

Cuba and the United States: An Overview of the Embargo Analyzed Under the Current World Trade Organization Law

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Resumen. Durante diciembre de 2014 Barack Obama, presidente de los Estados Unidos de Norteamérica, anunció su intención de impulsar el restablecimiento de relaciones diplomáticas oficiales con Cuba; tal decisión ha sido considerada como nada menos que histórica, sin considerar ningún tipo de afiliación política; especialmente si no se pierde de vista que, por más de 50 años, el embargo impuesto por los Estados Unidos a Cuba, ha probado ser un tema espinoso en los campos diplomático, económico, político e inclusive de derechos humanos. El hecho de que la medida haya sido ferozmente ejecutada por tan largo tiempo, resulta increíble, más aun si tal es estudiada bajo las prácticas internacionales del comercio uniformemente aceptadas, que implican que tanto Cuba como los Estados Unidos siendo miembros de la Organización Mundial del Comercio, están obligados por los compromisos firmados y ratificados.

Palabras claves: Organización Mundial del Comercio, Embargo, Excepción de Seguridad, Cuba, Estados Unidos de América.

Abstract: During December 2014, United States President Barack Obama, announced his intention of pushing the resumption of diplomatic contacts with Cuba; this decision has been considered by the world like nothing less than historic, despite any kind of political affiliation whatsoever; specially if keeping under sight that for more than 50 years, the United States embargo over Cuba, has proven to be a challenging matter on diplomatic, economic,

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political and even human rights fields; the fact that such measure has been fiercely enforced for a very long time, results baffling specially if studied under the world trade practices, since both countries are members of the World Trade Organization; thus making relevant to dedicate time to research and write about such a current theme, amidst the challenges faced by world trade nowadays.

Keywords: World Trade Organization; Embargo; Security exception; Cuba; United States of America

Nevertheless in order for the WTO to fulfil its purposes it has established a set of rules that bind all of its members. These rules cover from the way the trading practices and standards are supposed to be applied, to how trading differences must be treated and attempt to be solved within the organization.

The United States economic embargo over Cuba is not a recent matter. The controversy that such measure has created for over five decades is undeniable, as this measure, has always represented a challenge to diplomatic, political, social, and economic relations. The existence of the World Trade Organization, the fact that the United States and Cuba are both members of the WTO and as such are bound by the provisions they both have agreed on, is fundamental for the scope of this paper, especially if we take into account that as on December 2014, President Barack Obama, announced “steps towards re-establishing diplomatic relation with Cuba”. Decision which can be considered nothing less than historic despite the long and hard process ahead for an actual lift of the measure.

This paper will be analysing the imposition of the United States embargo over Cuba, focusing on the security exceptions contained in Article XXI of the General Agreement on Tariffs and Trade (from here on GATT) as a fundamental part of the WTO. In order to see if such measure is in compliance with the law of the World Trade Organization. Section I. Will cover the notion of free trade exceptions under the WTO, the reasons for their existence and will open a passage for the consideration of the Security Exception within the WTO law in the US-Cuban case. Section II. Will be concentrating on the security exception and the role that such provision has played in the way Cuban-US relations have been executed over the years. This section will do so by specially analysing one by one the different scenarios that the security exception clause contained in article XXI of GATT proposes, in order to see if they are applicable in any way to justify the imposition, strengthening, and current appliance of the embargo.

Section III. Will cover the historic background for the imposition of the embargo, including an analysis of the real reasons why this economic sanction was imposed. Finally section IV. Will analyse if the unilateral imposition of trade sanctions can be tackled under the current WTO law and if there are any remedies that Cuba could pursue under the provisions of the organization that allow it to find a way out of the embargo.

1. Unilaterally Imposed Economic and Trade Sanctions Under the WTO Law

The first thing that comes to mind whenever the World Trade Organization is mentioned, is the idea of free trade, the almighty free trade, and the utopic conception that this is the magic solution to all the world's greatest economic problems, and specially that free trade is above anything and everything regardless of any kind of sociological, geographical, political or moral standard.

If this were the case and there were no exceptions to free trade, it will be equal to denying the Rules on Conflicts Between Trade Liberalization and Other Societal Values, as a huge part of the Multilateral Trading System of the World Trade Organization, this means that there are clear, well established exceptions under which is completely lawful to generate barriers for free trade between members, and as such, these have been accepted by the Members of the WTO.

These exceptions can mostly be found in article XX of the GATT entitled "General Exceptions." This article covers a variety of subjects under which it will be justifiable for any member country, to create barriers to free trade in a *none-arbitrary or unjustifiable way*¹, as long as these measures are towards protecting:

a. Public morals; b. human, animal or plant life or health; c. relating to the importation or exportation of gold and silver; d. necessary to secure compliance with law or regulations which are not inconsistent with the provisions of the Agreement, including those relations to customs enforcement of monopolies operated under paragraph 4 of the Article II and Article XVII, the protection of patents, trademarks and copyrights, and the preventions of deceptive practices; e. relating to the products of prison labour; f. imposed for the protection of national treasures of artistic, historic or archaeological value; relating to the conservation of exhaustible natural resources if such measures are made ef-

¹ This is known as the "chapeu" of Article XX, it contains the parameters under which the exceptions must be applied, in order to avoid their misuse.

fective in conjunctions with restrictions on domestic productions or consumption(...).(World Trade Organization, Legal Texts, GATT, art. XX.)

These are the main exceptions for the creation of trade barriers contemplated by the World Trade Organization, although article XXI of GATT also gives us the provisions for the main scope of this paper, what is known as the “Security Exceptions”, this article establishes the reasons under which a member country can restrict trade in the name of “its own security” this article states that:

Nothing in this Agreement shall be construed a. To require any [Member] to furnish any information the disclosure of which it considers contrary to its essential security interests; or, b. to prevent any [Member] from taking any action which it considers necessary for the protection of its essential security interests (...) c. to prevent any [Member] from taking any action in pursuance of its obligation under the United Nations Charter for the maintenance of peace and security. (World Trade Organization, Legal Texts, GATT, art. XX.)

It results clear that State security has been considered above any idea or principle of free trade, this is justifiable under the premise of State sovereignty, and how in order for free trade to exist, it needs of minimum conditions of peace and security among the trading partners, Thus illustrating how free trade should not be considered “almighty” or above anything or everything, the World Trade Organization has recognized this. Nevertheless, these security exceptions can and have been used to justify very complex nontrade related actions carried out in very arbitrary ways. Especially for political reasons as a way of putting pressure on different countries with the intention of making them comply with other State’s foreign policies. Policies that very often have little if norelationship with trade itself. Policies that ended up being nothing but tools of repression that deny not only the very principles of the World Trade Organization, but also the Multilateral Trading System itself.

The United States commercial sanctions over Cuba, work as a perfect example to illustrate how an exception to a WTO principle can be completely twisted and manipulated, in order to apply economic and trading restrictions to a country’s economy with reasons that are completely political and constitute a mockery of the exception. If we take into account that the reasons explaining why all the sanctions have been imposed over the years, failed to show in any way how a country such as Cuba, has ever consisted on a threat to the national security of the United States, up to the point that it has been impossible to

remotely justify over 50 years of **unilaterally imposed** economic sanctions. Sanctions that have managed only to make even more difficult the lives of millions of Cubans, Cubans whom have a rough life as it is as a result of the Castro regime. This clearly falls off the original scope under which the security exceptions were created and one cannot help to wonder how effective the WTO really is when it comes to not caving to political pressure, this raises the following question, is the WTO really a non-political organization?

On the other hand it is worth mentioning that one of the reasons why the exceptions contemplated under article XXI of GATT have been misused very often is that unlike article XX, article XXI lacks of a “chapeu” that prohibits, or at least limits the use of this Security Exceptions in a “none-arbitrary or unjustifiable way”. In words of Lindsay (2003) “(...) there are longstanding tensions among the competing principles of sovereignty, flexibility and limiting abuse of GATT article XXI. The jurisdictional uncertainty of article XXI reflects these potentially conflicting interests”. (Lindsay, p.1277) Definitely the missing “chapeu” in article XXI GATT technically allows a misdirected application of the exception. It has been argued that this ambiguity, if you will, was allowed intentionally in order to simplify the joining of countries to GATT by recognizing the supremacy of State security over trade, “Article XXI was created in ambiguity, an ambiguity needed to allow countries to legitimately respond to security concerns without destroying advances in trade liberalization”. (Id, 1311) This clearly has created a giant loophole that allows powerful WTO members not only to abuse these exceptions and to get away with the abuses “in the name of security”, but also to legally justify their wrongdoing under a provision that was never intended for that purpose in the first place.

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