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CAN INTERNATIONAL TRADE LAW RECOVER?

THE SECURITY EXCEPTION IN WTO LAW: ENTERING A NEW ERA

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For seventy years, the security exception in the multilateral trade regime has mostly lain dormant. The exception first appeared in the General Agreement on Tariffs and Trade 1947 (GATT 1947), before being incorporated in the General Agreement on Tariffs and Trade 1994 (GATT 1994) upon the creation of the World Trade Organization (WTO). However, security exceptions also exist in several other WTO provisions, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS). Until recently, perhaps through a combination of WTO member restraint and fortuitous circumstances, WTO panels have not had to make a definitive ruling on the meaning and scope of these exceptions. Yet, suddenly, the security exception lies at the center of multiple explosive disputes, posing a potential threat to the WTO's very existence.

The text and history of the security exception reveal a longstanding recognition among GATT contracting parties, and now WTO members, of the highly sensitive nature of this exception. Members have traditionally refrained from bringing legal challenges against security-based measures and from invoking the security exception as a defense. Current disputes involving not only recent tariffs imposed by the United States but also other trade restrictions imposed by the United Arab Emirates (UAE) and Russia break with this culture of restraint, raising the question of the extent to which the security exception is "self-judging." Rather than forcing a WTO panel to rule on this contentious question, WTO members should collaborate more generally to resolve escalating challenges to the international trading system.

Text and History of the Security Exception

Article XXI of the GATT 1994 states, *inter alia*:

> Nothing in this Agreement shall be construed …
>
> (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests …
>
> (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; [or]
>
> (iii) taken in time of war or other emergency in international relations … .

Significant uncertainty surrounds this provision. A 1987 Secretariat note on Article XXI of the GATT 1947 recorded one case in which the GATT contracting parties had discussed measures taken under Article XXI(b)(ii)

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and eight in which they had discussed measures taken under Article XXI(b)(iii).[1] In addition, the Secretariat stated that in 1975 Sweden notified import restrictions on leather shoes, plastic shoes, and rubber boots "taken in conformity with the spirit of Article XXI."[2] At that time, Sweden explained that these import quotas rested on security grounds:

> [Sweden's] security policy … necessitates the maintenance of a minimum domestic production capacity in vital industries … to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations.[3]

This passage, arising in the context of footwear, highlights how extensive the WTO security exception might be if read to encompass any industry that a WTO member might regard as necessary to "meet basic needs."[4] Other contracting parties "expressed doubts as to the justification" of Sweden's measures under Article XXI, noting the lack of a "detailed economic justification" and the fact that they were introduced "at a time of high unemployment in their own countries."[5] Nevertheless, the Swedish problem dissipated when Sweden later decided to terminate the quotas, at least with respect to leather shoes and plastic shoes.[6]

Current WTO Disputes Involving the Security Exception

A series of WTO disputes involving the security exception has emerged in the last two years. The most advanced of these disputes is brought by Ukraine against Russian restrictions on traffic in transit from Ukraine to third countries via Russia. Ukraine alleges breaches of the "Freedom of Transit" provisions of GATT Article V.[7] In response, Russia has invoked the security exception in Article XXI.[8]

In 2017, Qatar requested the establishment of a panel with respect to "measures taken in the context of coercive attempts at economic isolation" allegedly imposed by the UAE against Qatar.[9] Qatar brings claims under GATT 1994, GATS, and TRIPS, including under provisions regarding transit and nondiscrimination. The UAE contends that, pursuant to the security exceptions in these three agreements, it was "forced to take measures in response to Qatar's funding of terrorist organizations."[10]

[1] Negotiating Group on GATT Articles, Article XXI: Note by the Secretariat para. 14, GATT Doc. MTN.GNG/NG7/W/16 (Aug. 18, 1987).

[2] General Agreement on Tariffs and Trade [GATT 1947], Minutes of Meeting Held in the Palais des Nations, Geneva, on 31 October 1975, GATT Doc. C/M/109, 9 (Nov. 10, 1975) [hereinafter Palais Minutes].

[3] GATT 1947, Sweden—Import Restrictions on Certain Footwear, para. 4, GATT Doc. L/4250 (Nov. 17, 1975).

[4] *Id.*

[5] Palais Minutes, *supra* note 2, at 9.

[6] GATT 1947, Sweden—Import Restrictions on Certain Footwear: Addendum, GATT Doc. L/4250/Add.1 (Mar. 15, 1977).

[7] Request for the Establishment of a Panel by Ukraine, Russia—Measures Concerning Traffic in Transit, WTO Doc. WT/DS512/3 (Feb. 10, 2017).

[8] Australia's Third Party Executive Summary, Russia—Measures Concerning Traffic in Transit, para. 13, WT/DS512 (Feb. 27, 2018) [hereinafter Australia Summary].

[9] Request for the Establishment of a Panel by Qatar, United Arab Emirates—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, para. 1, WT/DS526/2 (Oct. 12, 2017).

[10] *Qatar Seeks WTO Panel Review of UAE Measures on Goods, Services, IP Rights*, WTO (Oct. 23, 2017). *See also* WTO, Dispute Settlement Body—Minutes of Meeting—Held in the Centre William Rappard on 23 October 2017, para. 4.4, WT/DSB/M/403 (Feb. 20, 2018) [hereinafter DSB Minutes].

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Additional disputes have arisen more recently in relation to the U.S. imposition of tariffs on steel and aluminum imports, under Section 232 ("Safeguarding national security") of the Trade Expansion Act of 1962. Of the countries that export these products to the United States, only Argentina, Australia, Brazil, and the Republic of Korea are exempt from these tariffs, with Australia subject to monitoring in an undisclosed arrangement and the other three countries agreeing to import quotas of questionable WTO legality. Nine countries have commenced WTO disputes against the United States in relation to these tariffs: China, India, Canada, the European Union, Mexico, Norway, Russia, Switzerland, and Turkey. In addition, the United States has commenced six disputes against retaliatory tariffs imposed by Canada, China, the European Union, Mexico, Russia, and Turkey. WTO panels have already been requested in most of these fifteen disputes.[11]

Is the Security Exception Self-Judging?

WTO members' statements since the initiation of these WTO disputes have expressed, at one end, the idea that political actions fall outside the scope of WTO dispute settlement or the WTO altogether, and, at the other end, the idea that trade actions taken for security reasons must be scrutinized in a WTO dispute, as with any other trade action. As noted above, these opposing ideas have surrounded the security exception for decades.[12] The reality to date has fallen somewhere in the middle. Seven years ago, Roger Alford argued that the self-judging nature of the security exception was balanced by a well-functioning understanding that the exception should be invoked rarely, wisely, and in good faith.[13] If the exception is indeed self-judging, the effectiveness of that understanding may be coming to an end.

The suggestion that the security exception is wholly self-judging takes on an even more extreme form in the view of the United States, which sees the exception as "non-justiciable." That is, according to the United States, once a WTO member has invoked the security exception in a WTO dispute, all that the WTO panel seized of the matter may do is recognize that invocation and make no further findings:[14]

> Issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement.[15]

> [I]f the WTO were to undertake to review an invocation of Article XXI, this would undermine the legitimacy of the WTO's dispute settlement system and even the viability of the WTO as a whole.[16]

These statements do not overstate the significance of the security exception for the future of the WTO. In the current political climate, and given ongoing U.S. concerns with the WTO Appellate Body, the United States might well withdraw from the WTO should a panel choose to assess a member's invocation of Article XXI (particularly its own). With the Doha Round all but dead, a U.S. withdrawal might be the final blow from which the WTO could

[11] *See, e.g.*, Request for the Establishment of a Panel by the United States, Canada—Additional Duties on Certain Products from the United States, WT/DS557/2 (Oct. 19, 2018); Request for the Establishment of a Panel by Norway, United States—Certain Measures on Steel and Aluminium Products, WT/DS552/10 (Oct. 19, 2018).

[12] *See* GATT Council, Decision Concerning Article XXI of the General Agreement, GATT Doc. L/5426 (Dec. 2, 1982).

[13] Roger Alford, *The Self-Judging WTO Security Exception*, 3 Utah L. Rev. 697, 758 (2011).

[14] Third Party Executive Summary of the United States of America, Russia—Measures Concerning Traffic in Transit, paras. 7–8, 18, WT/DS512 (Feb. 27, 2018).

[15] *See, e.g.*, Communication from the United States, United States—Certain Measures on Steel and Aluminium Products, WT/DS548/13 (July 6, 2018).

[16] Statements by the United States at the Meeting of the WTO Dispute Settlement Body 34 (Oct. 29, 2018) [hereinafter U.S. Statements].

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not recover. Yet a panel's decision not to do so may be equally problematic for the legitimacy of the WTO, creating the possibility of an enormous loophole for noncompliant trade actions:

> [O]n the ground that security could be undermined by dependence on foreign supplies, a country might … restrict its imports, either discriminatorily or otherwise, by invoking the security clause of the Agreement. This would encourage the tendency towards autarky which the Agreement professed to eliminate.[17]

A panel that simply accepted a member's invocation of a security exception in a WTO agreement might also fail to perform its obligation to "make an objective assessment of the matter before it, including an objective assessment of … the applicability of and conformity with the relevant covered agreements."[18]

WTO members that agree with the United States that WTO panels may not review a member's invocation of a WTO security exception include the UAE, Bahrain, Saudi Arabia, and Egypt.[19] Russia appears to take a similar view in the dispute brought against it by Ukraine.[20] However, Russia may face difficulty in achieving a consistent position on Article XXI, given its own claim against the U.S. Section 232 steel and aluminum tariffs.

At the other extreme, the European Union maintains that Article XXI is an "affirmative defence" for which the respondent bears the burden of proof, including demonstrating that the challenged measure falls within one of the paragraphs of that provision.[21] According to the European Union, the words "which it considers" in Article XXI(b) qualify only the word "necessary" and not subparagraphs (i) to (iii), which the panel must separately and objectively assess. The panel must also determine whether the respondent "can plausibly consider that the measure is necessary," based on the respondent's explanations.[22] The European Union emphasizes similarities between GATT Article XXI and Article XX, suggesting that the interpretative approach developed by the Appellate Body in relation to Article XX, including the stringent necessity test, is adaptable to Article XXI.[23]

The question of whether the words "which it considers necessary" qualify only the words "for the protection of its essential security interests" in Article XXI(b) or also subparagraphs (i) to (iii) of paragraph (b) is important. For example, subparagraph (ii) refers to essential security interests relating not only to traffic in arms but also "to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment." As highlighted in the example of Swedish footwear, trade in almost any goods or materials might be seen as being indirectly involved in military supply, depending on how broadly this concept is defined. Similarly, subparagraph (iii) refers to essential security interests taken in time of not only war but also "other emergency in international relations," which could be construed narrowly or broadly by a panel or a respondent.

Finding a Way Out

These various security-related disputes, and particularly those directly involving the United States, create very delicate circumstances against a backdrop of global trade tension. The nine WTO complainants against the U.S.

[17] GATT 1947, Summary Record of the Twenty-Second Meeting, GATT Doc. CP.3/SR.22, 4 (June 8, 1949).

[18] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 11, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Apr. 15, 1994, 33 ILM 1125 [hereinafter DSU]. *See also id.*, art 7.

[19] DSB Minutes, *supra* note 10, at paras. 4.4–4.7.

[20] *See, e.g.*, Australia Summary, *supra* note 8, at paras. 8–9. *See also* WTO, Minutes of Meeting—Held in the Centre William Rappard—on 20 February 2017, para. 7.3, WT/DSB/M/392 (Apr. 5, 2017).

[21] European Union: Third Party Written Submission, Russia—Measures Concerning Traffic in Transit, paras. 24, 38, WT/DS512 (Nov. 8, 2017) [hereinafter EU Submission].

[22] *Id.* at paras. 39, 62–63.

[23] *Id.* at paras. 34, 60–61.

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Section 232 tariffs appear to have attempted to alleviate some of this tension by characterizing these tariffs as safeguard measures, which are allowed subject to compliance with detailed requirements set out in the WTO's Agreement on Safeguards. This characterization appears designed to allow WTO members to impose retaliatory tariffs against U.S. imports, pursuant to Article 8 of the Agreement on Safeguards. This approach might also be thought to avoid direct applicability of the security exception in GATT Article XXI, although that exception might still apply to the Agreement on Safeguards. However, as the United States has emphasized, the tariffs in question were imposed under Section 232 rather than U.S. safeguards law, and the United States is justifying them under Article XXI rather than the Agreement on Safeguards.[24]

Another approach that has been suggested to avoid the volatility of the security exception is for WTO members to pursue nonviolation complaints under GATT Article XXIII(1)(b) instead of violation complaints under Article XXIII(1)(a).[25] In a nonviolation complaint, a WTO member alleges that a "benefit accruing to it directly or indirectly" under the WTO agreements "is being nullified or impaired or that the impairment of any objective of the Agreement is being impeded" as a result of "the application by another Member of any measure, whether or not it conflicts" with WTO law.[26] Four of the complainants mentioned nonviolation as well as violation in their initial requests for consultations regarding the U.S. Section 232 tariffs, but not in their requests for panel establishment.[27] The benefit of a nonviolation complaint might be that a panel could rule in favor of the complainant without determining that the respondent has breached WTO law, requiring the respondent to "make a mutually satisfactory adjustment" rather than withdrawing the measure.[28] However, nonviolation complaints do not necessarily obviate the need for consideration of the security exception; nor are nonviolation complaints necessarily available in the face of a member invoking that exception.[29] Nonviolation complaints also raise their own difficulties and their use requires caution.[30]

Major substantive reforms on any WTO issue are unlikely at present. To hope for a textual amendment to or even an authoritative interpretation of the security exception[31] may be unrealistic. In any case, the exception as drafted already reflects a balancing of members' need for autonomy in ensuring their own security and the interests of the multilateral trading system in preventing unilateral trade actions. If a panel must rule on the security exception, its only feasible option is to adopt a deferential approach, assessing the respondent's invocation of the exception pursuant to the usual rules of treaty interpretation[32] to determine whether the respondent has acted in good faith.[33]

[24] *See, e.g.*, U.S. Statements, *supra* note 18, at 43.

[25] *See, e.g.*, Nicolas Lamp, *Why WTO Members Should Bring Pure Non-Violation Claims Against National Security Measures*, INT'L ECON. L. & POL'Y BLOG (Oct. 15, 2018).

[26] General Agreement on Tariffs and Trade 1994 art. XXIII:1(b), Apr. 15, 1994, 1867 UNTS 187.

[27] India, Mexico, Switzerland, and Turkey.

[28] DSU, *supra* note 20, art. 26.1(b).

[29] *But see, e.g.*, Panel Report, United States—Trade Measures Affecting Nicaragua, para. 4.9, GATT Doc. L/6053 (Oct. 13, 1986); Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, para. 188, WT/DS135/AB/R (Adopted Apr. 5, 2001) [hereinafter EC Asbestos].

[30] *See, e.g.*, EC Asbestos, *supra* note 31, para. 186; Graham Cook, *The Legalization of the Non-Violation Concept in the GATT/WTO System* (Oct. 24, 2018); Marrakesh Agreement Establishing the World Trade Organization arts IX(2), X, Apr. 15, 1994, 1867 UNTS 154.

[31] Marrakesh Agreement Establishing the World Trade Organization arts IX:2, X, Apr. 15, 1994, 1867 UNTS 154.

[32] DSU, *supra* note 20, art. 3.2; Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 UNTS 331.

[33] *See* EU Submission, *supra* note 23, para. 62; Stephan Schill & Robyn Briese, *"If the State Considers": Self-Judging Clauses in International Dispute Settlement*, 13 MAX PLANCK Y.B. U.N. L. 61 (2009). *See also* Australia Summary, *supra* note 9, paras. 29, 37.

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To avoid a panel ruling, the disputing parties must find a satisfactory resolution to these disputes outside the WTO dispute settlement system, with the support of the relevant panels, the WTO Secretariat, and other WTO members. For the U.S. disputes in particular, this possibility is likely to depend on progress on other fronts examined in this symposium, such as WTO discussions on Appellate Body appointments, the conclusion of new or revised U.S. trade agreements, and China–United States conflicts. Only by addressing these broader developments might the WTO be able to return to a more stable equilibrium on the WTO security exception.

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