

A study of foodstuff export bans and restrictions under WTO/GATT

Um estudo sobre as proibições e restrições às exportações de alimentos no âmbito da OMC / GATT

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Abstract

The WTO, derived from the GATT, is based on principles such as the Most Favored Nation and National Treatment, among others. There is also a tradition of evolving world trade by means of Rounds, mainly based on the reduction of tariffs. In the case of food, some authors and even authorities argue that there should be differentiated treatment because of the relevance they represent to people's lives. This article deals with how the WTO in its processes treats food in particular.

Keywords: WTO. International Trade. International Economic Law.

Resumo

A OMC, derivada do GATT, está assentada em princípios como Nação Mais Favorecida e Tratamento Nacional, entre outros. Existe também uma tradição de evoluir o comércio mundial por meios de Rodadas, principalmente fundada na redução de tarifas. No caso de alimentos alguns autores e mesmo autoridades defendem que deve haver tratamento diferenciado pela relevância que estes representam para a vida das pessoas. Este artigo trata de como a OMC nos seus processos tratam especialmente os alimentos.

Palavras-chave: OMC. Comércio Internacional. Direito Internacional do Comércio.

1 Introduction

The traditional challenge in facilitating international trade has been focused on eliminating high tariffs and other non-tariff barriers that hinder the free flow of inbound trade into a country. In the mid-20th century when the General Agreement on Tariffs and Trade (GATT) was being negotiated among member countries, the primary effort was put into solidifying the principles such as the Most Favored Nation Clause and National Treatment Clauses to achieve the goal of lowering trade barriers among the member states. Both of these clauses exist to unify a lowering of traditional tariff and non-tariff barriers to trade that is primarily focused on inbound trade. The issue of governmental controls that restrict outbound trade and how those regulations would impact international trade is less discussed since there is an underlying assumption that most countries are interested in exporting their goods. When the World Trade Organization (WTO) was established on January 1, 1995, GATT was one of the cornerstones on which the organization has built itself. In comparison with lowering inbound trade tariffs, the possible barriers that might influence international trade with outbound export activities have not been a focus of the GATT discussions. With time, new challenges for the promotion of free trade have become more diverse, and tariff barriers are no longer the largest challenge that nations face in the current free trade discussions. While many are focused on discussing the tangible or intangible trade barriers for market entry, the less talked about aspects of export bans and restrictions should be subject to renewed review and debate.

This paper wants to focus on a discussion of export control bans and restrictions specifically as they relate to foodstuffs and to the goal of food security. This area of restriction has been an understudied area of law because export control restrictions and bans have been designated as internal national necessities and possible national security issues. As a potential domestic necessity issue, foodstuff export restrictions and bans are subject to exceptions under GATT in the WTO. This allowance given to country governments creates a challenge in the facilitation of international food security. For countries that rely heavily on food imports as a way to maintain an internal food supply, the ramifications of these food export restrictions and bans creates a huge disadvantage to these countries. This paper discusses the ideal of food security, the various GATT articles under which food export control restrictions and bans are valid, and an analysis of whether the export ban that India installed during the 2007-2011 food crisis would be in violation of the GATT standards. This paper will conclude that although the measures do not violate GATT standards, their impact on food security should be a concern for food importing countries.

2 Research Purpose and Motivation

The motivation for this paper was the 2007-2011 food crisis that resulted in increased foodstuff export restrictions and a ban from major food exporting countries, such as Argentina, China, India, Egypt, Pakistan, Russia, Ukraine, and Vietnam.¹ These countries had placed foodstuff export restrictions and bans because there was concern for internal food security. Should there be domestic food shortages, social unrest was a real concern for the above-mentioned countries. World-wide food prices increased during this time.²

The foodstuff export restrictions and bans subject to WTO and GATT should be viewed on the premise of WTO and the broader food security debate. This is primarily because the effects of foodstuff export restrictions and bans could not be viewed simply as an internal domestic national security measure, but should be viewed as an international trade issue. Such stakes in international trade would warrant a renewed study of the current standards and practices because of its world-wide reaching effects.

3 Food Security and Foodstuff Export Control Restrictions and Bans

(A) Definition of Food Security

The definition of food security is nuanced and has evolved over time.³ The scope of food security went from being an international food supply issue to becoming a broader international issue discussing the overall nutritional and well-being of individuals. The change in focus was primarily due to the refining of the definition by the United Nations over a period of time.

In the 1970s, the lack of food security was viewed as a food supply problem because of the global food crisis. In order to tackle the problem from an international supply and demand perspective, international institutions such as the United Nations became involved in discussing ways to battle this issue. In 1974, the United Nations hosted the World Food Conference, and food security was defined as the “availability at all times of adequate world food supplies of basic foodstuffs to sustain a steady

1 SHARMA, Ramesh. Food Export Restrictions: Review of the 2007-2010 Experiences and Considerations for Disciplining Restrictive Measure. *FAO Commodity and Trade Policy Research Working Paper*. n. 32. May. 2011. Disponível em: <http://www.fao.org/economics/est/publications/en/>

2 UNITED NATIONS. *The Global Social Crisis 61: Report on the world social situation*. New York: UNP, 2011. Disponível em: <https://www.un.org/esa/socdev/rwss/docs/2011/rwss2011.pdf>

3 FOOD AND AGRICULTURAL ORGANIZATION OF THE UNITED NATIONS. *Trade reforms and food security: Conceptualizing the linkages*. Rome: FAOUN. 2003. Disponível em: <http://www.fao.org/3/a-y4671e.pdf>

expansion of food consumption and to offset fluctuations in production and prices.”⁴ During this time, food security was still viewed from the perspective of promoting a greater food supply.

By the 1980s, the issue of food security was expanded to include the issue from both the supply and demand aspect of the topic. Food security was no longer just focused on assuring the production of food, but also the consumption of food needed by individuals. In 1983, food security was defined by the United Nations Food and Agriculture Organization (FAO) as “ensuring that all people at all times have both physical and economic access to the basic food that they need.”⁵ This important transition pressed the discussion of food security to include a wider-range scope of impact that food security would need to achieve.

In 1986, the World Bank report “Poverty and Hunger” highlighted two dynamics of the food security issue. The two dynamics are views of what food insecurity looks like. From one perspective, the lack of food security was an on-going lasting status that was termed as chronic food insecurity. Chronic food insecurity related to problems stemming from low-income status and continued structural poverty. The other perspective was that a lack of food security was caused by a temporary external force defined as transitory food insecurity. Transitory food insecurity was caused by short-term shock such as natural disasters or economic collapse. Using these two types of food insecurity, the World Bank report defined food security as “access of all people at all times to enough food for an active, healthy life”.⁶

By the 1990s, food security was viewed as a concern that should be discussed as a human rights issue. The 1996 World Food Summit reflected this ideology when they adopted a complex definition of food security that stated: “Food security, at the individual, household, national, regional and global levels [is achieved] when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life”.⁷ The definition for food security was refined in The State of Food Insecurity 2001 and stated as: “Food security [is] a situation that exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their

4 UNITED NATIONS. *Report of the World Food Conference*. Rome. 5-16 Nov. 1974 (1975). Disponível em: <http://www.fao.org/docrep/meeting/007/F5340E/F5340E03.htm>

5 FOOD AND AGRICULTURAL ORGANIZATION OF THE UNITED NATIONS. *World Food Security: a Reappraisal of the Concepts and Approaches*. Director General’s Report. Rome. 1983. Disponível em: <http://agris.fao.org/agris-search/search.do?recordID=XF8333115>

6 WORLD BANK. *Poverty and Hunger: Issues and Options for Food Security in Developing Countries*. Washington, D.C.: The World Bank, 1986. Disponível em: <http://documents.worldbank.org/curated/en/166331467990005748/pdf/multi-page.pdf>

7 FOOD AND AGRICULTURAL ORGANIZATION OF THE UNITED NATIONS. Declaration on World Food Security and World Food Summit Plan of Action. *World Food Summit*. Rome: 13-17 November, 1996. Disponível em: <http://www.fao.org/docrep/003/w3613e/w3613e00.htm>

dietary needs and food preferences for an active and healthy life”.⁸

The evolution of the food security definition by the United Nations since the 1970s reflected the expansion of issues related to food security. Food security was viewed no longer as an aspect of food supply and was now inclusive of demands and individual nutritional needs. This broadening definition of food security would have an impact on an international trade organization’s trade policy as it relates to foodstuff. Trade policies such as export control restrictions and bans should be considered with this broad definition of food security and not simply as an economic challenge of an individual country.

(B) Export Control Measures under GATT

The General Agreement on Tariffs and Trade (GATT) took effect in 1947 and has been influential in creating specific standards regarding regulations in international trade. When the WTO was established on January 1, 1995, GATT 1994 became one of the prevailing standards for regulating trade.

Eliminating import barriers has been the prime focus of WTO trade negotiations, but there is a growing need to discuss export control restrictions and the conditions by which they are legitimate under GATT. Such discussions have been less prevalent before, but with limitations of exhaustible natural resources, it is possible for countries to use export control restrictions to interfere with international trade. Such interference would seem to be in conflict with the nature and goals of the WTO.

The following sections seek to analyze and discuss a WTO case that deals directly with export control restrictions and to determine how the discussions would be applicable to foodstuff export control. The 2012 “China- Measures Related to the Exportation of Various Raw Materials” (*China-Raw Material*) case was the first WTO dispute settlement case that primarily dealt with export control restrictions. Because China used various export control measures to regulate raw materials, it is important to discuss how the WTO Dispute Settlement Body viewed those export control measures against various articles in GATT. Using the conclusions that the WTO Appellate Body found in the *China-Raw Materials* case, we will then compare it to foodstuff export control regulations.

(i) China-Raw Material case

The *China-Raw Material* case was brought before the WTO dispute settlement body by the United States, the European Union, and Mexico, in 2009.⁹ These countries

8 FOOD AND AGRICULTURAL ORGANIZATION OF THE UNITED NATIONS. *The State of Food Insecurity in the World*. Rome: Organização das Nações Unidas para a Agricultura e a Alimentação Viale delle Terme de Caracalla, 2001. Disponível em: <http://www.fao.org/docrep/003/y1500e/y1500e00.htm>

9 WORLD TRADE ORGANIZATION. *China- Measures Related to the Exportation of Various Raw Materials*. Jan. 2012. p. 213. Disponível em: [http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials\(ab\).pdf.download](http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials(ab).pdf.download).

considered China's export restrictions as against China's WTO obligations. There were two WTO cases that dealt with China's export restrictions on raw materials during a similar timeframe, and the *China-Raw Material* case was decided by the Appellate Body of the WTO in 2012.¹⁰ The ramifications of the *China-Raw Material* case were more wide-ranging and closely related to export control restrictions, and this paper will focus on the discussions raised through the dispute settlement process in this case.

In the 2012 *China-Raw Materials* case, the United States, the European Union, and Mexico brought claims against China in regard to China's export restrictions related to bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorous, and zinc.¹¹ The complainants charged that China used various export restrictive measures that violated China's obligation under the WTO. These export restrictive measures included export duties, export quotas, export licensing, and minimum export price requirements. China did not view these issues to fall within the scope of the WTO's dispute settlement system. Even if they did, China's defense of the export duties charges was that the restrictive measures fell under the general exception provided by GATT Article XX (b) and (g).¹² China claimed that the export control measures were necessary because the raw materials were exhaustible resources, and the export duties were applied to reduce pollution and protect human health.¹³

In the four export restrictive measures that the complainants brought before the Dispute Settlement Panel, the Panel found all four in favor for the complainants. First, the Panel found that China did impose additional export duties in conflict with China's Accession Protocol in regard to most of the raw materials that the complainants listed.¹⁴ The Panel claimed that China could not claim general exceptions when the

10 WORLD TRADE ORGANIZATION. *China- Measures Related to the Exportation of Various Raw Materials*. Jan. 2012. Disponível em: [http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials\(ab\).pdf.download](http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials(ab).pdf.download)

WORLD TRADE ORGANIZATION. *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*. Aug. 2014.

11 WORLD TRADE ORGANIZATION. *China- Measures Related to the Exportation of Various Raw Materials*. Jan. 2012. p. 1. Disponível em: [http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials\(ab\).pdf.download](http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials(ab).pdf.download).

12 GATT Article XX (b) and (g): "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (b) necessary to protect human, animal or plant life or health; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

13 WORLD TRADE ORGANIZATION. *China- Measures Related to the Exportation of Various Raw Materials*. Jan. 2012. p. 5. Disponível em: [http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials\(ab\).pdf.download](http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials(ab).pdf.download).

14 WORLD TRADE ORGANIZATION. *China- Measures Related to the Exportation of Various Raw Materials*. Jan. 2012. p. 5. Disponível em: [http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials\(ab\).pdf.download](http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials(ab).pdf.download).

export duties that China imposed were inconsistent with Paragraph 11.3 of China's Accession Protocol.¹⁵ Second, the export performance and minimum registered capital requirements imposed by China on the allocation of certain export quotas are inconsistent with China's Accession Protocol.¹⁶ Third, although China's licensing export licensing process was not inconsistent with Article XI:1¹⁷ under the GATT 1994, China's licensing authorities had the discretion to request undefined "other" documents or materials from enterprises applying for export licenses. The power of the licensing authorities constitutes an export restriction that is prohibited under Article XI:1.¹⁸ Fourth, the imposition of a minimum export price (MEP) on the raw materials constituted a prohibited export restriction under Article XI:1, and the failure for China to promptly publish the MEP was inconsistent with China's obligations under X:1.¹⁹ After the Panel's decision, China appealed to the Appellate Body and added the legal argument that the power to impose export control regulations remained with China because they have the right to regulate trade as they see fit and that China's rights should not be restricted by the wording in GATT.

The Appellate Body agreed in part and disagreed in part in regard to the Panel's decision. The Appellate Body vacated the Panel's decision in regard to China's licensing

15 China Accession Protocol Paragraph 11.3: "China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994."

16 WORLD TRADE ORGANIZATION. *China- Measures Related to the Exportation of Various Raw Materials*. Jan. 2012. p. 7. Disponível em: [http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials\(ab\).pdf.download](http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials(ab).pdf.download).

17 GATT Article XI:1: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

18 WORLD TRADE ORGANIZATION. *China- Measures Related to the Exportation of Various Raw Materials*. Jan. 2012. p. 8. Disponível em: [http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials\(ab\).pdf.download](http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials(ab).pdf.download).

19 GATT Article X:1: "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private."

process and MEP measure,²⁰ and focused the discussion on two other issues: the issues of export duties and export quotas. The Appellate Body agreed with the Panel's determination as it pertains to export duties and the application between Article XX of GATT 1994 and Paragraph 11.3 of China's Accession Protocol. The Appellate Body stated that China has the obligation to eliminate all taxes and charges as it pertains to their Accession Protocol and could not use Article XX as an exemption not to do so.²¹ It disagreed with China's claim that there is a right to regulate trade within the realms of China's WTO obligations. As for the dispute on export quotas and whether XI:2(a) should apply, the Appellate Body stated that, "In our view, a measure applied 'temporarily' in the sense of Article XI:2(a) is a measure applied in the interim, to provide relief in extraordinary conditions in order to bridge a passing need. It must be finite, that is, applied for a limited time. Accordingly, we agree with the Panel that a restriction or prohibition in the sense of Article XI:2(a) must be of a limited duration and not indefinite."²² Whether or not the time limit to the "temporarily" imposed export duty was decided at the beginning of its application is of no importance in determining the nature of a temporary export control measure.²³ The Appellate Body also noted that XI:2(a) is different than XX(g) in terms of functions and obligations.²⁴ As the Appellate Body noted, "Article XI:2(a) addresses measures taken to prevent or relieve 'critical shortages' of foodstuffs or other essential products. Article XX(g), on the other hand, addresses measures relating to the conservation of exhaustible natural resources. We do not exclude that a measure falling within the ambit of Article XI:2(a) could relate to the same product as a measure relating to the conservation of an exhaustible natural resource. It would seem that Article XI:2(a) measures could be imposed, for example, if a natural disaster caused a 'critical shortage' of an exhaustible natural resource, which, at the same time, constituted a foodstuff or other essential product. Moreover, because the reach of Article XI:2(a) is different from that of Article XX(g), an Article XI:2(a) measure might operate simultaneously with a conservation

20 WORLD TRADE ORGANIZATION. *China- Measures Related to the Exportation of Various Raw Materials*. Jan. 2012. p. 235. Disponível em: [http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials\(ab\).pdf.download](http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials(ab).pdf.download).

21 WORLD TRADE ORGANIZATION. *China- Measures Related to the Exportation of Various Raw Materials*. Jan. 2012. p. 282-287. Disponível em: [http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials\(ab\).pdf.download](http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials(ab).pdf.download).

22 WORLD TRADE ORGANIZATION. *China- Measures Related to the Exportation of Various Raw Materials*. Jan. 2012. p. 330. Disponível em: [http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials\(ab\).pdf.download](http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials(ab).pdf.download).

23 WORLD TRADE ORGANIZATION. *China- Measures Related to the Exportation of Various Raw Materials*. Jan. 2012. p. 331. Disponível em: [http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials\(ab\).pdf.download](http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials(ab).pdf.download).

24 WORLD TRADE ORGANIZATION. *China- Measures Related to the Exportation of Various Raw Materials*. Jan. 2012. p. 337. Disponível em: [http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials\(ab\).pdf.download](http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials(ab).pdf.download).

measure complying with the requirements of Article XX(g).” Therefore the Appellate Body found against China on the issues of export duties and export quotas, because it was in violation with China’s WTO obligations.

The discussion in the *China-Raw Material* case highlighted several principles that should be discussed in regard to export control restrictions. Export control measures could actually be analyzed and discussed within the scope of two WTO exceptions, GATT XI:2(a) and GATT XX. These two exceptions are mutually exclusive and do not have to be viewed in conjunction with one another. The following segment discusses these two articles separately within the discussion of foodstuff exports.

(ii) *GATT XI:2(a): General Elimination of Quantitative Restrictions*

As WTO seeks to decrease market entry barriers, GATT Article XI:1 states the general rule for quantitative restrictions: “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.” Essentially, in accordance with GATT Article XI:1, quantitative restrictions should be banned.

However, there are exceptions to this rule, and Article XI:2 provides exceptions to Article XI:1. The important article subject to foodstuff discussion in Article XI:2(a) states that, “The provisions of paragraph 1 of this Article shall not extend to the following: (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.”

As the Panel and Appellate Body in the *China-Raw Materials* case determined, there are four aspects of Article XI:1(a) that should be discussed. First, there is the discussion of the meaning of “temporarily applied” for the export control measures. Second, the use of “foodstuff” highlights the type of necessary items that would be subject to GATT exception. Third, an imposed measure does not have to be imposed after the crisis has happened, but can actually be imposed as a preventative measure. Fourth, application of export control measures should be done on a case-by-case basis with the determination of when the situation is “critical.” A conclusion that could be drawn is that a sudden crisis that resulted in a country issuing restrictive trade measures would trigger the exception under XI:2(a).

The following paragraphs analyze the four various aspects in respect to how they were discussed in *China-Raw Materials*:

First, the term “temporarily applied” indicates that a measure would fall under Article XI:2(a) and should not be a permanent trade measure. As the Appellate Body

states, “[W]e note that the term “temporarily” in Article XI:2(a) of the GATT 1994 is employed as an adverb to qualify the term ‘applied’. The word ‘temporary’ is defined as ‘[l]asting or meant to last for a limited time only; not permanent; made or arranged to supply a passing need’. Thus, when employed in connection with the word “applied”, it describes a measure applied for a limited time, a measure taken to bridge a ‘passing need’. As we see it, the definitional element of ‘supply[ing] a passing need’ suggests that Article XI:2(a) refers to measures that are applied in the interim.”²⁵ As the Appellate Body describes, an export control restriction that falls within the exception of Article XI:2(a) must have an element of a time limit. The time limitation for restrictive measures does not have to have a clear end date, but the regulations must be blatantly clear that it will not last for a prolonged period of time. These restrictions should not be treated as a permanent measure, but as a short-term solution to deal with a sudden crisis.

Second, the subject of restrictions listed “foodstuff” as the standard that other essential products must be modeled on. As the Appellate body states, “For Article XI:2(a) to apply, the shortage, in turn, must relate to ‘foodstuffs or other products essential to the exporting Member’. Foodstuff is defined as ‘an item of food, a substance used as food’. The term ‘essential’ is defined as ‘[a]bsolutely indispensable or necessary’. Accordingly, Article XI:2(a) refers to critical shortages of foodstuffs or otherwise absolutely indispensable or necessary products. By including, in particular, the word ‘foodstuffs’, Article XI:2(a) provides a measure of what might be considered a product ‘essential to the exporting Member’ but it does not limit the scope of other essential products to only foodstuffs.”²⁶ By the Appellate Body’s reasoning, the listing of foodstuff in Article XI:2 (a) does not mean that “other essential products” must be exclusively within the family of items related to foodstuff. Rather, the categorization of foodstuff created a standard that should be used to measure “other essential products” that are important enough to be export restricted.

Third, whether or not a trade measure is a preventative or remedial measure is of no consequence. The Appellate Body states, “Article XI:2(a) allows Members to apply prohibitions or restrictions temporarily in order to ‘prevent or relieve’ such critical shortages. The word ‘prevent’ is defined as ‘[p]rovide beforehand against the occurrence of (something); make impracticable or impossible by anticipatory action; stop from happening’. The word ‘relieve’ means ‘[r]aise out of some trouble, difficulty or danger; bring or provide aid or assistance to.’ We therefore read Article XI:2(a) as providing a

25 WORLD TRADE ORGANIZATION. *China- Measures Related to the Exportation of Various Raw Materials*. Jan. 2012. p. 323. Disponível em: [http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials\(ab\).pdf.download](http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials(ab).pdf.download).

26 WORLD TRADE ORGANIZATION. *China- Measures Related to the Exportation of Various Raw Materials*. Jan. 2012. p. 326. Disponível em: [http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials\(ab\).pdf.download](http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials(ab).pdf.download).

basis for measures adopted to alleviate or reduce an existing critical shortage, as well as for preventive or anticipatory measures adopted to pre-empt an imminent critical shortage.”²⁷ The criteria for installing a temporary trade restriction does not have to be during a time period when a crisis is ongoing, but a preventative measure made in anticipatory of potential danger is also a valid method. This allows export restrictions.

Fourth, the relationship between critical measures and the essentialness of such measures must be dealt with on a case-by-case basis. As the appellate Body states, “[W]e consider that Article XI:2(a) must be interpreted so as to give meaning to each of the concepts contained in that provision. At the same time, we must take into account that these different concepts impart meaning to each other, and thus define the scope of Article XI:2(a). For example, whether a shortage is “critical” may be informed by how “essential” a particular product is. In addition, the characteristics of the product as well as factors pertaining to a critical situation, may inform the duration for which a measure can be maintained in order to bridge a passing need in conformity with Article XI:2(a). Inherent in the notion of criticality is the expectation of reaching a point in time at which conditions are no longer “critical”, such that measures will no longer fulfil the requirement of addressing a critical shortage. Accordingly, an evaluation of whether a particular measure satisfies the requirements of Article XI:2(a) necessarily requires a case-by-case analysis taking into consideration the nexus between the different elements contained in Article XI:2(a).”²⁸ The standards by which to measure critical and essential trade measures should not be measured by pre-determined rules that would calculate a situation’s criticalness or a trade subject’s essentialness. They must be analyzed by their corresponding importance in each individual circumstance.

By using *China-Raw Materials* to discuss GATT Article XI:2(a), the conclusion could be drawn that the article should be viewed as a short-term measure and not be treated as a long-term solution. In order for member states to qualify for the exception under this article, the measure must be short termed and determined in a case-by-case method.

(iii) GATT XX: General Exception

While GATT XI:2(a) is the standard to use for short term food crisis exceptions, it could be argued that GATT Article XX could be applied to long term food security issues. GATT Article XX states that, “Subject to the requirement that such measures are

27 WORLD TRADE ORGANIZATION. *China- Measures Related to the Exportation of Various Raw Materials*. Jan. 2012. p. 327. Disponível em: [http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials\(ab\).pdf.download](http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials(ab).pdf.download).

28 WORLD TRADE ORGANIZATION. *China- Measures Related to the Exportation of Various Raw Materials*. Jan. 2012. p. 328. Disponível em: [http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials\(ab\).pdf.download](http://www.worldtradelaw.net/reports/wtoab/china-rawmaterials(ab).pdf.download).

not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:... (b) necessary to protect human, animal or plant life or health.”

In the *China-Raw Materials* case, the discussion in regard to the use of Article XX is closely aligned with China’s Accession Protocol. The Appellate Body does not view Article XX as an exception to be applied as a measure to exclude China from their WTO obligation under China’s Accession Protocol. The Appellate Body stated that Article XX needed to be viewed in the totality of a country’s WTO obligation since the ramifications are long term. Exception under Article XX could exist if it is not in violation with the other country’s WTO membership obligations. Using the Appellate Body’s interpretation, WTO membership obligations trumps the application of Article XX in export control issues.

This creates a high standard for countries to qualify for if they have food export restrictions that they want to use under the exception created by Article XX.

(C) Foodstuff Export Control Restrictions and Bans from 2007-2011

The volatile nature of climate that brought on the drought caused many countries to impose export control restrictions on outbound exports.²⁹ The drastic change in climate causing a severe food shortage in 2007 resulted in a wave of food shortages. Many important food exporting countries such as Argentina, China, India, Egypt, Pakistan, Russia, Ukraine, and Vietnam took trade measures to restrict their outflow of foodstuffs.³⁰ The restrictive measures that the countries took came in a few other forms such as export duties, minimum export prices (MEP), export quotas, government to government sales, export bans or prohibitions. The export control restrictions varied in their subject of control, but the measures and their implications should be discussed.

Many of those export restriction policies that the countries currently have in place might have started out as temporary restrictions, but the duration of the export control restrictions have changed. In order to determine whether or not these restrictive measures fall under the accepted exceptions of GATT, a close analysis of the individual country’s trade measures pertaining to the country’s situation must be evaluated.

The country that this paper will spend some time discussing is India. India is now the largest rice exporting country in the world along with Thailand. During the 2007-2011

29 SHARMA, Ramesh. Food Export Restrictions: Review of the 2007-2010 Experiences and Considerations for Disciplining Restrictive Measure. *FAO Commodity and Trade Policy Research Working Paper*. n. 32. May. 2011. Disponível em: <http://www.fao.org/economics/est/publications/en/>

30 SHARMA, Ramesh. Food Export Restrictions: Review of the 2007-2010 Experiences and Considerations for Disciplining Restrictive Measure. *FAO Commodity and Trade Policy Research Working Paper*. n. 32. May. 2011. p. 31. Disponível em: <http://www.fao.org/economics/est/publications/en/>

food crisis, India imposed an export control ban on rice exports for nearly four years.³¹ India presents an interesting study on the relationship between food security, domestic food needs, and export restriction measures.

(i) *India*

While India is one of the largest rice exporting states in the world, the internal food security issue that the government was tasked with should not be overlooked. Twenty-two percent of the people in India live below the poverty line, and one in three malnourished children in the world is from India.³² Even while the country produces rich agricultural products and was a global rice exporter, the country as a whole is still plagued with food insecurity issues.

During the 2007-2011 food crisis, India was one of the first countries to immediately impose export control restrictions to forestall a potential food shortage. This was done in fear that a food shortage in India would cause political unrest. India's food export ban for wheat started in February 2007, and this ban lasted all through the food crisis until 2011. In early October 2007, India imposed an export ban on ordinary rice, but the export restriction measure was quickly changed to raising the MEP at the end of October 2007. A full export ban on rice went back into effect on April 1, 2008, and the rice export ban lasted until 2011 when the food crisis ended. The MEP on all exported basmati rice was raised, but no ban was announced.³³ The duration of India's food export restrictions was among the longest during the food crisis.

The economic effects of India's food export ban have been subject to much discussion, primarily whether or not such food export bans achieved the goal of maintaining food security for the people. The concern with export control bans was that the measure might distort the internal market and be a harmful trade measure.

Most of India's export restrictions have been lifted, so it is hard to make the argument that these export control measures are permanent. Therefore, their application in conjunction with GATT Article XX does not have to be discussed. The issue then is their compliance with GATT Article XI:2(a).

In the previous sections, we used *China-Raw Materials* to determine the four factors of applying GATT XI:2(a). We will use the four factors as they apply to India's export restrictions and bans.

The first factor to determine is the length of the export control ban. While it was indeterminable whether or not India's export bans would last indefinitely while they

31 SHARMA, Ramesh. Food Export Restrictions: Review of the 2007-2010 Experiences and Considerations for Disciplining Restrictive Measure. *FAO Commodity and Trade Policy Research Working Paper*. n. 32. May. 2011. p. 29-30. Disponível em: <http://www.fao.org/economics/est/publications/en/>

32 GULATI, Ashok; SAINI, Shweta, *India's political economy responses to the global food price shock of 2007-08*. UND-Wider, 2015. Disponível em: <https://www.wider.unu.edu/sites/default/files/wp2015-120.pdf>

33 SHARMA, Ramesh. Food Export Restrictions: Review of the 2007-2010 Experiences and Considerations for Disciplining Restrictive Measure. *FAO Commodity and Trade Policy Research Working Paper*. n. 32. May. 2011, p. 29-30. Disponível em: <http://www.fao.org/economics/est/publications/en/>

were imposed, in reality these bans have now been lifted. India's export bans should therefore be considered a temporary measure.

The second factor is whether the scope of restrictions was for essential items such as foodstuffs. Since the Indian export control is directly related to foodstuffs, the subject of export control falls within the category of items that could be export restricted.

The third factor disregards the time point to which an export restriction is placed as long as it is done with the thought of being a preventative or problem-solving measure. In India's case, this negates the challenge that India imposed export restrictions before the food crisis had hit. A preventative measure is considered to be legal under GATT.

Fourth, as the essentialness of India's measures needed to be decided on a case-by-case basis, India's internal situation presented a positive reinforcement and argument as to why the export restriction measures taken by India secured domestic food security.

The impact of India's food ban increased the panic among other food countries, and an avalanche of responses resulted in a surge in international food prices. For the countries that imposed food bans, the sky-rocketing food prices seemed to support their claim of the need to have the export restriction measures in the first place. However, it should not be overlooked that the export control restrictions created a vicious cycle that caused an unfavorable response from other nations, and the impact was strongly felt across the world. What that means for international food security is something to ponder as WTO moves forward in reshaping export control measures.

4 Unbalanced System

At first blush, the current GATT articles do not seem to challenge the balance between food security and food export restrictions by the interpretations of the *China-Raw Materials* case. *China-Raw Materials* made it clear that export control restrictions could only be implemented under GATT if export restriction measures were done during times of critical necessity and on a temporary basis. If one disregards the potential market effect that such restrictions will have on an economy, a short-term trade restriction does not seem to have an immediate impact on the long-term challenge on a global issue of food security.

Using the *China-Raw Materials* case, the acceptability of long-term food export restrictions would need to be determined on the basis of each individual export controlling country's WTO obligations and the use or inclusion of the exception under their obligations under Article XX. However, because this is a long-term exception to export restrictions, the existence of such export restrictive measures would create inconsistency among member states. Each country's negotiated WTO obligations and

their allowance of exceptions under Article XX might be different. This could potentially create varying standards related to food export control measures under GATT.

The allowance of short-term food export restrictive measures under GATT Article XI:2(a) has less long lasting problems because the time limitation that exists to limit exceptions. It is difficult, however, to determine if some countries might use it for a punitive strike against possible food price hikes. The challenge then is what recourse does WTO as an organization have against such action. Continual proposals have been made and discussions held about possible changes in WTO agricultural negotiations, but countries like India that have a heavily subsidized agricultural sector have an interest in maintaining these government sponsored subsidies. This creates a challenge in using WTO as a platform to continue the change that might be needed to protect future food security.

5 Conclusion

In a globalized world, the issue of ensuring food security and eradicating hunger is important, and the impact that the exportation ban of foodstuffs is something that would have a substantial influence on everyone in the world. The current WTO framework creates a divide between trade measures and food security, but legitimate trade restriction methods under WTO do not reflect a balanced resolution to food security issues. Export restrictions or bans on foodstuff could be made at a member country's discretion as long as there is a critical need. If the definition is to measure food security by having everyone on earth have sufficient nutrition, the current export restrictions might be problematic with assisting with the goal of providing global food security.

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