Regulating for Globalization

Trade, Labor and EU Law Perspectives

Revisiting the Security Exception Under GATT in light of Russia — Traffic in Transit Case

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Introduction

The novel Covid-19 is spreading expeditiously through China and resultantly, U.S. and Australia have imposed a ban on travellers who have been through China in light of its safety and security concerns. WTO primarily regulates the goods and services and not the movement of persons however there is an increased probability of imposition of restrictions on Chinese goods viz. India is already considering a duty hike, in case the virus is not contained. In the given scenario, a blanket ban on goods might be inconsistent with WTO norms still it can be justified under Article XX (General Exceptions) and Article XXI (Security Exception) of the General Agreement on Tariffs and Trade, 1994 ["**GATT**"]. Measures under Article XX of GATT are subjected to Panel's review, but since there is a divergence of opinion on Article XXI of GATT as to whether the same is self-judging or not, powerful countries often try to invoke security exception.

There remains a potential ambiguity as to whether a trade body could decide what is "*emergency*" for a country. This postulation seems to be inherently disputable as it questions the sovereignty aspect of a country. However, the World Trade Organisation ["**WTO**"] is based on the premise that government's role is to protect the country by providing enough military power and regulating the order through the police force. Interestingly, it protects sovereignty by not questing on the member's measures, given that, the same is essential to protect its security.

As a consequence, Security Exceptions under Article XXI of the GATT and Article XIV *bis* of General Agreement on Trade in Services ["**GATS**"] provides members of WTO, a right to derogate from the existing WTO framework in case of any security exigency. That being so, certain powerful nations such as the U.S. and Russia often try to justify their WTO inconsistent measures under the garb of security exception. As is evident, the reasoning applied by these countries lies on the ground that security exception is self-judging in nature. *Per contra*, in 2019, the Panel in *Russia—Traffic in Transit* case has held that security exception is not "*totally*" self-judging in nature. The authors in this post would analyse that although the outcome of the judgement seems logically sound, at the same time it suffers from certain inconsistencies.

Regulatory Framework and an Insight into Previous Stances:

The text of Article XXI states as:

Nothing in this Agreement shall be construed so as to:

> (b) to prevent any (member country) from taking any action which it considers necessary for the protection of its essential security interests
>
> > (i) relating to fissionable materials or the materials from which they are derived;
> >
> > (ii) relating to the traffic in arms, ammunition, and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
> >
> > (iii) taken in time of war or other emergency in international relations.

In absence of any formal guidelines by WTO, the interpretation of the text is generally relied on the Article 31-33 of the Vienna Convention on the Law of Treaties ["**VCLT**"] with the aid of Article 3.2 of the Dispute Settlement Understanding ["**DSU**"], according to which WTO agreements should be interpreted "*in accordance with customary rules of interpretation of public international law*."

Simplistically, the text of the provision, on the one hand, suggests that a member can take any action which "*it considers necessary*" for the protection of its essential security interests. This interpretation makes the member as a sole judge to invoke any measure in spite of its trade restrictiveness and also offers the member a *carte blanche* in justifying its national security. In addition, certain eminent scholars opine (see *Raj Bhala* p. 276, 277; *Roger P. Alford* p. 702) that WTO security exception, unlike any other, is beyond judicial review.

In particular, the foremost case which deals with the reviewability aspect in regards to treaties having semantic provisions is *Nicaragua v. U.S.*, wherein the court held that in case any treaty contains an exception that does not oust the reviewability power of the court. A similar dispute arose later in the *Djibouti v. France*, concerning the invocation of measure by France in the interest of its security. The court observed that even though discretion is provided by the relevant provision but still the court has reviewability power to check the compliance of good faith by the member as embodied under Article 26 of the VCLT. As is clear from above, the International Court of Justice has taken a firm stance in finding that it has reviewability power. Howbeit, it should be noted that abovementioned cases lack "*it considers*" phraseology which is present in Article XXI of GATT.

The case and Intricacies Involved:

Ukraine brought a case against Russia which is considered to be the first decision, related to the security exception in Article XXI of the GATT. Russia relying on the security exception argued that it had sole discretion to determine *first*, its essential security interest and *second*, any action necessary to protect those listed under paragraph (b). The Panel rejected Russia's argument on "*self-judging*" facet and held that subparagraph (i)-(iii) operates as limitative qualifying clauses, thereby acting as a restriction on the member's discretion.

The Panel on reaching this conclusion has relied on various primary sources of law and secondary documents. According to the authors, the decrepitude as shown by the Panel includes-

First, for analysing the object and purpose of GATT (para 7.79), it placed its reliance on the previous Panels and Appellate Body reports, rather than examining the agreement itself. *Second*, (para 7.79) without placing reliance on any WTO agreement it concluded that security issues

cannot be left to the unilateral will of the member. *Third*, the Panel at multiple instances ignored and misconstrued the negotiating history which states that matters concerning essential security of a nation are within the ambit of its government. For instance, it misconstrued Australia's statement as during this meeting it sought to ensure that (at p. 27) "*a member's right should not be impinged upon*." *Per contra*, the Panel construed its statement as such, whereby it concluded that the draft struck a "*balance*" where the security exception would remain subject to the ITO Charter.

Concluding Remarks:

In its dispositive reasoning, the Panel in *Russia—Traffic in Transit* case concluded that it had reviewability over the dispute regardless of the notion that measure was imposed in light of security interest. As this report was not appealed, in case of any such instance in future, the Panel may still depart from this reasoning. Intriguing, these political tensions are arising now, most of which may be in the form of restrictions, to address Covid-19 outbreak, when the Appellate Body is already at his breaking point. In light of this background, as per authors in such a situation of security, it should not be *entirely* left up to a trade body to set the contours for situations that affect the security of a nation as *first*, it lacks the geopolitical and strategic expertise to make decisions on these issues and *second*, the element of subjectivity cannot be neglected in respect of the security concerns as a grave situation of threat to the security of a minor economy might prove, just a law and order situation for a powerful economy i.e. U.S. or Russia. Furthermore, to prevent the misuse of exception, certain limitations have to be set-in for the invocation of the same. Such as, the country should have first recourse to the U.N. or other such intergovernmental authority which deals with peace & security before invoking the security exception. Thus, in this way, the unnecessary restrictions on the trade under the aegis of security can be regulated which ultimately will help in achieving the broader objective of Globalised Economy.

The Regulating for Globalization Blog is closely following the impact of COVID-19 on the labour, trade and European law communities, both practically and substantively. We wish our global readers continued health and success during this difficult time. All relevant coverage can be found here.
