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Using GATT Security Exception for Brexit-Irish Border Issue: Is it Sensible or Fantasy?

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A key part of Brexit negotiations was about the border that separates Northern Ireland and the Republic of Ireland. The UK and Ireland are currently part of the EU single market and customs union so goods do not need to be inspected for customs and standards. In December 2018, both the UK and EU agreed to a backstop agreement i.e. an arrangement that will apply to the Irish border after Brexit if a wider trade deal is not achieved. The agreement involves a temporary single custom territory effectively keeping the whole of the UK in the EU customs union unless both the EU and UK agree that it is no longer necessary.

Any separate status for Northern Ireland from the rest of the UK is seen as potentially damaging to the EU. On the part of the UK, goods coming into Northern Ireland would have to be checked to make sure they meet EU standards. This threatens the constitutional integrity of the UK. The UK would continue to follow EU rules for an indefinite time without having control over them.

Of course, the backstop agreement must be approved by the UK Commons and is likely to face defeat as it is. Theoretically, the UK could utilize GATT article XXI claiming "essential national security" to permit goods and services passing from the Republic of Ireland tariff-free access and with few restrictions into Northern Ireland. Though it is plausible and can be adopted, this may sound childlike national security argument.

International law and trade/investment agreements do recognize that states have the inherent right to override their obligations to defend national security interests. The national security exception is found in the WTO agreements which preclude nations from taking actions counter to free and open trade unless the conduct's motivation is to protect national security interests. Presumably, this is the exception that would empower the UK under international economic law.

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\text{\{}\text{nothing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party 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; or to prevent any contracting party from taking any action in}}
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pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.¹

This inherent sovereign right to take economic measures to protect national security is the raison d’être of the potential move of the UK. However, what is "national security" and is it applicable in this context? National security is the idea that a state must keep its property safe in order to protect its citizens. This is a concept that a government, along with its law-making bodies (e.g., parliament(s)), should protect the state and its citizens against all kinds of ‘national’ crises through a variety of power projections. Projections of power may manifest itself in such ways as political power, diplomacy, economic power, military might, and so on.²

The national security exception has rarely been invoked or interpreted and the meaning of national security in the context of trade obligations is unclear.³ The invocation of the national security exception is the subject of broad questioning particularly the subjective self-judging aspect⁴ but also to the substantive extent and contours of the exception as well. Since the national security provision is exceptional inasmuch as the invocation is subjective (unlike other exceptions) and is amorphous, some have noted that the exception is subject to abuse.

The phrase "essential security interest" creates a degree of uncertainty regarding reliance on the exception. The causes of the uncertainty are that the WTO has not provided any clear definition in clarifying the scope of the term "essential security" and also because different states hold different notions regarding the phrase.

Based on sweeping economic and political transformations, the national security exception needs to be revised. One approach is to presume that the national security exception is subject to certain norms as are other provisions requiring the nation invoking the exception to adhere to concepts of reasonableness. The test should be an objective one, namely, whether a "reasonable" government faced with the same circumstances would invoke Article XXI.

Drawing on investment treaty law, one could comparatively note that arbitration tribunals have consistently interpreted national security concepts such as "exigent circumstances" or "national emergency" as enabling a host state to override a treaty

³ Article XXI of the GATT has rarely been invoked in practice, and no GATT or WTO panel has exercised a meaningful standard of review in a litigation concerning this article. See Sophocles Kithardis, The unknown territories of the national security exception: The importance and interpretation of art XXI of the GATT, 21 Australian International Law Journal, 79, 83 (2014).
guarantee only if an security essential interest was in severe danger and the state’s action was vital to defending the interest. In addition, good faith can be an important factor in determining whether national security is a reasonable cause. Furthermore, the good faith argument is also embodied in the international law concept of *abus de droit*.

Accordingly, in evaluating the UK relying on GATT article XXI in the Irish border issue, the key is balancing the legitimate need of defending UK national security with the global interest in encouraging free trade and preventing annoying the EU. This would militate in favor of evaluating whether the need is compelling (a good faith objectively) and whether the conduct is reasonable in proportion to the threat to national security. The few available GATT precedents are incomplete precedents in this regard and provide no details as to the meaning of the words used and conditions of article XXI.

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5 To resolve the conflicting interests, various approaches such as a "good faith or a reasonableness test" have been proffered as well as "calls for a test of good faith to review the subjective element of the measure, i.e., whether the Member State in fact considers that the measure taken is necessary. See Hannes L. Schloemann & Stefan Ohlhoff, Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 Am. J. Int’l L. 424, 447-448 (1999). See also Dapo Akande and Sope Williams, International Adjudication on National Security Issues: What Role for the WTO? 43 Va. J. Int’l L. 365, 390–91 (2003) (suggesting an interpretation of Article XXI that incorporates the principle of *abus de droit* under DSU art. 3.2).

6 The *abus de droit* concept "refers to a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State. See Marion Panizzon, Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement 33-34 (2006).