

Economic Partnership Agreement between ECOWAS-EU in Relation to the Principle of Economic Duress

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Abstract

The nexus between international cooperation and economic relations among states cannot be over emphasized. It is, therefore, imperative for mechanisms to be put in place to safeguard the interest of all states irrespective of the region individual States belong. To break the monolith of the dominant powers of a party during negotiations with a weak party can create a new capacity and close the sharp developmental divide between poor and rich countries. This paper argued that the principle of economic duress be incorporated into WTO Law. This argument is based on the fact that the WTO regulates Regional Trade Area extensively, it has the apparatus to incorporate a principle of law to regulate the conduct of countries engaged in Regional Trade Area negotiations. As Cass suggested, it is important for the trading system to represent the viewpoint of the political community¹and in the context of this paper, to ensure that weak members are legally protected from undue economic pressure. It is believed that members who signed the Economic Partnership Agreements were coerced by the EU, which relied on its dominant powers and influence over some members. West Africa for instance, depends on the EU for trade and financial aid. Due to the inadequacies of the WTO rules, there is a need to formulate a revised system of rules that comprehensively protects the developing countries. Negotiations resulting in reciprocal agreements will in the short and long terms harm the developmental objectives which the EU claims to pursue for ACP countries. The article explores the EU and Africa, Caribbean and Pacific countries' agreements, with a particular focus on article 49 of the Vienna Convention on the Law of Treaty in the context of WTO's legal capacity to regulate regional trade to answer the question if the WTO can incorporate the principle of economic duress to regulate bilateral trade negotiations to better protect the interests of all parties, especially the developing countries.

Keywords: Economic, duress, Partnership, Agreement, EU, Africa, RTA, trade WTO, ACP and countries

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¹ Deborah Z Cass, *The Constitutionalization of the World Trade Organization* (Oxford University Press, Oxford, 2005) p 328

1.1. Introduction

The global economic relations has created intense interconnectedness.² Thus, it is of vital importance that systems are in place to protect the interests of all members. To put an end to the structural and institutional monolith of the developed countries during negotiations with a developing country, there is a need for an established process to create a capacity and minimise economic pressure brought upon developing countries during negotiation.³ Economic coercion, no doubt was practised in medieval Europe to enable countries to obtain benefits. In recent times it has been observed that it constitutes a threat to regional stability as it promotes nationalism.⁴ In 2021, the EU proposed ways it could counter the use of economic coercion by countries that negotiate with a member state of the EU. The EU calls on its members to protect their interests against those who weaponized trade and investment.⁵ However, during the Economic Partnership Agreements (EPAs), there was overwhelming evidence of the EU coercing the African, Caribbean and Pacific (ACP) countries to sign the EPAs as there was no better alternative.

This paper considers logical and plausible reasons for the incorporation of a principle into World Trade Organisation (WTO) law. This will be done through systematized legal analysis encompassing interdisciplinary methods. It is a fusion of the doctrine of law, philosophy of law and legal analysis of politics and economics.⁶ As noted by Petersmann, International Economic Law (IEL) has become more than ever, convoluted with the steady rise of the Regional Trade Agreement (RTA) and an increasing number of WTO case laws. The rules of IEL are

² Ibid at 21

³ Robert W Cox, *The Political Economy of a Plural World* (Routledge, London, 2002) p 41, when a party exercises its powers without careful consideration for the weaker party, there is bound to be objection and protest; Ernst-Ulrich Petersmann 'International Trade Law and The GATT/WTO Dispute Settlement System 1948-1996: An Introduction' In Ernst-Ulrich P (ed) *International Trade and The GATT/WTO Dispute Settlement System*, (Kluwer Law International Law Ltd, 1997) 26

⁴ Carlos Kuriyama, *Coercion: The International Economics of Self Harm*, Hinrich Foundation, 21 May 2021, available at <https://www.hinrichfoundation.com/research/article/protectionism/coercion-international-economics/> (accessed: 12 May 2021)

⁵ European Commission, *EU Strengthens Protection Against Economic Coercion*, Brussels 8 December 2021

⁶ Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (University of Pennsylvania, Philadelphia, 1989) 6-7

interdependent on other laws. Thus, it is vital for atomize and integrate the evaluation of legal analysis of the organizational configuration.⁷ Divergent sources need to be legally explored to understand the consequences of RTA through the WTO rules on society. The analytical integration of economics, politics and law when considered together with surrounding circumstances, and the general international law provides a framework to bring about a comprehensive understanding.⁸

The early part of the year 2000 heralded a fundamental policy change to the preferential non-reciprocal trade arrangement between the Economic Community of West Africa States (ECOWAS)⁹ and the European Union (EU).¹⁰ The reasons canvassed by the European Union for the controversial¹¹ Economic Partnership Agreements (EPAs) are mainly twofold: (i) compliance with Article XXIV of the World Trade Organisation (WTO) rules,¹² and (ii) sustainable development and active participation of the poor countries in the world trading system. Like the rest of the Africa Caribbean Pacific (ACP) countries, ECOWAS has a long history of development cooperation with the EU.¹³ The EU provides financial aid to West Africa and also to a great extent

⁷ Ernst-Ulrich Petersmann, "Narrating International Economic Law": (2014) p 787, Constitutional Limit' Max Planck-Institute fur Ausländisches offenthiches Recht <http://www.zaoerv.de> (accessed: 10/5/2018)

⁸ Ibid at 792

⁹ 'Economic Community of West African States (ECOWAS)' Member States comprise of fifteen countries found in Western part of the African region. www.ecowas.int/members-states/ (accessed: 17/6/2018)

¹⁰ European Commission, Economic Partnership Agreements (EPAs), New ACP-EU Trade Partnerships (July, 2010), <http://eu.europa.eu/trade/wider-agenda/development/economic-partnerships> (accessed: 29/5/2018)

¹¹ Ramdoo I, and Bilal S, 'EPA Negotiations: The Honey Moon is Over' Briefing Note 31 (2011) p 3 www.ecdpm.org/publications/ (accessed: 29/5/18)

¹² Smith N, 'The European Commissioner for Trade's Speech to Civil Society Dialogue Group in Brussels' The Guardian (20/1/2005)

www.theguardian.com/politics/2005/jan/development.internationalaidanddevelopment (accessed: 28/5/2018) Mandelson Peter, is quoted as saying "to end the grinding poverty which is the daily experience of so many ACP citizens"; Oxfam International, 'Unequal Partners: How EU-ACP Economic Partnership Agreements (EPAs) Could Harm the Development Prospects of Many of the World's Poorest Countries' Briefing Note, (September, 2006) p 13

¹³ European Parliament 'Relations with the Africa, Caribbean and Pacific Countries: From Yaoundé and Lomé to Cotonou Agreement' 'Economic development cooperation started between EU and West Africa in 1963 with leading successive agreements: First Lomé Convention (1975-1980) signed between 9 EU States and 46 ACP States, following the foundation of the ACP group in Georgetown (Guyana); 1979, Second Lomé Convention (1980-1985), signed between 9 EU States and 58 ACP States; 1984, Third Lomé Convention (1985-1990) signed between 9 EU States and 58 ACP States; and 1990, Fourth Lomé Convention (1990-2000) signed between 12 EU States and 68 ACP States. The Fourth Lomé Convention was in two stage, 1990-1994 and 1995-2000. Lomé IV bis was signed between 15 EU Members and 70 ACP States. The ACP group is presently composed of 78 states (46 African, 16 Caribbean and 14 Pacific) Article 7 of Lomé Convention which is refer to as Lomé 1; www.europarl.europa.eu/facts_2004/6-4-5-en.htm (accessed: 17/6/2018); Frank Long, *The Political Economy of EEC Relations with African, Caribbean and Pacific States* (Pergamon Press, Oxford, 1980) P 3-10

they depend on the EU market for trade.¹⁴ Some academic observers have argued that the circumstances that inform the relationship between West Africa and the EU can only be critically understood from the point of view of cooperation between poor countries in Africa and the Western developed countries.¹⁵ These writers argued that since neoliberalism took a hegemonic centre stage in the international political economy, there has been a fundamental shift in the idea that economically weak countries should liberalise their markets in order to develop their economies.¹⁶ According to Vogler, an idea attains hegemonic status when it is espoused as ‘common sense’.¹⁷ Hurt argues that the current EPA which is far from being comprehensively concluded is being negotiated with this liberalization ‘common sense’ perspective.¹⁸

Notwithstanding the assurance provided by some EU leaders such as Commissioner Mandelson, that the EU objective in the EPAs is to support the principles of cohesive ‘partnership’, sustainable development, and making ACP countries viable players in the world economy;¹⁹ many observers are sceptical about the viability of the EU-Africa EPA as development instrument. These observers point to the utilization of coercion to obtain the interim EPAs. For example, while Mandelson maintained that the idea behind the EPAs is to bring about economic development, the ACP Ministers of Trade stated that they ‘deplore the enormous pressure that had been brought to bear on the ACP states by the European Commission to initiate the interim trade arrangement.’²⁰

¹⁴ The European Commission, International Cooperation and Development: Peace Building for Change in Developing Countries http://ec.europa.eu/euroaid/regions/africa/west-africa_en (accessed: 14/6/2018) The EU earmarked (595 million euro) for poverty allocation and (141.5 million euro) for renewable energy

¹⁵ William Brown, *The European union and Africa: the restructuring of North-South relations*, (IB Tauris, London 2002) P 368

¹⁶ Ibid

¹⁷ Charlotte Bretherton and Johon Vogler, *The EU as a Global Actor* (Routledge, London, 2006)

¹⁸ CARIFORUM EPA, remains an exception because it has concluded a comprehensive agreement with all members of the region, they are 16 countries: Antigua, Barbuda, Bahamas, Barbados, Belize, Dominica, Dominica Republic, Grenada, Haiti, Jamaica, St. Lucia, St. Vincent, St Kitts and Nevis, Surinam and Trinidad & Tobago; (ECDPM, 2008) P 4

¹⁹ Mandelson P. Statement to the Development Committee of the European Union Parliament, (Brussels, March, 2005)

²⁰ ACP Council of Ministers, ‘Declaration of the ACP Council of Ministers at its 86th Session Expressing Serious Concern on the Status of the Negotiations of the Economic Partnership Agreements’, Brussels (December 2007)

Another observer, Paul Goodison, argues that the proponents of the EPA merge the notion of consent and coercion by emphasizing that West Africa owns their development action plan.²¹

ActionAid, an international NGO, has also argued that the EU utilized its vast dominant political and economic power to dictate to the West African countries that are politically and economically weak and depend on the EU for financial aid and market for their export.²² The ACP countries trade Ministers call to the EU to refrain from coercing the ACP countries into signing the EPA went unheeded. The EU displayed its dominance by threatening to withdraw the Generalised System of Preferences (GSP).²³ Some observers believe that Ghana and the Ivory Coast signed the interim EPAs (iEPA) as a result of this threat. Though ECOWAS maintained their lack of readiness to negotiate the reciprocal trade arrangement favoured by the EU, the EU insisted that it was the best option and offered no alternatives to ECOWAS.

It is the contention of this paper that there was no adequate mechanism put in place to check the dominant and coercive power displayed by the EU in the EU-West Africa EPA negotiations. The multilateral trading system does not appear to have incorporated the principles of ‘economic duress’ that apply to domestic law. The current WTO rules also do not provide adequate measures that can be taken by weaker member states that are subject to such dominant power and coercion by stronger states. This paper identifies a major gap in the global trading system and WTO rules on Regional Trade Agreements. Arising from this discussion two questions will be explored. Can the doctrine of Economic Duress be applied to Regional Trade Agreements governed by WTO Rules (Art XXIV and the Enabling Clause)? The above questions will be explored with reference

²¹ Goodison Paul, ‘EU Trade Policy and the Future of Africa’s Trade Relationship with the EU’ Vol 34 (112) (2007) p 247-266; Stephen R Hurt ‘Co-operation and Coercion? The Cotonou Agreement Between the European Union and ACP States and the End of Lome Convention’ vol 24 (1) Third World Quarterly (2003) 161-176

²² Actionaid International, ‘Trade Trap: Why EU-ACP Economic Partnership Agreements Pose a Threat to Africa’s Development’ p 29

²³ GATT, Generalised System Preferences (GSP); Decision of 25 June, 1971 L/3545 (28/6/1971) http://www.wto.org/gatt_docs/English/SULPDF/90840258.PDF (accessed: 14/6/2018); Vivian Jones, ‘Generalised System of Preferences (GSP): Overview and Issues for Congress’ Congressional Research Service (December, 2017) p 7-8, <http://fas.org/sgp/crs/misc/RL33663.pdf> (accessed: 14/6/2018)

The GSP is an exception to the Most Favoured Nation (MFN), which provides that all members must be treated equally without any form of discrimination. The GSP’s aim is to reduce export tariffs for poor countries in developed countries’ markets This was the idea of the GATT following in the footsteps of the United Nations Conference on Trade and Development (UNCTAD) principles.

to the academic literature on Economic Duress, Unequal Treaties, WTO rules and Regional Trade Agreements (Art XXIV and the Enabling Clause) are discussed briefly below.

2.1. The EU-ACP Countries Agreements

The Cotonou Partnership Agreement, signed in the year 2000, contains the fundamental principles guiding the EU and 79 ACP countries.²⁴ By general agreement, the EU-ACP redefine trade relations in order to achieve compatibility with the WTO Article XXIV. The Cotonou Partnership Agreement Article 1 states the general aims of the agreement, while Article 19 (1) provides explicitly the main objective of the agreement between the APC-EU as ‘cooperation in poverty reduction and, ultimately, its eradication; sustainable development; and progressive integration of the ACP countries into the world economy.’ Paragraph 2 of Article 34 states that ‘the ultimate objective of economic and trade cooperation is to enable the ACP States to play a full part in international trade.’ The basis for the provision in the sub-paragraph is for ACP countries to become active participants in trade negotiations in the multilateral trading system. However, observers have questioned the genuine intentionality of the Cotonou agreement. Weller interviewed representatives of ACP states EPA negotiators and found that the EU did not stand by the development rhetoric.²⁵ She states, ‘The EU portrays itself as the ally of developing countries-sensitive to their concerns and looking out for shared interests as a partner.’ However, the outcome of the negotiations revealed the contrary. According to Oxfam, the trade agreement between the EU and the ACP State, is ‘classic free trade.’ There is not much between it and the EU-Chile and EU-Mexico trade agreement. Concerns were raised by observers that the agreement is bad news for development. Weller and Ulmer view the EPAs as another effort by developed countries, the EU, to impose an obsolete style of development founded on a neo-classical prescription that does not take into consideration lessons from the historical development of advanced countries.²⁶

²⁴ Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one Part, and the European Community and its Member States, of the other Part, (23 June 2000) (hereinafter Cotonou Agreement)

²⁵Christina Weller, Dialogue of the Deaf: An Assessment of Europe's Developmental Approach to Trade Negotiations, (ICCO, 2008) 5 Available at <http://www.bibalex.org/baifa/Attachment/Documents/116861.pdf> accessed: 1 June 2020

²⁶Christina Weller & Ulmer K, Trade and Governance: Does Governance Matter for Trade? (2008) available at www.aprodev.net/trade/files/Events/Trade-and-gov.pdf Cited in Sanoussi Bilal, ‘Asymmetric Trade Negotiations for Development: What Does the Experience from the ACP-EU Economic Partnership Agreement Tell Us?’ in: Sanoussi Bilal, Philippe De Lombarde and Diana Tussie (eds) Asymmetric Trade Negotiations (2011) 57

There was a consensus on the part of the EU-ACP countries that there should be enough time to allow for capacity building in ACP countries' public and private sectors. Article 37 states that 'During the negotiations of the Economic Partnership Agreements, a capacity-building shall be provided in accordance with the provisions of Title I and Article 35 to the public and private sectors of ACP countries.' The reason for the 'capacity building' is to improve competitiveness and strengthen regional organizations, fiscal reform, and improve and rehabilitate infrastructure.

The Cotonou agreement is not a completely developed trade agreement, but it provides for the fundamental principles and objectives of the new economic and trade partnership between the ACP and the EU. The agreement's precise aim is 'fostering the smooth and gradual integration of the ACP States into the world economy, with due regard for their political choice and development priorities.' This rhetoric was called into question as the EU conduct was far from what it pontificated. According to the EU, negotiations shall take into account of the level of development and socio-economic impact of trade measures on ACP countries and their capacity to adapt and adjust their economies to the liberalization process. Negotiations will therefore be as flexible as possible in establishing the duration of a sufficient transitional period, the final product coverage, taking into account sensitive sectors, and the degree of asymmetry in terms of the timetable for tariff dismantlement while remaining in conformity with WTO rules then prevailing. The asymmetrical arrangement between the EU and ACP countries became, during the negotiation of the EPA, an enormous and controversial topic. For example, many of the ACP groups asked for flexibility in the meaning given to the WTO laws. For instance, the Economic and Monetary Community of Central Africa (CEMAC) proposed a liberalization of 60 percent spread for a period of 25 years. The EU remains adamant and continues to rely on the textual reading of the WTO rules. In Mandelson's own words, 'As I have said over again, limiting trade opening to 60 per cent will not survive WTO scrutiny. Moreover, I would not consider signing an agreement I could not successfully defend in Geneva...I believe that your development objectives are best served by going far beyond 80 percent.'

As the EU wields its economic and political power in the multilateral trade liberalization under the GATT/WTO, it also transplanted the power posture into its trade relations with the ACP countries. Wilkinson referred to it as 'a managed form of regulation strategically applied in pursuit

of its specific interests.’ Notwithstanding the expansion of the trading system at a phenomenal rate and its contemporary relevance, Heydon and Woolcock observed that it mainly provides an asymmetric set of rules that protect the interests of industrial states in global transactions.²⁷ The degree to which fundamental trade rules are enforced and the fairness process has become a significant question. Tussie posits that the history of worldwide trade cannot be divorced from political bargains that existed among states of an unequal level of ‘power capabilities.’²⁸ Each term negotiated put a new stratum of rules that bring into effect a favourable economic opportunity for the global interest in industrial countries while it circumscribed economic opportunities in periphery countries. The trading system is made up of rules and institutions, representing the interests of the United States and its alliances. The United States’ strategic trade framework is in constant conflict with the developing countries’ concerns. With its hegemonic allies in Western Europe, the US advanced the GATT because the consensus rule provided under the GATT enlarged its power.

It is this same style of trade in the GATT/WTO that the EU exported into its relations with the ACP countries. Guy, in his analysis of the ideology behind this pattern of trade between the EU-Africa, argued that the trade relationship between Africa and Europe has its foundation in asymmetrical ‘exchange and specialization.’²⁹ Guy based Eurafrica’s idea on two major abstractions: ‘complementarity’ and ‘interdependence,’ which perpetuate the economic asymmetry that exists between Africa and Europe presently. How Europe and Africa complement and depend on each other was carefully used repeatedly as a guile to give ground for a series of contractual trade arrangements prior to and post attainment of independence by Africans.³⁰

The justification for the Yaoundé I and II, Lomé Conventions I to IV, and Cotonou Agreement were based on the ‘neoclassical theory of international development.’ However, the EU will coerce the ACP countries to sign the agreement as it is in their best interest, as a result of aid, some

²⁷ Heydon K & Woolcock S *The Rise of Bilateralism: Comparing American, European and Asian Approaches to Preferential Trade Agreements* (2009) 3-4, 187-189

²⁸ Tussie, Diana ‘Developmental Opposition in International Trade Regimes: Regional Groupings, State and Civil Society Coalition’ (2015), Working Paper, Ridgway Centre for International Security Studies at Pittsburg.

²⁹ Guy Martin, Africa and the Ideology of Eurafrica: Neo-Colonialism or Pan-Africanism, (1982) 20 (2) *The Journal of Modern African Studies* 226

³⁰ Ibid

countries like Ghana, Cote d'Ivoire and many others signed the agreement but Nigeria declined to sign. It was argued that the reason that Nigeria did not succumb to the EU's pressure is because the country exports crude oil to the EU without payment of duty.

3.1. Economic Pressure and Article 49 of VCLT

Over the years, public awareness about economic pressure has been raised mostly by socialist theory at the international level. Countries in Africa are more acutely aware of this fact than their western counterparts. Due to their struggles for political and economic independence, they know the limitations of international treaties signed due to economic pressure.³¹ The argument surrounding coercion, threat and economic pressure is not new to international law.³² Article 49 of the Vienna Convention on the Law of Treaties and Article 2 (4)³³ of the United Nations (UN) Charter deal with situations that could destroy the legal validity of consent given by States due to, misconception, application of force, etc.³⁴

The family of nations did not share the same views on the issue of unequal treaty especially as it related to the interpretation of the use of force or coercion in international law.³⁵ For example, the spokesperson from the United Arab Republic canvassed that the provision against coercion and the use of force should be revised to include political and economic pressures. He suggested that the work of the International Law Commission on the use of force should not be confined to military pressure only because economic pressure is more potent.³⁶ The States that were less

³¹ Waldock H, (Fifth Report on the Law of Treaties) (1966), 2 Y B Int'l L Comm'n 17, U.N. Doc A/CN.4/183

³² Article 49 of the Draft Articles on the Law of Treaties, Report of the International Law Commission on the Work of its Eighteenth Session, 21 U.N. GAOR, Supp 9, 16, U.N. Doc A/6309/REV.1 (1966); 61 Am J Int'l L (1967) 253, 277; Drafting stages: Sir Humphrey Waldock, (Second Report on the Law of Treaties) Special Rapporteur, Doc A/CN.4/156 and Add.1-3, vol II Y B Int'l L Comm'n (1963) 51; Fitzmaurice (Third report on the Law of Treaties), U.N. Doc, A/CN.4/115, 2 Y B Int'l L Comm'n (1958); Lauterpacht, (First Report on the Law of Treaties) 2 Y B Int'l L Comm'n (1953) 90, 147 U.N. Doc A/CN.4/63

³³ Article 2 (4), Charter of the United Nations (1945)

³⁴ Ibid,

³⁵ Sir Humphrey Waldock, (Fifth report on the Law of Treaties) 2 Y B Int'l L Comm'n 17, U N A/CN.4/183 (1966); A duress hat is not easily observed is worse than physical force because physical can be seen and be quickly declared to be wrong.

³⁶ Mr Dessouki Delegate from United Arab Republic, First Session Official Records, U N Conference on Law of Treaties First Session, Vienna (26 May 1968); Friedmann, 'The "Satisfied" and "Dissatisfied" States Negotiate International Law: A Case Study' 18 World Pol (1965) Friedmann, The Confrontation of Equality and

powerful and had newly gained independence at that period wanted a situation where consent to a contract was given explicitly without coercion so as to contain the menace of economic and political pressure.³⁷ Canada contended that “economic or political pressure” would defeat the purpose of *pacta sunt servanda*.³⁸

The United Kingdom delegate described the phrase “economic and political pressure” as vague and lacking in concrete content.³⁹ The addition to the article proposed by the developing countries, ‘was lacking in juridically acceptable content’, and also presented an opportunistic way for countries to avoid obligations when it became onerous.⁴⁰ Lauterpacht expressed the view that to allow States to pull out of a treaty on the grounds of coercion would open the floodgate of circumvention.⁴¹ Fitzmaurice⁴² also agreed with this line of reasoning that expanding coercion vitiate a treaty, the aftereffects will be much.⁴³

Waldock expressed the fear that extending the meaning of coercion as provided in the Article could result in subjective interpretations. The apprehension of the developing countries however seemed greater than the concerns expressed above. While Waldock stated that political and economic pressure constituted normal relations among States, delegates from the developing countries did not accept the idea of normalcy expressed by Sir Waldock.⁴⁴ According to Waldock, international law did not have the apparatus to devise a methodology to differentiate between “legitimate and illegitimate” utilisation of pressure.⁴⁵ The representatives of India, Tito and Nasser recommended an amendment to the provisions of the Article to include political and economic pressure as another form of force used by dominant powers over developing countries. They also

Equalitarianism: Institution-Building Through International Law, in Deutsch K and Hoffman S (eds) *The Relevance of International Law* (1968)

³⁷ U N Doc A/ CONF 39/11 (1969) 269-70, at 279

³⁸ Ibid at 281, *Pacta sunt servanda* is a principle international law, which says countries who signs international treaties must support it. It is based on the principle of good faith, the only exception to this principle is the peremptory norm known as “jus cogens”. www.uslegal.com/p/pacta-sunt-servanda (accessed: 6/62018)

³⁹ Ibid at 283,

⁴⁰ Ibid

⁴¹ Lauterpacht, (First) Report on the Law of Treaties, (1953) 2 Y B Int’l Comm’n 90, U.N. Doc A/CN 4/63 (1953)

⁴² Fitzmaurice, supra n 67 at 20, 38

⁴³ Waldock (Second) Report on the Law of Treaties, (1963) 2 Y B Int’l L Comm’n 36, U N Doc /A/CN 4/154 and Add 1-3 (1963), at the Commission meeting in 1963, Waldock expressed the positions of previous rapporteurs regarding the issue of coercion.

⁴⁴ Supra n 87 at 70

⁴⁵ Supra n 88 77

denounced the use of financial aid as a weapon of economic pressure. Failure to enlarge the scope of the article would amount to a failure to secure equality and freedom of States.⁴⁶

In the end, a “compromise” was reached. A draft Declaration provided that the United Nations Conference on the Law of Treaties denounced the utilisation of “threat”, or “pressure in any form”. The use of “military, political, or economic” pressure by a member state to “coerce” another State to sign a treaty without “freedom of consent” would amount to a “violation of the principles of sovereign equality”.⁴⁷ The Declaration does not constitute part of the VCLT. In addition, members were requested to publicize the Declaration as much as they could. The Declaration provides that the “prohibition of the threat or use of military, economic and political coercion in concluding a Treaty,” should not only be made known to all member states but also the United Nations organs should be adequately informed.⁴⁸ The procedure for passing this information is not stated in the Declaration. No doubt, the Declaration may be relevant for future policy, if it is not viewed as a compromise to appease the dissenting voices for the time being. The rejection to restrain the use of economic pressure could lead to weakening of the world economic institution.⁴⁹ A genuine and straightforward approval is achievable if foreign affairs policy is coherently linked to domestic principles.⁵⁰

3.2. The Domestic Principles

Economic duress is conceptualized as some of the threats used to coerce somebody into doing something, not in line with their will. In the context of contract law, it refers to where a party used duress against the other party in order for them to enter into a contract which they either do not want to or where the terms of the contract were not favourable to them. Economic duress is a powerful instrument the court used to set aside otherwise unquestionable contracts.⁵¹ The

⁴⁶ supra n 81 at 279

⁴⁷ United Nations Conference on the Law of Treaties, First Session Vienna, 26 March-24 May 1968, Official Records, U N Doc A/Conf 39/11 (1969) 254 [hereinafter, First Session, Official records]

⁴⁸ United Nations Conference on the Law of Treaties, Second Session Vienna, 9 April-22 May 1969, Official Records, UN Doc A/Conf 39/11/Add 1 [hereinafter Second Session Official Records] 735

⁴⁹ Cox supra n 75

⁵⁰ Murphy C, ‘Economic Duress and Unequal Treaties’ vol 11 (51) Va J Int’l L (1970) 61

⁵¹ Daniel Tan, ‘Grounds of Economic Duress—Further Clarification or Further Confusion? Singapore Journal of Legal Studies [2001] 268-279

challenges faced by the courts most of the time is the ability to differentiate between economic duress and illegitimate' pressure, which arise from usual commercial pressure.⁵²

The doctrine of economic duress is to some degree modern aspect of English law. Economic duress refers to a threat to a person's interest. The doctrine evolved from the case of *Pao On v Lau Yiu Long*⁵³, Lord Scarman set out two requirements for there to be economic duress. First, the coercion of the will of a person, which vitiates consent and secondly, the pressure mounted must be illegitimate. According to the judge in the case of *Dimskal* discussed below, consent can be vitiated even when it was intentionally given. Economic duress became popular from the trade union decisions. Such as *Universe Tankships v International Workers Federation*⁵⁴ and *Dimskal Shipping v International Works Federation*⁵⁵. In the *Universe* case, the owner of a Liberian ship encountered a situation where an embargo was placed on their ship. As a result of the blacklisting no tug boat was available to them and so the ship could not sail, which had adverse effects. The union maintained and insisted that payment must be made to its welfare fund as a condition for the removal of the ship from the blacklist. The owner of the ship made the payment to the union but then brought a successful claim to recover the money, citing economic duress. The House of Lords held that the money had been extracted under economic duress and could be recovered. The same was held in *Dimskal's* case. Accordingly, some elements of duress were identified from the cases mentioned above: first, the compulsion of the will, meaning there is the absence of choice, in other words, there is a lack of practical choice and second, illegitimacy of the pressure. If the above-mentioned ingredients are established, then the victim of the duress has the right to avoid the contract and claim restitution of any monies paid there under.

In the case of *North Ocean Shipping Co v Hyundai*⁵⁶ the court held that the ship builder's threat to break the contract without any legal justification except the owners increased their payment to 10% amounted to duress in the form of economic pressure and as such the agreement was voidable, which the owner could either affirm or voided. The reading of the case made it clear that economic

⁵² Ibid

⁵³ [1980] AC 614

⁵⁴ (1983) 1 AC 366

⁵⁵ (1992) 2 AC 152

⁵⁶ [1979] QB 705

duress can even arise even when the perpetrators are unaware of the victim's susceptibility to succumb to pressure easily.

In the European Union as well as in the United States of America, legal provisions and jurisprudence on economic duress show that judicial notice has been taken of power relations in commercial transactions. For instance, Article 86 of the European Community (EC) Regulation provides for the prohibition of abusive utilisation of the dominant position in contractual bargains within the common market.⁵⁷ Also, both the legislature and the courts in the USA have made efforts to prevent the inequalities that are inherent in the bargaining power within a contractual agreement.⁵⁸ This shows how much governments at the domestic level make concrete efforts to prevent a dominant party from gaining from unequal contractual agreements, normally obtained through coercion. If this policy is adopted globally, it will significantly enhance economic progress and integration.

3.4 Economic Duress

The method adopted in the cases dealing with economic duress shows that contractual obligations should be obtained via free consent. A person who enters into an agreement, is duty-bound to fulfill his obligations in the agreement unless he proves that he was restrained from exercising the full faculties of free will.⁵⁹ In other words, if an agreement is signed due to coercion or pressure, there is no consent.⁶⁰ Holmes disagrees with the element of coercion, and instead states that there is freedom to choose and the main issue should be public opinion on the options that were available.⁶¹ However, Hale maintains that there is no freedom but coercion, which consists of withholding advantage or benefits from the person being coerced.⁶² In other words, if you want to survive you submit to coercion.

⁵⁷Article 86 EC Commission Regulation (EEC) No 417/85 eu-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:1986:048:TOC (accessed: 7/6/2018)

⁵⁸ Uniform Commercial Code 2-302 (1); *Henningsen v Bloomfield Motors, (1960) Inc.*, 32 N J 358, 386-389 84-6 www.law.cornell.edu/ucc/2/2-301 (accessed: 7/6/2018) the code is designed to prevent economic duress.

⁵⁹ Kennedy D, *Form and Substance in Private Law Adjudication* 89 Harv L Rev (1976) 1685, 1730

⁶⁰ Parson T, *The Law of Contracts* (1853) 319

⁶¹ *Union Pac RR Co v Public Service Commission* (1918) 284 US 67

⁶² Hale R, *Coercion and Distribution in a Supposedly Non-Coercive State* vol 38 Pol Sci Q (1923) 470; Hale R, *Bargaining, Duress, and Economic Liberty* 43 Colum L Rev (1943) 603, according to Hale those who do not have must surrender to the coercive power of those who have.

Dalzel argues that⁶³ economic duress is useful to public policy because it deters objectionable results of bargaining conduct. The pressure exerted unlawfully gives rise to a voidable contract.⁶⁴ Courts have held in a series of cases that a contractual agreement obtained by compulsion is void especially when the contract has been revoked.⁶⁵ In *Lewis v Fahn*,⁶⁶ it was held that the issue for determination should always be whether the person was deprived of freedom of choice. It is not so much the threat but the state of mind created in the pressured party.⁶⁷ In *Universe Tankerships Inc of Monrovia v International Transport Workers*,⁶⁸ the court held that the victim had full knowledge of his submissiveness but there was no other realistic alternative.

Under domestic law, the doctrine of economic duress has not been a clear-cut principle as practice under the domestic law. In *Biliouris v Biliouris*⁶⁹ the court refused to grant the plea for duress based on the fact that the claimant had enough time to review the contract,⁷⁰ she was given legal advice,⁷¹ and had therefore, appended her signature without compulsion.⁷² The decision of the court shows that the claimant's pregnancy and the economic power of the claimant's husband were not considered. The court took a restricted view of consent and did not take cognizance of a broad picture of the surrounding circumstances leading to the signing of the prenuptial agreement.

However, the general perception from case law and other sources, which shall be examined in the course of this research, shows that there are demands on courts to take a firm stand on the "control

⁶³ John Dalzell, *Duress by Economic Pressure* 20 No Car L Rev (1942) (pt 1) 237 and 20 No Car L Rev (1942) 341 (pt 2)

⁶⁴ Jackson Beaton et al, *Anson's Law of Contract* 30th edn (Oxford University Press, Oxford, 2016) p 375

⁶⁵ *Universe Tankships Inc of Monrovia v International Transport Workers Federation*, *The Universe Sentinel* (1983) 1 AC 366; Cf *Barton v Armstrong* (1976) AC 104, 120

⁶⁶ (1962) 247P 2d 831

⁶⁷ *Galusha v Sherman* (1900) 81 NW 50,

⁶⁸ *Supra* note 89; the court stated three tests that must be fulfilled to prove duress. (i) the pressure on the victim is illegitimate. This will arise when the threat is illegal. Lawful coercion is seen as legitimate unless such a threat is unreasonable and unethical. (ii) As a result of the pressure, the victim signed a contract. (iii) No real alternative is provided but to give in to the threat; *Chen-Wishart supra* n at 321-322

⁶⁹ (2006) Mass App Ct 852 N E 2d, Cassim F H I, 'Economic Duress in the Law of Unjust Enrichment in USA, England and South Africa' 24 Com & Int'l L J Afr (1991) 38

⁷⁰ *Ibid* at 693

⁷¹ *Ibid* at 689

⁷² *Ibid* at 693, the court reached a final decision that the fact that the claimant was threatened that if she did not sign the prenuptial agreement, there would be no marriage did not vitiate the contract. The claimant was not deprived of her will.

of economic power” on issues bordering on “unequal hands” bargains.⁷³ For all intents and purposes, the doctrine states that a party should not sign an agreement out of compulsion. There are some burdens that cannot be borne by the weak party in a contract, therefore, the law must consider the surrounding circumstances when deciding cases of economic duress. Cohen believes that the worst forms of abuse will happen if there is no limit to the extent to which a party can go to secure a contract.⁷⁴ A contract does not only serve the parties that append their signatures but is also vital to the community because they share in it.⁷⁵

4.1 Regulation of Regional Trade Agreement

This section briefly analyses the WTO’s legal capacity to regulate Regional Trade Agreements (RTA) between members. The establishment of the General Agreement on Tariff and Trade (GATT), particularly the WTO saw an upsurge of regional trade agreements.⁷⁶ This was a major reversal from the fundamental principle upon which the GATT/WTO was designed to promote the Most Favoured Nation (MFN). The MFN principle was created to ensure consonance among GATT/WTO member states. The MFN principle states that any commercial benefit accorded to a member must be unconditionally extended equally to all WTO members. Members began to form units to cater for their domestic interests, as the GATT bowl was not big enough to contain members’ yearnings and aspirations.⁷⁷ The branch-off necessitated by domestic interests was regulated by GATT/WTO under Article XXIV of the GATT/WTO.

The WTO institutional power to regulate RTA, according to Alvarez, is a hard law regime regulating the world trading system.⁷⁸ In other words, it has formal legal rules and foists punitive sanctions on member states to ensure compliance with its rules and obligations. This is opposed to soft law which is merely persuasive and attempts to convince the doing of the action being

⁷³ John P Dawson, *Economic Duress—An Essay in Perspective* vol (3) Mich L Rev (1947) 253

⁷⁴ Morris R Cohen, ‘The Basis of Contract’ vol 46 Harv L Rev (1933) 587

⁷⁵ Ibid at 586

⁷⁶ In January 2007, the WTO was notified of 368 agreements, out of which 260 agreements were entered into after 1995. It was estimated by the Secretariat that by 2010 over 400 RTA would have been implemented all over the world. www.wto.org on RTA

⁷⁷ Hudec R E, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (1993) p 6-7

⁷⁸ Alvarez J E, *International Organisations As Law Makers* (2005) 232

promoted.⁷⁹ A breach of agreements entered into by members of the WTO is enforceable via the WTO dispute settlement system. The success record of the WTO is used to counter those views that international law is for the promotion of states' interests and does not promote enforcement of obligation.⁸⁰

Views have been expressed that the hard law nature of the WTO constitutional law is challenged by the ability of members to make rules for themselves when they form RTA without much influence of the WTO law⁸¹. However, Petersmann is of the view that members cannot detract from the WTO rules because the rules of the system are binding and form part of key elements of a constitution.⁸² Petersmann emphasizes that the WTO law should be understood as what Kelsen referred to as *grundnorm*.⁸³

The critic of this opinion believes that the WTO is only contractual in nature in the sense that members can only enter into agreement with each other.⁸⁴ Jackson agrees that the setup of the world trading system is nothing short of a constitution.⁸⁵ Cass also believes that constitutionalisation is taking place in the trading system,⁸⁶ and refers to the process as the “new *grundnorm*”.⁸⁷ In Howse's opinion, giving the WTO the toga of constitutionalism leads to a

⁷⁹ Abbot K W and Snidal D, *Hard and Soft Law in International Governance*, in: Goldstein J L et al (eds) *Legalisation and World Politics* (2001); Robilant A D, *Genealogies of Soft Law*, vol 54 (3) *Am J Com L J* (2006) 499, 505

⁸⁰ Goldsmith J L & Posner E A, *The Limit of International Law* (2005)

⁸¹ Joost Pauwelyn 'Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature' vol 14 (4) *EJIL* 907-951 (2003) P 908

⁸² Jeffrey L Dunoff, *Why Constitutionalism Now?: Text, Context and the Historical Contingency of Ideas* vol 1 *J INT'L L & INT'L REL* (2005) 191, 194-96 (Jeffrey gave account of Petersmann constitutional theory) Jackson J H, *The Peril of Globalisation and the World Trading System*

⁸³ Ernst-Ulrich P, *The GATT/WTO Dispute Settlement System: International Law, International Organisation, and Dispute Settlement* (1997) 47; Ernst-Ulrich P, *The WTO and Regional Trade Agreements as Competing For a for Constitutional Reforms: Trade and Human Rights*, in: Bartels L & Ortino F (eds) *Regional Trade Agreements and The WTO legal System* (2006) 281, 285-93; Ernst-Ulrich P, 'Constitutionalism and International Organisations' *17 Nw J INT'L L & BUS* (1996) 398, 402, 406 The mandate of the WTO to Petersman to enforce within the context of a just system.; Hans K, *The Pure Theory of Law* (California U P, Berkeley 1967)p 56, to Kelsen, "Any relatively higher legal norm is a constitution in relation to any norm created under its authority"; Raz J, *Kelsen' Theory of the Basic Norm* <http://academic.oup.com/ajj/article.pdf/19/1/94/.../aj-19-94.pdf>

⁸⁴ Dunoff *supra* at 197-8

⁸⁵ Jackson J H, 'The Perils of Globalisation and the World Trading System', vol 24 *Fordham INT'L L J* (2000) 371, 375, 376; Jackson J H, *The World Trade Organisation: Constitution and Jurisprudence* (Pinter: House Gatham House Papers 1998)

⁸⁶ Cass D Z, *The Constitutionalisation of the World Trade Organisation* (Oxford University Press, Oxford, 2004) p 117-118

⁸⁷ *Ibid* at 68-69

delegitimation of the system.⁸⁸ The advocates of the constitutional nature of the WTO want to see the trading system as an institution that places law above other issues. While those who promote the idea that WTO is only contractual see the WTO only as a mechanism to enforce bilateral obligations between members when there is an impairment or nullification of the gains of a member, and therefore is not aimed at addressing a breach of obligations.⁸⁹ In other words, the application of the WTO law is only triggered when there is withdrawal of benefits accruing to a member.

Agreements between private parties are governed by domestic legal arrangements which do not contravene the constitution of the State. Anson defined a contract as a promise or agreement that is legally binding on the parties involved.⁹⁰ It can be contextualized as self-imposed obligations.⁹¹ The arguments advanced by scholars on both sides are not attuned to the extent of the WTO's regulation of bilateral agreements or RTA when members decide to enter into such an agreement. Therefore, this paper agrees that the extent of WTO involvement after members enter into bilateral agreements or RTA, and will give particular attention to the fact that WTO has no regulatory powers after the parties have entered into an agreement. In other words, WTO cannot regulate how contracts are executed and no principle can be advocated for incorporation to regulate such contractual relationships. The RTA is regulated through Article XXIV, the Agreement on Differential and Favourable Treatment, Reciprocity and Participation of the developing countries (Enabling Clause).

4.2 Regulation of the Regional Trade Agreement

Article XXIV of the GATT provided the most significant exception to the Most Favoured Nations (MFN) principle at its establishment by the original GATT members in 1947.⁹² It was the

⁸⁸ Howse R, *The WTO System: Law, Politics & Legitimacy* (Cameron May Ltd, London, 2007) p 249

⁸⁹ Pauwelyn Joost 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' Vol 14 *Euro J INT'L L* (2003) P 937, 931

⁹⁰ Beatson J et al, *Anson's Law of Contract* (30th ed) (OUP, Oxford 2016) p 1, 2 and 3; Chen-Wishart M, *Contract Law* (Fifth ed) (OUP, Oxford, 2015) p 4-5

⁹¹ Fried C, *Contract As Promise* (Harvard University Press, Cambridge, 1981) p 14

⁹² 'The GATT Years: From Havana to Marrakesh', www.wto.org/english/thewto_e/whatis_e/tif/fact4_.htm (accessed: 3/6/2018); Peet R, *Unholy Trinity*, (2nd ed) (Zed Books, London, 2009) p179,181, 182; Thomure J C, 'The Uneasy Case for the North American Free Trade Agreement, vol 21 (181) *Syracuse J INT'L L & Com* (1992) P 192; Robinson

Europeans who pushed for this exception during the negotiations so as to bring about the regional integration and reconstruction of Europe.⁹³ Developing countries who at that time had newly gained independence mainly wanted preferential trade between them and the former colonial powers.⁹⁴ It has, however, been argued, that the developing countries instead of preferential treatment, wanted rules that catered for all members according to their level of developmental needs.⁹⁵ At the insistence of the European negotiators, Article XXIV of the GATT was birthed, which set forth the conditions for the operation of RTA.⁹⁶ Article XXIV provides a long list of prohibitions and conditions that must be met when entering into regional agreements. The purpose of this framework is to check and reduce to the barest minimum, the side effects of contravening the MFN principle.⁹⁷ The following are requirements, that an RTA must fulfill:

Firstly, RTAs must remove “substantially all” obstacles to trade between States that have signed such an agreement.⁹⁸ The provision of the article calls for significant steps to be taken towards the elimination of trade barriers. The economic logic adumbrated by Wilcox is that if RTA and Custom Union remove barriers it will result in free trading areas, foster economic distribution of resources and also raise the standard of living as opposed to preferential trading which prevents economic growth. Custom union promotes multilateralism and non-discrimination.⁹⁹ West Africa, however,

S, 'The Spirit of Geneva and Globalisation: Economic, Financial and Ethical Dimensions' vol 26 (4) Refugee Survey Quarterly (2007) the GATT was "contractual and not an organisation".

⁹³ Odell J & Eichengreen B, 'The United States, the ITO and the WTO: Exit Options, Agent Slack, and Presidential Leadership', in Kreuger A O, (ed) *The WTO As an International Organisation* (1998) 181, 193

⁹⁴ Mathis J H, *Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement* (2002)

⁹⁵ Lamp N, 'How Some Countries Became 'Special': Developing Countries and the Construction of Different in Ministerial Trade Lawmaking' vol 18 *JIEL* (2015) P 744

⁹⁶ Lowenfeld, A F, *International Economic Law*, (2nd ed) (OUP, Oxford, 2008) p 42-44; Dam K, *The GATT: Law and International Economic Organisation* (1993); Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1997); Tribilcock M J & Howse R, *The Regulation of International Trade* (2005)

⁹⁷ Chase K, 'Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV' vol 5 (1) *World Trade Rev* (2006) 1-2

⁹⁸ GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organisation (with Final act, annexes and Protocol) Article XXIV, Legal Text: Understanding on the Interpretation of Article XXIV of the General on Tariffs and Trades, 1994,

<http://un.org/doc/publication/UNTS/volumn%201867/volumn-1867-A-31874-english.pdf> (accessed: 4/5/2018)

⁹⁹ Wilcox Clair, 'A Charter for World Trade' vol 47 (7) *Mich L Review*, 1039 (1949) 70

in the recent and ongoing RTA negotiations does not agree with the complete elimination of barriers with developed countries will be beneficial to its members.¹⁰⁰

Also, there is an obligation on how to relate with a third party who is not a signatory to the RTA. The parties to the RTA are to ensure that higher barriers to trade are not inflicted on other members of GATT¹⁰¹. In other words, duties and regulations agreed upon shall not be higher or more restrictive than a previous agreement.¹⁰² The provision is to ward off any negative impact on the MFN principles.

Article XXIV sets out the procedural steps that must be taken. A notification must be sent to the GATT/WTO that an RTA has been put in place and an ad hoc party selected by GATT will review the agreement to ensure that it is in compliance with Article XXIV. The ad hoc party is then replaced with the Committee on Regional Trade Agreements (CRTA).¹⁰³ Through the provisions of Article XXIV, the WTO regulates how members conduct an RTA agreement. There are some basic obligations members must comply with when they enter into an RTA. They are required to inform GATT/WTO that the review stage has not been properly implemented on the legal limit set.

4.3 Enabling Clause

The Tokyo Round gave rise to the enabling clause to allow for preferential treatment and a well-rounded participation of smaller countries in the trading system.¹⁰⁴ Under the enabling clause, there is no need for such an RTA to be in conformity with WTO except to only give notification to the CRTA. It is relevant to point out that the clause does not make it impossible for developing countries to enter into another term of RTA. It must not also create unnecessary barriers for the

¹⁰⁰ Cosmas M Obote Ochieng 'The EU—ACP Economic Partnership Agreements And 'Development Questions': Constraints And Opportunities Posed By Article XXIV And Special And Differential Treatment Provisions Of The WTO' Vol 10 (2)), JIEL 363-395 (2007)

¹⁰¹ Article XXIV: 5

¹⁰² Supra Article XXIV: 5 (a)

¹⁰³ Work of the Committee on Regional Trade Agreements (CRTA), World Trade Org., http://www.wto.org/english/tratop_e/region_e.htm (accessed: 4/5/2018)

¹⁰⁴ GATT, Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November, 1979, L/4903 (December 3rd, 1979) http://www.wto.org/gatt_docs/English/SULDF/90970166.PDF (Accessed: 14/6/18)

countries trading under MFN obligations.¹⁰⁵ Again, this shows that the WTO regulates RTA to ensure that to a large extent, members are confined within the MFN principles.

Article V of the General Agreement on Trade in Services (GATS) bears a resemblance to GATT. Its provision is made up of four parts. Firstly, RTA dealing with service must include “substantial sectoral coverage”.¹⁰⁶ Secondly, the agreement puts an end to discrimination through the abolition of existing discriminatory measures and the elimination of new discriminatory tendencies.¹⁰⁷ Thirdly, such an agreement must not set higher barriers to trade and investment for a party that is not a signatory to such an agreement. Fourthly, it must ensure the inclusion of provisions for surveillance and openness. RTA covering goods must be made known to the CRTA. It is important to note that liberalization in the conditions set by GATS is different from GATT. It is probably not tenable to ask members to sign an agreement under RTA that covers the service sector while such an agreement has not been liberalized on an MFN basis.

4.4. Regulating RTA through Judicial Decisions

Regulation of RTA by the WTO law is strengthened further by the WTO Panel and Appellate decisions. Decisions show that RTA does not allow a member to discriminate between RTA members and WTO members. The *locus classicus* for article XXIV is the case of Turkey—Textiles¹⁰⁸ where India objected to the custom union agreement¹⁰⁹ between Turkey and European Union because the quantitative restrictions¹¹⁰ were not in line with the provisions of WTO¹¹¹ and also there was no basis for it under Article XXIV.¹¹² The Appellate Body held, that while Article XXIV can be relied upon to justify actions that would normally be a violation of the WTO rule, it

¹⁰⁵ Ibid

¹⁰⁶ General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organisation, Annex IB, art. IV, Apr 15, 1994, 1869 UNTS 183

¹⁰⁷ Ibid

¹⁰⁸ Panel Report, Turkey--Restrictions on Imports of Textile and Clothing Products, WT/DS34/R (31 May, 1999) [hereinafter Turkey-Textile]

¹⁰⁹ Custom Union is explained in Article XXIV:8 (a) of the GATT 1994, It is an agreement where duties and restrictive regulations of trade allowed under Articles XI, XII, XIII, XIV, XV and XX are eliminated with regard to "substantially all the trade between the constituent territories of the union:.. Bossche P V, and Zdouc W, The Law and Policy of the World Trade Organisation, (Fourth ed) (CUP, Cambridge 2017) p 680-681; Krueger supra at 174

¹¹⁰ Ibid Bossche at 480, “quantitative restriction” is step that is taken to seal the quantity of goods that may be brought into a country or exported as the case may be.

¹¹¹ Supra n 51 Turkey—Textile, para 9.3

¹¹² Ibid para 9.67

is invoked only in limited situations.¹¹³ This shows that WTO regulates the formation of RTA and also, the extent to which a WTO measure can vary an agreement. Preferential trade agreement does not overshadow the overall goal of the WTO.

In the case of Argentina-Safeguard Measures on Imports of Footwear¹¹⁴ Argentina foisted safeguard measures on WTO member states while excluding the members of their own RTA referred to as MERCOSUR".¹¹⁵ The Appellate Body, without making reference to Article XXIV, held that Argentina was obligated to apply safeguard measures to all WTO Member States.¹¹⁶ In the case of Brazil—Tyres,¹¹⁷ Brazil had restricted imports from all countries except for members of MERCOSUR on the grounds that the MERCOSUR tribunal had required Brazil to grant exemption to MERCOSUR members from import restrictions. Appellate Body found that the tribunal's decision was not a justification for discrimination.¹¹⁸ Instead of Article XXIV, it found Brazil's action to be arbitrary discrimination under Article XX.¹¹⁹ The Panel found no justification for the import restriction under Article XXIV. Canada invoked the provisions of Article XXIV as a defence for giving special tariffs to partners and non-partners.¹²⁰ It was held that the defence would not succeed because the special favour was extended to non-members and not to WTO members who were not party to the North American Free Trade Agreement (NAFTA).¹²¹ The decision shows that RTA benefits cannot be granted discriminatorily to parties that are not members.¹²²

Even if the RTA members have agreed to use the RTA dispute settlement mechanism, it is not to be interpreted to mean that rulings by such bodies will bind the WTO.¹²³ The WTO maintained its

¹¹³ Ibid 9.83

¹¹⁴ Appellate Body Report--Safeguard Measures on Imports of Footwear, WT/DS121/R (12 June, 1999)

¹¹⁵ Ibid 5.67

¹¹⁶ Appellate Body Report, Argentina—Safeguard Measures on Imports of Footwear WT/DS121/AB/R (14 December, 1999), the Appellate Body held that Article XXIV does not apply in the instant case and reversed the decision of the Panel.

¹¹⁷ Appellate Body Report, Brazil—Measures Affecting Imports of Retreated Tyres WT/DS332/AB/R (3 Dec, 2007)

¹¹⁸ Ibid 256, 258

¹¹⁹ Ibid

¹²⁰ Panel Report, Canada—Certain Measures Affecting the Automotive Industry WT/DS139/R (11, Feb, 2000)

¹²¹ Ibid 6.113

¹²² Ibid at 10.55-10.56

¹²³ Panel Report, Argentina--Definitive Anti-Dumping Duties on Poultry from Brazil, WT/DS241/R (22 April, 2003); The Panel was not willing to imply estoppel. It held: " the fact that Brazil chose not to invoke its WTO dispute settlement rights after previous MERCOSUR Dispute settlement proceedings does not, in our view, mean that Brazil

position in the pecking order. The appellate body held in Mexico—Soft Drinks¹²⁴ that it is vested with the right to entertain a matter between parties while an RTA dispute settlement is ongoing. It has been shown from the analysis above that WTO to a great extent, regulates the conduct of RTA. It restricts members from discriminatory measures hiding behind RTA and members have the right to use the WTO dispute settlement notwithstanding RTA arbitration proceedings.

1.5. Conclusion

The global trading system as structured, according to Cox, effectively constrains States, especially developing countries, from taking actions to protect their interests.¹²⁵ This paper explored the rationale canvassed for the incorporation of a principle into WTO law for the protection of the interest of all parties who engage in bilateral trade negotiations. The article examined the concept of economic duress as provided under domestic law and argued that it can guard the global trading system to address the imbalance that exists among countries that negotiate free trade areas, as seen in the negotiation of Economic Partnership Agreements (EPA) between the EU and the ACP countries. Developing countries have argued that the International Law Commission (ILC)'s work on the use of force should not be limited to military pressure alone but economic pressure or coercion because unequal treaty harm nations more extensively. However, developed countries are of the view that economic pressure is too vague to be read into the use of force as provided under Article 49 of VCLT and Article 2 (4) of the UN Charter. Nevertheless, as mentioned above, the EU is creating awareness among its members of the danger of economic pressure, which could be detrimental to the economic well-being of EU member states.

During the negotiations of the EPAs between the EU and ACP countries, enormous economic pressure and coercion were brought to bear on ACP countries to sign the EPAs because according to the EU there was no alternative for the ACP countries. Some countries signed the agreement even though it was not favourable to them due to coercion and economic pressure. Therefore, it is

implicitly waived its right under the Uruguay Round Understanding on Rules and Procedures...; Appellate Body Report, European Communities- Export Subsidies on Sugar, WT/DS265/AB/R (28 Apr 2005) Paul J R, *Comity in International Law* vol 32 Harv Int'l L J (1991) 5

¹²⁴ Appellate Body Report, Mexico-Tax Measures on Soft Drinks and Other Beverages WT/DS308/AB/R / (6 Mar, 2006), Mexico Imposed taxes on beverages using corn syrup instead of sugar cane and brought arbitration under NAFTA. The USA took the matter to the WTO dispute settlement and the Appellate body exercised jurisdiction over the matter, holding that it is obligated to hear and decide the fact in issue.

¹²⁵ Cox, *supra* n 17 at 85

imperative to make provisions for regulation of bilateral trade negotiations between countries by the WTO. As demonstrated above, the WTO regulates free trade areas, as such it can also provide mechanisms for the regulation of bilateral negotiations, especially where such negotiations involve advanced and developing countries. The WTO, according to Cass, is to a large extent able to reach a level of “coherence, systematization and legitimacy”¹²⁶ because members adhere to its ruling, and it commands respect among its signatories as well as non-members. Therefore, WTO has the apparatus to incorporate the principle of economic duress based on the declaration made by the international law commission dealing with coercion in the signing of a treaty.

Although academic work has been done on unequal treaties and economic duress, there is scarcely any work specifically examining how the WTO deals with the challenge of further regulating FTA contractual negotiation processes between developed and developing countries. Murphy, Kulski, and Detter¹²⁷, studied the similarity between municipal law and unequal agreement under international law and stated that the justification given for the recognition of unequal bargains at the domestic level should also apply at the international level. However, they did not discuss the Organization responsible for working towards the incorporation of the principle of economic duress into international law. As rightly acknowledged by Cox, the United Nations is insignificant when it comes to questions of politics and economy.¹²⁸ The WTO now manages global trade, and it has the apparatus to effectively incorporate the principle of economic duress for the sake of those members who are weak economically and plagued with underdevelopment.

Cooperation is important in this era of globalization, as interdependence, which the EU has emphasized in the series of its agreement with African countries, is key, although hardly observed due to disparity in development. Debatably, for global trade arrangements to benefit all, coercion must be minimized during trade negotiations to promote mutual trust and respect and prevent nationalism and populism, which is counter to the idea of globalization. It is hoped that this paper will likely stimulate further academic discourse in the area.

¹²⁶ Cass at n 16 69

¹²⁷ Murphy supra, Kulski W W, ‘Soviet Attitude Towards International Law and Relations’ vol 48 AM J Int’l L (1954); Ingrid Detter ‘The Problem of Unequal Treaties’ vol 15 (4) Int’l Comm L Q 1069-1089 (1966) 1070

¹²⁸ Cox at 38