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TRANSCRIPT

Exception Clauses in International Trade Law

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1. Hello, my name is Petros Mavroidis. I am a professor of law at Columbia Law School, where I teach international trade and antitrust. And we are here to discuss exceptions to obligations assumed under the World Trade Organization contract.

2. I'll give you an idea about how this lecture will be taking place in the next 35 minutes or so. I've divided the discussion into four parts. First, I will explain how I understand the term *exceptions*. It's some sort of functional semantics, so you – the auditor – understand where I'm coming from with this issue. Then I will discuss the *rationale,* and then the architecture of the exception clause. So, you have an idea about what was the legislative intent and to what extent both law and case law are – let's say – compatible with the legislative intent. Now, because all feasible contracts are incomplete, in the third part, I will discuss the completion of the contract through case law. In other words, the jurisprudence – the leading cases in the jurisprudence of the provision – will be discussed. And for this context, I have divided the discussion into two parts. We'll first do the GATT case law – 1948 to 1995 – and then the WTO. It is not just the chronology that matters. What also matters is that the case law has undergone a significant change with the advent of the WTO. And finally, at the end of our discussion, I will explain the new generation agreements – because you can imagine a contract written back in 1948 does not necessarily correspond to the wishes of societal preferences in 2025. So, we'll see how this provision has been evolving also in the mind of the framers of the WTO.

3. Now, with this in mind, let me start with a brief discussion of how I understand exceptions. And I think here, what matters is to make a distinction between *exemptions*, on the one hand, and *exceptions* on the other. An exemption from a contract is – if you wish – the limits of the contract, the jurisdiction of the contract. Some provisions which are exempted, they are not covered by the disciplines agreed; whereas exceptions from a contract denote a case where we all assume an obligation, but we agree that maybe if we were too rigid in formulating the obligation, then we'd be adding to the rules instead of solving problems. And this is precisely why under *conditions*, we allow exit from the contract. That's an exception.

4. Now, to make sure that one does not, in an opportunistic manner, invoke an exception – exceptions are always associated with a certain burden of persuasion – the part invoking an exception will carry the burden of proof to show that it meets the conditions. And the burden of persuasion will be the content that the part invoking an exception must prove in order to successfully deviate from its obligations.

5. Now that we know what we discussed, let me explain one more thing: I will not discuss all of the exceptions of the WTO. I will discuss one, but my selection does not suffer from sample bias. And here is why. We'll discuss Article XX of the GATT. Article XX of the GATT – the General Agreement on Tariffs and Trade – the predecessor to the WTO, is the first provision discussing exceptions. It's the provision with the longest case law, and it's the provision on which all other exceptions, provisions, have been modeled. So, Article XIV of GATS – the service agreement – for example, reproduces Article XX of the GATT. So, by discussing Article XX of the GATT, we'll have a great idea about how exceptions operate throughout the WTO contract.

6. Now, let me say two words – now that we understand exceptions, and we know we'll be focusing on Article XX – about the rationale and the architecture. And I think the most important point here is the rationale for Article XX.

7. If you open the Agreement and you see for yourself how it's written, you, any reader, will be surprised to see, for example, that non-discriminatory protection of health features under the exceptions clause. And then legitimately you ask yourself, "Wait a second, why should this be an exception and not the rule?" Isn't the purpose of the world trading system to guarantee non-discrimination as opposed to deregulation, with insight to the WTO to have a world policeman who will essentially condone deregulation? All we promised is non-discrimination. In fact, if you go back in economic history and we forget law for a moment, even discriminatory measures were accepted as legitimate in the GATT. This is what John Raggy, a very famous political scientist who alas is not with us anymore, called the "Embedded Liberalism" – that's the whole idea of Embedded Liberalism.

8. Now back to our story. To understand why health and non-discriminatory measures feature under exceptions, we have to go back to the main focus of the GATT. Now what was the main focus of the GATT? So, the main objective of the GATT was to address tariffs. Now to address tariffs, they had to come up with a recipe for addressing tariffs – and I simplify here, I hope without vulgarizing – the instrument to simplify tariff negotiations was to draw a list of all products – the so-called harmonized system, which had a different name before – and include all their products.

9. So, now we have lists: let's say State A has its own list of tariffs and State B has its own list of tariffs. And State A imports, let's say, a car or a pen, let's say – it's an easier example – a pen from State B; and a pen from State B looks like *this,* but pens in State A don't look like *this*. So, the question is: should they accept this pen as a pen in my State even though it looks different?

10. Now, you see this question … you can ask this question to either the consumers in State A, the importer or to the government of State A. If you ask this question to the government – democracies normally function in the context of political economy – there are lobbies that want a preferred solution over another. So, government might be incentivized to behave opportunistically because it wants to promote a particular sector. This is not the

case with consumers. Consumers are motivated by price concerns to the extent that the imported item works like the domestic pen; consumers will say this is a pen.

11. Now, to make sure that trade will happen and will not be obstructed, the agreement – the GATT – ensured that it would be the consumers who would be entrusted with the question "is this a pen?"

12. Now, this is so far so good. This looks very reasonable, except there are areas where consumers have perfect knowledge and areas where consumers do not have perfect knowledge. For example, consumers might not know that this pen was produced in Country B with child labor, which State A condemns. Furthermore, consumers care only about the price they pay. They don't care about the social cost of the imports. And I'll give you an example. Instead of child labor, think of it this way: this pen was produced in a manner that nullifies environment. Now this pen might be very cheap; but to produce this pen, the exporter has imposed a huge cost on environment; and the importer does not want to assume this cost by itself. In order to dissuade the exporter from producing environmentally unfriendly goods, the importer should be in position to say *"these two goods are not like my pen or whatever protects environment – and that's why it's more expensive and your pen does not. And I'm not going to accept pens that destroy environment"*.

13. So, because consumers don't care about the social cost, but governments do, we head to the equilibrium that we strike in the GATT and say *"Ok, it will be in principle consumers who will define if two pens are the same, but governments, if they have reasons to believe that they are not, they could intervene in the second stage and say stop, even though they have the same functionality these two goods should be treated as unlike – either because they don't respect environment or because they're produced with child labor or … or … or"*. And this is why we added the list of exceptions to the critical obligation assumed to impose law and bound tariffs on imported goods.

14. Now, this is the rationale for the list of exceptions. The architecture of Article XX, I would say, is quite faithful to this rationale. So, what the framers did is to introduce a legal

test that governments had to observe in order to prove that what they are doing – the reason why they stop trade – is a genuine and authentic reason and not a beggar-thy-neighbor policy.

15. I'll give you one example here again. If State A wants to make the point that this pen is environment-unfriendly, State A must demonstrate that its measure – let's say an import embargo – is necessary for State A to achieve its objective, which is environmental protection, *necessary* means this is the least restrictive option to international trade. If I have 10 options, which one helps the importer to achieve the stated objective? So, we don't want States to impose a disproportionate cost on international trade. We want States to achieve their objective with the minimum possible hindrance on international trade. In a way, the necessity principle will oblige States to pick the one measure which, on the one hand, helps it achieve its objective and, on the other, does not amount to a regulatory substitute to its own producers. This is as good as it gets when it comes to distinguishing between wheat and chaff: *when is the importer telling me the truth that it is promoting environmental objectives instead of promoting the interest of its own domestic producers?*

16. Now, with this in mind, I will move to discuss the evolution of the case law, and I will do it through two cases. Again, my discussion does not suffer from sample bias because these are the two cases which shape the case law over the years. And the second dispute that I'll be discussing with you is the case which is being to this day – September 2025 – cited as the leading case in the context of disputes in the realm of exceptions in the GATT.

17. The first case is very famous: the *US-Tuna case* – and I don't know if you can see it but I have a very nice picture here. I mean one picture is 1000 words; and this picture is indeed 1000 words. What is the idea behind the *Tuna case*? Well, the idea is this: when fishermen in the Pacific Ocean go fishing tuna, they can do it through a variety of measures – you can go like hook-fishing with a cane, or you can go with a fishing boat and then throw your nets, or you can go with the purse seine nets. And now, this is the problem, and I'll explain why it is a problem. You see, tuna does not fish on the surface of the water but for biological reasons, there is a symbiosis between tuna and dolphins: dolphins and tuna, they swim together; so, fishermen, when they observe dolphins in the ocean, when they see

dolphins on the surface of the water, they know that underneath, there is a school of tuna. Now, one way to fish tuna effectively as much tuna as possible is through the so-called *purse seine nets*. So, what they do is they encircle the dolphins, and they catch, harvest, all the tuna which is underneath. Unfortunately, because of this purse seine net, dolphins, they have no means to escape the net, and they suffocate, and accidentally fishermen fishing for tuna kill an inordinate amount of dolphins.

18. The respondent here was a government which had enacted legislation in order to ban the sale of tuna fished with purse seine nets. Why? Because in the respondents' constituency, a number of consumers valued the life of dolphins very much. And because they valued the life of dolphins very much, they persuaded the government to enact legislation which obliged its domestic fishermen, its national fishermen, to avoid using purse seine nets. So, the respondents' fishermen were obliged to incur an adjustment cost and move from cheap nets like the purse seine nets to a more expensive technology to harvest tuna in order to avoid killing dolphins. They were at a competitive – if you wish – disadvantage vis-a-vis foreign fishermen who continue to fish tuna with purse seine nets.

19. Now, the exporter, when facing the ban, saw its sales of tuna in the respondents' markets go down – plummeted – they go down almost to zero, and complained. The discussion ended up … there was a dispute, there were consultations, they were not successful, and the dispute reached the door of the GATT in Geneva.

20. So, you understand the dispute here is about the process of production and a lot about consumer protection, a lot about environmental protection, a lot about labor laws, a lot about health concerns – the process of production.

21. Now, when the case went before the GATT, of course, the respondent could not defend the point: "this is not an import embargo"; it was an import embargo although there was another defense, which was discussed summarily by the panel – there's no need to discuss it here for the purposes of this talk. The discussion moved into the invocation of Article XX. So, the respondent invoked Article XX – Article XX.b) to be precise – stating that

"well, this measure, fine, it violates my obligation not to impose import quotas, but you have to understand, it's necessary for me to protect the life of dolphins – animal life – otherwise, I will be obliged to accept tuna which is fished in a way that kills dolphins, and in this way, I will never be in position to achieve my environmental objective".

22. When the case went before the panel, I think the world was betting on the respondent winning the argument. Surprisingly, for reasons that nobody understood, that panel – that was 1989 – decided that the measure by the respondent was unilateral; and hence, because it was unilateral, it was illegal, as if I cannot – anyone, any country on earth – cannot protect its environment or the health of its citizens unless if it concludes agreements with the rest of the world.

23. That was out of this world, totally unsubstantiated, impossible to justify – and you can imagine the world environmental community was up in arms. There were all sorts of demonstrations before the GATT and so on and so forth.

24. Thank god, it didn't last long because a few years later a similar case came before the world – let's call it – trade court. And this is the picture of the second case. And the second case concerns the so-called TEDs – the Turtle Excluding Devices.

25. Now what is the idea behind that? There is almost a striking parallelism with the first case in the sense that, again, shrimps and sea turtles, they are in symbiotic relationship, they swim together. Now, the way fishermen normally fish for shrimps is by using normal nets. The funny thing is – and there are short digression here – there are a number of observations concerning the way sea turtles react, which have informed even some papers in economics – believe it or not: sea turtles, when they are caught in a net, they don't try to stream over the net, over the surface of the water, but they start going down to the end of the net. And that's where they die because they're suffocated.

26. So again, in this case, the respondent – the country which took the measure – imposed on its own fishermen to use Teds. That's a TED. Now, you see there is a hole at the end. Now, this hole at the end allows sea turtles to swim out but streams will be caught on

the side. And with the TEDs, there are a number of empirical papers suggesting clearly that mortality of sea turtles, as a result of fishing streams, had gone down to close to zero. It's a very effective device.

27. Now, once again the case goes before the world Court; and this time, instead of tuna and dolphin, we have shrimps and sea turtles. The plaintiff makes the same argument as the plaintiff in the *tuna-dolphin case;* and the respondent says, *"look, I insist upon the argument made the first time in the tuna-dolphin case. I don't see why unilateral protection should be condemned by the world trade Court because all I'm doing here is ensuring non-discriminatory conditions of competition between foreign and domestic fishermen with respect to fishing shrimps; since I have no obligation to have common environmental policies with anyone else – the GATT and the WTO were not about common harmonized policies – well, it is my privilege to go ahead and do that and by the way, my domestic producers had to incur adjustment costs themselves as well".*

28. Now, this is not at all crazy because, you can imagine, when we discuss international trade cases, there are 166 members in the WTO. They are not all on the same line of development and so on; even if all of them might care about environment, those who are poorer cannot afford – they have bigger fish to fry than those who are wealthier.

29. So, we have to accept regulatory diversity as long as it is coupled with non-discrimination. And that is exactly what this panel suggested. It says: *the first panel was wrong, Tuna-Dolphin was wrong, and it is reversed in its entirety*. A measure cannot be judged illegal simply because it is unilateral; it can be legal only if it is unnecessary or discriminatory. This was not the case here: game set and match for the respondent.

30. So, this is, if you wish, quickly where we are nowadays. I'll make two more points and then I'll move to my last point about the new generation. Two more points about the jurisprudence so far.

31. In a nutshell, what this jurisprudence suggests is that unilateral measures are perfectly consistent with the World Trade Agreement as long as they observe the

requirements of Article XX – broadly speaking as long as they are necessary and they are non-discriminatory. The judge – and that's very important – the WTO judge has no power to dictate environmental policies on anyone. All the judge can put into question, is the means used to achieve an objective but not the objective itself. The judge cannot tell, in my two examples, the respondent, *"why are you protecting? Why do you care about the life of dolphins? Or why do you care about the life of sea turtles?"* The judge can say TEDs are necessary or unnecessary to achieve your objective and that's where his or her control power stops.

32. Now, of course – and now I move to my last point – you might ask yourself why do I need to invoke exceptions? Why do I need to justify my regulations? Isn't it the duty even of the modern State to take care of public health? of environmental protection? Isn't this why we have governments? Because private parties will never provide public goods, the reason why we have governments is precisely because we need an agent to provide those public goods.

33. Well, it is true, and I explained in the beginning of this talk why the GATT system is the way it is – the equilibrium that at the time they thought was the perfect equilibrium in order to dismantle protectionism.

34. But now, in 2025, we are not in 1946 when the GATT was negotiated; and regulation is not only a function of preferences; regulation is also – and to a large extent – function of knowledge. I'll give you one example in this effect. Now, if you open the European Economic Community Treaty of 1957 in your computer, and you do search for the term "environment", you will end up with an outcome: zero. In 1956-57, we didn't know much about how disastrous for the environment some of our policy choices are. In today's world, there is not one single document of the European Union that comes out which does not observe environmental protection in one way or the other.

35. Now, this knowledge – we know more about public health, more about environment, more and more – has led to more regulations. And you can imagine more regulations, in 166 members, can be problematic for trade because State A regulates in one

way, State B in a different way, State C in another way. So, what happens is there is a process of harmonization taking place in the ISO for example – the International Organization for Standardization to be precise. What has happened as of 1995, is that international standards – the areas where the world community has managed to agree on what is the best way to achieve a particular outcome be it in public health or environment or anywhere – those international standards have become compulsory for the WTO members to use them in principle, unless, if they want to hire for example standard of protection.

36. So, as of 1995 WTO members, when they regulate in the field of environment consumer protection and so on, they have to ask first the question: is there an international standard that they can usefully employ to reach my objective? And if yes, everything I told you so far is not relevant because all you'll be asking is, "did you faithfully implement the international standard?" In case of deviation from the international standard, everything I told you so far becomes relevant but with one big difference: there is no shift in the burden of proof; governments can regulate as they wish as long as the measure is necessary and not discriminatory and it is the plaintiffs and not the respondent, not the regulator, who carries the burden of proof to show that the measure is not necessary or is discriminatory.

37. So, as of 1995, we have come up in the WTO with agreements which, if you wish, capture quite adequately the modern image of the regulatory State. Governments intervene; they have the right to intervene. And as long as this intervention is non-discriminatory, sometimes when warrant is necessary, then there is nothing wrong. Those who are feeling fulfilled by the effects of the regulation, those who cannot export as much because of the regulatory hurdle, have the burden of proof to show that either the measure is unnecessary or discriminatory.

38. And this is where we are in the context of exceptions in the WTO. Thank you very much.