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## USING NATIONAL SECURITY EXCEPTIONS IN WORLD TRADE ORGANIZATION (WTO) SYSTEMS

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### ANNOTATION

The main objective of this study is to analyze national security exceptions in the World Trade Organization (WTO) system, to study how these exceptions are interpreted, to determine their impact and consequences on the WTO system, as well as to assess the need and prospects for developing exception norms in the WTO system.

The study analyzes the content of the WTO legal norms on national security exceptions, how they are applied in practice, how these exceptions affect the obligations of membership, and the problems they cause for the stability and fairness of the international trading system. At the same time, it considers what legal mechanisms should be developed to prevent the abuse of these exceptions and the possibilities of developing clearer and more consistent rules on exceptions in order to further strengthen the WTO system.

**Keywords:** WTO, national security exceptions, GATT, GATS, TRIPS, transparency.

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### ANNOTATSIYA

Ushbu tadqiqotning asosiy maqsadi Jahon Savdo Tashkiloti (JST) tizimidagi milliy xavfsizlik istisnolarini tahlil qilish, ushbu istisnolar qanday talqin qilinishini o‘rganish, ularning JST tizimiga ta’siri va oqibatlarini aniqlash, shuningdek, JST tizimida istisno normalarini ishlab chiqish zarurati va istiqbollari baholashdir.

Tadqiqotda JSTning milliy xavfsizlik istisnolariga oid huquqiy normalarining mazmuni, ular amaliyotda qanday qo‘llanilishi, ushbu istisnolar a’zolik majburiyatlariga qanday ta’sir ko‘rsatishi, xalqaro savdo tizimining barqarorligi

va adolatliligiga olib keladigan muammolar tahlil qilinadi. Shu bilan birga, ushbu istisnolardan suiiste'mol qilinishining oldini olish uchun qanday huquqiy mexanizmlarni ishlab chiqish kerakligi va JST tizimini yanada mustahkamlash uchun istisnalar bo'yicha aniqroq va izchil qoidalarni ishlab chiqish imkoniyatlari ko'rib chiqiladi.

**Kalit so'zlar:** JST, milliy xavfsizlik istisnolari, GATT, GATS, TRIPS, shaffoflik.

## ИСПОЛЬЗОВАНИЕ ИСКЛЮЧЕНИЙ ПО ОБЕСПЕЧЕНИЮ НАЦИОНАЛЬНОЙ БЕЗОПАСНОСТИ В СИСТЕМАХ ВСЕМИРНОЙ ТОРГОВОЙ ОРГАНИЗАЦИИ (ВТО)

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### АННОТАЦИЯ

Основная цель данного исследования — проанализировать исключения национальной безопасности в системе Всемирной торговой организации (ВТО), изучить, как эти исключения интерпретируются, определить их влияние и последствия для системы ВТО, а также оценить необходимость и перспективы разработки норм исключений в системе ВТО.

В исследовании анализируется содержание правовых норм ВТО об исключениях национальной безопасности, как они применяются на практике, как эти исключения влияют на обязательства членства и какие проблемы они вызывают для стабильности и справедливости международной торговой системы. В то же время рассматриваются правовые механизмы, которые следует разработать для предотвращения злоупотребления этими исключениями, и возможности разработки более четких и последовательных правил об исключениях в целях дальнейшего укрепления системы ВТО.

**Ключевые слова:** ВТО, исключения по соображениям национальной безопасности, ГATT, GATS, ТРИПС, прозрачность.

### Introduction

Before entering to this theme, it is better to start with its background and legal basics to understand deeper. What is the term “national security exceptions”? “National security exceptions” is also considered as “national security exemptions” and these security exceptions in legal systems domestically and internationally allows the governments of states to do some actions in order to secure their interests. Even though sometimes the governments infringe their other legal obligations, national security exceptions allow discretion and taking flexible actions to response against security threats.

In terms of World Trade Organization (WTO), national security exceptions permit the member states of the Organization to do measures which violates their obligations under the Agreements of WTO such as General Agreement on Trade in Services (GATS) and the General Agreement on Tariffs and Trade (GATT), when it is necessary to protect national security interests. In the Article XXI of the GATT, the important key points of national security exceptions are outlined. According to this Article:

#### “Article XXI: Security Exceptions:

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 (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security [1].

This provision lets the member countries of the Organization to ascertain threats and dangers to their national security and implement actions, such as restrictions and bans to trade, tariffs and other trade barriers that may be reasons to violate the rules of WTO. Moreover, the interpretation of the Article XXI includes the determination of what the content of the exceptions are and who determines the scope of the exceptions, the essential national security interests, whether that particular action as an exception is necessary for their protection [2]. The application and interpretation of the provision have been considered contentious due to varying their views on what constitutes legitimate national security threats and protectionism in each member country. Recent years, the usage of national security exceptions are becoming more relevant with many cases. For instance, the United States has been appealing to national security exceptions to set tariffs on the import of aluminum and steel, mentioning threats to the production capacity in domestic level for those metals, their importance in the national defense of the states.

The Article XXI exception of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement allows) member states to restrict trade in three cases to protect their essential security interests: fissile materials, weapons for military installations, and war or emergencies. This exception is based on the open-textured content of subsection, which provides no other definition [3].

However, the Article XXI in the TRIPS and GATS agreements presents two ambiguities:

(1) the substantive scope of the exception and (2) who determines the substantive scope. The substantive content of the exception becomes open only if the exception is not self-judging, and if self-judging, the substantive scope is whatever a state says it is. This makes interpretation difficult and potentially leads to ambiguities in international law. The Article XXI and its exceptions in TRIPS and GATS agreements have two ambiguities: the substantive scope of the exception and who decides its substantive scope. The substantive scope is open only if the exception is not self-judging [4].

### Interpretations

The self-judging nature of security exceptions is unclear. Member States can decide whether the measure is important to their interests, set a standard of good faith, or decide whether the measure is necessary for their essential security interests, but the conditions are subject to judicial review.

To put these interpretations into practice, in November 1975, Sweden introduced a global import quota on certain footwear, noting that the sharp reduction in local production “became a significant threat to the emergency planning of Sweden’s economic defense as an integral part of Sweden’s security policy”. Other member states have questioned the rationale, but no GATT panel decision

has been made to challenge the measure. Under all three interpretations, combat boots meet the requirements of Article XXI(b)(ii) as goods used to equip the military. The same cannot be said about slippers. According to the first theory, the choice of which products to restrict under Article XXI is left to the Member State alone. According to the second approach, WTO review is limited to examining whether a restriction on trade in footwear was adopted in good faith. Under the third approach, the WTO would be free to examine whether a particular boot actually constitutes a military product [5].

### **Implication of national security exceptions**

The implementation of national security exception in WTO systems plays a role as significant implications in important aspects of world trade, particularly international relations, global trade, multilateral system of trading, abuse, trust and trade liberalization among the member states of the Organization. In this case, I decided to focus on three aspects of using national security exceptions:

- To balance liberalization and national security interests;
- Potential abuses and misuses of national security exceptions;
- Impacts on international trade relations and trust among member countries;

To balance liberalization and national security interests: These exceptions may cause to challenges in the process of balancing liberalization in trade with national security interests. Member states may need to protect their security interests through taking actions and measures such as controls on export or tariffs. To achieve balance in liberalization and national security is complicated, while member states are ruling out different kind of tariffs, import quotas to protect important industries for those countries or ensure strategic autonomy. In this aspect, it is the challenge related to determining whether those national security trade measures actually serve for a legitimate security interest, as a lot of interpretations may undermine the principles of non-discrimination and reciprocity in the World Trade Organization systems.

Potential abuses and misuses of national security exceptions: “National security exceptions” in GATT, 1994 can be misused and abused WTO member states, because these security exceptions let member states to justify non-security protection actions as well. For instance, in order to avoid or to protect domestic industries and producers from broad foreign competition, usage of national security exceptions by a member state can lessen trade flows, disturb supply chains, abuse transparency and predictability in international trade. Moreover, the possibility to broad using of the scope of national security exceptions may cause to the uncertainty for businesses and trading parties or partners which leads to high level of risk and negative impacts to engagement of cross-border investment and trade. In some cases, abuse or misuse of national security exemptions may undermine the belief to the mechanism of dispute settlement in the Organization and make the effectiveness and efficiency of multilateral trading systems as one whole system.

Impacts on international trade relations and trust among member countries: The implementation of national security exceptions can impact significantly to international trade relations and trust among parties. Disputes due to the national security measurements may lead to diplomatic strain and high-volume trade tensions. The insufficiency of consensus and clarity during the interpretation of national security exemptions may cause to disagreements and challenges legally within the WTO systems and processes. For example, the case about imposing tariffs to steel and aluminum imports by the United States. Under this case, the guise of national security provoked retaliatory actions from trading partners and led to the disputes within the WTO.

### **Prospects for the development of provisions on exceptions in WTO systems**

Taking into account the above, as well as the prerequisites and conditions for reforming the



WTO, it is advisable to prepare proposals to clarify Art. XXI GATT, XIVbis GATS and 73 TRIPS with a view to reducing, where possible, existing Gaps in WTO legislation regarding national security provisions.

Key elements of possible future agreements between WTO members that will help eliminate the legal vacuum in the interpretation of Art. XXI GATT, XIVbis GATS and 73 TRIPS may be the followings:

1. Transparency. An equally important aspect when clarifying the provisions on security exceptions is the question of transparency in the application of trade measures with reference to Art. XXI GATT-94, XIVbis GATS or 73 TRIPS. During negotiations on the development of Art. XXI GATT-47, the parties doubted the need for notification (notification) of the contracting parties about measures introduced for security reasons. However, after the Falkland Islands crisis (as a result of events related to with the armed conflict between Great Britain and Argentina, when.

The European Communities have introduced restrictive measures against Argentina with reference to Art. XXI), the parties to GATT 47 adopted a “Decision regarding Art. XXI General Agreement [on Tariffs and Trade]” November 30, 1982<sup>5</sup>. This decision provided for the notification of GATT contracting parties about measures taken in accordance with Art. XXI GATT, except for the cases provided for in paragraph (a) of this article, i.e. about the possibility of not providing information, the disclosure of which is contrary to essential security interests.

In addition, paragraph 2 of Art. GATS XIVbis provides for the need for WTO Members to notify the WTO Council on Trade in Services of the adoption of trade measures in accordance with the provisions of this article, as well as the cancellation of such measures. As confirmation of the intention of WTO Members to notify measures, accepted under Art. XIVbis:2 GATS, you can cite the document “Guiding principles regarding notifications under the General Agreement on Trade in Services”, approved by a decision of the WTO Council on Trade in Services on March 1, 1995. The guidelines establish format of notifications sent by WTO members to the Council for Trade in Services. From a legal point of view, this document, of course, is an element “soft” law (soft law). However, it clearly states the intention of members of the organization to notify, among other things, measures taken for security reasons. However, notification obligations are not observed in practice. In 2018, neither Australia imposing restrictions on Chinese 5G equipment and its services, nor the United States imposing tariffs on steel and aluminum citing exceptions for reasons of national security were not provided with appropriate notifications to the WTO Secretariat [6].

In future agreements to clarify the provisions of Art. XXI GATT-94, XIVbis GATS or 73 TRIPS it is advisable to include provisions on transparency that would provide for both the submission of notifications to the WTO Secretariat, as well as notification of members of the organization affected by the introduction of restrictive measures.

2. Jurisdiction. For a long time, the provisions of Art. GATT XXI were not interpreted by arbitration commissions within the WTO. Before the dispute between Russia and Ukraine (DS512) the provisions of this article were never considered on their merits. The same applies to similar provisions of GATS and TRIPS, only while the relevant articles did not even become the subject of discussion spore. In this regard, the question remained open about the availability. The Panel has jurisdiction to consider exceptions for safety reasons.

In this dispute regarding the transit of goods, the Panel found for the first time that “[...] it has jurisdiction to determine whether the requirements of Art. XXI(b)(iii) GATT 1994”. In other words, fact that the determination of the essential interests of their security is the inalienable right of WTO members, as well as those measures that they consider necessary to protect them, does not prevent

the arbitration commission from checking the actions WTO Members for compliance with specific provisions on exceptions for security reasons in accordance with Art. XXI GATT-94, XIVbis GATS or 73 TRIPS. Otherwise, US actions for steel and aluminum, it would be reasonable by definition only because the United States declared that there was a threat to its vital security interests.

### Conclusion

The considered conditions and prerequisites for reforming the WTO allow us to make the conclusion is that the current situation in international economic relations, the crisis in the WTO, as well as recent events such as the introduction of import duties on steel and aluminum with reference to national security (Article XXI GATT) indicate insufficient legal regulation in areas covered by WTO agreements. For uninterrupted work of the organization; existing gaps in WTO legislation regarding exceptions. For reasons of national security, WTO law must include decreased.

In the context of WTO reform, certain provisions on national security exceptions require interpretation and clarification. Possible future agreements on the interpretation of the provisions of Art. XXI GATT, GATS XIVbis and TRIPS 73 may include the following elements:

- jurisdiction of arbitration commissions;
- transparency (notification of trade measures applied under security exemptions);
- qualification of restrictions (conditions for the application by WTO members of trade measures to protect the essential interests of their security or in fulfilling its obligations under the UN Charter) and the principle of good faith;
- proportional suspension of concessions (the right of states to protect essential interests of their security in response to accepted unilateral measures taken against it by another WTO member).

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