

Kluwer Arbitration Blog

The Self-Judging WTO Security Exception

Roger Alford (General Editor) (Notre Dame Law School) · Thursday, June 7th, 2012

I have just published an article in the [Utah Law Review](#) that I wanted to flag for our readers. For the international arbitration community the article is relevant because it compares and contrasts the self-judging WTO security exception with non-self-judging emergency exceptions in various BITs.

The focus of the Article is on the WTO security exception, one of the least appreciated aspects of WTO law. Given that the security exception is self-judging, it is curious that Member States rarely abuse the privilege by invoking it in bad faith. This in turn raises interesting questions about compliance with international law: if a Member State has a trump card to avoid legal obligations, why does a Member State not invoke it more frequently? Scholars rarely focus on the question of why nations obey international law in the context of self-judging treaty exceptions. The WTO security exception affords that opportunity.

Here's the [abstract](#):

This Article analyzes the WTO security exception, with a particular focus on State practice. In the absence of any GATT or WTO jurisprudence, State practice affords the best vehicle to understand the meaning of Article XXI. In the few instances when invocation of the security exception has been challenged, State practice suggests that the security exception is not judicially reviewable.

A critical question emerges from this analysis of State practice. If a Member State can avoid WTO obligations through a self-judging security exception, what is to prevent bad faith invocations? The WTO regime includes a number of devices to address this concern, including opting out of normal trade relations, opting in to deeper trade relations, granting preferential treatment to developing countries consistent with security interests, and protecting against the nullification or impairment of Member States' legitimate expectations even in the absence of a WTO violation. These arrangements provide broad discretion to act in furtherance of the national interest without violating trade rules. As such, Member States quite often can advance national objectives without the need to invoke the security exception.

Notwithstanding these mitigating factors, a self-judging security exception poses grave risks. If abused, it could undermine the entire WTO regime. But the practice of WTO Member States is to invoke the security exception in good faith, with a margin of discretion. A Member State may do so because of a fear of sanction, out of a sense

of norm legitimacy, or because it is in its self-interest to do so.

The Article concludes with brief reflections on why nations comply with the good faith obligation of a self-judging exception. Compliance with a self-judging rule offers useful insights into larger questions of why nations obey international law. Rational choice and normative theories best explain compliance with a self-judging international norm.


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