting the welfare of countries and their citizens.

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<sup>19</sup> WTO, Amendment to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), WTO, [https://www.wto.org/english/tratop\\_e/trips\\_e/tripsfacsheet\\_e.htm#:~:text=WTO%20members%20therefore%20adapte d%20a,measures%20to%20protect%20public%20health](https://www.wto.org/english/tratop_e/trips_e/tripsfacsheet_e.htm#:~:text=WTO%20members%20therefore%20adapte d%20a,measures%20to%20protect%20public%20health).

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