



THE 19TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Legal Mechanisms for Ensuring National Security in the Field of International Trade

Alexandr Cauia¹, Lidia Cherdivara²

Abstract: The world economic system is developing rapidly, and respecting the essence and principles established in this process is absolutely necessary to ensure the smooth development of economic relations between states. However, the realities of the 21st century require states to take the necessary measures to ensure their national security and the security of their own citizens. In addition to the multilateral rules of the World Trade Organization (WTO) and the United Nations (UN), elements related to ensuring national security are also reflected in the free trade agreement between the states participating in international economic relations. This article analyzes some aspects of this complex process of interaction between the need to ensure national security and the specifics of international trade relations.

Keywords: national security; economic security; legal regulation; international trade

The connection between international trade and national security has a long history that can be traced back at least to the inception of the General Agreement on Tariffs and Trade (GATT) in 1947.³ Ever since, the topic of national security has often been at the center of trade disputes as some members have unilaterally imposed trade sanctions against other members on national security grounds. But to date, the results of the disputes have not successfully provided useful guidance on how to implement trade rules related to national security.

The recent evolutions in the international political and economic environment have shaped a more complex character to the problem of national security. In particular, the terror of September 11th, 2001 brought an additional dimension to the scope of national security. Thus, national security could be extended to cover so-called human security in the context of international trade.

All the elements of a policy, concept, strategy, action plan contain in themselves aspects that can be modeled, generated and ensured to be respected, only subject to the consistent presence of the initiative and legal expertise in addition to the economic-financial ones that should be to form a well-connected system of competent bodies and a network of established specialists to contribute decisively to the

¹ PhD, Free International University of Moldova (ULIM), Republic of Moldova, Address: 52 Strada Vlaicu Pârcălab str., Chisinau, Republic of Moldova, Tel: +37369205130, Corresponding author: acauiia@ulim.md.

² PhD in progress, Free International University of Moldova (ULIM), Republic of Moldova, Address: 52 Strada Vlaicu Pârcălab str., Chisinau, Republic of Moldova, Tel: +37369618366, E-mail: lidia.cherdivara@gmail.com.

³ General Agreement on Tariffs and Trade (GATT), 30.10.1947 (online). Accessed 12.10.2022. Available on the https://www.wto.org/english/docs_e/legal_e/gatt47.pdf.



prevention and combating of threats and dangers to national security (Cauia, 2020, p. 41).

Scientists have studied trade sanctions, which were imposed for the purpose of ensuring national security. There are two main approaches to this: the economic approach and the legal approach. Since the early 1980s, the authors Hufbauer C. and Schott J. have carried out a fundamental study on the effects of trade sanctions. (Clyde, Jeffrey & Kimberly, 2005) The purpose of the paper was to identify the circumstances under which economic sanctions are most likely to achieve foreign policy objectives. Consequently, the study focuses on four central questions: What has been the record of economic sanctions in achieving foreign policy objectives? What factors – both political and economic – improve the chances that sanctions will make a positive contribution to the desired outcome of achieving the foreign policy objective? What are the costs of sanctions to both targeted countries and target countries? What lessons can be learned from this experience to guide policy makers on the use of sanctions in the future? (Clyde, Jeffrey & Kimberly, 2005, p. 2).

The entire work presents a genuine interest in the analysis of the role and place, costs and effectiveness of commercial sanctions as a tool to achieve some or other foreign policy objectives. Thus, the authors were keen to point out that, in many cases, it is fair to say that sanctions were a necessary component of the overall campaign which focused primarily on preventing the use of military force.

Thus, the statement: “sanctions never work” is clearly wrong. That being said, there are several reasons why sanctions often “don’t work”. First, trade sanctions are of limited utility in achieving foreign policy objectives that aim at compelling the target country to take actions it strongly opposes. In some cases, the security, political, or other costs of complying with the requirements of the sanctioning statute may simply be prohibitively high. In other cases, particularly situations involving small countries and relatively modest objectives, sanctions have helped change the behavior of the targeted state (Clyde, Jeffrey & Kimberly, 2005, p. 159).

On the other hand, Jackson J. (Jackson, Davey & Alan, 2002) comprehensively analyzes the matter of national security in the context of international trade law, analyzing whether certain trade sanctions are justified in accordance with the relevant rules of the GATT and the WTO. The authors deal with the basic GATT rules on: trade liberalization (tariffs and quotas), non-discrimination, standards and trade remedies (guarantees, dumping and subsidies). The paper provides a basic understanding of the international economic system, the impact of international economic interdependence, and the struggle of legal institutions to deal with this and other aspects of globalization.

While international trade is one way to achieve a nation’s economic prosperity, national security is a goal that a nation must pursue in the presence of an external threat, real or potential. Thus, the impression is created that there is no substantial relationship between these two phenomena. However, national security has often been cited in attempts or efforts to require or justify protection of certain import-competing industries. According to the so-called national security argument, if a product in question is used by the military, whether it is weapons or basic necessities such as footwear and clothing, the industries in question may claim to be vital to national security and then that they need protection from foreign competition.

National security concerns also affect the export side. Trade sanctions have been used as a major means to counter the external threat to national security, mainly in the form of export controls. It is believed that the absence of an objective definition of national security could lead to the misuse of national security provisions. Thus, this approach can have negative effects on international trade (Sohn & Yeo, p. 3).

The primary conclusion is that nothing exists outside security, and the weight of this phenomenon that

develops from the perception of each individual as an element of society on own security towards the security of the group one belongs to where the benchmark of group security is the medium value of the subjective perceptions of all members of this group, evolving towards societal security where the degree of subjectivity in the process of assessing the degree of security of the societal group is already replaced by some objective evaluation mechanisms and tools towards national and international security where the dose of subjectivity is substantially reduced and limited to error calculations generated by the human factor, and pragmatism, the cynical and ironic calculation of the security supplier or consumer status is performed with arithmetic precision (Cauia, 2018, p. 26).

No one could doubt that international trade and national security affect each other. National security affects international trade. In particular, trade measures have often been used as a means to protect national security. Trade sanctions have been applied in various forms: full or partial embargoes on exports and imports, restrictions on air and sea transport, bans on financial transactions and freezing of state assets.

It is often claimed that trade sanctions imposed for national security purposes result in adverse effects on international trade without achieving the intended objectives. Thus, expressing concern about the negative effects of trade, industry groups called on governments and multilateral organizations to take trade measures with extreme caution. They also emphasize that the measures in question must be imposed in accordance with relevant international agreements, including WTO agreements (Kiyoun & Taek, p. 6).

On the other hand, international trade helps to enhance national security. Whether driven by economic or political objectives, regional trade agreements can enhance national security because they increase the level of trade between member countries and thereby increase cooperation between the citizens of member states. Extensive economic integration could deter war as it makes war more expensive.

Author Brace Stokes argues that the outlook for defense and diplomatic spending depends more than ever on the performance of the economy, and that economic performance is increasingly dependent on exports and earnings from overseas investment. It also emphasizes that state-level foreign and security policy makers must recognize that foreign economic policy – opening markets for its exports and investment to support domestic economic growth – is a tool to achieve foreign policy goals (Brace, 1998, pp. 165-166).

Various international agreements and regulations provide the legal basis for trade measures to ensure national security. One of the basic international rules is the WTO agreements. They allow trade restrictions to protect national security. The GATS¹ and the TRIPS Agreement² contain separate national security exceptions: Article XX of the GATS, Article XIV bis of the GATS and Article 73 of the TRIPS.

There are several disputes over Article XXI of the GATT.³ The most contentious issue boils down to

¹ General Agreement on Trade in Services, 1995, Accessed 02.10.2023. Available on the https://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm.

² The TRIPs Agreement and Developing Countries. United Nations Conference on Trade and Development, Geneva, 1996, accessed 02.10.2023. Available on the Internet: <URL: https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/1_tripsandconventions_e.pdf.

³ Article XXI GATT provides that: “(a) require any member to provide any information the disclosure of which it considers contrary to essential security interests; or (b) prevent any Member from taking any action it considers necessary to protect its essential security interests (i) in respect of the fissile material or material from which it is derived; (ii) relating to the trafficking of arms, ammunition and instruments of war and to the trafficking of other goods and materials which are used directly or indirectly for the purpose of supplying a military unit; (iii) taken in time of war or other emergency in international relations; or prevent any member from taking any action in the performance of its obligations under the Charter of the United Nations for the maintenance of international peace and security.”

who is entitled to determine whether trade-restrictive measures are necessary to protect the security of the member invoking these provisions under paragraph (b). The jurisprudence establishes that the invoking Member has the authority to determine necessity. In the case of Czechoslovakia against the US export control measure in 1949, it was determined that each country should have the final solution in matters related to its own security. This interpretation of the self-judging authority has become another source of dispute (Jackson, Davey & Alan, 2002, p. 1046). GATS Article XIV bis and TRIPS Article 73 are similar to GATT Article XXI.

The Agreement on Technical Barriers to Trade (TBT) also provides for national security exceptions. Unlike the national security provisions of the GATT, GATS and TRIPS, Article 2.2 of the TBT specifies the extent to which trade-restrictive technical regulations are permitted. In particular, technical regulations must not restrict trade more than is necessary to achieve a legitimate objective, taking into account the risks that failure to do so would create. According to Article 2.2, national security is considered to be one of the legitimate objectives that justify certain restrictive technical regulations of trade.

The United Nations (UN) has imposed and considered a variety of trade sanctions under certain provisions of the UN Charter. The relevant provisions are Articles 39, 41 and 42. Under Article 39, the UN Security Council has the authority to determine whether there is any threat to the peace, breach of the peace or act of aggression. If it establishes the existence of either situation, it shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42 for the maintenance or restoration of international peace and security.

The articles 41 and 42 specify the forms of measures provided for in Article 39. The article 41 provides for the types of measures that the Security Council may take, but these are limited to those that do not involve the use of armed forces. On the other hand, military action is permitted under Article 42, subject to a finding by the Security Council that the measures under Article 41 would be or have been found to be inadequate. Also, the UN Charter is the international normative act to which reference is made in the texts of the agreements within the WTO, as regards the trade limitation measures that can be taken for the purpose of ensuring security.¹

Other international organizations have adopted anti-terrorism measures that affect trade in goods and services. One of these is the International Ship and Port Facility Security Code (ISPS Code) adopted by the International Maritime Organization (IMO) in 2003.² The IMO adopted a number of amendments to the 1974 Convention for the Safety of Life at Sea (SOLAS), including the ISPS Code. The main purpose of the Code is to increase the level of maritime security in ports and ships around the world.

On the other hand, the Organization for Economic Co-operation and Development (OECD) established the Financial Action Task Force (FATF). Its main purpose is to combat money laundering activities, which are also known to be substantial financial sources of terrorist groups. By adopting nine recommendations, the FATF regulates bank transfers, the remittance system and financial transactions of non-profit organizations.

The international trade and national security are closely related. The national security has increasingly depended on international trade, especially after the end of the Cold War. There are several aspects that need to be improved to achieve a secure trade. First of all, it is vital to define well the concept of national security in the sense of the application of trade measures to ensure it. One of the reasons for trade

¹ GATT Article XXI(c), GATS Article XIV bis: 1(c) and TRIPS Article 73(c).

² International Ship and Port Facility Security Code, 2003, <https://www.imo.org/en/OurWork/Security/Pages/SOLAS-XI-2%20ISPS%20Code.aspx>.

disputes in the WTO has been the absence of an objective definition of key terms such as “essential security interests”.¹

Multilateral agreements and national legislations fail to clearly define national security, a fact that causes commercial disputes and demonstrates the need to develop a reasonable and objective definition, with the aim of promoting trade and discouraging the abusive use of national security provisions.

In addition, it is necessary to clarify the scope of the national security provisions, as there is no scope limit under the existing provisions, which may lead to misuse.

WTO rules do not provide what types of procedures should be applied in the case of invoking trade sanctions for security reasons. In particular, it may be essential to specify the factors to be assessed in order to determine whether a state’s security interests are threatened. The multilateral rules do not specify the factors to be taken into account in making a decision on a trade sanction. Similarly, most national laws do not specify these factors.

Article XXI of the GATT, Article XIV bis of the GATS and Article 73 of the TRIPS provide that the action of “restricting trade is necessary” for the protection of the essential security interests of a member state. But they do not specify criteria for determining necessity. This lack of criteria has returned to the focus of trade disputes. Thus, it is necessary to develop criteria of necessity that are applicable to national security measures.

Most export and import controls are taken in the form of quantitative restrictions. According to most experts, quantitative restrictions are inferior policy instruments to price ones such as subsidies. Certain types of subsidies may be given to a domestic industry that competes with foreign industries that are found to affect national security.

It is also necessary to pay special attention to developing countries. In other words, states can initiate trade sanctions, if necessary, that grant special and differential treatment to developing countries, a fact that is, at the moment, only at the level of recommendation and is not expressly established in the text of an international standards act.

The national security is an omnipresent phenomenon, and the denial or misunderstanding of this phenomenon can even affect the existence of the state. The lack of clear documents in this area deprives the state bodies not only of the possibility to react promptly as a response to various vulnerabilities and threats that can and do very quickly turn into dangers for different segments of national security, and the field of international trade, in addition to the indisputable commercial and economic advantages, it could also generate a series of challenges to national security, a fact to be prevented and combated by the use of specific economic-legal instruments both at the national and international level.

¹ Article XXI(a) and (b) of the GATT 1994. Article XIV *bis* (a) and (b) of the GATS, and Article 78(a) and (b) of the TRIPS Agreement.

Bibliography

*** (1947). *General Agreement on Tariffs and Trade (GATT)*. Accessed 02.10.2023. Available on the https://www.wto.org/english/docs_e/legal_e/gatt47.pdf.

*** (1995). *General Agreement on Trade in Services*. Accessed 02.10.2023. Available on the https://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm.

*** (1996). *The TRIPs Agreement and Developing Countries. United Nations Conference on Trade and Development. Geneva*. Accessed 02.10.2023. Available on the https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/1_tripsandconventions_e.pdf.

*** (2003). *Facility Security Code*. Accessed 02.10.2023. Available on the <https://www.imo.org/en/OurWork/Security/Pages/SOLAS-XI-2%20ISPS%20Code.aspx>.

Cauia, A. (2018). The necessity of substantiating and studying national security law in the Republic of Moldova. University Legal Studies. *Ultimate*, no. 3-4. Year XI/2018, pp. 24-32.

Cauia, A. (2020). Financial security — fundamental component of national security. University Legal Studies. *Ultimate*, no. 1-2. Year XIII/2020, pp. 32-43.

Clyde Hufbauer; Jeffrey, J. Schott & Kimberly, Ann Elliott (2005). *Economic Sanctions Reconsidered*. 3rd ed. Washington. DC: Institute for International Economics, p. 24.

Jackson, John H.; William, J. Davey & Alan, O. Sykes, Jr. (2002). *Legal Problems of International Economic Relations*. 4th ed. St. Paul, MN: West Group, p. 1250.

Kiyoun, Sohn & Taek, Dong Yeo, *Does the international trade help to enhance national security?* P. 24. Accessed 02.10.2023. Available on the http://faculty.washington.edu/karyiu/confer/sea05/papers/sohn_yeo.pdf.

Stokes, Brace 1998). A Geoeconomic Strategy for the 21st Century. *Trade Strategies for A New Era: Ensuring US Leadership in a Global Economy*. Geza Feketekuty and Brace Stokes, eds. A Council on Foreign Relations Book, pp. 162-174.