

The Scope and Future of National Security Exception Clauses in GATT 1994

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Abstract:

National security is becoming a key rationale for expanding or restricting trade measures (Gladysz 2021). Article XXI of GATT 1994 was firstly regulated in GATT 1947 and carried over to the establishment of the WTO, seeking the balance between trade and non-trade concerns and enabling Members the right to circumvent WTO provisions on national security grounds. However, Article XXI has hardly ever been invoked during the seventy years until the Russian Transit Traffic case shattered the dormant provision in 2017. This paper will first discuss the problem of jurisdiction and analyze whether the Panel should reserve certain right of jurisdiction. It then turns to the heated topic of the standard of review to examine how the WTO has refined national security exceptions and prevented members from abusing these provisions to implement measures that violate international trade rules. Subsequently, it presents some concerns faced by national security exceptions and provide some recommendations in this regard.

Keywords:GATT 1994, national security, international trade, emergency

1. Introduction

Over recent years, national security is becoming a key rationale for expanding or restricting trade measures (Gladysz 2021). Free traders argue that international trade is conducive to peaceful development among nations (Erik, Quan and Charles 2001), while trade sceptics argue that unrestricted imports may lead to hostile competition (Cass 2019), as well as that international trade rules may threaten national security and thus limit national sovereignty (Barfield 2001). This criticism of free trade has led to the emergence of multiple exceptions to national security provisions in both domestic and international legal systems (Claussen 2020). Article XXI of GATT 1994 was firstly regulated in GATT 1947 and carried over to the establishment of the WTO, seeking the balance between trade and non-trade concerns and enabling Members the right to circumvent WTO provisions on national security grounds. However, Article XXI has hardly ever been invoked during the seventy years until the Russian Transit Traffic case shattered the dormant provision in 2017.

In terms of the concept of national security, Article XXI of GATT 1994 provides for three aspects: information security, the fundamental security interests of its Members and the obligations relating to the maintenance of international peace and security under the Charter of the United Nations. It contains detailed provisions on the actions of Member to safeguard their essential security interests, including (i) actions related to nuclear substances, (ii) actions related to trade and transport of arms, ammunition

and war materiel, and (iii) actions taken in time of war or other emergencies in international relations. With the trend of economic globalization and and the intensification of geo-economic and trade struggles, the concept of national security has evolved from the inter-state conflicts of the Cold War era to a range of issues in both traditional and non-traditional areas, including economic crises, cybersecurity, infectious disease, climate change and transnational crime, which are normally unrelated to competition between countries (Heath 2020).

The emerging cases since 2017 mostly cited Article XXI(b)(iii) as a defence with two main issues. Firstly, respondents argued that the wording of the provision gives Member States the right to exercise complete self-judgment in deciding what constitutes an emergency situation (Vidigal 2019). The criteria for review as a new issue has also been intensively debated by Members and Panels (Damme 2022), including the Members and events encompassed by an emergency and the severity of the emergency. Nevertheless, the Panel reports showed different outcomes and ambiguities in some interpretations, such as the principle of good faith. The future development of Article XXI(b)(iii) generates great concerns among Members.

With most of the disputes defending on Article XXI(b)(iii) of the GATT 1994, this paper mainly concentrates on the application of national security exceptions regulated in Article XXI(b) of the GATT 1994. By comparing and contrasting the Panel reports, this paper will analyze the jurisdiction of these disputes, how the WTO dispute settlement bodies define and apply national security excep-

tions in concrete cases. Therefore, this paper argues that despite uncertainty as to the meaning of the provisions and the potential for abuse by members to avoid treaty obligations, the national security exceptions in the WTO dispute settlement mechanism is becoming more visible and important in resolving international trade disputes.

This paper proceeds as three parts. It will first discuss the problem of jurisdiction and analyze whether the Panel should reserve certain right of jurisdiction. It then turns to the heated topic of the standard of review to examine how the WTO has refined national security exceptions and prevented members from abusing these provisions to implement measures that violate international trade rules. Subsequently, this paper will present some concerns faced by national security exceptions and provide some recommendations in this regard.

2. The problem of jurisdiction

As the exception clauses intend to preserve a Member's trade measure exempt from WTO rules on the basis of protecting national security, Members in disputes inclined to argue it is self-judging to decide what constitutes 'emergency in international relations' and should not be reviewed by the Panel. Therefore, the first issue to be settled in the panel stage is clarifying the jurisdiction. As Akande analyzed, it is important to distinguish jurisdiction and justiciability when construing Article XXI (2003). The jurisdiction relates to whether a Panel can consider a dispute in national security while the justiciability connects to whether a Panel can make actual review of the measures (Akande 2003). Non-justiciability assumes that a Panel has jurisdiction but operates that power as an 'empty shell' (Bossche 2020). Thus, by discussing the Panel reports of *Russia - Measures Concerning Traffic in Transit*, *Saudi Arabia - Intellectual Property Rights* and *United States - Certain Measures on Steel and Aluminium Products*, this section will argue that emergency in international situations should be reviewed by the Panel based on objective facts rather than exercising absolutely discretion by Members.

In *Russia - Measures Concerning Traffic in Transit*, Russia argued that considering the wording 'which it considers' in Article XXI(b), the right to decide whether a situation is emergency is definitely a Member's subjective matter which should not be assessed by any third party. It also contended that the Panel should only admit that Russia invoked Article XXI in the report 'without engaging in any further exercise'. To response to Russia's statement, the Panel adopted a two-step process. It firstly referred to Article 1.1 and 1.2 of the Dispute Settlement Understanding (DSU), stating that the rules and procedures governing dispute settlement are applicable to all disputes relating to the covered agreements, except for the special and supple-

mentary provisions set forth in Appendix 2. Since article XXI is not included in Appendix 2, the Panel rejected Russia's opinion on self-judging and said that the dispute fell within the purview of the Panel (para 7.56). Also, the Appellate Body Report in *Mexico - Taxes on Soft Drinks* has reached a consensus that the terms of reference of the Panel includes addressing any relevant provision of covered agreement invoked by the disputing parties. Therefore, it can be demonstrated that the Panel has jurisdiction concerning these disputes.

Furthermore, the Panel delineated the scope of Members' self-determination and Panel's objective review. Considering the definition of 'which it considers', the phrase can be interpreted to qualify: (i) the word 'necessary'; (ii) criteria for determining 'essential security interests' and (iii) the criteria for determining all matters regulated in Article XXI(b). The Panel argued that supposing Members had absolute discretion to determine whether their conduct was intended to protect essential security interests, there would be no need for regulating subparagraphs (i) to (iii). Accordingly, the subparagraphs are 'limitative qualifying clauses', which restrict Member's discretion to determine only their necessary actions in protecting essential security interests. However, that discretion is not unfettered. Measures adopted by Member's must be subject to the principle of good faith and subsequently, whether the measure satisfies the subparagraphs of Article XXI(b) will be objectively reviewed by the Panel. This conclusion was accepted by both the Panel and disputing parties In *Saudi Arabia - Intellectual Property Rights*.

In *United States - Certain Measures on Steel and Aluminium Products*, the Panel extended the scope of its jurisdiction. Not only measures taken before the establishment of the Panel but also measures imposed after its establishment which relates to Panel's settling disputes, all fell within the terms of reference of the Panel. Meanwhile, it manifested that the fact that the security exceptions do not expressly provide for review of their invocation by the Panel does not in itself exclude the Panel's jurisdiction. DSU recognizes that the WTO dispute settlement mechanism is designed to provide security and predictability to the multilateral trading system, and therefore whenever a disputing party invokes the national security exception, the Panel is empowered to conduct an objective review in accordance with the provision.

The panel decisions reached a relatively balanced outcome. On the one hand, it clarified the limited discretion and the principle of good faith of Members in imposing measures to protect essential security interests, and on the other hand, it defined the Panel's power of objective review. The interpretations made in the Panel avoid undermining the credibility of the WTO, meanwhile counterbalancing the wording of the provision with the high political

sensitivity of its members (Prazeres 2020). To a large extent, there is a positive effect on preventing the abuse of the provisions and dealing with trade unilateralism.

3. The problem of standard of review

After determining that the Panel has jurisdiction, the review standard of whether a measure can be justified on protecting essential security interests should be discussed. In terms of wording and present cases, the primarily invocation is Article XXI(b)(iii) of the GATT 1994, where Members concentrate on arguing whether their actions were taken under an emergency international situation. As geopolitical issues become increasingly intertwined with economic matters, there is a debate on whether political and economic affairs should be included in the scope of emergency events (Prazeres 2020). Thus, this paper will focus on what constitutes an emergency situation by analyzing the scope of Members and events in emergency and the severity of emergency.

3.1 The scope of Members and events in emergency

Firstly, the scope of Members in emergency has been expanded, including the disputing parties and affected Members. In *Saudi Arabia - IPRs*, what the Panel considered is the possibility of an emergency in international relations between the disputing parties, with a relatively narrow subject matter. The Panel report in *US - Origin Marking (Hong Kong, China)* nevertheless provides a broader view, concluding that the emergency situation does not have to originate in respondent Member's own territory or bilateral relations, as the war between two or more countries may cause an emergency to a third country.

With regard to the scope of events in emergency, the definition of 'emergency in international relations' is the initial problem to be clarified. By textual interpretation, the Panel in *Russia - Traffic in Transit* hold the opinion that an emergency in international relations refers to circumstances of 'armed conflict, latent armed conflict, heightened tension or crisis or general instability engulfing or surrounding a state'. Thus, the subparagraphs (i) to (iii) consist only of interests in defence, military and the safeguard of law and public order raised by such circumstances. It is highlighted that conflicts in political and economic should be excluded. Although these conflicts may sometimes be regarded as severe or urgent, they do not fall within the scope of Article XXI(b)(iii) unless the invoking Member demonstrates that such conflicts lead to emergency in the four aspects analyzed above. This judgement was adopted in *Saudi Arabia - IPRs*.

However, the Panel generated a different point in *US - Steel and Aluminium Products (China)*. At first, it interpreted relations as the multiple ways in which a state

maintains political and economic engagement with others. Besides, the term 'international' was defined as matters relating to the existence, occurrence and continuation of interactions, communications and travel between states. Consequently, in contrast to DS512 and DS567, the panel broadened the definition of international relations beyond political interactions, aiming to include political and economic affairs. It also stated that the international character must be focused, from which emergency in purely domestic matters should be differentiated.

Furthermore, in *US - Origin Marking (Hong Kong, China)*, through interpreting the textual meanings, the Panel finally concluded that an emergency in international relations refers to relations arising from affairs of 'utmost gravity' which in fact represents a breakdown or near-breakdown of relations between Members, their governments or organization in political, economic, social and cultural interactions. Consequently, the Panel reports reflected a clear trend towards broadening the scope of events in emergency, covering not only conflicts in the realm of traditional warfare but also affairs in economy, society, culture interactions and other diverse fields.

3.2 The severity of emergency

Given that it is not possible or necessary to list all the events of an emergency, whether there is an emergency in international relations is more of a case-by-case analysis and the severity of emergency is a vital factor considered by the Panel. Hence, it is an important and controversial part of deciding whether measures adopted in a dispute can be interpreted as protecting essential security interests and being justified.

In *Russia - Traffic in Transit*, the Panel used the phrase 'heightened tensions or crisis' to describe the severity of an emergency, which was also adopted by *Saudi Arabia - IPRs*. Despite having limited this broad and subjective statement in the subparagraph (iii) (Vidigal 2019), there is still a potential to be abused, as the boundaries of the word 'heightened' are uncertain.

Consequently, the Panel in *US - Steel and Aluminium Products (China)* pointed out that concerning the effect of an emergency on international relations, it must be at least as grave or serious as a war. In judging whether an emergency exists in international relations, the Panel has developed previous Panel reports by requiring that the situation be of 'a certain gravity or seriousness'. In this case, despite the evidence submitted by the United States that there are international concerns about global overcapacity in steel and aluminium, the Panel did not consider the United States measures at issue to be of a certain gravity or severity and therefore construed that measures adopted by the United States could not be justified.

After that, a more strict approach in deciding the severity

of emergency was made in *US - Origin Marking (Hong Kong, China)*. The Panel hold that the situation must be of 'utmost gravity' which would actually cause a 'breakdown or near-breakdown' relationship between the conflicting parties, narrowing the application of Article XXI(b)(iii) into relatively extreme cases. In this case, notwithstanding the high level of concern of the United States and other Members about the human rights situation in Hong Kong, China, the relevant evidence suggested that the measures taken by the United States had been targeted only in specific areas, while they had remained cooperation in other policy areas. In addition, with the exception of labeling of origin and export controls, trade between the United States and Hong Kong, China, continued largely unchanged and did not reach the utmost severity that would cause their relationship breakdown or near-breakdown, thus the international relation did not constitute an emergency.

Therefore, the Panel's interpretation of 'emergency in international relations' was characterized by an increase in severity from case to case, which strictly limits Member's invocation of the provision. At a time when the international economic and trade situation is getting increasingly volatile, geo-economic and trade relations are becoming more and more complicated, and the connotation of national security is constantly being broadened, a wider interpretation of the scope of Members and events in emergency is conducive to responding to security problems in non-traditional areas. On the other hand, considering the object and purpose of GATT 1994 and the WTO Agreement in fully using of the world's resources to promote the production and exchange of goods, achieving mutually beneficial agreements, and substantially reducing tariffs and other barriers to trade (WTO IN BRIEF 2023), the strict interpretation of the severity standard for emergency in international relations and the higher threshold for invoking Article XXI(b)(iii) as a justification contribute to fulfilling the goals. The strict approach has effectively prevented Members from abusing the provision to commit unilateral trade acts, meanwhile balancing the trade and non-trade concerns.

4. Concerns and recommendations

Although Panels have been tried to interpret Article XXI(b)(iii) in order to balance trade and national security concerns, since the ambiguity of the wording and the Appellate Body being paralyzed, the interpretations continue to evolve and still lack consensus among all Members. This part will focus on the concerns raised by Members and WTO, thereby providing some recommendations on the dilemma faced by Article XXI(b)(iii) in two aspects - reforming while actively finding alternative ways.

There is no controversy that the wordings of Article XXI are soft and uncertain, which do not draw a clear bound-

ary in deciding whether the measure is necessary to protect essential security interests. such as the right of member States to self-determination and emergency situations. The uncertainty of the provision raises the problem that, although the Panel has clarified that it has jurisdiction, some Members continue to argue for self-judging in what constitutes essential national security interests, given that neither the GATT 1994 nor DSU has a clear provision on self-judging concerning national security disputes. Thus, it is suggested that consideration should be given to amending the existing provisions to rationalize the scope of Members' limited self-judging and the jurisdiction of the Panel in national security disputes (Damme 2022).

Additionally, the Panel's first application of the principle of good faith in *Russia - Traffic in Transit* is a highlight, yet it does not provide any further definition of how to determine whether a measure is in good faith or not and how Members should comply with the principle. Therefore, this paper proposes that the Panel could delineate the criteria for judging the principle of good faith in subsequent disputes, such as only recognizing the measure that has the least impact on other countries to be justified when more than one measures can achieve the goal of protecting the essential security interests.

Furthermore, concerns also brought by political risk in the WTO are becoming more pronounced. Whereas political issues do not fall within the scope of WTO, the trend towards the convergence of politics and trade in national security disputes suggests that panels inevitably discuss political issues when settling disputes invoking national security exception clauses, and that the political risk posed by such litigation to WTO remains high (Prazeres 2020). The pervasive application of national security provisions and the lack of self-regulation by members puts the WTO in a vulnerable position. Abuse can result in Article XXI being trivialized, while the WTO is unable to limit Members to invoke Article XXI as a justification for imposing trade barriers, which in turn bring risks to Members (Prazeres 2020). Accordingly, an alternative way to solve disputes should be considered. Some claimed to resort to non-violation nullification or impairment clauses regulated in Article XXIII of GATT and Article 26 of DSU. Under this way, when a Member adopts trade-restrictive measures on national security grounds, other Members adversely affected may request compensation. If there is no agreement on compensation, authorization may be sought to suspend reciprocal concessions or retaliation to re-establish the balance of rights and obligations of the Members involved under the WTO Agreement. This mechanism effectively avoid invoking national security exception clauses as a defence and sets aside political issues arising from it, which also protects Member's certain discretion right in national security affairs.

With regard to the future of the security exceptions, the fundamental problem is that the generalization of national security has made it a legitimizing ground for export controls or unilateral economic sanctions. It should be noted that no matter how the dispute settlement measures are improved, before Members resort to the WTO to resolve disputes, they should adopt a positive and friendly attitude towards consultation, and commit themselves to the maintenance of the multilateral trading system while pursuing their own economic interests.

5. Conclusion

The WTO dispute settlement mechanism is an effective and important step in resolving disputes between two or more Members. As economies have become increasingly intertwined, the protection of national interests has become more apparent and many conflicts happened between national security and trading. With the national security exception clauses being increasingly invoked, the measures adopted by the invoking Members' have reflected a weakening of multilateralism. In this regard, the Panel's report interprets Article XXI in a way that seeks to maximize the preservation and effective functioning of WTO rules, while balancing the non-trade concerns of Members and bridging disputes.

Therefore, this paper focuses on the Panel reports of *Russia - Traffic in Transit*, *Saudi Arabia - IPRs*, *US - Steel and Aluminium Products (China)* and *US - Origin Marking (Hong Kong, China)*. By comparing and contrasting Panels' interpretation and the rationale, this paper discusses the limited discretion owned by Members and the jurisdiction owned by the Panel to decide which constitutes an essential security interest. Subsequently, it concludes that there is a wider range of Member and events in emergency and a stricter approach in ascertaining the severity of emergency. This paper argues that despite the uncertain wording and the evolving interpretation, the underlying view of the Panel is certain and the high quality of the legal analysis carried out by the Panel demonstrates that the WTO dispute settlement mechanism is becoming more visible in resolving international trade disputes and balancing trade and non-trade problems.

In terms of the concerns, this paper concentrates on the wording of the provision, the ambiguity in the Panel reports and the potential political risks caused by analyzing national security in WTO disputes. This paper therefore provides some recommendation on amending the existing rule, detailed interpretation in the Panel stage and an alternative way of resorting non-violation nullification or impairment clauses. Further research should consider the feasibility of the suggestions and consider other resolutions beyond the dispute settlement mechanism, in order to provide more choices for disputing countries and pro-

mote free trade and protect.

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