

GATT Article XXI as a way to justify food trade restrictions adopted as a response to COVID-19?

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1. Introduction

The current COVID-19 pandemic has brought to the frontline many national law and policy issues, from the importance of national health systems to work security. Similarly, in the international arena the outbreak of COVID-19 has shown the fragility of global supply chains and global cooperation.[1] While appeals not to destroy supply chains abound, many countries have already adopted a variety of export restrictions starting from medical supplies, protective gear and foodstuffs. All such trade restrictions might violate quantitative restrictions prohibition as prescribed by GATT Article XI. The question arises – are these restrictions justified under WTO law? And if so on which grounds?

The possibility to justify trade restrictions related to COVID-19 has been already discussed on various blogs, including this one, both in light of GATT Article XX (b) and Article XXI (b)(iii). As these contributions show, limitations on the trade of medical supplies and protective gear are likely justified as necessary to protect public health under GATT Article XX (b). However, reference to public health would hardly justify export restrictions on foodstuffs.

In this blog post, I focus on restrictions on foodstuff and explore the possibility that some States, in the presence of a challenge before the WTO would justify their rules by reference to GATT Article XXI rather than Article XX. As I will explain, these provisions differ not only in terms of the public interest objectives that may justify the restrictions, but also in terms of the deference awarded to WTO members. As such, Article XXI may be more attractive than Article XX as a defense for food export prohibitions, which calls attention on the ability of Article XXI to justify food export restrictions and under which conditions. This thought exercise also allows discussing whether food security can be framed as a national security interest under WTO law, as well as whether COVID-19 can be considered an emergency in international relations in light of the decision by the Panel in the *Russia-Traffic in Transit* case.

2. Food security under GATT Article XXI (b) (iii)

2.1. Can COVID-19 be considered a situation of emergency in international relations?

In order to justify certain measures under the GATT Article XXI(b) (iii) there should be an emergency

in international relations and such measures should be adopted at the time of such emergency.

Recently, the Panel defined what an emergency in international relations is. In *Russia-Traffic in Transit* the Panel adopted a state-centered definition which revolves around armed conflict.[2] However, some scholars have already discussed 'actorless' security risks like pandemic or climate change as novel security threats. Indeed, a literal interpretation of the term 'crisis' provides a certain margin to include situations that go beyond armed conflicts.

One could claim that an infectious disease like COVID-19 is a situation of emergency in international relations due to the following facts. First, some States such as the United States or Russia have included pandemics in their National Security Strategy. For example, Russia has mentioned a pandemic among threats to its national security in public health sphere. Second, there are already examples in which the UN Security Council has recognized that an infectious disease such as Ebola 'constitutes a threat to international peace and security'.[3] Moreover, it is clear that the pandemic may create new international tensions as well as strengthen international cooperation to solve the crisis. Therefore, one could reasonably claim that COVID-19 is not just a national emergency, but an emergency in international relations.

As to the timing element, it is obvious that States would act during the situation of emergency. For example, the WHO declared COVID -19 as a global pandemic on 11 March 2020 and North Macedonia imposed prohibition of exports of wheat and meslin as well wheat flour on 20 March 2020, i.e. in time of such emergency.

2.2. Requirements under the chapeau of GATT Article XXI(b)

As established in *Russia-Traffic in Transit case*, when raising a security exception, WTO Members should (1) define 'essential security interests' in good faith and (2) adopt measures for the protection of essential security interests in good faith, i.e. the measures should not be implausible as measures protective of those interests. These requirements are aimed at prevention of abusive use of security exceptions but at the same allow quite a lot of deference to WTO Members that is not completely unconstrained.

First, can we consider 'food security' to be an 'essential security interest' of the State? Food security, as defined at the World Food Summit in 1996 '*...exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life*'.

WTO Members could claim that pandemics like COVID-19 are an external threat to their population and ensuring food security is a legitimate essential security interest in this context. What is more, the right to food finds ample recognition in international law. It is enshrined in Article 11 of the International Covenant of Social, Economic and Cultural Rights. Therefore, one might claim that protection of food security is one of the quintessential functions of the State in time of a pandemic. Consequently, food security can be considered as an essential security interest of the State.

Second, good faith obligation is applied not only to definition of essential security interests but also to the connection of such interests with the measures. In other words, it requires WTO Member to show that its measures 'are not implausible as measures protective of these interests.'[4] The plausibility of food export prohibitions for protection of food security could be checked against certain principles, e.g. WTO Members should show that their trade restrictions are effective in ensuring food security.[5] If we look from another side, WTO Members would need to show that the food export prohibitions do not contribute to exacerbating the negative effects on food security - i.e. there are no price spikes, etc.[6] This element seems to be the hardest one to prove for the State, given the interconnection of

global supply chains.

Last, the 'necessity' of the measures is a so-called 'self-judging' element of GATT Article XXI. Art XXI in fact refers to the measures that a State 'considers necessary' rather than measures that are objectively 'necessary' such as under GATT Article XX. Therefore, it is left to the WTO Member which adopted the trade-restrictive measures and it seems that WTO Members would easily pass this test.[7]

3. Conclusions

To sum up, the COVID-19 pandemic could be viewed as an 'emergency in international relations'. In this context food security seems to be a legitimate essential security interest which WTO Members might justify by GATT Article XXI (b)(iii). That said, WTO Members should not abuse the flexibility given by GATT Article XXI (b) (iii) in order to circumvent their commitments under GATT Article XI. To do so, the States would need to prove that food export prohibitions are not implausible as measures protective of food security, which seems to be a challenging task taking into account the interconnection of global supply chains. As a matter of fact, there is a pressing need to prevent the disruption of food supply chains and future price spikes on foodstuffs. At the end of the day, we should not forget that autarky has often proved disruptive: in the Soviet Union, as Leonid Brezhnev acknowledged in 1981, food distribution and supply was one of the greatest economic and political problem.[8] States should learn the lessons from history and collaborate to find a global solution to COVID -19. As we may hope, the present pandemic is a 'global crisis, not a crisis of globalization'.

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[1] Geoffrey Gertz, *The coronavirus will reveal hidden vulnerabilities in complex global supply chains*, The Brookings Institution (Mar. 5, 2020), <https://www.brookings.edu/blog/future-development/2020/03/05/the-coronavirus-will-reveal-hidden-vulnerabilities-in-complex-global-supply-chains/>.

[2] *'An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.'* See Panel Report, *Russia-Traffic in Transit*, para.7.76

[3] Resolution 2177 (2014) Adopted by the Security Council at Its 7268th Meeting, on 18 September 2014 (United Nations Security Council).

[4] Panel Report, *Russia-Traffic in Transit*, para.7.138

[5] Robert L. McGeorge, *Accommodating Food Security Concerns in a World of Comparative Advantage: A Challenge for GATT's International Trade System*, 71 Nebraska Law Review 368 (1992).pp.416-420

[6] Giovanni Anania, *Export Restrictions and Food Security* (International Center for Trade and Sustainable Development 2014). P.189

[7] Panel Report, *Russia-Traffic in Transit*, para.7.146

[8] <https://www.nytimes.com/1981/11/17/world/shortage-of-food-worries-brezhnev.html>

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