

Research on “Security Exceptions Clause” of GATS

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Abstract

Nowadays, with the rapid development of Internet technology and communication technology, the status of service industry in the global economy is rising day by day, the global service trade is growing, and the service trade market is further opened and liberalized. In this context, the study of *General Agreement on Trade in Services* (GATS) under the WTO is of great significance for China to legally use this Agreement and protect China's national interests. Among the many provisions of GATS and WTO, the “Security Exceptions clause” is undoubtedly very characteristic. In the current practice, many countries invoke the Exceptions clause of GATT, and scholars have done more research on it. Compared with GATT, there are few cases involving the “Security Exceptions clause” of the GATS, and scholars have relatively few studies on it. Based on this, this paper studies the application of “Security Exceptions clause” of the GATS.

Keywords: service trade, security exceptions, emergency in international relations, essential security interests

1. GATS and Security Exceptions Clause

GATS is an international multilateral agreement, which regulates international trade in services. It was negotiated in the *Uruguay Round*, and its emergence has made a great contribution to the development of international service trade. According to paragraph 1 of Article 1 of GATS, if the measures taken by WTO Members affect the service trade, GATS can be used solving disputes. In the original article, it adopts the word “affecting”. With regard to the word “affecting”, in the early case of “*Canada—Autos*” (WT/DS139, WT/DS142) and “*Canada—Periodicals*” (WT/DS31), the WTO dispute settlement body (DSB) pointed out that the word “affecting” in paragraph 1 of Article 1 of GATS showed that GATS can be applied in a wide scope. Article 2.1 of GATS also creatively defines “trade in services” as four forms, namely cross-border supply, consumption abroad, commercial presence and movement of natural persons.

The Security Exceptions clause means that WTO Members do not need to bear liability, even if they take unfavorable measures against other Member countries, if the unfavorable measures are in accordance with the provisions of the clause. Article 14 bis of GATS provides for Security Exceptions clause. The articles mainly deal with military security, national security, and other situations that may endanger the national security of WTO Members. That is to say, one Member state may exempt itself from liability under the Security Exceptions clause if the restrictive measures taken against other Member States are based on the maintenance of the basic national security stipulated above.

Up to now, few Members have invoked the Security Exceptions clause under GATS to defend in practice. On the one hand, the rules of GATS itself are not mature and detailed enough. Therefore, in case of disputes, investors tend to choose to develop a more mature way of investment arbitration; On the other hand, the applicable standard of the Security Exceptions clause has been vague for a long time, and it is difficult for Member States to invoke the Security Exceptions clause for exemption. However, with the rapid development of trade in services and the continuous improvement of the legal principle of GATS, the cases related to GATS will also increase.

In addition, in recent years, the United States has generalized the invocation of national security, which will also produce many potential conflicts. For example, the TikTok incident, which caused a sensation in 2020, in which the U.S. government claimed that the application collected sensitive information of users, which may be used as espionage by the Chinese government because the parent company is a Chinese company. The United States believes that the Chinese government can enter the company's system to obtain users' location information, browsing records and search records according to Chinese law, which poses a threat to the national security of the United States. Under the WTO, if the United States wants to justify its behavior, it is necessary to invoke the

Security Exceptions clause of Article 14 bis of GATS.

2. The Relationship of “Security Exceptions Clause” Between GATS and GATT

The Security Exceptions clause was originally stipulated in GATT1947. At first, when the drafters drafted the ITO charter, the General Exceptions clause and the Security Exceptions clause were stipulated together. Then, in 1947, during discussions in Geneva, the drafters decided to separate the General and Security Exceptions. Since the ITO Charter was not recognized by most countries, GATT was formed as a temporary agreement. The Security Exceptions in GATT1947 is derived from article 94 of the ITO charter. By 1994, the GATT1947 Security Exceptions had evolved into what is now GATT1994 Security Exceptions 21.

Due to the continuous economic development of various countries, after the conclusion of the Uruguay Round negotiations, the scope of WTO adjustment has been extended to many areas, including service trade, and is no longer limited to the field of goods trade. And under the guidance of Article 21 of GATT, many international trade agreements within the WTO system have set up Security Exceptions clauses, such as Article 14 of GATS. It can be said that Article 21 of GATT is the cornerstone of all existing Security Exceptions under the WTO system. Although the Security Exceptions clauses in GATS and GATT are aimed at different objects, they are very similar in structure and content. Their purpose is to coordinate the issues of trade freedom and national security. At present, there are few cases involving GATS Security Exceptions clauses, and the Panel and Appellate Body of WTO has not made an authoritative interpretation of the applicable standards of GATS Article 14 Security Exceptions clauses. In contrast, the WTO Panel’s interpretation of GATT Article 21 Security Exceptions clauses is very representative. Therefore, when analyzing the applicable conditions of GATS Security Exceptions clauses, we can learn from the interpretation of the applicable standards of GATT Article 21 Security Exceptions clauses by the Panel and Appellate Body in relevant cases.

3. Analysis on the Application of Security Exceptions Clause in Article 14 bis of GATS

First of all, obviously, it is a precondition that the GATS Security Exceptions clause may be applied only when the conflict or dispute concerned international service trade in falls within the scope of GATS adjustment. Secondly, from the perspective of the treaty language, the GATS Article 14 bis Security Exceptions, it lists three situations in which Members can invoke this provision to defend their actions or some measures: (a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; (b) to prevent any Member take it considers necessary to protect its essential interests of any action; (c) to prevent any Member to fulfil its obligation of the maintenance of international peace and security and to take any action under the UN charter. If one of the above three situations is satisfied, the GATS Security Exceptions clause can be applied.

Combined with practice and relevant cases of Article 21 of GATT, the disputes over the Security Exceptions clause mainly focus on the third of the above-mentioned second situation, that is, item 1 (b) (iii) of Security Exceptions of Article 14 bis of GATS. This subparagraph stipulates “taken in time of war or other emergency in international relations”. Literally, it is no longer limited to military acts, but includes actions in other emergencies, which is juxtaposed with “war”. It is this provision that makes the Security Exceptions clause flexible. However, due to the different national interests of contracting states in different situations, there are disputes in theory and practice. And other provisions of Security Exceptions are less likely to apply and there are less disputes. From the wording of GATS Article 14 bis Security Exceptions 1 (b) (iii), if Members want to apply this provision to exempt certain acts or measures, they need to meet the following requirements: (a) the action is taken in time of war or other emergencies in international relations;(b) the act or measure is to protect the national’s essential security interests;(c) any relevant action taken by the Member is necessary. In practice, the interpretation of the three terms “other emergencies in international relations”, “essential security interests” and “necessary” is also the core issue of the application of Security Exceptions.

In addition, we also need to pay special attention to that, due to the word “which it considers” in the clause, the Security Exceptions clause has long been regarded by many Members as a “self-determination” clause, that is, as long as the Members itself think that they need to take relevant measures to safeguard their essential security interests, then when it comes to the settlement of trade disputes, they can invoke the Security Exceptions clause to defend. It has also led to the expansion and application of Security Exceptions clauses by some Members.

3.1 Which It Considers

From the GATT era to the WTO era, the Security Exceptions clause has long been regarded as a “self-determination” clause. The self-determination right of WTO Members to apply the Security Exceptions clause and the jurisdiction of the dispute settlement body have always been the focus of controversy. In the 1985

case of “*US—Trade Measures—Affecting Nicaragua*”, the United States adopted the Security Exceptions, but in the process of hearing the case, it refused the Panel to review the validity of its invocation of the Security Exceptions clause, and the Panel finally avoided the jurisdiction issue. In the following time, the issue of jurisdiction has not been resolved. Due to the lack of binding guidelines for dispute settlement and adjudication, many concepts in the Security Exceptions clause are lack of clear explanation, which is also an important reason why the Security Exceptions clause has been controversial for a long time.

Until 2019, the case “*Russia—Traffic in Transit*” (WT/DS512) broke the myth that the Security Exceptions clause could not be reviewed, and made it clear for the first time that the WTO DSB had jurisdiction over Members invoking the Security Exceptions clause. Although the Security Exceptions of Article 21 of GATT is involved in this case, as mentioned above, because the interpretation of Article 21 of GATT by the Panel in this case is very representative, we can learn from it. In the case, the panel made it clear that the WTO DSB has the right to the jurisdiction of the behavior of Members, and objective review Members on the definition of “essential security interests” and whether it is in “emergency in international relations”. As for the judgment of the “necessity” of relevant measures, the Panel gave Members the right to make free rulings.

3.2 *Emergency in International Relations*

In the “*US—Gasoline*” (WT/DS2) case, the AB pointed out that according to Article 3.2 of DSU, the general rules of interpretation of international law in articles 31-33 of the “Vienna Convention on The Law of Treaties” (VCLT) can be applied to the interpretation of WTO agreements. In the case of “*Russia—Traffic in Transit*” (WT/DS512), the Panel interpreted the “emergency in international relations” in the context of article 31.1 of the VCLT. Since the structure of GATS Security Exceptions clause is highly similar to that of GATT Security Exceptions clause, the interpretation of GATT Article 21 “emergency in international relations” by the Panel according to the context structure can be applied to GATS Security Exceptions clause.

In this case, the Panel pointed out that according to the principle of homogeneity of treaty interpretation, in the provisions, “emergency in international relations” is juxtaposed with “war”, so they are homogeneous, and “war” is a kind of situation in the category of “emergency of international relations”. In addition, “essential security interests”, as the common introduction of “emergency in international relations” and “war” and “fissile fusion materials” and “weapons, ammunition and combat materials”, shows that “emergency in international relations” overlaps with the security interests involved in other situations. Therefore, the “emergency in international relations” are homogeneous with “war” “defense and military” and “law or state public order” in terms of the essential security interests they protect.

In GATS, “emergency in international relations” is placed under “essential security interests” together with “war”, “services of provisioning a military establishment” and “fissionable and fusionable materials or the materials from which they are derived”. According to the interpretation method of GATT Security Exceptions by the Panel, the security interests maintained by GATS should also be homogeneous with war, national security and military interests and the maintenance of national public order.

In addition, the Panel noted that “emergency” refers to unforeseen dangers or conflicts requiring immediate action, while “emergency in international relations” usually refers to armed conflict, potential armed conflict, high tension or crisis and situations leading to instability in the country and its surroundings. When invoking the Security Exceptions clause, Members need to prove that the restrictive measures they take are based on specific emergency in international relations rather than general emergencies.

In addition, the Panel also pointed out that the existence of an emergency in international relations is an objective state of affairs. Therefore, it is necessary to objectively examine whether the actions taken under the Security Exceptions clause are “taken in time of an emergency in international relations”.

3.3 *Essential Security Interests*

“Essential security interests” is obviously a narrower concept than “security interests”, it can be generally understood as the interests related to the basic functions of the state, that is, to protect its territory and people from external threats and to maintain law and public order at home. The traditional security interests mostly refer to the military and political fields. However, with the development of the times, the security situation faced by all countries has changed greatly, and the traditional security concept can no longer meet the needs of safeguarding national security.

3.3.1 *The Essential Security Interests Should Be Extended to Non-traditional Security Field Under the Evolutionary Interpretation*

Since the Appellate Body defined “exhaustible natural resources” with evolutionary interpretation in the case of

“US—Shrimp” (WT/DS58), the practice of dispute settlement has regarded evolutionary interpretation as an effective interpretation method to deal with the changes of objective circumstances. As a general term, “essential security interests” should be dynamically explained according to evolutionary interpretation under the new security situation. In the case of “Russia—Traffic in Transit” (WT/DS512), the Panel also affirmed the method of evolutionary interpretation and pointed out that what security interests belong to “essential security interests” can change according to specific situations and perceptions.

Different from the national political and military security emphasized by the traditional security concept, non-traditional security does not involve military, political and other factors, but can pose a serious threat to the security and stability of a country or region and even the whole world. With the change and development of the times, non-traditional security issues are particularly prominent, and occupy a more and more important position in the national security strategy and international security agenda. Cyber security, terrorism, nuclear proliferation and other issues all pose serious threats and challenges to a country’s national security. The traditional security concept has been unable to adapt to the development of the times.

Under the new situation, “essential security interests” should not only include military, political and other traditional security interests, but also extend to non-traditional security fields.

3.3.2 The Interpretation of Essential Security Interests Should Conform to the Principle of Good Faith

The principle of good faith is not only a basic legal principle of great significance in international law, but also a basic principle of WTO law. In order to safeguard the essential national security, WTO Members have a certain autonomy to use the Security Exceptions clause, but this right is limited to a certain extent, and the countries that take measures have the obligation to prove “good faith” themselves. In the case of “Russia—Traffic in Transit” (WT/DS512), when talking about the “essential security interests”, the Panel made it clear that the “subjective” judgment of Members to explain the “essential security interests” should be limited by objective factors. When judging the essential security interests, they must take good faith as the starting point and abide by the principle of good faith.

3.4 Necessity

According to Article 14 bis of GATS, the actions or measures taken by Members when invoking the Security Exceptions clause shall be “necessary” to protect the essential national security interests. In the “US—Gambling” (WT/DS285) case, the Panel adopted the “three factors balancing test” established from the case of “Korea—Various Measures on Beef” (WT/DS161) and “EC—Asbestos” (WT/DS135) to judge whether the online gambling ban is necessary. Finally, it summarizes the three elements to meet the necessity, including: (i) the importance of the social interests and values protected by this measure; (ii) the degree of protection achieved by this measure; (iii) the trade implications of such a measure, including the existence of reasonable alternatives. When invoking the Security Exceptions clause, WTO Members can judge whether the actions or measures taken are “necessary” according to these three elements.

To sum up, the self-determination right of WTO Members and the jurisdiction of the DSB under “which it considers”, what belongs to the “emergency in international relations”, the scope of “essential security interests” and the judgment of “necessity”, these controversial hot issues are the core issues of WTO Members when quoting GATS and GATT Security Exceptions clauses. As the GATT Security Exceptions clause is the source of all WTO Security Exceptions clauses, and it has strong similarities with the GATS Security Exceptions clause in structure and treaty terms, when studying the GATS Security Exceptions clause, we can learn from the Panel’s interpretation about GATT Article 21. The case of “US—Gambling” (WT/DS285) is the first WTO case involving the General Exceptions of GATS. In this case, based on the similarity between GATS Article 14 (General Exceptions) and GATT Article 20 (General Exceptions), the Panel and the AB draw lessons from the interpretation of GATT Article 20 by previous DSB.

However, it should be noted that although GATS and GATT’s Security Exceptions clauses are similar, in view of the huge differences between service trade and goods trade, as well as the differences in the purpose and purpose of GATS and GATT and the obligations undertaken by Member states in the two agreements, when interpreting and applying the Security Exceptions clause of GATS, it should be judged in the context of the object and purpose of GATS.

4. Conclusion

With the development of the world economy, service trade plays a more and more important role in the world economy. How to promote the development of service trade all over the world and safeguard the essential security interests of all countries, GATS Security Exceptions clause plays a crucial role in this regard. At present,

there are few cases involving GATS Security clauses in WTO, and there is a lack of authoritative interpretation by DSB. Therefore, when studying the application of GATS Security Exceptions clauses, we can learn from the previous interpretation of GATT Article 21 by DSB. However, it should be considered that trade in goods and trade in services are different, and the purposes and purposes of GATS and GATT are also different. When studying the application of GATS Security Exceptions clauses, we should not blindly rely on the interpretation of Article 21 of GATT, but should consider the characteristics of trade in services and its impact on the specific policies of various countries, so as to better maintain the balance between promoting the liberalization of service trade and safeguarding the essential national security interests.

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