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ARTICLE XX OF GATT: A LEGAL COMPROMISE BETWEEN FREE TRADE AND SOVEREIGN INTERESTS

Açar sözlər: GATT, ÜTT, XX maddə, ümumi istisna, zəruri, suverenlik, öhdəliklər, liberallaşdırma.

Ключевые слова: ГАТТ, ВТО, Статья XX, общее исключение, необходимый, суверенитет, обязательства, либерализация.

Keywords: GATT, WTO, Article XX, general exceptions, necessity, sovereignty, obligations, liberalization.

The General Agreement on Tariffs and Trade (GATT) 1994 establishes a free trade regime for all WTO Members and is based on fundamental principles such as MFN, national treatment, and the prohibition of the discriminatory application of quantitative restrictions [1, p. 82]. However, it is recognized that these liberalization rules may sometimes conflict with social and economic values such as public morals, health, the environment, national security, and economic development; therefore, Article XX of the GATT provides a legal framework to resolve these conflicts through general exceptions [5].

The general exception provisions do not, in essence, alter the core obligations under the GATT; they serve only as a defense mechanism to protect a measure that has already been determined to be inconsistent with GATT obligations

in certain circumstances, and the burden of asserting and proving this defense rests upon the state applying the measure [3].

In this regard, Article XX serves as the central legal instrument for reconciling the rules of trade liberalization with values such as public morals, human-animal-plant life and health, the conservation of exhaustible natural resources, the enforcement of domestic laws, balance of payments, economic development, and national security [6].

Structurally, Article XX consists of two parts: first, an introductory paragraph known as the «chapeau,» followed by specific categories of exceptions in the form of subparagraphs (a)–(j), and these subparagraphs constitute a limited and closed list [6, p. 7784]. At the subparagraph level, each exception identifies a specific legitimate policy objective (for example, the protection of public morals or the conservation of exhaustible natural resources) and requires a legal «nexus» between the measure and that objective through connectivity requirements such as «necessary» or «relating to» [2, p.178].

The chapeau, in turn, becomes an overarching supervisory norm that filters out the abuse of the general exception mechanism by requiring that measures adopted for these listed legitimate purposes are not applied in a manner that constitutes «arbitrary or unjustifiable discrimination

between countries where the same conditions prevail, or a disguised restriction on international trade» [6, p.7785].

A state invoking Article XX must first, in the initial stage, prove that the measure falls within the scope of one of the subparagraphs (a)–(j)—that is, it makes a real and reasonable contribution to the protection of the specified social or economic value [6, p.7786]. In the subsequent stage, the state must demonstrate that this measure, in its actual application, does not create arbitrary and unjustifiable discrimination between countries in the same conditions and does not have a purpose of disguised protectionism; this is the primary function of the chapeau.

The «necessary» requirement has been specifically developed in the jurisprudence of the Appellate Body, and the *Korea – Various Measures on Beef* case is the main point of reference in this regard [4]. In that case, the Appellate Body stated that «necessity» must be determined based on a «weighing and balancing» of several factors, such as the extent to which the measure contributes to the objective of the law or regulation in question, the importance of the protected values, and the measure's impact on exports or imports [8]. Within this balancing framework, the tribunal examines whether there is an alternative measure—either WTO-consistent or less WTO-inconsistent—that the member in question could «reasonably be expected to employ»; if such an alternative exists, a more trade-restrictive or more inconsistent measure is not considered «necessary» [2, p.182].

Precisely due to the requirements of the chapeau, there have been cases where measures adopted for legitimate objectives were justified under an Article XX subparagraph but failed to receive legal protection due to their manner of application [3]. In the *US – Gasoline* case, although the United States was found to be fundamentally justified in applying environmental

standards to gasoline to protect air quality, it was concluded that these standards created unjustifiable discrimination against gasoline from Venezuela and certain other countries [9]. In the *US – Shrimp* case, the objective of protecting sea turtles was considered legitimate; however, the rigid and inflexible application of the US measures regarding shrimp imports from India, Malaysia, Pakistan, and Thailand was evaluated as arbitrary discrimination between countries where the same conditions prevail [10].

Following the same line of reasoning in the *US – Gambling* and *Brazil – Retreaded Tyres* cases, while the legal legitimacy of public morals and public health objectives was recognized, the courts strictly scrutinized whether differential treatment and exceptions in the application of the measures created risks of discrimination or disguised protectionism [5].

The interpretation of Article XX has not remained static over time; rather, it has developed based on an «evolutionary approach,» which is particularly evident in the interpretation of general terms such as «public morals,» «exhaustible natural resources,» and «human life and health.» [3] In the *US – Shrimp* case, the Appellate Body criticized the panel for interpreting the phrase «exhaustible natural resources» in a narrow and static manner and emphasized that this term is «evolutionary by definition» and, taking into account the development of modern international environmental law, must encompass both living and non-living natural resources [10]. At the same time, in disputes such as the *US – Gambling* and *China – Certain Publications and Audiovisual Products* cases, a dynamic content was given to the concept of «public morals» by noting that it is a variable and context-dependent category shaped by the prevailing social, cultural, ethical, and religious values of each member [4].

As a result of these interpretative approaches, GATT Article XX provides a certain «green

light» to environmental and public health-oriented measures and allows states to legally implement trade restrictions they deem necessary to protect their natural resources, ecosystems, and domestic markets [5]. Article XX demonstrates that free trade rules are not absolute; when values such as environmental protection and the preservation of human, animal, and plant health so require, states may prioritize these values, provided that the adopted measures do not become a means of arbitrary or disguised circumvention of GATT obligations [4].

In a broader context, Article XX creates an exceptional space within the predictable and rules-based multilateral trading regime established by the WTO and serves to manage the tension between social values and trade liberalization [4].

According to the precedent established by the WTO Appellate Body, the requirement for a state to pass a two-tier test in order to justify a measure inconsistent with GATT obligations under Article XX ensures both a broad interpretation of social values and the prevention of protectionist intentions hidden behind these values [2, p.178].

Consequently, if a measure not only makes a real contribution to the protection of one of the specified values but also does not create arbitrary and unjustifiable discrimination between countries where the same conditions prevail and

lacks a motive of disguised protectionism, that state can maintain the measure even if it is inconsistent with GATT [3].

In subsequent years, GATT Article XX has served as a model for general exception clauses used not only in trade law but also in international investment law [7]. Following the same logic, a number of international investment agreements recognize the rights and protections of investors on one hand, while on the other, they include general exception clauses that—under certain conditions—exempt measures adopted in good faith for purposes such as public health, the environment, public order, and national security from treaty obligations; these clauses are, in most cases, an adapted version of the GATT Article XX model [7].

Such clauses typically consist of three main elements: a limited list of permissible policy objectives, a connectivity requirement expressed through formulas like «necessary» or «relating to» between the measure and that objective, and finally, a chapeau-style general filter mechanism prohibiting protectionist and arbitrarily applied measures; this structure has become the central legal technique for balancing free economic relations with social and environmental values in both trade and investment law [7].

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**GATT-IN XX MADDƏSİ: AZAD TİCARƏT VƏ SUVEREN
MARAQLAR ARASINDA HÜQUQİ KOMPROMİS**

XÜLASƏ

Bu məqalədə beynəlxalq ticarət rejimində iqtisadi liberallaşdırma ilə dövlətlərin suveren tənzimləmə maraqları arasındakı incə tarazlıq təhlil edilir. Məqalənin əsas qayəsi ondan ibarətdir ki, GATT-in XX maddəsi dövlətlərə ictimai mənəviyyatın, insan və heyvan sağlamlığının qorunması, habelə tükənən təbii sərvətlərin mühafizəsi kimi ali məqsədlər naminə azad ticarət öhdəliklərindən müvəqqəti kənara çıxma imkanı yaradır.

Həmçinin, vurğulanır ki, bu istisnaların tətbiqi mütləq deyil və iki mərhələli sınaq testinə tabedir: ilk növbədə müvafiq tədbir maddədə sadalanan spesifik bəndlərdən birinə uyğun gəlməli, daha sonra isə maddənin giriş hissəsindəki (Chapeau) şərtləri yerinə yetirməlidir. Tədqiqatda Ümumdünya Ticarət Təşkilatının (ÜTT) presedent hüququna istinad edilərək göstərilir ki, əsas çətinlik dövlətin legitim daxili siyasətini «gizli proteksionizm»dən fərqləndirməkdir. Yekun olaraq, məqalə XX maddəni ticarət hüququnun «təhlükəsizlik klapanı» kimi xarakterizə edir və onun global ticarət sisteminin legitimliyini qorumaqdakı rolunu əsaslandırır.

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**СТАТЬЯ XX ГАТТ: ПРАВОВОЙ КОМПРОМИСС МЕЖДУ СВОБОДНОЙ
ТОРГОВЛЕЙ И СУВЕРЕННЫМИ ИНТЕРЕСАМИ**

РЕЗЮМЕ

Статья посвящена анализу одного из самых сложных механизмов в праве ВТО, который позволяет государствам-членам отступать от правил свободной торговли ради защиты ключевых общественных интересов. В работе рассматривается, как правовые рамки ГАТТ позволяют странам реализовывать меры по охране окружающей среды, защите здоровья населения и сохранению исчерпаемых природных ресурсов, не нарушая при этом целостность международной торговой системы.

Центральное место в анализе занимает «двухуровневый тест», выработанный практикой Апелляционного органа ВТО. Автор подробно разбирает необходимость соответствия ограничительных мер не только конкретным пунктам Статьи XX, но и её вводной части (*Chapeau*), которая служит барьером против произвольной дискриминации и скрытого протекционизма. В статье делается вывод, что Статья XX не является лазейкой для уклонения от обязательств, а представляет собой необходимый инструмент гибкости, позволяющий примирить глобальную экономическую интеграцию с социальными и экологическими приоритетами государств в условиях современного меняющегося мира.

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