

Yearbook of International Disaster Law

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1 Introduction

Assistance in the event of a disaster may require the affected country to import goods and equipment necessary to deploy emergency operations. However, severe problems may arise, precluding the chance to provide immediate aid, while increasing the associated costs for relief agencies. These problems include but are not limited to: delays in customs clearance and release, lack of exemptions from import tariffs, and the application of regulations on the quality and safety of relief products.

Similarly, affected countries may need specific services, including health-related services, environmental services (in particular sewage, sanitation or refuse disposal), or telecommunication services to reach devastated areas and disaster victims. Nevertheless, foreign relief organizations may face a multitude of obstacles to the entry of services or service suppliers.

A growing body of law has been developing to address these issues, mainly under the scope of 'International Disaster Law'. However, they have also been tackled within the World Trade Organization (WTO) in view of its fundamental role in the regulation of international trade flows. The following sections will give an account of these developments through firstly providing a brief overview of the WTO (Section 2), then focusing on the 'Natural Disasters and Trade' project which was launched in April 2018 (Section 3), and finally by analysing some relevant case law under the WTO dispute settlement mechanism (Section 4).

2 The World Trade Organization – Some Brief Remarks on Law and Flexibilities

Established in 1995, the WTO is the universal inter-governmental organization on trade. Its main purposes are set in the preamble of the 1995 Marrakesh Agreement:¹ 'the substantial reduction of tariffs and other barriers to trade

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1 For the texts of the WTO agreements, see WTO, *The WTO Agreements: The Marrakesh Agreement Establishing the World Trade Organization and its Annexes* (CUP 2017²). For a detailed

and (...) the elimination of discriminatory treatment in international trade relations',² pursuing, at the same time, the 'optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so' in a manner consistent with the Members' respective needs and concerns in view of their different level of economic development.³

In view of these aims, the 164 WTO members (as of June 2019, and including the EU and its 2 member States) have entered into 'reciprocally and mutually advantageous arrangements' covering trade in goods, trade in services and the trade-related aspects of intellectual property rights. Overall, the WTO legal regime embraces 19 agreements binding upon all WTO members and two further agreements effective only for those having expressly accepted them. The General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) establish the basic legal regime for trade in goods and trade in services. Both are supplemented by several annexes setting the commitments accepted by each member on the custom duties it may apply on the importation of goods and the market access and national treatment obligations with respect to the foreign services and service suppliers.

The agreements on goods cover trade both in industrial and in agricultural goods. They address several matters: customs barriers (tariffs and quantitative restrictions); customs processes and procedures (rules of origin, customs valuation, pre-shipment inspections, import licensing, and, since 2017, trade facilitation); practices that may affect market competition (i.e., State aid, safeguard measures and dumping); regulations on the quality and safety of products (technical barriers to trade and sanitary and phytosanitary measures).

Furthermore, the multilateral trading system is supplemented by the Dispute Settlement Understanding (DSU), setting the rules and procedures for the resolution of disputes between WTO members.

Non-discrimination is the basic principle underpinning the WTO legal regime (together with reciprocity). It is at the foundation of the core provisions of WTO law, i.e. the most-favoured nation (MFN) obligations and the national treatment obligations. Concisely, the former prohibits discrimination between countries, compelling members to extend in their mutual relationships

analysis, see Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (CUP 2018⁴).

² The WTO Agreements (n. 1) para. 3.

³ *Ibid.*, para. 1.

the “most-favoured” treatment granted to any third country on all matters coming under the scope of WTO agreements. Under the national treatment clauses, foreign goods and services may not be treated less favourably than the domestic ones: a prohibition is established on discriminating against foreign countries.

A peculiarity of the multilateral trading system lies in its “flexibilities”. Indeed, several clauses provide the possibility of waiving substantive obligations. Some exceptions allow the application of permanent derogations, in view of interests and concerns deemed to prevail over trade liberalization and/or non-discrimination. In this typology, the so-called “general exceptions” provisions included in both GATT and GATS can be considered. For instance, art. XX GATT establishes that nothing in the General Agreement may prevent the WTO members from adopting measures considered to be necessary for the protection of public morals or of human, animal or plant life or health, or relating to the conservation of exhaustible natural resources. In addition, developing and least-developed countries (LDCs) are beneficiaries of several temporary derogations, which may be legitimately invoked on a transitional basis in view of their development needs. Other flexibilities refer to further circumstances, including the adoption of trade restrictions for the protection of national security, the need to restore a disequilibrium in the balance of payments, or the participation to treaties establishing a customs union or a free trade area or, under GATS, eliminating ‘substantially all discrimination’ in trade in services among the contracting parties.

In the exceptional circumstances whereby any of these flexibilities are found not to be appropriate to address a particular demand, members may invoke article IX.3–4 of the Marrakesh Agreement as ‘a remedy of last resort’, and request an authorization from the WTO to temporarily derogate from clearly identified obligations binding upon them. In the practice, article IX has been used as a legal basis to adopt trade preferences in favour of countries hit by disasters. Reference can be made here to the 2012 decision authorizing the European Union to derogate from its MFN obligation, in view of granting a preferential tariff treatment on the importation of products originating in Pakistan:⁴ the ‘exceptional circumstances’ referred to in article IX were also identified in ‘the dramatic social and economic situation as a consequence of the floods which affected extensive regions of Pakistan during the months of July and August 2010’. A similar decision was also adopted in the aftermath of

4 WTO, ‘European Union Preferences for Pakistan – Waiver Decision of 14 February 2012’ (22 February 2012) WT/L/851.

the 2015 earthquake in Nepal, always under article IX, whereby the United States were authorized to lower the customs duties applied on the importation of some products from Nepal.⁵

3 The Road to the 2018 ‘Natural Disasters and Trade’ Project

More recently, the potential role of exceptions and waivers in a post-disaster scenario has been emphasised during the Ministerial Conference held in December 2017 in Buenos Aires. Usually, WTO high-level meetings close with the adoption of a ‘ministerial declaration’, where the guidelines for future work of the Organization are set and determinations may be taken as to members’ rights and obligations. In view of the 2017 catastrophic weather season, with two category 5 hurricanes striking the Caribbean resulting in extensive destruction and devastation, the members of the Organization of Eastern Caribbean States (OECS) proposed to include in the Buenos Aires declaration specific language on the significance of WTO’s flexibilities in supporting their ‘gigantic task of economic reconstruction’.⁶ According to the proposal, WTO members would have noted ‘the destruction and loss of critical infrastructure and capacities at all level caused during [2017] unprecedented hurricane seasons, particularly to the Small Island Developing States and the [Small Vulnerable Economies] of the Caribbean’, acknowledging that ‘reconstruction and recovery and redevelopment will take many years’. Therefore, during this time ‘WTO rules and disciplines must not stand in the way of reconstruction’ and *‘the full flexibility of the multilateral trading system should be deployed so that reconstruction measures taken by the affected Members will be considered compatible with WTO Agreements’* (emphasis added).

However, due to the overall deadlock in negotiations within the WTO, consultation for the final text of the declaration came to nothing. Nevertheless, the OECS’s proposal deserves attention, at least for two reasons. First, it clearly takes into account the more general needs of countries hit by a disaster, not only in the immediate aftermath of a natural hazard, but also from the

5 WTO, ‘Trade Preferences granted by the United States of America to Nepal – Decision of 7 December 2016’ (12 December 2016) WT/L/1001.

6 WTO, ‘Recognition of the Need for Flexibilities for Caribbean and Small and Vulnerable Economies Recovering from Natural Disasters Proposal by Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, Saint Lucia and St. Vincent and the Grenadines’ (10 December 2017) WT/MIN(17)/37.

perspective of their overall “reconstruction” from the devastation and material/economic losses in the manufacturing, agriculture and services sectors. Furthermore, the proposal highlights the pivotal role of the flexibilities, asking for their full deployment so that not otherwise defined “reconstruction measures” might be considered consistent with WTO law. Most likely, this was the most controversial part of the proposed text that would have opened a tough confrontation within the organization. Indeed, it could be interpreted as a proposal for the consideration by the WTO of a waiver under article IX.3–4 authorizing a general derogation from WTO agreements.

In 2018, the impact of trade policies on disaster-affected countries has been raised in the regular work of the WTO, in particular regarding export subsidies and restrictions on the exports of foodstuff. The first issue has been raised in April 2018 by the Central African Republic on behalf of the group of LDCs.⁷ In particular, LDCs drew attention to the challenges they face once they are “graduated”, namely once they are excluded by the UN from the official list of least-developed countries.⁸ According to article 27.2(a) and Annex VII(a) of the WTO Agreement on Subsidies and Countervailing Measures (SCMA), LDCs are exempted from the prohibition of export subsidies set in article 3:1(a) SCMA. However, when graduation is approved, LDCs may no longer claim the advantages of this exception. Therefore, a proposal was submitted in April 2018 for a General Council decision whereby LDCs, once graduated, could continue to provide export subsidies until their per capita GDP is below a given threshold. For our purposes, the adoption of the proposal would have important implications, taking into consideration that most LDCs are highly prone to disasters.⁹ The possibility to grant financial support to local businesses could indeed be an instrument to boost disaster recovery and to support the rehabilitation of the economic activity.

However, the proposal did not reach a unanimous consent. On the one hand, LDCs and most developing countries voiced their support. In a statement before the General Council, Vanuatu expressed its upmost favour: it pointed out the serious difficulties graduated LDCs may face due to the loss of

7 WTO, ‘Communication from the Mission of the Central African Republic on Behalf of the LDC Group with Regard to Measures to Allow Graduated LDCs, with GNP Below US\$1000, Benefits Pursuant to Annex VII(B) of the Agreement on Subsidies and Countervailing Measures’ (19 April 2018) WT/GC/W/742, G/C/W/752.

8 UN, Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures (United Nations Publications 2018³).

9 See the list of countries vulnerable to disasters published in: Hans-Joachim Heintze et al, World Risk Report 2018, Focus: Child Protection and Children’s Rights (Bündnis Entwicklung Hilft 2018) 48 ff.

preferences in trade matters, 'which could be exacerbated by climate change and natural disasters'.¹⁰ On the other hand, developed members questioned the necessity of the proposed decision, 'particularly as the UN process already [provides] for a rather lengthy transition out of the LDC category, including possible extensions',¹¹ according to the United States. While in principle ready to discuss the issue, other developed countries requested more detailed information. In this vein, the European Union recognized that LDCs should have access to flexibilities that would help them achieve their development objectives; however, 'such flexibilities should be needs-driven and evidenced-based'. Hence, it requested a thorough analysis of the specific problems to be addressed as well as the relevant courses of action.¹²

In November 2018, Singapore raised the issue of export restrictions on foodstuff in a communication to the WTO Committee on agriculture.¹³ The topic had already been approached by the European Union in 2011,¹⁴ but without stimulating a wide support within the membership.¹⁵ Seven years later, the communication from Singapore focused on the impact on humanitarian assistance of the export restrictions on foodstuff implemented by WTO Members. The communication gave also some concrete examples of the difficulties run into by the World Food Programme in some operations in East Africa and the Middle East. In particular, the application of export restrictions in countries close to a region hit by a disaster forced the WFP to find other supply sources, remote from the areas where assistance was needed, thus increasing the time and cost of relief operations and lowering the number of individuals receiving food aid. However, some developing countries underlined the critical importance that food export restrictions may play for them, for instance in view of guaranteeing the supply on the domestic market in times of food

10 WTO, 'Minutes of the Meeting Held in the Centre William Rappard on 26 July 2018' (5 October 2018) WT/GC/M/173, paras. 5.27–5.28.

11 *Ibid.*, para. 5.25 and WTO, 'Minutes of the Meeting of the Council for Trade in Goods 3 and 4 July 2018' (13 March 2019) G/C/M/132, para. 8.12.

12 *Ibid.*, paras. 8.14–8.15.

13 WTO, 'Impact of Export Prohibitions or Restrictions on Foodstuffs Purchased for Non-Commercial Humanitarian Purposes by the World Food Programme (WFP) – Communication from Singapore' (14 November 2018) JOB/AG/148.

14 WTO, 'Food Export Barriers and Humanitarian Food Aid by the WFP (World Food Programme) – Communication from the European Union' (18 November 2011) WT/GC/138.

15 WTO, 'Minutes of the Meeting held in the Centre William Rappard on 30 November 2011' (21 March 2012) WT/GC/M/134, paras. 69–110.

shortages (consistent to GATT article XI:2(a)) or of improving the competitiveness of domestic companies using farm inputs.¹⁶

These and other concerns are deemed to find some follow-up as a result of the project on 'Natural Disasters and Trade' launched by the WTO in April 2018, with the financial support from the Australian government.¹⁷ The overall purpose of the project is to examine the impact of natural disasters on trade and, to assess whether and to what extent the multilateral trading system can support disaster-affected countries. Compared to the traditional international disaster law instruments, the WTO project addresses trade issues in a holistic manner, studying trade-related challenges that may arise not only in the immediate aftermath of a natural disaster (i.e., during the 'disaster relief' phase), but also when designing trade measures and trade-related policies aiming at restoring or improving the living and economic conditions within the affected community (i.e., for the purposes of recovering from a disaster) and at strengthening disaster resilience, namely the ability of a country to absorb and recover from future natural hazards.¹⁸ The emphasis on resilience is coherent to the goal set in the 2015 UN Sendai Framework on Disaster Risk Reduction to '[p]revent new and reduce existing disaster risk through the implementation of integrated and inclusive (...) measures that prevent and reduce hazard exposure and vulnerability to disaster, increase preparedness for response and recovery, and thus strengthen resilience'.¹⁹

The project is articulated in two phases. The first phase is mostly focused on the economic and trade impact of disasters. Its specific purpose is to measure the impact of natural hazards on the economic situation of the affected countries. In this regard, relevant studies acknowledge that the economic damages and losses due to disasters are expected to increase in the future. The need to establish clear and effective measures to cope with them is all the more evident taking into consideration that climate change is likely to increase the frequency and the severity of weather-related disasters, and that, even if natural hazards impinge on states at all levels of development, the specific

16 WTO, 'WTO Members Weigh Options for Addressing Farm Export Restrictions: Food Aid' (22 November 2018), available at <www.ictsd.org/bridges-news>, last accessed (as any subsequent URL) on 27 June 2019.

17 See: <www.wto.org/english/news_e/news18_e/devel_26apr18_e.htm>.

18 For the accepted definition of disaster response, recovery, and resilience, see: United Nations Office on Disaster Risk Reduction (UNISDR), 'Terminology on Disaster Risk Reduction', available at <<http://www.unisdr.org/we/inform/terminology>>.

19 UN 'Sendai Framework for Disaster Risk Reduction 2015–2030' (18 March 2015) UN Doc A/ CONF.224/ CRP.1, para. 17.

circumstances of poor countries have to be properly addressed, in view of both their acute vulnerability to disasters and of the higher economic costs they suffer in relative terms.²⁰

The second phase of the project on 'Natural Disasters and Trade' is devoted to a legal mapping exercise under the three-pronged prism of disaster response, recovery, and resilience. It intends to carry out a cross cutting analysis of the WTO agreements and relevant decisions, with the ultimate purpose of identifying and understanding the implication of trade rules, in particular of WTO rules on disaster risk management. Since states have the primary role and responsibility to reduce disaster risk and to design the necessary domestic policies, the aim of the study is to assess how these policies may also cover trade issues under the scope of WTO agreements. At the first symposium organized for the presentation of the project, the WTO Director General underlined that trade measures can 'help boost supply side capacity and restore trade after a disaster', but they can also 'stifle recovery, erode resilience and restrain development'.²¹ Accordingly, the legal mapping will try to unveil whether and to what extent WTO law (including its flexibilities) proves to be adequate to support trade-related policies addressing relief, recovery and resilience goals.

4 Dispute Settlement: the *Korea – Radionuclides (Japan)* Case

The *Korea – Radionuclides* case concerns trade measures adopted not *by*, but *against* a disaster-affected country. Therefore, it raised the question of how to find a balance between, on the one hand, the concern of a State for recovering from a disaster and, on the other hand, the interest of its trade partners to guarantee the safety of imported products, should they be harmfully affected by the degradation of environmental conditions in their country of origin.

20 For instance, it has been estimated that 'disaster damage as a ratio to GDP is 4.5 times greater for small States than for larger ones': Inci Ötoker and Krishna Srinivasan, 'Bracing for the Storm: For the Caribbean, Building Resilience is a Matter of Survival', in Finance & Development (March 2018) 48 ff.

21 See the summary of symposium published at <http://www.wto.org/english/tratop_e/devel_e/informal_report_of_1st_symposium_on_natural_disasters_and_trade_26_april_2018_formatted_e.pdf>, 2. A second symposium was held in December 2018, available at <www.wto.org/english/tratop_e/devel_e/summary_report_of_the_second_symposium_on_natural_disasters_and_trade-14_december_2018_final_22_feb_19.pdf>.

Following the March 2011 Fukushima nuclear accident, South Korea introduced a number of measures with the purpose of safeguarding its population from the risk associated with the consumption of Japanese food that could have been exposed to nuclear radiation. These measures included bans on the entry and marketing of fishery products originating in 8 Japanese prefectures and additional tests applied on the importation of food products from Japan.

Japan challenged their legitimacy according to the WTO agreement on sanitary and phytosanitary measures (SPS), setting the conditions whereby WTO Members may adopt measures aiming at protecting human, animal or plant life or health from the risks associated with the consumption of food, feed and feedstuffs or the establishment or spread of pests. After unsuccessful consultations with Korea, in August 2015 Japan requested the establishment of a panel of independent experts with the mandate to examine the matter, pursuant to articles 4 and 6 DSU. The panel report was released on 22 February 2018.²²

The panel ruled against the respondent. In particular, since Japan submitted the existence of a reasonably available and significantly less restrictive alternative measure achieving the level of protection of human health deemed appropriate by Korea, both the import bans and the testing requirements were found to be inconsistent with article 5:6 SPS, whereby SPS measures have not to be more restrictive than required to meet the concerned Member's level of protection.

Likewise, the inconsistency with article 2:3 was also ascertained. This provision sets a requirement of non-discrimination, pursuant to which SPS measures may not arbitrarily or unjustifiably discriminate between countries where the same conditions prevail and shall not be applied in a manner which would constitute a disguised restriction on trade. The panel observed that Korea's measures applied exclusively on imports originating in Japan, altering their competitive conditions on the Korean market, thereby discriminating against them. At the same time, the discriminatory treatment was deemed unjustifiable: it was 'not rationally connected to the objective of protecting Korea's population against the risk arising from consumption of contaminated food',²³ considering the very low levels of radioactive materials detected in Japanese

22 WTO, 'Korea – Import Bans, and Testing and Certification Requirements for Radionuclides Report of the Panel' (22 February 2018) WT/DS495/R.

23 *Ibid.*, para. 7:349.

food and the lack of a review mechanism that could be pursued in order to modify the challenged measures on the basis of risk assessment.²⁴

The panel report was appealed by both parties. It has been adopted by the WTO Dispute Settlement Body in May 2019, as modified by the Appellate Body which reversed most panel's findings.²⁵

24 The panel also acknowledged the violation by Korea of rules set in the SPS Agreement on transparency and on the control, inspection and approval of SPS measures. Further, it ruled that Korea could not legitimately invoke Article 5.7 SPS on provisional measures.

25 WTO, 'Korea – Import Bans, and Testing and Certification Requirements for Radionuclides – Report of the Appellate Body' (11 April 2019) WT/DS495/AB/R.