A Proposal to Reform ‘Security-Emergency’ Exceptions in Trade

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Overview

1. What is the current state of security-emergency exceptions in trade agreements?
2. Are security-emergency exceptions suitable for the current international security environment?
3. What risks does the current security framework present?
4. How can we improve security-emergency exceptions for times of crisis and pandemic?
5. Final Remarks
1. What is the current state of security-emergency exceptions in trade agreements?

GATT Art. XXI: Security Exceptions
- Traditional military-centered vision of security
- Clear overlaps between security provisions and other provisions (Articles XI:2(a) for critical shortages and XX General Exceptions)
- Insufficient procedural safeguards to prevent misuse
- No specific provisions to guide a coherent international response to address new global security threats, such as large-scale natural disasters, pandemics, or even man-made crises
2. Are security-emergency exceptions suitable for the current international security environment?

- The relationship between trade and security is undergoing a historical transformation
- Security has become a multifaceted, risk-based concept, embracing nonstate actors and nonhuman threats
- Governments’ conceptions of their own vital interests are pushing the limits of security to encompass issues such as national industrial policy, migration, terrorism, climate change, and pandemics
# Issues or Threats Covered in Selected National Security Plans

<table>
<thead>
<tr>
<th>Country/ Region</th>
<th>Terrorism</th>
<th>Weapons of Mass Destruction</th>
<th>Attack by foreign country</th>
<th>Pandemic</th>
<th>Natural disaster</th>
<th>Man-made emergency</th>
<th>Other Concerns Discussed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>x</td>
<td>x</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>Technology-enabled crime (e.g. cybercrime), critical infrastructure.</td>
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<tr>
<td>Austria</td>
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<td>Regional conflict, failed states, organized crime.</td>
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<td>Canada</td>
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<td>x</td>
<td>x</td>
<td>Critical infrastructure, cyber networks, failed states, organized crime, trafficking in drugs or humans, climate change.</td>
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<td>France</td>
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<td>Critical infrastructure, organized crime, trafficking in drugs or humans.</td>
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<td>Germany</td>
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<td>Critical infrastructure, migration, regional conflict, failed states.</td>
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<td>Italy</td>
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<td>Regional conflicts, failed states, organized crime.</td>
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<tr>
<td>Mexico</td>
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<td>Regional conflict.</td>
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<tr>
<td>United Kingdom</td>
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<td>x</td>
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<td>Energy, regional conflict, failed states, climate change.</td>
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<tr>
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<td>x</td>
<td>x</td>
<td>x</td>
<td>Critical infrastructure, energy, trafficking in drugs or humans.</td>
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<tr>
<td>European Union</td>
<td>x</td>
<td>x</td>
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<td></td>
<td>x</td>
<td>x</td>
<td>Regional conflicts, failed states, organized crime.</td>
</tr>
</tbody>
</table>

Source: OECD
3. What risks does the current security framework present?

- If available and supported by a widening consensus on non-traditional threats, security-emergency provisions may provide an appealing alternative to Members seeking to avoid their obligations.

- For example, Members trying to cope with post-COVID-19 economic consequences and trying to guarantee an adequate supply of medical products for future crises may perceive economic, legal, or political benefits in invoking security-emergency provisions to justify their actions.
4. How can we improve security-emergency exceptions for times of crisis and pandemic?

- The “Achilles’ heel” of international law must be addressed to meet the present international security environment.

- Modernization of these provisions is critical to maintain the trading system’s required certainty for it to continue to prosper.

- A framework to offset the growing temptation to justify politically motivated trade-restrictive measures under the pretext of security-emergencies and to enhance cooperation among Members when dealing with common threats.
Article XXI: Security Exceptions

1. Nothing in this Agreement shall be construed to:

   (a) require a Member to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

   (b) preclude a Member from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, the protection of its own essential security interests, or in circumstances of extreme emergency in accordance with its laws.

2. Notwithstanding paragraph 1,

   (a) Members shall comply with the Security Measures Code for the adoption and application of measures mentioned in paragraph 1(b).

   (b) Members recognize that their interconnectedness and vulnerabilities in the face of global emergencies require a coherent, multi-sectoral, multi-stakeholder, and whole of the WTO Community approach. Accordingly, in times of global emergency or similar serious catastrophe as declared by a competent international organization, Members should take action in accordance with the Guiding Principles for Times of Global Emergency.

   (c) The adoption of measures to give effect to paragraphs 2(a) and 2(b) shall be a matter of conscious and purposeful effort on the part of the Members both individually and jointly.
GUIDING PRINCIPLES FOR GLOBAL EMERGENCIES (GPGE)

GPGE 1. Principle
Members agree to cooperate with each other in times of global emergency or similar serious catastrophe as declared by a competent international organization.

GPGE 2. Principle
Members should apply emergency measures only to the extent necessary to protect the quintessential state functions, namely, the protection of its territory and its population, and the maintenance of law and public order internally.

GPGE 3. Principle
Members should take additional steps to protect against any trade measure misuse within their territory during global emergencies.

GPGE 3.1. Subprinciple. Members should be free to determine the appropriate adjustments to their own legal system and practice.

GPGE 4. Principle
Emergency measures should be targeted, proportionate, transparent, temporary, and should not create unnecessary barriers to trade or disruption to global supply chains in essential goods.

GPGE 4.1. Subprinciple. Members should choose measures most suitable for the achievement of these objectives.

GPGE 4.2. Subprinciple. Emergency measures must meet a minimum requirement of plausibility in relation to the proffered purpose.

GPGE 4.3. Subprinciple. Measures should be withdrawn as soon as reasonably practicable.

GPGE 5. Principle
Members should give public notice before taking emergency measures or as soon as reasonably practicable.

GPGE 5.1. Subprinciple. Members should give notice to the Global Emergency Working Group with all pertinent information, which shall include a precise description of the product involved, the proposed measure, date of introduction, expected duration, the purpose of the measure, and the rationale underpinning it. The Global Emergency Working Group may request such additional information as it may consider necessary.

GPGE 5.2. Subprinciple. Members should initiate consultations as reasonably practicable with the Members who would be affected by the measure at issue.

GPGE 6. Principle
The GEWG shall coordinate the creation of essential goods lists according to the nature of the emergency.

GPGE 6.1. Subprinciple. The GEWG shall coordinate the design of common product standards and mutual recognition procedures to facilitate supply in essential goods.

GPGE 6.2. Subprinciple. The GEWG shall promote coordination among Members to finance the expansion of the production capacity of manufacturers of key essential goods and the companies they source from.

GPGE 6.3. Subprinciple. The GEWG shall promote coordination to pool international buying power to prevent hoarding and bidding wars among Members.

GPGE 6.4. Subprinciple. The GEWG shall monitor all measures notified and keep an up-to-date record available in the platform mentioned above to ensure transparency.

GPGE 6.5. Subprinciple. The GEWG shall create effective communication channels to disseminate among the public and private sectors relevant information regarding the importance of preventing actions that may result in trade disruptions that affect trade in essential goods.

GPGE 7. Principle
The GEWG shall maintain constant communication with the Committee on Security Measures.

GPGE 7.1. Subprinciple. The GEWG shall prepare in a timely fashion a report to the Committee on Security Measures concerning emergency measures implemented by Members during the emergency.

GPGE 7.2. Subprinciple. The report should include Members’ strategies or policies taken during the emergency, as well as relevant information regarding their application and outcomes.

GPGE 7.3. Subprinciple. The report should include the best practices and experience gained by Members’ implementation of measures during the emergency, as well as recommendations for future events.

GPGE 8. Principle
After the emergency, Members should engage in discussions to share ideas to address the collective action problem. Dialogues towards a minima ethics during global emergencies should be launched among Members and include the participation of other stakeholders. An inclusive approach, as opposed to an exclusive one, is crucial to identifying concurrent values for better coordination of international response in future emergencies.

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Key Advantages of the Proposed Framework

1) Incentivizes Members to refrain from weaponizing security-emergency provisions by increasing the costs of invoking such provisions

2) Dejudicializes security disputes that compromise the credibility of DSS and undermine the treaty regime

3) Promotes that measures applied are targeted, proportionate, transparent, temporary, and should not create unnecessary barriers to trade or disruption of global supply chains, especially in essential goods

4) Enhances cooperation among Members when dealing with common threats to provide a coherent, multi-sectoral, and multi-stakeholder unified response

5) Incorporates a mix of binding and nonbinding elements

6) It does not impinge on national sovereignty; on the contrary, it encourages the strengthening of the rule of law from a domestic perspective
5. Final Remarks

- While nationalism has characterized the initial legal and political responses to the pandemic, international cooperation will determine the next stage.

- One of the major false dilemmas of our times is that international trade weakens national strength and capabilities.

- Pooling and sharing capabilities, setting priorities, and improving coordination through international cooperation enhances our response in the face of an emergency and mitigates risks for future ones.

- International trade is not a drawback when facing a global threat, it is an essential element of the solution, and during a pandemic, it is a matter of life and death.

- Members must recognize that the risk of non-cooperation is probably the greatest threat to security.
THANK YOU!