

GENERAL AND SECURITY EXCEPTIONS IN RTAs (CENTRAL ASIA)

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INTRODUCTION

- Methods of dealing with societal values such as environment, morals and security:
 - preserving a right to regulate or
 - positive action
- In the advanced RTA models, like the EU, market fragmentation (because of applicability of some exceptions) can be removed through harmonization.

GENERAL AND SECURITY EXCEPTIONS IN GATT 1994

- *Article XXI (Security Exceptions)*
- *Article XX (General Exceptions)*

Article XXI (Security Exceptions)

- sensitive information;
- fissionable materials;
- trade in arms;
- emergency in international relations;
- UN mandated;

Article XX (General Exceptions) (1)

10 grounds-“laundry list” (Bhala)

- morals (a);
- environmental concerns (b, g);
- gold and silver (c);
- administrative (d);
- labor (e);
- national treasures (f);
- cartels (h);
- price stabilization (i);
- short supply (j);
- chapeau !

Article XX (General Exceptions) (2)

- three “necessity” tests;
- morals:
 - religious beliefs;
 - pornography;
 - gambling & betting;
 - cultural concerns;
 - environment (animal welfare);
 - human rights;
- exhaustible natural resources (oil, raw materials, rare earths !!!);
- extraterritoriality?

GENERAL AND SECURITY EXCEPTIONS IN RTAS

- **Methods (by reference, copy-paste, personalized approach, no mention at all)**
- **WTO compatibility of additional exceptions in RTAs**
- **WTO compatibility of missing exceptions in RTAs**
- **General lack of litigation; general and security exceptions in the EU.**

Methods (by reference, copy-paste, personalized approach, no mention at all)

- ❑ **by reference**

e.g. Thailand –Australia FTA& EIA, Art. 1601, 1602

- ❑ **copy-paste**

e.g. Singapore-Australia FTA& EIA, Art. 12, 13

- ❑ **personalized approach**

e.g. NAFTA, Art. 2101, 2102, 2106

- ❑ **no mention at all**

e.g. China-Pakistan FTA&EIA

WTO compatibility of additional exceptions in RTAs

- ❑ internal trade requirement (“substantially all trade”) for CU & FTAs, XXIV:8(a) and (b) GATT 1994;
- ❑ no reference to security exceptions- what does it mean?
- ❑ additional general exceptions, which cannot be included somehow under the list of 10 exceptions in Article XX GATT 1994, may not be exempted from the “substantially all trade” requirement;
- ❑ balance of payments and general exceptions are dealt with in separate provisions of the GATT 1994 (Art. XII and XX); a different approach in some RTAs;

WTO compatibility of missing exceptions in RTAs

- some exceptions may be missing (e.g. exhaustible natural resources in the TFEU, in some bilateral FTAs in Central Asia);
- it is fine, as long as RTAs Members do not use the missing exception against third countries;
- non discrimination requirements of the XX GATT 1994 chapeau- consistency (*Brazil-Tyres*);

General lack of litigation

- WTO DSU is preferred against the RTA DSM e.g. Canada - periodicals (US)- not in NAFTA, cultural industries;
- The RTA DSM is not of interest because the measure concerns third countries (*Brazil-Tyres*);
- The RTA is used, but finally settled out of the court e.g. CIS FTA exceptions might have been used in **01-1-E/2-10** – Belarus c Russia (export duties on oil);
- EU: significant litigation (36 TFEU, mandatory requirements, harmonization);

GENERAL AND SECURITY EXCEPTIONS IN C-ASIAN RTAs

- The overlapping noodle bowl of Central Asian RTAs
- General and security exceptions in plurilateral RTAs (FTAs, CUs)
- General and security exceptions in bilateral RTAs

The overlapping noodle bowl of Central Asian RTAs



General and security exceptions in plurilateral RTAs (FTAs, CUs)

- Commonwealth of Independent States Free Trade Agreement (CIS FTA);
- Eurasian Economic Community (EAEC), Russia Belarus Kazakhstan ;
- Economic Cooperation Organization Trade Agreement (ECOTA);
- Framework Agreement on Trade Preferential System Among the Member States of the Organization of the Islamic Conference;
- Under negotiation: Shanghai Cooperation Organization FTA, EFTA- FTA;
- Possible future initiatives: EU- FTA, Vietnam - FTA.

CIS FTA

□ Article 13 Exceptions

General Exceptions

1. This Agreement shall not hamper the right of any of the Contracting Parties to accept measures of state regulation in the area of foreign economic relations **generally accepted in international practice**, that **it** considers **necessary** for the protection of its **vital** interests or **which are undoubtedly necessary for the implementation of international agreements of which it is a signatory or is intended to become a signatory**, if these measures concern:

- protection of public moral **and order**;
- protection of life and health of people;
- protection of animals and plants (**life and health**);
- protection of **environment**; [...]
- trade in gold, silver or **other precious metals and stones**;
- preservation of exhaustible natural resources (**in conjunction with...**);
- violation of **balance-of-payments**.

Exceptions for the reasons of security

2. Nothing in this Agreement shall hamper the right of any of the Contracting Parties to accept any measures of state regulation that it considers necessary, if these measures concern: [...]

- delivery of fissionable materials and sources of radio-active substances, **utilization of radio-active wastes**; [...]

EAEC, RU-BY-KZ

(1)

□ Internal exceptions: Article 3

“ Nothing in this article shall prevent the Parties from applying to mutual trade [...], and prohibitions and restrictions on imports or exports, necessary to protect public morals, life or health of humans, animals and plants, the environment and the protection of cultural values, provided that such prohibitions and restrictions are not an unjustifiable (arbitrary ?) discrimination or a disguised restriction on trade.”

EAEC, RU-BY-KZ

(2)

□ Customs Union to third countries (unilateral measures): Article 8

1. The parties may unilaterally introduce measures affecting foreign trade in goods and are not of an economic nature (hereinafter - the temporary measures), if they are aimed at:

- observance of public morals and **public order**;
- **defense and security**;
- protection of life and health, the environment, life and health of animals and plants;
- protection of cultural property and cultural heritage;
- protection of intellectual property;
- prevent **exhaustion of non-renewable natural resources**;
- prevention or reduction of critical shortage in the domestic market of food or other goods that are essential for the domestic market;
- protection of the external financial position and **balance of payments** support.

ECOTA (1)

□ **Article 15 Exceptions**

A. General Exceptions

1. The agreement shall not preclude the prohibitions or restrictions on imports, exports, or goods in transit justified on grounds of national security, religious faith, public morality, public security; the protection of health and life of humans, animals or plants, or to pursue sanitary and quarantine objectives, the protection of national treasures possessing artistic, historic or archaeological value, protection of intellectual property or rules relating to gold or silver or the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or disguised restriction on trade among the Contracting Parties.

ECOTA (2)

2. Pursuant to paragraph (1), nothing in this Agreement shall prevent the right of any Contracting Party to take any measures of public regulation, which it considers necessary, provided these measures refer to:
 - a. delivery of fissionable materials and sources of radio active substances, utilization of radio active wastes; and
 - b. actions it takes in pursuance of commitments as per the UN Charter to preserve the international peace and security.

B. Security Exceptions

3. Nothing in the Agreement shall prevent a Contracting Party from taking any measures, which it considers necessary:
 - a. to prevent the disclosure of confidential information contrary to its essential security interests;
 - b. for the protection of its essential security interests or for the implementation of international obligations or national policies such as:
 - i. relating to the traffic in arms, ammunition and implements of war, provided that such measures do not impair the conditions of competition in respect of products not intended for specifically military purposes (dual use goods), and to such traffic in other goods, materials and services as is carried on directly or indirectly for the purpose of supplying a military establishment; or
 - ii. relating to the non-proliferation of biological and chemical weapons, nuclear weapons or other nuclear explosive devices; or
 - iii. taken in time of war or other serious international tension (grave tension internationale).

Organization of the Islamic Conference

□ Art 10

3. The provisions of this Agreement do not prevent each Participating State from implementing measures that it deems necessary as a safeguard for its basic interests relating to security and health.
4. Products prohibited by virtue of the Islamic Sharia shall not be covered by trade negotiations. (similarly, see Saudi Arabia's WTO accession)

General and security exceptions in bilateral RTAs (1)

- basic "model" (KG: 5 out of 6, KZ: 3 out of 5, TJ: 1 out of 2):
Art. 11 KG-KZ FTA, Art. 11 KG-Russia FTA, Art. 11 KG-Moldova FTA, Art. 9 KG-UA FTA, Art 10 KG-Armenia FTA; Art 11 KZ-RU FTA, Art 11 KZ-Georgia FTA; Art 11 TJ-RU FTA,

Nothing herein must prevent a Contracting Party from taking measures [**generally accepted in the international practice**] which **it considers necessary to protect its vital interests** or which are **undoubtedly necessary for the implementation of the international agreements of which [it is or] it intends to become a signatory**, if these measures concern:

- information affecting interests of the national defense;
- trade in weapons, ammunition and military equipment;
- investigations or production connected with needs of defense;
- deliveries of materials and equipment used in nuclear industry;
- defense of public moral and **public order**;
- protection of industrial or intellectual property;
- gold, silver or **other precious metals and stones**;
- health protection of people, animals and plants.

General and security exceptions in bilateral RTAs (2)

- More elaborated models (KG: 1 out of 6, KZ: 2 out of 5, TJ: 1 out of 2, UZ: 2 out of 2)

Art 3 **KZ**-UA FTA, Art 11 **KZ**-Armenia FTA; Art 5 **UZ**-KG FTA, Art 4 **UZ**-UA FTA; Art 3 TJ-UA FTA;

basic model + references to (1) exhaustible natural resources (2) national treasures and (3) radioactive waste;

- Afghanistan-India partial scope agreement, **Article IV (General Exceptions)**

Nothing in this Agreement shall prevent any Contracting Party from taking action and adopting measures, which it considers necessary for the protection of its national security, the protection of public morals, the protection of human, animal or plant life and health, those relating to importation or exportation of gold and silver, the conservation of exhaustible natural resources and the protection of national treasures of artistic, historic and archaeological value.

CONCLUSIONS (1)

- Security exceptions in Central Asian RTAs:
 - sometimes mixed with general exceptions, common chapeau;
 - closed list or open list?
 - very general vs very specific;
 - special reference to nuclear waste and chemical weapons;

CONCLUSIONS: (2)

- General Exceptions in Central Asian RTAs - on “chapeau”:
 - open list or closed list? “generally accepted in international practice”- the list is illustrative, all the other GATT exceptions may be included?
 - “undoubtedly necessary for the implementation of the international agreements of which it intends to become a signatory”- undoubtedly UNnecessary phrase ☺; at least this is not the right place for a conflict clause;
 - “**it** considers **necessary**, ... **vital** interests”: ok for security exceptions, not for general exceptions; a necessity test for all? Or, on the contrary, too much state discretion (it)? only vital (important to the highest degree) interests?
 - instead: the “classic” arbitrary or non-justifiable discrimination/ disguised restriction.

CONCLUSIONS (3)

- General Exceptions - on the list:
 - public order in addition to public morals (probably inspired by WTO- GATS);
 - specific reference to religion as part of morals;
 - addition of environment;
 - addition of “other precious metals and stones”;
 - balance of payments included in the same list;
 - exhaustible natural resources: no even-handedness (in conjunction with...) or no mention at all;

CONCLUSIONS (4)

- one needs to make order: RTAs between the CU and the other countries;
- what logic in bilateral FTAs?
- if one wants to skip some exceptions internally, it is ok, as long as not used by RTA Members towards third parties (XX GATT 1994 chapeau-non discrimination requirement);
- may the CU take such measures as a block, towards third parties?

BIBLIOGRAPHY & “WEBOGRAPHY”

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- Maur & Chauffour;
- Van den Bossche;
- WTO Legal texts, case law;
- EurLex;
- WTO RTA IS;