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T20 Policy Brief

Task Force 06

STRENGTHENING MULTILATERALISM AND GLOBAL GOVERNANCE

Improving WTO Security Exception Clause: Preventing Abuse

Daria Boklan, Professor, National Research University Higher School of Economics (HSE, Russia)

Ru Ding, Associate Professor, China University of Political Science and Law (CUPL) (China)



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Abstract

The reform of the WTO should balance free trade and security interests in order to ensure the efficiency of the Organization. It is important to provide for escape clauses, which can allow WTO Members to protect their sovereign security concerns. However, when these escape windows are too ambiguous, defining their scope becomes challenging yet crucial to ensure that they are not misused and bear risks to collapse multilateral trading system within the WTO. “Security” falls short of a universally accepted definition. It includes a variety of issues such as climate change, energy and infrastructure security, food security and others. However, broad interpretation of the WTO security exception clause as well as claims of its “self judging” nature may lead to abuse and allow WTO Members to use national security to justify any measures, implying that national security and trade liberalization are contradictory in nature.

“Security” also became a main consideration in some countries’ domestic industrial policies. Recent industrial subsidy legislation in some WTO Members implement the “guardrail provisions” to force domestic companies to exclude certain countries from their supply-chains, by requiring domestic companies not to do business or cooperate in research with companies from the group of countries, determined on the basis of security concerns. This new form of protectionism in the name of national security is discriminatory. It would spur racing to the bottom effect among major trading partners and erode the foundation of multilateralism.

This policy brief addresses both systematic risk of broad interpretation of the WTO security exception clause and recognizing it as self-judging provision. It proposes a balanced interpretation of the WTO security exception clause and adds disciplines in the WTO rules to set boundaries to “guardrail provisions” based on national security concerns, calling on the G20 to use such interpretation and disciplines to make reform of the WTO effective.

Keywords: WTO, Security Exception, Interpretation, Guardrail Provisions



Diagnosis of the Issue

The WTO reform is highly relevant to the G20 agenda as G20 states are the biggest trading nations. Therefore, preservation and development of the multilateral trading system is dependent on policy of G20 states. This policy should balance free trade and security interests. For the WTO to be inclusive and relevant it is important to provide escape clauses, which can allow WTO Members to fairly protect their sovereign security concerns. However, when these escape windows are too ambiguous, defining their scope becomes challenging yet crucial to ensure that they are not misused and bear risks to collapse the WTO. “Security” falls short of a universally accepted definition. It includes a variety of issues such as climate change, energy and infrastructure security, food security and others. However, broad approach to interpretation of the WTO security exception clause as well as claims of its “self-judging” nature may lead to abuse and allow WTO Members to use national security as an, implying that national security and trade liberalization are contradictory in nature.

Such approach bears a risk of abusing of national security exception allowing a state not directly involved in particular emergency in international relations violate its obligations under General Agreement on Tariffs and Trade (GATT), General Agreement on Trade in Services (GATS) and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which provide for the said exception. This may result in national security being an exception to liberalization of trade and that both values are contradictory in nature.

Such idea may totally destroy multilateral trading system which already suffers from the crisis of the dispute settlement system and deadlock of the negotiations function. This policy brief address both systematic risk of broad interpretation of the WTO security

exception clause and recognizing it as self-judging provision. It proposes a balanced interpretation of the WTO security exception clause and adds disciplines in the WTO rules to set boundaries to “guardrail provisions” based on national security concerns calling on the G20 to use such interpretation and disciplines, to make reform of the WTO effective.

Recommendations

The authors of this policy brief recommend using narrow and hybrid approach to interpretation of security exception clause, and expand the application of this approach to the Agreement on Subsidies and Countervailing Measures.

Security exception clause was addressed at least in nine reports of the WTO panels.¹ The Panel in *Russia — Measures Concerning Traffic in Transit (Russia — Transit)* employed a combination of objective and subjective approach and narrow interpretation of security exception clause.

A provision is “self-judging” and “non-justiciable” when it could be assessed subjectively by the invoking country without reliance on any legal standard or test. On the contrary, a provision is “not-self-judging” and “justiciable” if the panel can rely on

¹ *Russia — Measures Concerning Traffic in Transit (DS 512)*

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm); *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights (DS 567)*

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm; *US – Certain Measures on Steel and Aluminum products (DS 554, 552, 556, 564)*,

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds548_e.htm; *United States — Origin Marking Requirement (DS 597)*,

https://www.wto.org/english/tratop_e/dispu_e/cases_e/DS597_e.htm; *China — Additional Duties on Certain Products from the United States (DS 558)*,

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds558_e.htm and *Turkey — Additional Duties on Certain Products from the United States (DS 561)*,

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds561_e.htm.

objective legal standards and in this manner employ an objective approach of interpretation.² The Panel in *Russia — Traffic* has found that the actions taken under security exception clause can be objectively reviewed by WTO dispute settlement body (§ 7.103). On the other hand, the Panel has decided that an assessment of what constitutes “essential security interests” is subjective in nature and hence can be judged by the WTO members themselves, when invoking this provision.

Assessing the nature of “emergency in international relations” the Panel used narrow interpretation. The Panel expressly excluded political and economic interests from the scope of “essential security interests”, as it clarified that “political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for the purposes of security exception clause” (§7.75). The Panel interpreted “emergency in international relations” as 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 invoking security exception (§§7.76, 7.111). The Panel underlined that the further invoking security exception member is removed from armed conflict, the less obvious are the defense or military interests, which can be generally expected to arise. In such cases, a Member would need to articulate its essential security interests with greater specificity (§7.135). This obligation is crystallized in demanding that the measures are not implausible to protect such interests (§7.138). Therefore, the Panel narrowly interpreted security exception clause, as covering solely military interests and international relations between states directly involved in the state of emergency. However, the Panel’s ruling in *US — Marking Requirement* applied much

² Multiple scholarly works support this analogy, see Hahn (1991), Piczak (1999), Schloemann and Ohlhoff (1999).



broader interpretation. The Panel defined “international relations” as “relations involving political, economic, social, and cultural exchanges” (§7.280) and underlined that such international relations are not “exclusively bilateral relations between the invoking Member and the Member affected by the action”. This approach bears systematic risk of total collapse of the WTO as soon as it may be used to justify “anything under the sun” under the security exception clause.

The authors of this policy brief argue that hybrid approach together with the narrow interpretation developed in *Russia —Transit* provided a systemic balance between the rights of the WTO members to invoke security exception and their right to free trade. Hybrid approach implies right of every state to have discretion in defining its essential security interests (subjective approach), on the one hand, however, on the other hand, the WTO panel has the jurisdiction to assess and interpret term “emergency in international relations” objectively. Alongside with that security exception clause should be interpreted narrowly as covering specifically military interests and military international relations of states directly involved in the state of emergency. All other types of interest and types of international relations should not be covered by the security exception clause as well as this clause should not cover interests of states not directly involved in the state of emergency in international relations.

The authors also argue that this hybrid and narrow approach shall also be applied in the context of industrial subsidy policies. Recent years witnessed a subsidy race among major economies for concerns of national or supply chain security, especially in the sectors of semiconductor and sustainable technologies. Some of these industrial policies discriminate against products coming from or going to a certain region or country without a solid foundation of security rationale. It was underlined in the WTO 2023 World Trade Report, that if such policies became prevalent, it will not only cause a detrimental impact



on liberalization of trade, but also will lead to a slowing down transition to green economy. Considering that the current Agreement on Subsidies and Countervailing Measures (SCM Agreement) does not explicitly incorporate the security exceptions under the GATT 1994, we propose that the WTO members shall reach understandings or consensus on applying a hybrid and narrow test of security concerns in implementing industrial policies.

As a practical recommendation the authors of this policy brief recommend to G20:

- to adopt authoritative interpretation of the WTO security exception clause based on hybrid approach and narrow interpretation, and
- to apply the same approach in examining WTO members' trade-related industrial policies.



Scenario of Outcomes

This combination of objective and subjective approach coupled with narrow interpretation of security exception clause is a laudable attempt to provide a systemic balance between the sovereign rights of the members to invoke security exception and the rights of the members to free and open trade. If followed in the future disputes, this approach will leave some discretion in the hands of the WTO members and at the same time allow the panels to review whether there was “an emergency in international relations”, whether the measure “was taken at the time of” such emergency, whether there was “good faith” determination of “essential security interests” and whether the measure at issue meets a “minimum requirement of plausibility” in relation to the argued security interest.

If the Panel had employed a completely subjective approach, it would have lent its support to the idea that national security is an exception to trade liberalization and that the two values are contradictory in nature. This idea, and its essence, is problematic because free trade for many decades has allowed countries to work together for their individual benefits. It has made countries dependent on each other, which has indeed fostered greater cooperation and understanding between countries. Identification of common interests has led to countries coming together as trade partners. This shows that the spirit of trade liberalization and multilateralism on one hand and national security on the other hand are very much complimentary to each other. Protection of one can lead to the enhancement of the other interest. The Panel’s decision in *Russia – Transit* reinforces and restores this belief.

Broad interpretation of security exception clause which includes in “emergency in international relations” all types of international relations with states not directly involved



in such emergency will lead to abuse of security exception and will permit justification of any trade restrictive measure. This bears systematic risk of total collapse of the WTO. However, this suggestion may be problematic for the WTO members, which strictly support purely subjective approach and self-judging nature of the security exception clause. Finding possible trade-offs with such members could be the relevant solution and contribution to the efficiency and inclusiveness of the WTO reform.

There would be tensions in applying this hybrid approach and narrow interpretation into the industrial subsidies policies. G20 countries might be constrained domestically to subject their industrial policies to a stricter review regarding security justifications. It is however in the benefit of all the G20 leaders and beyond to be rational in applying security-based trade restrictive measures. The leaders can narrow down the scope of sectors where they believe mutual benefit of further trade cooperation supersedes geopolitical considerations. The approach as proposed could be applicable in that defined scope.



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