CHAPTER 5

National security and other non-trade objectives under WTO law[1]

CUI Fan, Catherine Hoeffler, and Stephanie C. Hofmann
SITE and UIBE; Sciences Po; IHEID

In an ideal(ised) classical economic model, trade between states is always good and mutually beneficial. However, states have many concerns when trade with each other does not align with other political goals in areas such as food security, environment and climate change, labour rights, culture, or national security. The integrity of the World Trade Organization (WTO) rules and the success of reform of the WTO requires keeping some policy space for states to address such concerns, while keeping the WTO as a system of trade rules rather than a boxing ring of political fighting. Legitimate security grounds may not be able to be defined, but can be embedded in other rules. A more open process of the evaluation of states' invocation of Article XXI may trigger more willingness to engage in it, thereby increasing the efficiency and legitimacy of WTO rules.

1. SECURITY MATTERS UNDER WTO LAW

Under what lawyers call exceptional circumstances, national security constitutes a legitimate ground for states not to abide by their commitments in many international treaties. If we turn our gaze to international trade and General Agreement on Tariffs and Trade (GATT)/WTO law, the 'security exception' laid down in Article XXI grants such room for manoeuvre to states.

While the security exception is the most obvious institutional entry point, discussions about the linkages of, and interdependencies between, security and trade issues in international trade are not solely constrained to Article XXI. Instead, states have already claimed national security prerogatives in everything but name. For instance, the Airbus/Boeing disputes have been framed as trade issues and treated with traditional WTO rules such as the regulation of state subsidies. Yet, no one can doubt the underlying security implications of such a trade 'war' between the two aerospace giants across the Atlantic and its geopolitical implications. This example underlines that while the security exception article is the most visible – and currently relevant – institutional tool, it constitutes but the tip of the iceberg of instruments for states to voice their national security concerns.

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Another example is the food security issue, which is often treated as part of widely defined 'national security'. The Doha Round negotiations collapsed in July 2008, because of the inability of India and the US to agree on a special safeguard mechanism for the agricultural products of developing countries designed to address food security concerns. Rather than fitting in a neatly delineated category, states' national security concerns pervade in many different ways how international trade works and is regulated. We therefore need to look beyond the use and abuses of Article XXI if we want to locate national security thinking in WTO. This requires us to consider more fundamentally how trade and security are co-constituted and how this impacts rules and practices in international trade regulation.

2. WHY AND HOW THE TRADE-SECURITY NEXUS MATTERS FOR THE WTO

2.1 Article XXI: A Damocles' sword over international trade rules

Until recently, the WTO had dealt little with national security matters, at least formally. States had only rarely invoked Article XXI, and if this was the case, other states had not challenged the state(s) that did so.[2] This scant use of the security exception can be explained by the member states' unwillingness to more formally define the security proceedings and to question states' sovereignty over security matters. This behaviour had been based on, but has also reproduced, the taken-for-granted 'self-judging' character of Article XXI until recently. An additional reason why states might not want to explore these uncharted waters is that they can use other legal mechanisms to protect their national security interests without invoking the said security exception provision. The restraint of using national security considerations could also be found in economic relations outside of the WTO, until recently. In 2012, the US and the European Union (EU) released a joint statement on shared principles for international investment, which advocates 'narrowly-tailored reviews of national security considerations: governments should ensure that their reviews, if any, of the national security implications of foreign investments focus exclusively on genuine national security risks'.[3]

Despite this limited use, the WTO security exception has been considered potentially disruptive, for there was always the possibility of states making use of this article to circumvent international trade rules. This use of Article XXI could harm the integrity of WTO trade laws, but it could also hurt states that do not possess strong military or international influence, i.e. less developed member states, which could suffer from powerful states' arbitrary use of Article XXI (Cann 2001:416).

However, we might be at a turning point, as in recent years, some states have made more frequent use of this security exception clause. This is the case for instance in the Russia-Measures concerning Traffic in Transit (WT/DS512/7) or in the Saudi Arabia-Measures

2 In the era of GATT, Article XXI was invoked by Ghana on the occasion of the accession of Portugal in 1961, by EEC and its member states, Canada, Australia against import from Argentina in 1982, by US in its trade embargo against Nicaragua in 1985, among other occasions.

3 https://2009-2017.state.gov/p/eur/rls/or/2012/187618.htmL

concerning the Protection of Intellectual Property Rights (WT/DS567/8) cases. The Section 232 tariffs of 25% on steel and 10% on aluminium imposed by the US caused nine cases of dispute settlement in the WTO. While it falls outside the scope of WTO jurisdiction, the strengthening of national security screening in many countries is another sign that testifies to the increased importance given to security over trade.

2.2 Increased politicisation and securitisation of world trade

This renewed interest in the security exception clause enclosed in WTO law reflects broader dynamics of politicisation and securitisation of international trade and investment. For the sake of this chapter, we refer to politicisation as the process where 'something – an issue, an institution, a policy – that previously was not a subject to political action into something that now is subject to political action' (Palonen et al. 2019:249). The concept has been used to analyse the trend by which certain organisations, most notably the EU, have become more 'political', through either increased salience of the issues they are dealing with, larger and broader participation of actors, and/or last but not least, stronger polarisation (De Wilde 2011). Historically, economists and lawyers involved in the development of autonomous international law through the GATT and the WTO have regarded politicisation as a threat to the efficiency and very existence of these institutions. The rising politicisation of international trade, which has been happening for a few years now, however, seems difficult to ignore.

This is even more difficult to ignore as this multifaceted dynamic called politicisation has used one specific policy frame as of late, namely national security. International trade has been increasingly portrayed as linked to national security concerns. This process has been analysed in international relations through the concept of securitisation (Balzacq and Guzzini 2015, Buzan et al. 1998). The process of securitisation entails that in the name of an existential threat to the political community, political authorities suspend normal (democratic) rules, and grant themselves exceptional powers. The concept of securitisation has been developed to explain the inclusion of certain issues/topics (such as internal security, terrorism, frontiers) into the realm of 'traditional' security and defence policies. It has also been applied to other policies (health, migration, environment, energy) (Hofmann and Staeger 2019, Huysmans 2000, McInnes and Rushton 2013) to designate more broadly the framing of these policies from a security perspective and to point to the (mostly detrimental) effects of such a process.

While they are not synonyms, politicisation and securitisation both point to interesting political dynamics in international trade. Obvious indicators of these trends are the increased use of war metaphors to describe trade disputes and the return of geopolitics/geoeconomics in policy and academic circles. However, these dynamics do not always unfold clearly: governments can try to play their cards through different strategies, using or discarding the 'security' card. Different examples illustrate these two-sided dynamics. On the one hand, the aluminium-trade 'war' spearheaded by President Trump under the premise of national security shows how security can be deployed to uphold ordinary trade

rules through the use of Article XXI. On the other hand, the rare earths cases, in which the EU and the US filed complaints against China, demonstrates that actors such as the EU and the US see their security interests at stake when China claims protective measure of its rare earths. China's rare earth reserve accounts for about 37.8% of the world reserve, while China accounted for 98% of the world production in 2010. When China invoked the exception of 'the conservation of exhaustible natural resources', some sort of concern on national security might be in mind. This could be understood as a covert (as China does not claim that its policy is motivated by security concerns) securitisation move by China, as it limits full access to security-related minerals to arms-producing and technologically-inclined countries by using export tax and quota, which is not allowed according to some specific commitments in China's protocol of WTO accession.[4]

As such, politicisation and securitisation have the potential to impact the WTO in different ways. Firstly, it is likely that WTO member states will invoke the security exception more frequently in the future, thus jeopardising the tacit restraint that prevailed until recently. Secondly, it is possible that states will disrupt long-standing WTO procedures, by not complying to WTO rulings on Article XXI if they should see their national security concerns, however defined, not being taken into account. Finally, a broader implication could reside in the overall contestation of the artificial (read: political) boundary between security and trade/investment. States could decide to adopt broader definitions of security, which would have implications of what they define as their essential national security interests. Negating the very relevance of the boundary drawn between trade and politics/security would amount to a fundamental challenge to WTO's intellectual foundations.

3. THE PATH AHEAD: WTO REFORM AND INTERNATIONAL/NATIONAL SECURITY

More than ever, any reform of the WTO system should be designed to take into account international and national politics. The politicisation and securitisation of trade, observable from the 'top', i.e. world politics, to the 'bottom', i.e. its local implications, is here to stay. The WTO cannot afford to contest national sovereignty. Similarly, the embeddedness of trade in national politics and the existing and potential interlinkages between trade and other political goals such as security, but also the environment (just think of a green global economy), health (e.g. access to medicine) or human rights (PTAs with HR clauses), need to be reckoned with – not as a limitation to trade but as a precondition for it. In the meantime, in certain areas such as environment and climate change, states should shoulder common but differentiated responsibilities, and the least developed countries should be given more help to meet the minimum standards.

4 According to Article XI:2(a) of the GATT 1994, 'export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting Member'. The Panel in China – Raw Materials contrasted the language used in Article XI:2(a) with that used in Article XXI, and held that the determination of whether a product is 'essential' to that Member should not be decided by the Member on its own.

Here are a few things that, we argue, are worthwhile to be considered:

We need to keep WTO system as a system of trade rules rather than a boxing ring of political fighting

To prevent over-politicisation, we need to stick with WTO's basic principles such as non-discrimination. Within the WTO, the tradition of ownership-neutrality goes hand in hand with the principle of non-discrimination. The idea of ownership-neutrality can be best illustrated by Article 345 of the Treaty on the Functioning of the EU (TFEU), formerly Article 295 of the Treaty Establishing the European Community (TEC) and, before that, Article 222 of the Treaty Establishing the European Economic Community (EEC), which states that 'the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'. Mavroidis and Cottier (1998: 3) believe that this article proclaims its ideological neutrality with respect to property ownership. When national security exception is used to target states with different systems of property ownership or other different ideology, it will be difficult for the WTO, with 164 members, to sustain. However, WTO members have legitimate reasons to counter competitive advantage earned by enterprises, because of governmental ownership or control. Competition neutrality, the recognition that significant state-owned business activities, which are in competition with the private sector, should not have a competitive advantage simply by virtue of governmental ownership and control, should be followed just as ownership neutrality.

Legitimate security grounds may not be able to be defined, but they can be embedded in some other rules

National security can be defined in a broad way and a narrow way as well. National security with a broad definition can be linked with all kinds of concerns. Serious deterioration of the environment may damage national security of certain states. Climate change may influence national security of countries with low elevations more seriously than other countries. Food security is one facet of national security as well. The worry that foreign telecommunication equipment might pose a threat to national security can be addressed by setting technical standards and requirements. Such technical standards should be objective and based on scientific evidence and follow Technical Barriers to Trade (TBT) rules. If foreign producers are willing to disclose technical details and source codes to regulators of importing countries, the regulators should allow market access and help the producers to keep commercial secrets.

For all those concerns, the WTO should provide suitable tools or policy flexibility for members to address such concerns rather than solely rely on Article XXI of GATT 1994. If an exception is invoked to address concerns mentioned above, preconditions should be clearly defined.

National security should be defined in a narrow way if Article XXI is invoked. A WTO member may take 'any action which it considers necessary' to protect its 'essential security interests', however the circumstances that 'essential security interests' are related to are

not totally 'self-judging'. The Panel in the case Russia-Measures concerning Traffic in Transit (DS512) holds that 'that the adjectival clause, which it considers in the chapeau of Article XXI(b), does not extend to the determination of the circumstances in each subparagraph. Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision.'

However, some uncertainty still persists as to whether the emergency condition of the national security exception covers the entire Article XXI or only part of it. Article XXI does not define critical concepts such as 'essential security interests' and 'other emergency in international relations', which causes ambiguity (Lindsay 2003). In the case Russia-Measures concerning Traffic in Transit, the respondent identified the situation that it had considered to be an emergency in international relations by reference to the following factors: '(a) the time-period in which it arose and continues to exist, (b) that the situation involves Ukraine, (c) that it affects the security of Russia's border with Ukraine in various ways, (d) that it has resulted in other countries imposing sanctions against Russia, and (e) that the situation in question is publicly known. The Panel regards this as sufficient, in the particular circumstances of this dispute, to clearly identify the situation to which Russia is referring, and which it argues is an emergency in international relations'.[5] As to 'essential security interests', the Panel in the case Russia-Measures concerning Traffic in Transit noted that a Member is not 'free to elevate any concern to that of an "essential security interest"'. Rather, the discretion of a member to designate particular concerns as 'essential security interests' is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith.[6]

Which measures are necessary to address security concerns?

The 'good faith' argument is not only applied to the interpretation of 'essential security interest' but also applied to the measures taken to protect the essential security interest. The Panel in the case Russia-Measures concerning Traffic in Transit considered that this obligation 'is crystallised in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of those interests'.[7] It would need to review whether the measures 'are so remote from, or unrelated to, the … emergency that is implausible that Russia implemented the measures for the protection of its essential security interests arising out of the emergency'.[8] China and the EU have at different times promoted the idea that the invocation of the security exception should be followed by compensation measures proportionate to the initial move. This could help avoid litigation and the political risks attached to constraining the states' use of Article XXI.

5 WTO Panel Report, Russia – Traffic in Transit, para. 7.119.
6 WTO Panel Report, Russia – Traffic in Transit, para. 7.132
7 WTO Panel Report, Russia – Traffic in Transit, para. 7.138.
8 WTO Panel Report, Russia – Traffic in Transit, para. 7.139.

There are many measures a state can take to protect essential security interests. To determine the necessity of trade intervention, possibility of other policy tools should be considered. In many cases, it is not necessary to resort to measures inconsistent with other WTO rules. Bhagwati (1969) considered an economic model with many possible measures to address a non-economic objective, and he believes that the policy intervention that creates the distortion directly affecting the constrained variable is optimal, i.e. policy intervention should target the policy objective, which is known as the 'targeting principle'. The 'targeting principle' is helpful but may not be strict enough to determine necessity. Even if the cost of other tools is higher than that of the trade intervention, as long as it is not unreasonably higher, it is still not necessary to use trade restrictions. Very rigorous calculation of welfare cost of policy tools may be difficult, as WTO Members may use national security concerns as an excuse to refuse to provide certain information. However, WTO panellists can still use available information to determine if a WTO Member has considered the necessity of trade intervention in good faith.

Who assesses the legitimate use of Article XXI?

Even more important than the definition of the conditions covered by Article XXI is the question about the evaluation of whether a state has met the requirements for invoking Article XXI or not. Recent cases such as DS512 have challenged the idea of self-defining security grounds, taking away this freedom from governments. While this move makes sense from a functional perspective, it could lead to states trying to avoid using this article altogether and pursuing the same interests through other means. Rather than putting national (security) interests under the rug, a more open process of the evaluation of states' invocation of Article XXI may trigger more willingness to engage in it, and henceforth, an increased efficiency and legitimacy of WTO rules.

A second option lies in formulating better inter-institutional cooperation, i.e. on security matters, between the WTO and the UN, and/or regional security organisations such as the African Union or the EU. The United Nations (UN) is referred in Article XXI(c) and security exception is given when 'taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security'. Perez (1998) finds that while there is a UN Supremacy Clause, there is no similar clause in the WTO, which ensures that in the case of a direct conflict, any state member of both the UN and WTO would be compelled to observe its UN obligations.

In conclusion, beyond simply fixing the use of the security exception, these options could have a larger effect on how trade is considered and assessed in conjunction with other political commitments and interests such as security that states pursue.

Opening up this process can take different forms. A first option would be to enrich WTO dispute settlement mechanism on security matters. For example, to enlarge and diversify the composition of WTO panels which are ruling on the cases where a state invokes Article XXI. If the parties in the dispute agree, a specific arbitration may be used, or a group of security experts may be organised to make a conclusion.

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ABOUT THE AUTHORS

CUI Fan is a Professor of International Trade, at the School of International Trade and Economics (SITE) of the University of International Business and Economics (UIBE) in Beijing. He is also the Director of Research at the China Society for WTO Studies. He has received a PhD in Economics and a LLM in International Commercial Law from the LSE.

Catherine Hoeffler is an Associate Professor in Political Science at Sciences Po Bordeaux/ Centre Emile Durkheim, France, and is currently a Visiting Professor at the Graduate Institute, Geneva. Her research interests lie in the political economy of security, comparative public policy, and theories of European integration.

Stephanie C. Hofmann is Professor of International Relations and Political Science at the Graduate Institute of International Relations and Development Studies. Her research revolves around issues in international security, international organizations, the interlinkages between global and regional understandings of order, the nexus of regional economic and security cooperation as well as national foreign policy preference formation.