

Guest Post: Japan–South Korea Trade Friction

This is a guest post from Bashar H. Malkawi:

Japan imposed tighter export control measures on chemicals used by South Korean companies to produce semiconductors and smart phones and TV displays. In addition, Japan removed South Korea from a "white list" of twenty-seven preferential trading partners that can import Japanese goods without added procedures. Adding to list of countries – such as the U.S.- which rely on punitive economic measures on the basis of national security, Japan justified its actions on security grounds. Japan should evaluate whether the motivation of national security is a reasonable excuse to restrict free trade with South Korea and furthermore – assuming *arguendo* a good faith *bona fide* threat exists – whether the export control measures even constitute an effective tool to advance national security.

Free trade is a core component of the global governance architecture and recent decades have witnessed the legalization of international economic law. The institutions that govern international economic relations today such as the World Trade Organization (WTO) grew out of an understanding that peace cannot flourish in a world with trade barriers. Thousands of bilateral investment agreements and free trade agreements have been executed all intending to depoliticize economic relations and WTO rules preclude discriminatory trade conduct. However, international economic law recognizes the right of states to invoke policies and trade barriers such as boycotts on the basis of national security and the inter-connection between trade and national security is not new.

National security concepts have changed and consist of concerns like funding terrorism, developing and threatening nations with weapons of mass destruction, and cyber-security – none of which point to any national security concerns between Japan and South Korea. Moreover, and significantly, national security is not only military preparedness; national security encompasses a wide range of important bulwarks in defense of the good of the nation such as peace, prosperity, stability and freedom. Thus, ironically, maintaining export control measures may in fact harm the national security of all parties involved.

Given the sweeping regional and international changes and the importance of trade as a pillar of the global governance architecture, the timing of this issue is particularly germane. The interaction between national security and free trade has become an increasingly significant global issue in our internationalized world since invoking the national security exception inherently involves both law and politics.

The initial question in evaluating trade restrictions is from the vantage point of effectiveness. While export restriction can potentially have strong negative effects on bilateral trade for South Korea, other alternative sources of materials can fill in the gap left by Japan. South Korea enjoys one of the most prosperous world economies, with booming trade relations with many of the leading economic powers such as the U.S., China, U.K. and Germany. Parallel to the lack of effectiveness are the likely rewards of formally eliminating the export control restrictions. International economic law and in particular trade law are based upon economic benefits accruing to the trading partners. Free and efficient markets combined with the ability of talented

individuals to work and trade without restrictions is the hallmark of the South Korean economy.

Japan's trade restrictions are the antithesis the objectives of GATT – the promotion of cooperative and peaceful relationships. Peace and prosperity through trade was the basic objective of the GATT. Countries must build a world in which they use cooperation to pursue their mutual interests. Countries should recognize that they do better as trade partners, not rivals, which would create both peace and prosperity.

Separate from wealth creation, free trade brings the significant benefits of regional peace and stability and diplomatic resolution of disagreements. Peace is the dividend that develops when free trade reigns because free trade makes nations busy, more prosperous with financial interests at risk should conflict arise. A growing literature has confirmed the positive correlations between free trade and the advancement of stability in international relations. Rescinding the export control measures would allow for an exchange of goods and services. Without the opportunities to interact, people do not get to know neighbors and remain ensconced in a perception that may not reflect reality. Ironically, therefore, upholding the Japanese export restrictions may impede full and peaceful relations and in fact run counter to Japan's own national security.

The invocation of the national security exception is the subject of broad questioning particularly the subjective self-judging aspect but also to the substantive extent and contours of the exception as well. Since the national security provision is exceptional inasmuch as the invocation is subjective (unlike other exceptions) and is amorphous, the national security rationale is subject to abuse.

National security concepts should be interpreted as “exigent circumstances” or “national emergency” as enabling a state to override international norms only if a security essential interest was in severe danger and the state’s action was vital to defending the interest. Also, good faith could be an important factor in determining whether national security is a reasonable cause for export restrictions. Furthermore, the good faith argument is also embodied in the international law concept of *abus de droit*. Accordingly, in evaluating a draconian restriction such as export restrictions, the key is balancing the legitimate need of defending national security with the global interest in encouraging free trade and preventing the harassment of another nation.

Neither Japan nor South Korea benefits from a stagnant economic relationship. Export restrictions should be rescinded. The alternative to formally rescinding the export measures is for the parties to adopt a pragmatic and business like approach. Parties would continue their relationships on an informal basis and conduct business through third countries or parties. Businesses will continue to transact deals regardless of the political climate, and help industries in Japan and South Korea complement each other albeit secretly or some other indirect ways. There will be progress but following this path is a long journey and substantially limits the potential economic gains and peace dividends that formally rescinding the export control measures would produce. Ultimately, however, export restriction will end. Irrespective of whether the policy of informal relations is maintained or whether the process is expedited through ending export restrictions, this inextricable destiny will happen.

Posted by [Simon Lester](#) on December 23, 2019 at 08:14 AM | [Permalink](#)

[Tweet This!](#)

<https://ielp.worldtradelaw.net/2019/12/guest-post-japansouth-korea-trade-friction.html>