

On Fissionable Cows and the Limits to the WTO Security Exceptions

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ABSTRACT

Some WTO Members are of the view that the WTO security exceptions are ultimately in the hands of the invoking Member. However, several others offer a more balanced position: while recognizing the broad discretion enjoyed by Members, they also acknowledge the limits of these exceptions and the WTO adjudicating bodies' power to make findings and issue recommendations on the matter.

Panels and the Appellate Body have normally jurisdiction to deal with cases in which defences based on security exceptions are raised. The Article XXI test should draw inspiration from the elements of the well-established Article XX of GATT 1994 test, adapted to the particular circumstances of the "mother of all exceptions". The famous "it considers" does not offer a carte blanche to the Members invoking security exceptions and refers only to the necessity test, which consists of a verification of whether it is plausible to consider the measure at issue necessary for the protection of the respective essential security interests, from the perspective of the invoking Member. There are a series of objective elements conditioning the applicability of the security exceptions. Cows, for instance, cannot be considered fissionable materials. The limits of the invocation of the security exceptions should be the good faith and the abuse of rights.

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I. Introduction

In almost fifty years of GATT 1947 security exceptions were mentioned in only a few disputes,¹ to which one may add other instances, like the famous Swedish footwear notification.²

The first 20 years of the WTO era were relatively calm,³ Members refraining themselves from challenging measures with a clear link to security or refraining from defending domestic measures under the security exceptions.⁴ This led some authors to a little bit too easily conclude that most of the countries regard the WTO security exceptions as self-judging.⁵ In fact, the GATT Contracting Parties and then the WTO Members views' on this matter vary greatly, from extreme positions that they are not justiciable at all to more balanced approaches acknowledging justiciability,⁶ but catering for a deferential standard of review.

However, this relative calm ended as in the last two years there are around 15 cases in which security exceptions may be invoked,⁷ in most of them probably unsuccessfully. *Russia - Transit* (DS512) is the very first case when a panel is requested to rule on a defense based on Article XXI of GATT 1994, which will have very serious implications for the WTO system.

The security exceptions are the mother of all exceptions. No question about that. However, I cannot go as far as saying that they are non-justiciable or that they are self-judging. While

¹ E.g. *US - Issue of export licenses* (1949), *US - Suspension of obligations between the US and Czechoslovakia* (1951), *Peru - Prohibition of Czechoslovakian imports* (1954), *EC, Australia, Canada - Trade restrictions affecting Argentina applied for non-economic reasons* (1982), *US - Imports of sugar from Nicaragua* (1983), *US- Trade measures affecting Nicaragua* (1985), *EEC - Trade measures taken by the EC against the Socialist Federal Republic of Yugoslavia* (1992).

² L/4250, p. 3, C/M/109, pp. 8 - 9.

³ See *US - Helms Burton* (DS38) and *Nicaragua - Imports from Honduras and Colombia* (DS188, DS201).

⁴ For instance, measures concerning nuclear energy, oil restrictions imposed by OPEC, or measures concerning raw materials and rare earths.

⁵ See Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 *Utah L. Rev.* 697 (2011).

⁶ E.g. positions expressed by Argentina, Brazil, Cuba or the European Union. In addition, the fact that in several situations the GATT Contracting Parties resorted to Article XXXV (non-application of the Agreement between particular Contracting Parties) and not to Article XXI may be telling in this regard (e.g. Accession of Portugal, Invocation of Article XXXV, L/1764).

⁷ For instance, *Ukraine - Measures relating to Trade in Goods and Services* (DS525), *United Arab Emirates/ Bahrain/ Saudi Arabia - Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* (DS526, DS527, DS528), *Russia - Measures Concerning the Importation and Transit of Certain Ukrainian Products* (DS532), *United States - Certain Measures on Steel and Aluminium Products* (DS544, DS547, DS548, DS550, DS551, DS552, DS554, DS556), *Russia - Pigs* (DS475).

Members have the widest margin under any exception of the covered agreements, that discretion is not unfettered. The standard of review has to be deferential, but not turning a blind legal eye to abuse and misuse. Such a standard of review will seek to assess the plausibility of the "essential security" interests and of the nexus between the measure at issue and the interests mentioned, from the perspective of the invoking Member,⁸ while accounting for objective elements such as whether the respective goods are "fissionable materials" or whether there is a "war or other emergency in international relations".

This article does not aim at being an exhaustive approach, but rather to focus on the limits of the invocation and application of the security exceptions in the WTO agreements. Certain issues, such as the applicability of Article XXI of GATT 1994 to other Annex 1A Agreements, or the non-express mentioning of Article XXI in Article XXIV, are intentionally left outside the scope of this paper. Similarly, there is plenty of literature dealing with the chronology of security-related cases in the GATT era, and I see no point in spending more time on that issue, especially as it does not seem to be of a particular interpretative significance.

Finally, I recall that the principle *exceptio est strictissimae interpretationis* seems to not apply in WTO law.⁹

II. Evolution of the security exceptions in international instruments

The general and security exceptions as we know them today were at the beginning un-separated from each other, united in a sole list called general exceptions.¹⁰ They became part of different articles during the Havana Charter negotiations, when the present general exceptions were then the general exceptions to the commercial policy chapter (Chapter IV) and the security exceptions were general exceptions to the whole Charter, some of them being

⁸ Some authors suggest that the standard of review of with respect to the "essential security interests" and "it considers necessary" may draw inspiration from Article 17.6(i) of the Anti-Dumping Agreement.

⁹ Appellate Body Report, *EC- Hormones*, para. 104:

merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.

¹⁰ Article 4 of the 1927 Convention for the Abolition of Import and Export Prohibitions and Restrictions.

part of a separate article on the relationship with the UN.¹¹ At some point the famous "it considers" appeared before "necessary"¹² and the exceptions were transferred to Articles XX and XXI of GATT 1947. The Uruguay Round did not bring any change to the security exceptions, as the GATT exceptions were replicated in the GATS,¹³ TRIPS and some other trade in goods agreements.¹⁴

In contrast to the WTO agreements, where security exceptions are confined to closed lists, certain RTAs and certain BITs have more open provisions.¹⁵

In particular, this is the case of the US-led treaties. However, even in this case those BITs concluded during the Uruguay Round do not contain the words "it considers" before "necessary".¹⁶ The US seemed to realize this possible "mistake" and their recent BITs¹⁷ and RTAs contain security exceptions with both open lists of exceptions and "it considers". For instance, the KORUS FTA provides that:

Nothing in this Agreement shall be construed: [...] (b) to preclude a Party from applying measures that it considers necessary for [...] the protection of its own essential security interests.¹⁸

In addition, a footnote is added to clarify that:

For greater certainty, if a Party invokes Article 23.2 in an arbitral proceeding initiated under Chapter Eleven (Investment) or Chapter Twenty-Two (Institutional Provisions and Dispute Settlement), the

¹¹ Articles 45, 86 and 99 of Havana Charter.

¹² Preliminary Summary of Geneva Draft of ITO Charter, Changes from New York Draft (15 September 1947), Senate Finance Committee.

The national security exceptions have been moved from Article 37 (New York), where they only applied to Chapter V (New York), to new Article 94, where they apply to the whole Charter. They have been so worded as to make it clear that members will be able to apply them as they themselves determine.

¹³ The GATS however also refers to fissionable materials, in addition to fissionable materials.

¹⁴ Article 3 of TRIMS makes reference to the GATT exceptions, Article 2.2 of TBT Agreement contains its own balancing of security interests, while the plurilateral revised GPA has its own security exceptions (Article III).

¹⁵ In the opposite direction, some RTAs do not contain security exceptions at all (e.g. the China –Pakistan RTA).

¹⁶ See e.g. US – Bangladesh BIT, US-Panama BIT, US-Congo BIT, US-Kyrgyzstan BIT. This suggests that at the time of the Uruguay Round the US may have already realized that the way security exceptions are drafted in the trade agreements is not broad enough. At the same time, this may also suggest that the US placed more weight on the closed vs open list than on "it considers", which was "forgotten".

¹⁷ E.g. Article 18 of US-Rwanda BIT (2012). Other international instruments, such as the OECD Codes, contain similarly worded provisions; see, for instance, Article 3 of OECD Codes.

¹⁸ Article 23.2 of KORUS FTA or Article 21.2 of Panama FTA.

tribunal or panel hearing the matter shall find that the exception applies.¹⁹

Other international agreements contain slightly differently worded security exceptions²⁰ or even a common list of general and security exceptions, subject to the same chapeau.²¹

III. Justiciability of the WTO security exceptions

This discussion is a non-topic and it does not deserve too much space. Briefly, I consider that the WTO covered agreements clearly place panels and the Appellate Body in a position to review a WTO Member's invocation of the security exceptions. This is not a matter of justiciability, but rather a matter related to the standard of review and the discretion WTO Members enjoy under those provisions.²²

There are several clear arguments confirming that the security exceptions (in e.g. Article XXI) are justiciable.

First, security exceptions are affirmative defenses and they may be invoked to justify an otherwise WTO-inconsistent measure. The security exceptions apply to the provisions of the respective substantive agreements and do not constitute exceptions to the rules of jurisdiction provided for in the DSU.²³

Second, if the security exceptions were non-justiciable provisions, then it would become impossible for panels to make an objective assessment of the matters before them, as provided for in Article 11 of DSU.

¹⁹ Footnote 2 of KORUS FTA.

²⁰ For instance, Article 347 of TFEU provides that:

Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take [...] in the event of war, serious international tension constituting a threat of war, or [...].

²¹ E.g. Article 29 (Exceptions From the Functioning Procedure of Internal Market of Goods) of the Treaty on the Eurasian Economic Union, Article 11 of Kyrgyzstan - Moldova FTA, Article 9 of Kyrgyzstan – Ukraine FTA.

²² See also the EU's third party written submission in *Russia - Transit*.

²³ This is different from certain RTAs, where there is an express footnote referring to the dispute settlement chapter (see e.g. Footnote 2 of KORUS FTA).

Third, the "matter" before a panel normally includes the security exceptions as invoked by the defendant, under the standard terms of reference.²⁴ It would be required special terms of reference to take the security exceptions out of a panel's jurisdiction.²⁵

Fourth, and crucially, if the security exceptions were interpreted as non-justiciable provisions, then WTO Members would unilaterally decide the outcome of the respective cases, instead of the DSB. This would question the "rules-based" approach to international trade. Even if some rules may grant WTO Members more discretion, the jurisdiction over whether a Member acted within its discretion rests with the DSB.

IV. Legal standard for the interpretation and application of the WTO security exceptions

Article XXI of GATT 1994 provides that:

Nothing in this Agreement shall be construed:

(a) to require any [Member] to furnish *any information* the disclosure of which *it considers contrary to its essential security interests*;

(b) to prevent any [Member] 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) *relating 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) *taken in time of war or other emergency in international relations*;

(c) to prevent any [Member] from taking *any* action in pursuance of its *obligations* under the United Nations Charter for the maintenance of international peace and security. [emphasis added]

Thus, there are three categories of security exceptions: (i) those related to the sanctions mandated by the UN, (ii) exceptions related to top secret information and (iii) other unilateral security measures, related to fissionable materials, weapons and goods for the supply of

²⁴ See Articles 7(1) and 7(2) of DSU.

²⁵ During the GATT era the panel in a dispute between Nicaragua and the US had special terms of reference excluding from the scope of the panel's review the validity of the US' invocation of Article XXI (GATT Panel Report, *US– Trade measures affecting Nicaragua*, para. 5.3, unadopted).

military establishments, and those taken in relation to a state of war or other emergency in international relations.

4.1. UN sanctions

If security exceptions are the mother of all exceptions, then the exceptions related to the UN-mandated sanctions are the grand-mother of all exceptions.

This provision ensures the cohesion between the UN instruments and the multilateral trading system, acknowledging the supremacy of the UN Charter in the post-WWII international architecture.²⁶

It is the UN Security Council resolutions that normally would provide the "obligations under the United Nations Charter for the maintenance of international peace and security" to which Article XXI(c) refers to.²⁷ It is questionable to which extent General Assembly resolutions, normally containing recommendations, may also be the source of stand-alone "obligations" within the meaning of Article XXI(c).²⁸ In this regard, the United for Peace resolution provides for the possibility of the General Assembly to act to maintain or restore international peace and security when the Security Council cannot take decisions because of lack of unanimity of the permanent members.²⁹

The provision has a broad coverage, as suggested by "any action", which has to be related to the maintenance of international peace and security.

There may be several types of sanctions: mandatory sanctions (e.g. "Decides that all States shall prevent the direct or indirect supply, sale or transfer to ..."), voluntary sanctions (e.g.

²⁶ Article 103 of UN Charter.

²⁷ See Articles 25, 39 and 41 of UN Charter.

²⁸ UN General Assembly resolutions could be helpful in establishing the framework with regard to a certain situation (e.g. Kimberley process). Furthermore, Article 12 of UN Charter provides that:

While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

²⁹ United Nations General Assembly Resolution 377. Economic sanctions were prescribed in 1981 against South Africa through A/RES/ES-8/2 (Namibian case):

14. *Also strongly urges* States to cease forthwith, individually and collectively, all dealings with South Africa in order totally to isolate it politically, economically, militarily and culturally;

"Calls upon States to take appropriate measures that prohibit ...")³⁰ and sanctions that exceed the contents of the resolution.³¹

There is no doubt that mandatory sanctions are justifiable under the security exceptions. It is however questionable whether voluntary sanctions can be considered "obligations" within the meaning of Article XXI. As with regard to unilateral sanctions exceeding the sanctions provided for in a resolution (e.g. oil-related sanctions on Iran), they may be justifiable under one of the unilateral security exceptions.

It is worth mentioning that UN Security Council resolutions usually provide for a "humanitarian exception" comprising trade, travel and assets freeze.

4.2. Top-secret information

This provision operates as an exception to certain transparency provisions (e.g. Article X of GATT 1994). It also applies in the context of the 1982 Decision.³² Indeed, it is natural that certain types of information are not to be disclosed: criminal law provisions cover similar situations in domestic law.

In order for a measure to be justified under this provision it has to refer to (i) information the disclosure of which (ii) the respective Member considers contrary to (iii) its essential security interests. As "it considers" and "essential security interests" will be discussed in the following sub-section, I will make only a few remarks particular to this exception.

The top secret information exception has to be understood also in the context of the burden of proof obligations. This exception cannot excuse a party to a dispute from meeting its burden of proof under the other unilateral security exceptions (e.g. Article XXI(b)). Like the other

³⁰ Resolution 1929 (2010) on Iran.

³¹ For more details see George-Dian Balan, *The Latest United States Sanctions Against Iran: What Role to the WTO Security Exceptions?*, *Journal of Conflict and Security Law*, Volume 18, Issue 3, 2013, pp. 365–393. The preamble of Resolution 1929 provides that:

while noting the potential connection between Iran's revenues derived from its energy sector and the funding of Iran's proliferation sensitive nuclear activities'. Such a language in the preamble cannot be considering as authorizing the respective kind of sanctions.

³² Paragraph 1 of the Decision Concerning Article XXI of the General Agreement of 30 November 1982. The GATT 1994 consists of other decisions of the Contracting Parties to GATT 1947 as per paragraph 1(b)(iv). See also Appellate Body Report, *US – FSC*, para. 107 and Appellate Body Report, *EC- Tariff Preferences*, para. 90.

unilateral security exceptions, the top secret information exception is also a justiciable provision. Discretion accorded under this provision is not unlimited.

Information relating to essential security interests is of a highly sensitive nature, but the party invoking the exceptions is expected at a minimum to explain in sufficient detail why such information cannot be shared with the WTO adjudicating bodies. There is nothing that would prevent a panel, if necessary, from adopting appropriate procedures to deal with sensitive information in cases involving the invocation of the security exceptions. Finally, even if a party is justified in not providing certain information pursuant to this exception, that will not discharge it from its burden of proof in relation to the other security exceptions invoked.³³

It is worth looking at the case law of the CJEU in the context of the similarly worded provision in the TFEU, which also contains the words "it considers".³⁴ For instance, several EU Member States attempted to avoid contributing to the EU budget under the pretext of the sensitivity of the information related to the purchase of certain military equipment. The CJEU disagreed:

As regards the argument that the Community customs procedures are not capable of safeguarding the security of the Kingdom of Sweden, in the light of the confidentiality requirements contained in agreements entered into with exporting States, it must be stated, as correctly observed by the Commission, that the implementation of the Community customs system requires the active involvement of Community and national officials, who are bound when necessary by an obligation of confidentiality, when dealing with sensitive data, which is capable of protecting the essential security interests of Member States.

Furthermore, the level of specificity to be attained in the declarations which Member States must periodically complete and send to the Commission is not such as to lead to damage to the interests of those States in respect of either security or confidentiality.[...]

In the light of the foregoing, the Kingdom of Sweden has not shown that the conditions necessary for the application of Article 296 EC are satisfied.³⁵

³³ See EU's third party oral statement in *Russia - Transit*, paras. 28 – 30.

³⁴ Article 346(1)(a) of TFEU.

³⁵ CJEU Judgment (Grand Chamber), *Commission v Sweden*, Case C-294/05, paras. 49, 50 and 52. Moreover, advocate general Colomer pointed out in his Opinion to the inconsistencies between the alleged sensitivity of the respective information and the fact that it was already publicly available (Cases C-461/05, C-409/05, C-387/05, C-372/05, C-294/05, C-284/05, C-239/06):

180. A search of the websites (130) to which the Commission refers in its pleadings makes available to everyone the details of certain armaments purchased by armed forces.

4.3. Other unilateral security measures

Security interests may vary in time and space, even with regard to the same WTO Member. Certain aspects such as climate change and environmental issues, while normally covered by general exceptions, may under certain circumstance become a matter related to the very existence of a nation, which is a matter of essential security interests.³⁶ However, unilateral security exceptions of the kind contained in Article XXI(b) cannot be used to circumvent the requirements of Article XX.

Article XXI(b), as well as the other similar provisions in the WTO agreements, do not contain open ended exceptions.³⁷ It is clear that the intention of the GATT 1994 drafters was to allow for reliance on security exceptions only in those circumstances expressly and exhaustively mentioned in subparagraphs (i) to (iii) of Article XXI(b). Those circumstances are objective and verifiable by panels.

The most controversial unilateral exceptions are those relating to “arms and the supply of military establishment” and the “war or other emergency in international relations”.

In brief, panels and the Appellate Body can review whether there is a (plausible) essential security interest and whether there is a plausible connection between the objective pursued and the measure at issue, while taking into account the fulfilment of certain specific objective conditions.

Thus, in order for a measure to be justified under the unilateral security exceptions it has to (i) meet the specific conditions of e.g. subparagraphs (i) to (iii) of Article XXI(b), to (ii) pass an attenuated necessity test and to (iii) refer to the protection of the essential security interests of the invoking Member.

(i) fissionable materials

This exception is mainly used for restrictions on exports and it does not expressly distinguish between fissionable materials for civilian or military uses, differently from the arms and other goods exception, which refers to the supply of military establishments.

(130) – Providing information, inter alia other matters, on the United Nations Register of Conventional Arms (http://disarmament.un.org/UN_REGISTER.NSF), which even describes States’ arsenals, and on the arms industry (<http://www.defenseindustrydaily.com>).

³⁶ This could be the case of island nations affected by the rising of the ocean level. This kind of situation may fall under "other emergency in international relations" if the particular conditions of that exception are met.

³⁷ For an example of an open list see Article 24 of the Energy Charter Treaty (*including those...*).

"Relating to" in this provision means "about" and should not be given any particular interpretative weight. The degree of nexus between the measure and the essential security interests is reflected in the attenuated necessity test (plausibility test) contained in the *chapeau* to the unilateral security measures.

"Fissionable materials" is an objective term and it is not at the free interpretation of the Member invoking the exception. "It considers" in the chapeau of paragraph (b) refers only to the necessity test and not to all the objective terms found in the specific exceptions. Otherwise it would be absurd to consider cows as fissionable materials, even if radioactively contaminated.³⁸

To understand what type of materials may be objectively considered as fissionable one may have a look at Article XX of IAEA Statute:

The term "special fissionable material" means plutonium-239; uranium- 233; uranium enriched in the isotopes 235 or 233; any material containing one or more of the foregoing; and such other fissionable material as the Board of Governors shall from time to time determine; but the term "special fissionable material" does not include source material.[...]³⁹

Similarly, the phrase "materials from which they are derived" may be understood by reference to the IAEA Statute:

The term "source material" means uranium containing the mixture of isotopes occurring in nature; uranium depleted in the isotope 235; thorium; any of the foregoing in the form of metal, alloy, chemical compound, or concentrate; any other material containing one or more of the foregoing in such concentration as the Board of Governors shall from time to time determine; and such other material as the Board of Governors shall from time to time determine.⁴⁰

³⁸ For such situations there are the SPS Agreement and Article XX(b) of GATT 1994.

³⁹ Article XX(1) of IAEA Statute. Of note, there are 170 countries Members to the IAEA Statute (<https://www.iaea.org/about/governance/list-of-member-states>). It is not yet clear in WTO law if to qualify as "relevant rules of international law applicable in the relations between the parties" under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) such rules need to be applicable only between the parties to a particular dispute or between (among) all the WTO membership. The panel in *EC - Biotech* took a very narrow view and considered that the reference to rules "applicable in the relations between the parties" refers to those applicable in the relations between all WTO Members (Panel Report, *EC – Biotech*, para. 7.68). A report issued by the International Law Commission (ILC) considered this approach as being problematic (International Law Commission, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, U.N. Doc A/CN.4/L.682, 13 April 2006, pp. 226- 228).

⁴⁰ Article XX(3) of IAEA Statute.

Of note, the GATS also refers to "fusionable materials".⁴¹ Furthermore, there is also the question whether international trade of nuclear energy services for pacific purposes is covered as well, due to the potential spill-overs in the military field.⁴²

(ii) arms and the supply of military establishment

Like the preceding exception, this exception was also mainly used for restrictions on exports. There may be some overlap between this exception and the exception concerning fissionable materials; in that case the latter will apply, as a more specific exception.⁴³

Again, "relating to" in this provision means "about" and should not be given any particular interpretative importance.

The phrase "arms, ammunition and implements of war" should not pose particular interpretative problems. It refers to goods directly intended for use in war. However, it is not clear if the condition "directly or indirectly for the purpose of supplying a military establishment" applies to "arms, ammunition and implements of war" or only to "other goods and materials".

"Other goods and materials" should not be interpreted very broadly, as almost any product can also be intended to be used by a military establishment. During the GATT negotiations the US representative indicated exports of metal before the outbreak of a war as falling under this exception.⁴⁴

It is reasonable to consider that "other goods and materials" may include the so-called "dual-use goods," that can be used both for civilian and military purposes, such as computers, telecommunications equipment and other high tech equipment. Useful guidance may be found in the Wassenaar Arrangement's List of Dual-Use Goods and Technologies.⁴⁵

⁴¹ Article XIV bis of GATS.

⁴² WTO Council for Trade in Services, Energy Services, Background Note by the Secretariat, S/C/W/52, 9 September 1998, para. 28.

⁴³ Authors consider that there is no need for an exact demarcation of the different security exceptions along the lines of the *lex specialis* principle (Holger Hestermeyer, Article XXI. Security Exceptions, WTO Trade in Goods, Max Planck Commentaries on World Trade Law, p. 578).

⁴⁴ E/PC/T/A/PV/36, 18-9.

⁴⁵ <https://www.wassenaar.org/app/uploads/2018/01/WA-DOC-17-PUB-006-Public-Docs-Vol.II-2017-List-of-DU-Goods-and-Technologies-and-Munitions-List.pdf>. Of note, only some of the WTO Members are participating States of the Wassenaar Arrangement (<https://www.wassenaar.org/about-us/>).

The reference to "directly or indirectly" suggests a potential broad coverage of situations. However, this should not be interpreted as applying to operations too remotely situated from the trade in the respective goods as such. For instance, it is questionable whether one can justify under this provision sanctions on oil founded on the premise that the sale of oil generates revenues that will then be used for the supply of certain goods to a military establishment.

The use of the phrase "for the purpose" suggests that it is the end use that matters. For instance, the CJEU has found that helicopters which were certainly for civilian use and possibly for military use were not covered by the respective security exception in the TFEU.⁴⁶

There is debate whether "military establishment" is limited to state armed forces or it refers also to private armed forces and to terrorist organizations. I tend to be of the view that the provision should be interpreted in the light of the current security threats.

It has to be noted that the Revised GPA, which is a plurilateral agreement, contains its own security exceptions.⁴⁷ Furthermore, Article III:8(a) of GATT 1994 takes out of the scope of the national treatment obligations procurement by governmental agencies.

Finally, while this provision does not make reference to "emergency" or to "imminent", it is reasonable to take into account whether the occurrence of the threatened event is a real, true possibility.

(iii) war or other emergency in international relations

In contrast to the previous two exceptions, this exception is not defined by reference to a particular type of products, but instead by reference to the occurrence of international events of certain gravity. Thus, measures taken pursuant to this exception are not limited to certain categories of goods, but can cover any products traded between the respective countries, as long as the other legal conditions are fulfilled.

⁴⁶ CJEU Judgment, *Commission v Italy* (Agusta helicopters), C-337/05, paras. 48 – 49.

⁴⁷ Article III(1) of Revised GPA, entitled Security and General Exceptions, provides that:

Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes. [...]

The terms "war" and "other emergency in international relations" refer to rather objective factual situations. The existence of such situations is largely independent from the assessment made by the invoking Member and, in any event, can be controlled by panels and the Appellate Body.

Some authors seem to consider that "in time of" requires only a mere temporal coincidence between the action taken and a given situation ("war" or "other emergency"), because it allows WTO Members the freedom to choose sides in a conflict (but can one aid an aggressor by imposing sanctions on the victim?).⁴⁸

However, such an interpretation would give green light to the adoption of measures unrelated (other than by mere temporal coincidence) to the respective war or emergency. It follows that the terms "in time" ("en cas" and "en caso" in the French and Spanish versions, respectively) require a sufficient nexus between the action taken by the invoking Member and the situation of war or emergency in international relations to which this responds.

Thus, the required nexus would most often comprise a geographical component, by proximity to the respective conflict. Otherwise it could be absurd to take measures allegedly on security grounds just because there is a mere temporal coincidence with an unrelated armed conflict in a different part of the world, which does not pose any essential security threat (e.g. ballistic missiles) to the respective Member.

This interpretation is confirmed by the use of the term "protection" in the chapeau of Article XXI(b), which implies the existence of a threat to which the action of the invoking Member responds.⁴⁹

There are no specific difficulties in understanding the meaning of "war". In essence, the term "war" describes a situation when one or more states have used armed force against each other, irrespective of the reasons or intensity of the conflict.⁵⁰ Its scope extends not only to declared war, but to any armed conflict.

Similarly, the phrase "other emergency in international relations" was apparently meant to cover situations like the one preceding the involvement of the US in WWII, that is, threats of

⁴⁸ Michael J. Hahn, *Unilateral suspensions of GATT obligations as reprisal*, Springer, 1997, p. 346.

⁴⁹ See e.g. the EU's third party written submission in *Russia - Transit*, para. 47.

⁵⁰ See the UN General Assembly Resolution 3314 (XXIX) (Definition of Aggression), 14 December 1974.

war.⁵¹ By looking into the different linguistic versions (FR: "guerre ou grave tension internationale"; E: "guerra o grave tensión internacional") two features emerge: the gravity of the situation and a sense of emergency, imminence. Indeed, not only the French and Spanish versions refer to the gravity, but also in the English version war is one example of emergency, as suggested by the interposition of "other" between "war" and "emergency".⁵² Because of its very nature, in principle an emergency situation would not cover a measure that is taken as a response to an action that occurred long time ago, unless the threat is ongoing.

This is the provision the most often invoked and the one which is the most susceptible to being abused. If it is construed too broadly, then the other exceptions may be devoid of meaning. Similarly, purely economic,⁵³ autarky considerations would not be covered by this exception. However, there may be situations other than a threat of war that may amount to "other emergencies in international relations". That may be the case of a small island nation being threaten by the rising ocean level and that leading to serious tensions with another country, or the case of a massive cyber-attack from abroad, paralyzing a whole country and its vital structures. Thus, to qualify under this exception, such situations should not be of a purely domestic nature, but involve an international dimension, a conflict between two or more different countries.

(iv) the chapeau of paragraph (b)

The chapeau of paragraph (b) contains the reference to the values to be protected (essential security interests) and to the nexus between the measure at issue and the value protected (it considers necessary). Subparagraphs (i) to (iii) refer to "action" and not to "it considers". "It considers" refers to only the necessity test. This is confirmed by the French (toutes mesures ...

⁵¹ During the second session of the preparatory committee of the UN Conference on Trade and Employment the US representative noted (UN, Economic and Social Council, E/PC/T/A/PV/33, 1947, p.20):

As to the second provision, "or other emergency in international relations," we had in mind particularly the situation which existed before the last war, before our own participation in the last war, which was not until the end of 1941. War had been going on for two years in Europe and, as the time of our own participation approached, we were required, for our own protection, to take many measures which would have been prohibited by the Charter. Our exports and imports were under rigid control. They were under rigid control because of the war then going on.

⁵² Article 347 of TFEU refers to "serious international tension constituting a threat of war".

⁵³ Article XIX of GATT 1994 refers to "emergency action on imports of particular products" and addresses the possibility to apply safeguard measures. That is a different type of emergency than the one contemplated by Article XXI.

appliquées) and Spanish (todas las medidas .. relativas) versions. The types of measures are closely linked to the kind of "essential security interests" that can be justified.

With respect to the required nexus, because "necessary" is preceded by "it considers", this is an attenuated necessity test, which may be called a plausibility test. Panels and the Appellate Body must review, using the analytical tools developed in the context of the general exceptions, whether the invoking Member can plausibly consider that the measure is necessary. This limited review ensures that the exception is invoked in good faith, thus preventing abuses.

The Appellate Body has explained that the "necessity" of a measure under the relevant paragraphs of Article XX of GATT 1994 containing that term must be assessed through a "process of weighing and balancing" of several factors. According to the Appellate Body, those factors include: (i) the relative importance of the objective pursued by the measure; (ii) the contribution of the measure to that objective; and (iii) the trade restrictiveness of the measure.⁵⁴ Then, once such an analysis is conducted, the challenged measure should normally be compared with reasonably available alternative measures that are less trade restrictive, while making an equivalent contribution to the protection of the relevant objective.⁵⁵

Moreover, when assessing the existence of reasonably available alternatives, panels and the Appellate Body should assess whether the interests of third parties that may be affected were properly taken into consideration, as required by the 1982 Decision.⁵⁶ This assessment is particularly relevant in the case of secondary sanctions, when one Member imposes sanctions not only to the WTO Member concerned, but also to other WTO Members trading with the Member concerned.

The limited review described above is not without precedence in WTO law. For instance, in *EC- Bananas – Recourse to arbitration by the EC under article 22.6 DSU* the arbitrators interpreted in a similar way Articles 22.3(b) and 22.3(c) of DSU, which both start with the phrase "if that party considers".⁵⁷

⁵⁴ See e.g. Appellate Body Report, *Korea – Various Measures on Beef*, para. 164; Appellate Body Report, *Brazil- Retreaded Tyres*, paras. 156 and 178; Appellate Body Report, *EC – Seals Products*, para. 5.169.

⁵⁵ See e.g. Appellate Body Report, *EC – Seal Products*, paras. 5.169 and 5.261.

⁵⁶ Recital 3 of Decision Concerning Article XXI of the General Agreement of 30 November 1982.

⁵⁷ Decision by the arbitrators, *EC - Bananas III (Ecuador) – (Article 22.6 – EC) – Recourse to arbitration by the EC under article 22.6 DSU*, para.52.

Similarly, in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, the International Court of Justice interpreted the terms "if it considers" in a treaty provision as not giving absolute discretion to the party invoking them because the exercise of discretion remained subject to the principle of good faith.⁵⁸

Finally, the CJEU has held that the text of Article 346(1)(b) of TFEU does not preclude the matter being examined by the Court. In interpreting that provision, the Court has found that the terms "it considers necessary" in Article 346(1)(b) of TFEU do not amount to considering that provision "as conferring on Member States a power to depart from the provisions of the Treaty simply in reliance on those interests". Rather, an EU Member State must "show that such derogation is necessary in order to protect its essential security interests".⁵⁹

With respect to the measure at issue, the use of the terms "for the protection of" suggests that the invoking Member must show that the action is "designed" to protect the relevant essential security interests from the threat to those interests posed by one of the situations described in sub-paragraphs (i) to (iii). By comparison with Appellate Body approach with regard to the general exceptions, this requires a demonstration that the measure, having regard to its content, structure and expected operation, is not "incapable of" protecting the relevant essential security interests from the stated threat.⁶⁰ In other words, a measure which on its face, or manifestly would not be able to protect the stated essential security interests (e.g. because it is in fact designed to promote autarky) should already fail this part of the test and that should be the end of the legal analysis.

With regard to the kind of the values protected, the provisions at issue make reference not to any security interests, but to "essential" security interests. This means that not any security interest would qualify under this exception. The interests must relate genuinely to security and be "essential". Purely protectionist interests or security interests of minor importance would not qualify under this exception.⁶¹

⁵⁸ ICJ Judgment, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, 2008, para. 145. Of note, this judgment from the WTO era differs from the ICJ's considerations expressed during the GATT era in para. 222 of its judgment in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986.

⁵⁹ CJEU Judgment, *Schiebel Aircraft GmbH*, Case C-474/12, para. 34; see also CJEU Judgment (Grand Chamber), *Commission v Denmark*, Case C-461/05, paras. 53 – 60.

⁶⁰ Appellate Body Report, *Colombia – Textiles*, para. 5.68.

⁶¹ In the view of smaller states security exceptions are sometimes used as bullying instruments by bigger economies, without those security interests qualifying as "essential" or without the existence of the required

Thus, while it is in principle for each Member to identify its own security interests and to choose the level of protection of those interests that it considers appropriate, which is reflected in the term "its", preceding the phrase "essential security interests", WTO Members do not enjoy unfettered discretion. Accordingly, a panel would need to ascertain whether the interests at stake could be considered to be "essential security" interests from the perspective of the respective Member.⁶²

V. Conclusions

In my opinion, for a provision on security exceptions to be self-judging it would be required several cumulative elements: an open list of exceptions and the presence of "it considers" before "necessary", in the overall framework of a provision worded in a purely discretionary way. If any of these elements is missing, then I am of the view that security exceptions are subject to a standard of review deferential to the invoking country's choices, but nevertheless not leading to the acceptance of anything-under-the-sun reasons. Thus, I find it wrong that a recent arbitral tribunal has labeled Article XXI of GATT 1994 as self-judging.⁶³

Litigating the security exceptions should be rather seen as a matter of normality and not as an atomic danger to the multilateral system. It is much dangerous to let abusive invocations pass undisputed than to have a rational and reasonable approach. It cannot be that WTO Members can unilaterally decide the outcome of a dispute by merely invoking security exceptions, which risks create a race to the bottom and undermine the whole multilateral trading system.

There have been several attempts to clarify the security exceptions in the past, notably the proposals by Argentina (1982), Nicaragua (Uruguay Round) and Russia (2015). However, except with respect to certain procedural matters, the Membership was reluctant to touch the good old texts. While the range of possible essential security threats has evolved over the years (climate change, cyber-attacks, terrorism), security exceptions should not be used to justify purely protectionist measures, seeking autarky and economic prosperity of certain industries. Members may define broadly national security, with references to "the economic

nexus between the measures and the essential security interests. See e.g. the positions expressed by Nicaragua, India, Cuba, Poland and Czechoslovakia with regard to the US actions concerning Nicaragua (GATT Council, Minutes of Meeting Held in the Centre William Rappard, 29 May 1985, C/M/188).

⁶² EU's third party written submission in *Russia - Transit*, para. 50.

⁶³ Footnote 286, *Devas v. India Award* (2016).

welfare of the nation"⁶⁴ or to "the welfare of the people, sustainable economic and social development",⁶⁵ but that does not mean that the security exceptions in the WTO agreements should cover all those situations. The interpretation of WTO law cannot be a matter of unilateral determination by Members.

Although Article XXI of GATT 1994, Article XIV bis of GATS and Article 73 of TRIPS do not have an Article XX-style chapeau, this does not mean that security exceptions should not be applied and interpreted in good faith. Indeed, every treaty must be performed in good faith, as per Article 26 of VCLT. This is necessary so as to prevent and detect possible abuses.

The analytical tools developed with regard to the general exceptions could be useful in designing a legal test for the security exceptions, while taking into account the particularities of the "mother of all exceptions". The correct legal approach to the security exceptions is not a matter of jurisdiction, but a matter of standard of review. And however deferential that standard of review is, there are certain objective elements that cannot be subjectively contorted: cows, cows ladies and gentlemen, are not fissionable materials!

⁶⁴ Paragraph (c) of Section 232 of the Trade Expansion Act of 1962 provides that:

In the administration of this section, the Secretary and the President shall further recognize the close relation of the **economic welfare** of the Nation to our national security, and shall take into consideration **the impact of foreign competition on the economic welfare** of individual domestic industries; and any **substantial unemployment, decrease in revenues of government, loss of skills or investment**, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security. [emphasis added]

⁶⁵ Articles 2 and 3 of the National Security Law of the People's Republic of China (2015) state that:

National security refers to the relative absence of international or domestic threats to the state's power to govern, sovereignty, unity and territorial integrity, **the welfare of the people, sustainable economic and social development, and other major national interests**, and the ability to ensure a continued state of security.

National security efforts shall adhere to a comprehensive understanding of national security, make the security of the People their goal, political security their basis and economic security their foundation; make military, **cultural and social security** their safeguard and advance international security to protect national security in all areas, build a national security system and follow a path of national security with Chinese characteristics. [emphasis added]