# Elgar Encyclopedia of International Economic Law

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consequences of bank failures are perceived to be less severe. Therefore, effective bank regulation and supervision is essential, not only to detect vulnerabilities early and to take preventive action before an institution becomes severely distressed, but also to minimize moral hazard and to mitigate the incentives arising from the existence of a deposit guarantee.[27]

Still, many experts admit that with an economy-wide problem, governments need to issue extensive guarantees to maintain confidence and prevent banks from failing. Central banks can provide important liquidity assistance both to the market as a whole and to individual solvent banks. Liquidity is necessary to prevent bank runs and to permit deposit insurers to pay out claims instantly and to fund bank resolution efforts. By providing liquidity to the market in general at such a time of financial distress, the central bank can relieve tensions and limit the potential fears which might prompt bank runs. Such actions are part of the lender of last resort function.

**2. International standards**

Although crisis management remains to a great extent within the responsibility of national authorities, the challenge of ensuring the stability and soundness of the financial system is clearly global or at least cross-border. This is not only because of the existing linkages among international markets but also because many of the main institutions operate across borders. Hence, cooperation and coordination among the authorities in the countries involved is required – not just in a crisis but at all times that the institution is being supervised and monitored.[28] Coordination and information-sharing takes place at the political level (G20, G8), at the technical level e.g., Financial Stability Board (FSB), Basel Committee on Banking Supervision (BCBS), and at the monetary level (bilateral and multilateral currency swaps between central banks).

[27] See e.g., Eva Hüpkes, "Challenges in Safeguarding Financial Stability, Lines of Defense Against Systemic Crises: Resolution" in Gerard Caprio, Jr. (ed), *Handbook of Safeguarding Global Financial Stability* (Elsevier 2013) 499 ff.

[28] James R Barth, David G Mayes and Michel Taylor, "Safeguarding Global Financial Stability, Overview" in Gerard Caprio et al. (eds) *Handbook of Safeguarding Global Financial Stability* (Elsevier 2013) 229.

In 2011, the FSB elaborated a set of "Key Attributes of Effective Resolution Regimes for Financial Institutions" (the Key Attributes) based on earlier work by the Basel Committee (2010) and the IMF (2009, 2010). The Key Attributes, which were updated in 2014, set out 12 essential features that should be part of resolution regimes. Their implementation across all jurisdictions should enable authorities to take action to resolve financial institutions and to cooperate and grant recognition to their resolution measures. In addition, the BCBS and the International Association of Deposit Insurers (IADI) elaborated "Core Principles for Effective Deposit Insurance Systems". They are included in the FSB's list of key standards.

Nina Reiser

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# II.35 National Security

While the older practice of concluding treaties of 'amity and commerce' shows that international trade has long been associated with peaceful relations, peace and trade are not always synonymous. Where they conflict, states usually prioritize national security over economic matters. Therefore, governments must make sure that their obligations in the field of economic relations do not prevent them from adopting measures they deem necessary to protect their security.

To do this, states draft treaty rules broadly and imprecisely, adopt national security measures without formally justifying them on the basis of an explicit provision, and may refuse to submit security matters to international courts. This makes conclusive case-law rare. Thus, while some applications of the national security exception are well documented, practice is probably much more developed.

**Treaty provisions**

At the multilateral level, the national security exception is clearly articulated in the World Trade Organization (WTO) agreements. Article XXI of General Agreement on Tariffs and Trade (GATT), Article XIV*bis* of General Agreement on Trade in Services (GATS) and Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) all contain similar wording. Provisions linked to security interests can also be found in other WTO agreements, such as Article 2.2 Agreement on Technical Barriers to Trade (TBT) and III.1 Revised Agreement on Government Procurement (GPA).

National security exceptions exist in most bilateral or regional trade agreements, too. For example, Article 346 of the Treaty on the Functioning of the European Union, Articles 607, 1018 and 2102 of the North American Free Trade Agreement and Article 24 of the Annex to the Treaty Establishing the Caribbean Community (CARICOM) provide for security concerns to override economic liberalization.

National security exceptions are less frequent in investment treaties, but do exist. The wording, scope and broadness of the exception vary.

**Article XXI GATT**

This article, dating back from 1947, reads as follows:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

The most noteworthy aspect of Article XXI GATT is the absence of a 'chapeau' such as is found in Article XX GATT. Thus, there is no text to explicitly require that Members apply the national security exception in a non-discriminatory manner and with the least possible impediment to international trade. Article XXI(b) provides that the measures must be 'necessary' to protect the national interest but the text makes clear that the concerned state appraises the necessity of the measure, leaving it with considerable discretion.

The drafters of the GATT were aware that such a broad exception could be seriously abused. However, it was inconceivable at the time that trade obligations might prevail over national security concerns in case of military conflict or tensions between contracting parties. The later history showed that, overall, abuse did not take place, and that Article XXI of GATT was invoked in cases of genuine international conflict and not as a pretext to gain some economic advantage.

**State practice**

States have implemented various types of measures to protect their national interests. Some of them amount to economic sanctions (see this entry) such as embargoes, import restrictions, freezing of assets and other similar measures. Others are intended to prevent the enemy from acquiring material it could use against the exporting country. Weapons, ammunition and military goods are obvious objects of such measures. Trade in so-called 'dual-use' goods (goods that can be used both for civilian and military purposes, like aircraft and electronic devices or components) may also be restricted.

Some measures may have extraterritorial application. These sanction third states (or nationals thereof) who carry on business with the target state and/or contrary to the national interests of the sending state.

**Justiciability and case-law**

States try to avoid scrutiny of national security measures by (international) courts. Classical methods like foot-dragging, refusal to accept a non-compulsory jurisdiction, or out-of-court settlement are often used. When a case is nonetheless submitted to a court, the argument is made that the court has no jurisdiction to rule on questions of security interests. In this regard, the 'self-judging' character of the exception may be raised when the wording defers to the opinion of the state invoking the national security exception in determining what its security interests necessitate.

The first major case where Article XXI of GATT was invoked arose in 1948 when Czechoslovakia became a communist country. Czechoslovakia complained to the GATT about the United States' trade measures against the communist bloc. Highlighting the inherent conflict between each member's right to determine its security interests and the risk of undermining the GATT if the exception was abused, the Contracting Parties rejected Czechoslovakia's claim by a majority vote.

When Argentina invaded the Falkland Islands in 1982, the European Community, Canada and Australia reacted with an embargo on Argentinian products. Argentina launched a complaint at the GATT, but the matter was never referred to a proper panel. After months of discussions, the Contracting Parties adopted a decision where, again, the conflict between the individual right of each member and the systemic risks for the international trade system could not be solved. The decision only required that the Members inform 'to the fullest extent possible' of their measures based on Article XXI GATT.[29]

Later in the 1980s, the United States enacted restrictive trade measures in connection with its conflict against Nicaragua. Nicaragua requested the establishment of a GATT panel, but the US argued that this kind of dispute was not a matter to be dealt with by the GATT. The European Communities (EC) concurred, at least on this principle. A panel was finally established, but its mandate clearly mentioned that it could not examine whether Article XXI GATT was validly invoked. Consequently, the panel was unable to determine whether the United States violated the GATT or not.

As is well known, the Nicaragua case was also submitted to the International Court of Justice (ICJ). The Court had to rule on the application of a Treaty of Friendship, Commerce and Navigation of 1956, which contained a clause similar to Article XXI GATT, referring to measures 'necessary to protect [a party's] essential security interests'. In the reasoning establishing that it had jurisdiction on the matter, the ICJ contrasted the wording of Article XXI of GATT with that of the 1956 Treaty. The latter speaks simply of 'necessary' measures, not of those considered by a party to be such.[30] One cannot interpret this as denying justiciability of Article XXI GATT, as this was only an ancillary argument about a provision that the Court was not asked to apply. On the contrary, what the Court decided is that a national security exception is justiciable, absent any indication to the contrary in the dispute settlement provision of the Treaty.

The US also invoked the national security exception before the WTO when the EC requested the establishment of a panel to consider the US's extraterritorial sanctions against companies involved in business relations in Cuba (in particular with regard to American assets formerly seized by the Cuban government) under the Helms-Burton Act of 1996.[31] The US argued that the WTO was not the proper forum, but could not block the judicial process under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). It seems that both parties preferred to avoid a full judicial process on this question. After negotiations the US suspended the most controversial aspects of the Helms-Burton Act and the panel proceedings were suspended.

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[29] Decision Concerning Article XXI of the General Agreement, 30 November 1982, L/5426.

[30] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 222. See also *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection) [1996] ICJ Rep 803, para 20.

[31] WTO, *US: The Cuban Liberty and Democratic Solidarity Act – Request for Consultations by the European Communities* (13 May 1996) WT/DS38/1.





# II.36 Development

Development is a contested term with no single overarching definition. Broadly, the term can be used to describe policies or strategies which purport to improve the organization and administration of communities and/or increase the social and economic welfare of populations. Economic theories of development place emphasis on industrial development or economic growth or the absence of absolute poverty as determinants of development. More comprehensive approaches to development focus on broader social and economic welfare objectives, including access to public services, such as health and education, gender equality, and political freedom. More recently, the concept of 'sustainable development' has become increasingly predominant, encapsulating the idea that economic and social development must be constrained by ecological considerations.

## Impact of international economic law on development

International economic law can impact on development in a number of ways.

### *Historical and contemporary asymmetries*

First, there are concerns that international economic law does not adequately address global economic inequalities and that, in many cases, international economic law may hinder or constrain economic development. Historically, non-industrialized or newly industrializing countries, known collectively as 'developing countries', have played marginal roles in the design and implementation of international economic law. This, coupled with underlying asymmetries inherent in the global economy, has meant that the design of international economic rules and principles can and does privilege the interests of industrialized countries and non-state actors located in such countries over the social, economic, and environmental concerns of developing countries.

### *Constraints on national policy space*

One of the main concerns with international economic law is that it constrains countries' use of national policy and regulatory instruments to achieve development objectives. For example, multilateral trade rules can place constraints on industrial development strategies undertaken by developing countries. These include binding lower industrial tariffs under the General Agreement on Tariffs and Trade and prohibiting industrial and agricultural subsidies under the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures. This curtails opportunities for countries to utilize tariffs and subsidies to protect and promote domestic economic sectors. The non-discrimination principle of national treatment requiring signatory states to treat locally produced and imported goods equally after the goods have entered in the local market can also impact on development by prohibiting government measures to incentivize and protect industries which are at early stages of development known as 'infant industries'. Without state support and protection, many local enterprises are often unable to compete with increasing foreign imports, leading to losses in domestic productive capacity and unemployment.

The development of infant industries may be further hampered by global intellectual property rights regimes which require state parties to establish domestic regimes in conformity with extensive minimum standards of protection modelled after Western laws which can impede technological innovation. Some economists have termed this phenomenon in international economic law as industrialized countries 'kicking away the ladder' of development for other countries, using economic rules and principles to prevent countries from utilizing the same policy and regulatory measures that the advanced economies have previously used to develop their own industries and economic sectors.[32] For most developing countries, these restrictions on their policy and regulatory autonomy are not necessarily matched by the promised greater access to markets in

[32] See Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem Press 2001) and Yilmaz Akyüz, 'Global Rules and Markets: Constraints over Policy Autonomy in Developing Countries' (2007) TWN Global Economy Series No. 10, Penang: Third World Network.