COMMERCIALIZING NATIONAL SECURITY? NATIONAL SECURITY EXCEPTIONS' OUTER PARAMETER UNDER GATT ARTICLE XXI

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ABSTRACT

The security exceptions under the GATT Article XXI set forth an important carve-out for WTO Members. The provision arguably contains an element of a "self-judging" nature. It also extends to other non-military and commercial sectors. Nonetheless, the provision remains subject to a WTO panel's review. The provision also sets forth specific requirements to be fulfilled before it is properly invoked. In particular, the terms "for the purpose of supplying a military establishment" and "other emergency in international relations" establish an important outer parameter for the interpretation and application of the provision. The negotiating history and ordinary meaning interpretation of these two terms also support such conclusion. As such, irrespective of and without prejudice to the self-judging nature of the article, proper invocation of Article XXI would demand showing of the satisfaction of these two requirements of the provision.

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KEYWORDS: *security exceptions*, *national security*, *essential security interests*, *Section 232*, *GATT Article XXI, necessity defense*, *self-judging provision*

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I. INTRODUCTION

It appears that Section 232 investigations under the Trade Expansion Act of 1962 (19 U.S.C. § 1862, as amended)[1] have suddenly become a main policy tool for the United States (hereinafter U.S.)to protect its domestic industries.[2] It was April 19, 2017 that the United States Department of Commerce (hereinafter "USDOC"), at the request of President Donald J. Trump, initiated its steel investigation under the section, followed by an aluminum investigation one week later,[3] to determine if imports of those products threatened the "national security" of the United States. The USDOC made an affirmative determination in its report dated January 23, 2018. The reports revealed that steel and aluminum were essential to U.S. national security but that foreign imports were undermining domestic producers of those products. The reports then concluded that the present quantities and circumstance of imports were "weakening [the U.S.] internal economy" and "threatened to impair the national security as defined in Section 232."[4] Based on these findings, President Trump signed an executive order on March 8, 2018 to impose a 25% tariff on steel imports

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[1] Section 232 is sometimes called the "national security clause", because it enables the U.S. President to impose restrictions on imports that the United States Department of Commerce [hereinafter USDOC] determines threaten to impair the national security. RACHEL F. FEFER & VIVIAN C. JONES, CONG. RESEARCH SERV., IF10667, SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 (2018), https://fas.org/sgp/crs/misc/IF10667.pdf.

[2] Since 1963, there were 28 investigations initiated under Section 232. These investigations of manufactured goods were focused on specific products, including antifriction bearings and gears and gearing products. Until 2017, 16 cases were determined in the negative and only 8 cases were determined in the affirmative (2 cases were terminated or not reached to a finding). Based on those positive determinations by USDOC, President recommended action 5 times. These determinations and actions were all related to petroleum products or crude oil. However, one of these actions, a conservation fee added to petroleum products, was held illegal by a federal court, and of the remaining 4 actions, 2 were based on the Mandatory Oil Import Program (an initiative that predated enactment of Section 232). Accordingly, among 28 investigations under Section 232 from 1963 to 2017, only two cases in effect were led to import restriction measures: one was an Iranian oil embargo in 1979, and the other was a Libyan oil embargo in 1982. *See* BUREAU OF INDUS. & SEC. OFFICE OF TECH. EVALUATION, SECTION 232 INVESTIGATIONS PROGRAM GUIDE: THE EFFECT OF IMPORTS ON THE NATIONAL SECURITY (June 2007), https://www.bis.doc.gov/index.php/documents/section-232-investigations/86-section-232-booklet/file, at 13-20; *Id.*

[3] FEFER & JONES, *supra* note 1.

[4] *See The Effect of Imports of Steel on the National Security*, U.S. DEP'T COM. BUREAU INDUS. & SEC. OFFICE TECH. EVALUATION 55 (Jan. 11, 2018), https://www.awpa.org/wp-content/uploads/2018/02/Section-232-Investigation-of-Steel-Imports-DOCs-Report-and-Recommenda....pdf; *The Effect of Imports of Aluminum on the National Security*, U.S. DEP'T COM. BUREAU INDUS. & SEC. OFFICE TECH. EVALUATION 104 (Jan. 17, 2018), https://www.bis.doc.gov/index.php/forms-documents/aluminum/2223-the-effect-of-imports-of-aluminum-on-the-national-security-with-redactions-20180117/file.

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and a 10% tariff on aluminum imports.[5] The measure was finally imposed as of June 1, 2018. Some countries received exemptions from the measure through bilateral negotiation: for instance, Korea accepted export quotas in exchange for exemption,[6] while Australia and the European Union (E.U.) secured respective exemptions through their own give-and-takes.[7]

Almost consecutively, the USDOC initiated yet another "national security" investigation into automobiles and auto parts on May 23, 2018.[8] The investigation is still under way as of this writing in late August of 2018. It attempts to look into whether imports of automobiles and parts are weakening the U.S. automobile industry and consequently the U.S. national security.[9] It is expected that the USDOC will issue a report to the President by September 2018 at the earliest. The USDOC is also rumored to be preparing similar investigations into other sectors, including shipbuilding, semiconductors and uranium industries,[10] suggesting that national security stands to become a new major vehicle for the Trump Administration's import restrictions in various sectors.

With this in mind, this article aims to closely examine Article XXI of the General Agreement on Tariffs and Trade 1994 (hereinafter "GATT 1994"), a provision that sets forth national security exceptions in the goods trade. In particular, this article focuses on two key elements of the provision —namely, the terms "for the purpose of supplying a military establishment," and "other emergency in international relations." This article argues that the two terms are broad enough to cover non-military and commercial situations.

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[5] *See* Donald J. Trump, *Presidential Proclamation on Adjusting Imports of Steel into the United States*, WHITE HOUSE (Mar. 8, 2018), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states/; Donald J. Trump, *Presidential Proclamation on Adjusting Imports of Aluminum into the United States*, WHITE HOUSE (Mar. 8, 2018), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states/.

[6] *See* Donald J. Trump, *Presidential Proclamation on Adjusting Imports of Steel into the United States*, WHITE HOUSE (Mar. 22, 2018), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states-2/; Donald J. Trump, *Presidential Proclamation on Adjusting Imports of Aluminum into the United States*, WHITE HOUSE (Mar. 22, 2018), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states-2/.

[7] *See* Donald J. Trump, *Presidential Proclamation on Adjusting Imports of Steel into the United States*, WHITE HOUSE (May 31, 2018), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states-4/; Donald J. Trump, *Presidential Proclamation on Adjusting Imports of Aluminum into the United States*, WHITE HOUSE (May 31, 2018), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states-4/.

[8] *U.S. Department of Commerce Initiates Section 232 Investigation into Auto Imports*, U.S. DEP'T COMMERCE (May 23, 2018, 8:20 PM), https://www.commerce.gov/news/press-releases/2018/05/us-department-commerce-initiates-section-232-investigation-auto-imports.

[9] *Id.* ¶ 4.

[10] Jennifer Jacobs et al., *U.S. Plans Uranium Import Probe That May Lead to Tariffs*, BLOOMBERG (July 18, 2018, 4:33 AM), https://www.bloomberg.com/news/articles/2018-07-17/u-s-said-to-plan-uranium-import-probe-that-may-lead-to-tariffs.

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But they set forth specific requirements such that a simple showing of economic concern, mere reference to an economic harm, or remote relevance to military activity does not satisfy them. Chapter II discusses historical backgrounds of the national security exceptions. Chapter III then discusses legal issues associated with the two terms at issue based on the general rules of interpretation under the 1969 Vienna Convention on the Law of Treaties (hereinafter "VCLT"). Chapter IV concludes.

II. HISTORICAL BACKGROUNDS OF NATIONAL SECURITY EXCEPTIONS

Although much as the issue of national security has rarely been analyzed in the context of the World Trade Organization (hereinafter "WTO") Agreements, examining its historical backgrounds would offer a useful starting point for the discussion. Both U.S. municipal law and WTO Agreements possess a record of serious discussions on the scope of the national security exceptions even in the early days of the legislative debates.

A. Evolution of United States Municipal Law

The idea that national security somehow depends on a strong domestic economy has been deeply engrained in American politics since the adoption of the U.S. constitution. For example, George Washington, in his first State of the Union Address presented to U.S. Congress, stated that:

> A free people ought not only to be armed, but disciplined; to which end a uniform and well-digested plan is requisite; and their safety and interest require that they should promote such manufactories as tend to render them independent of others for essential, particularly military, supplies.[11]

As a matter of fact, this also echoed the sentiments of Alexander Hamilton, the first U.S. Secretary of the Treasury, who stated in his Report on the Subject of Manufactures:

> Not only the wealth; but the independence and security of a Country, appear to be materially connected with the prosperity of manufactures. Every nation, with a view to those great objects, ought to endeavour to possess within itself all the essentials of

[11] THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 543-49 (Dorothy Twohig & W.W. Abbot eds., 1993). Original Source see *From George Washington to the United States Senate and House of Representatives, 8 January 1790*, FOUNDERS ONLINE, NATIONAL ARCHIVES (June 13, 2018), http://founders.archives.gov/documents/Washington/05-04-02-0361.

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> national supply. These comprise the means of subsistence, habitation, clothing and defence.[12]

Based on these early notions of the importance of national security, high tariffs have had significant support in American politics since the early days of U.S. history. Following the War of 1812, British manufactures began entering the American market and U.S. Congress responded by enacting the Tariff of 1816 (also known as the Dallas Tariff) in 1816, which is regarded as the first protectionist tariff adopted by the U.S. government. A more massive wave of protectionism came in the wake of the Civil War, in order to support fast industrialization of the U.S. economy,[13] culminating in the Tariff Act of 1897 (also known as the Dingley Act). The Great Depression provided yet another turning point for the introduction of protectionist tariffs such as the Fordney-McCumber Tariff Act of 1922 and the well-known Tariff Act of 1930 (commonly known as the Smoot-Hawley Tariff Act of 1930). Interestingly, in these historical developments the steel industry had been one of the major domestic interest groups behind these legislative efforts.[14]

While U.S. national interest and public security had been frequently mentioned in the discussions of these legislative developments, a specific mechanism had not existed in these legislations which are similar to a national security exception seen in trade agreements today. It appears that situations of other countries were not that much different. This is largely due to the fact that protectionist tariffs at that time were simply unilateral measures imposing high tariffs based on policy decisions, and the concept for a systematized "national security" exception to respond to a national emergency probably did not exist in this period.

An "exception" was first introduced into domestic statutes as a response to the inception of the GATT 1947. In the negotiations of the GATT 1947, the U.S. and other countries strongly felt the need for a national security exception, which ultimately led to the adoption of Article XXI of the agreement.[15] Reflecting this development and addressing increasing domestic concerns, the *Trade Agreements Extension Act of 1954* became the first U.S. legislation to contain a national security exception, allowing the President to refuse tariff reduction for reasons of "national defense

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[12] ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 135 (1904).

[13] Bennett D. Baack & Edward John Ray, *The Political Economy of Tariff Policy: A Case Study of the United States*, 20(1) EXPLORATIONS ECON. HIST. 73, 74 (1983).

[14] Bennett D. Baack & Edward John Ray, *Tariff Policy and Comparative Advantage in the Iron and Steel Industry: 1870-1929*, 11(1) EXPLORATIONS ECON. HIST. 4, 4 (1973).

[15] Alan S. Alexandroff & Rajeev Sharma, *The National Security Provision—GATT Article XXI*, *in* THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1572, 1572 (Patrick F. J. Macrory et al. eds., 2005).

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requirement."[16] In the following year, the exception clause was further expanded to allow all necessary measures including imposition of quotas when imported items threatened to impair "national security".[17] The 1955 Act, however, also narrowed the scope of an "industry" and required an affirmative decision as to whether increased imports had contributed "substantially" to causing "serious injury."[18]

The national security exception clause was further strengthened by the *Trade Agreements Extensions Act of 1958* which introduced important changes. First, the language of the relevant provision was further expanded to apply not only to an imported "article", but also to "its derivatives." The reasons for relief actions were also broadened to include situations where either the "quantities" or the "circumstances" of imports threaten to impair the national security of the U.S. Moreover, the executive branch was now given discretion to consider various factors when determining whether imports threatened to impair national security. These factors broadened the scope of the clause by employing a definition which was broader than the previously used term of "national defense requirements." Thirdly, private parties were now accorded the right to petition for relief under the clause and the executive branch was required to publish a report in response.[19]

These changes had been finalized in Section 232 of the *Trade Expansion Act of 1962*. Particularly, various factors for consideration were finally enumerated in subsection (c), which stipulated 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

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[16] *See*, *e.g.*, WILLIAM MCKINLEY, SPEECHES AND ADDRESSES OF WILLIAM MCKINLEY: FROM HIS ELECTION TO CONGRESS TO THE PRESENT TIME 19 (1893). In this address to congress regarding the Wood Tariff Bill, McKinley argues that the matter of tariffs concerns the self-preservation and security of nations.

[17] David D. Knoll, *Section 323 of the Trade Expansion Act of 1962: Industrial Fasteners, Machine Tools and Beyond*, 10(1) MD. J. INT'L L. & TRADE 55, 58 (1986).

[18] TRADE AGREEMENT EXTENSIONS ACT OF 1955, https://www.gpo.gov/fdsys/pkg/STATUTE-69/pdf/STATUTE-69-Pg162-2.pdf; Robert E. Baldwin, *The Changing Nature of US Trade Policy Since World War II*, *in* THE STRUCTURE AND EVOLUTION OF RECENT US TRADE POLICY 5, 16. (Robert E. Baldwin & Anne O. Krueger eds.,1984).

[19] TRADE AGREEMENT EXTENSIONS ACT OF 1958, https://www.gpo.gov/fdsys/pkg/STATUTE-72/pdf/STATUTE-72-Pg673.pdf; Knoll, *supra* note 17, at 58.

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national security (emphases added).[20]

Again, this development reflected the view that the issues of national security and the protection of domestic industries were inherently intertwined with one another. Stated differently, foreign imports' serious threats to U.S. domestic businesses stood to be counted as an instance to invoke national security.

Recent attempts of the U.S. to impose Section 232 tariffs and quotas should be examined from this historical evolution of U.S. municipal laws and political perspectives surrounding them. From this perspective, recent attempts by the U.S. administration to impose tariffs and quotas to protect U.S. domestic industries under the name of national security are largely recurrences of its long-standing efforts and tendencies.[21] Obviously, the difference is that the present application of the exception is more direct and aggressive. But the legal framework to operationalize the exception has been there for a significant amount of time in U.S. history. U.S. history. In other words, pinpointing the Trump administration or its trade policy alone as a sole source of the current trade friction may not provide an accurate picture of the issue. On that note, references to the U.S., U.S. trade policies and U.S. legislations in this article are not intended to single out and criticize the U.S. References to these are made simply because U.S. domestic legislations and their application in 2018 are triggering new debates as to the meaning and boundary of the national security exception within the U.S. domestic legislative framework within the overall ambit of the WTO regime.

B. Evolution of the WTO Agreements

While U.S. domestic statutes have taken economic situations into consideration when formulating national security exceptions, the WTO regime is not entirely clear. In any event, the plain text of Article XXI does not include a specific language that rules out the possibility of applying the exception to economic situation. Nonetheless, the intention of the drafters has remained controversial. For instance, some scholars have underscored that the GATT was introduced with the possibility of invoking economic situation-associated national security exceptions in mind. They pointed out the fact that when the International Trade Organization (ITO) Charter was being negotiated during the 1940s, Europe was in a period of great economic slump. At that time, they argue, the U.S. realized the need to formulate a provision that ensures a carve-out when it experiences an economic crisis,

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[20] 19 U.S.C. § 1862(d) (2012).

[21] Furthermore, Section 232 could be regarded as one of several tools that the United States has at its disposal to address unfair trade practices, such as Section 201 of the Trade Act of 1974, 19 U.S.C. § 2252. *See* FEFER & JONES, *supra* note 1.

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such that it could balance domestic economic interests against international obligations arising from treaties.[22]

This tendency of exploring an exception due to economic situations is also found in other treaties of the U.S. Consider, for example, the Friendship Commerce & Navigation Treaties (hereinafter "FCN Treaties") concluded by the U.S. Some of the U.S. FCN Treaties contain provisions that permit contracting parties to deviate from the treaty obligations at the time of adverse economic situations. For instance, foreign exchange restriction measures are permitted so as to maintain a necessary level of monetary reserves.[23] Others include provisions that allow deviation from national treatment obligations during the time of economic emergency.[24] Additionally, these FCN Treaties did include security exceptions clauses which are similar with trade agreements such as the GATT.[25] Therefore, the issue of applying these security exceptions to non-military or commercial aspects remained in the FCN Treaties as well.

In addition, the examination of the debates during the negotiation for the

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[22] The purpose of the International Trade Organization [hereinafter ITO] Charter was to establish the ITO in 1948 as a special agency of the United Nations, but it never entered into force. For more background on the ITO, see e.g., Richard Toye, *The International Trade Organization*, *in* THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION 85, 85-100 (Amrita Narlikar et al. eds., 2012). At the time, multilateral trade was handled through the GATT and eventually replaced by the formal establishment of the WTO. *See The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Aug. 27, 2018). *See generally* Peter Neumann, *The Relationship Between GATT and the United States*, 3(1) CORNELL INT'L L.J. 63 (1970).

[23] Treaty of Friendship, Commerce and Navigation, U.S.–Greece, Aug. 3, 1951, art. XV(2), https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005345.asp [hereinafter U.S.-Greece FCN Treaty]; Treaty of Friendship and Commerce, U.S.-Pak., Nov. 12, 1954, art. XII(2), https://tcc.export.gov/trade_agreements/all_trade_agreements/exp_005355.asp; Treaty of Friendship, Commerce and Navigation, U.S.-Japan, Apr. 2, 1953, art. XII(2), https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005539.asp; Treaty of Friendship, Commerce and Navigation, U.S.-Nicar., Jan. 21, 1956, art. XII(2), http://www.mpil.de/de/pub/publikationen/archiv/world-court-digest.cfm?fuseaction_wcd=aktdat&aktdat=107090400100.cfm. Another variations of the balance-of-payments exception permitted the restriction "to the extent necessary to maintain or restore adequacy to its monetary reserves . . . ." Treaty of Friendship, Establishment and Navigation, U.S.-Lux., Feb. 23, 1962, art. XI(2), https://tcc.export.gov/trade_agreements/all_trade_agreements/exp_005857.asp; Treaty of Friendship, Establishment and Navigation, U.S.-Belg., Feb. 21, 1961, art. X(2), https://treaties.un.org/doc/publication/unts/volume%20480/volume-480-i-6967-english.p df; Treaty of Friendship, Commerce and Navigation, U.S.-Neth., Mar. 27, 1956, art. XII(2), https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005868.asp. *See* Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21(2) CORNELL INT'L L.J. 201, 245-46 (1988).

[24] Kenneth J. Vandevelde, *Rebalancing Through Exceptions*, 17(2) LEWIS & CLARK L. REV. 449, 457, 457 n.46 (2013) (stating that this FCN "subordinated the right of corporations to national treatment to local law"). Treaty of Friendship, Commerce and Navigation, U.S.-R.O.C., Nov. 4, 1946, art. III(3), http://loc.gov/law//help/us-treaties/bevans/b-cn-ust000006-0761.pdf. Treaty of Amity and Economic Relations, U.S.–Eth., Sept. 7, 1951, art. VIII, https://tcc.export.gov/trade_agreements/all_trade_agreements/exp_002815.asp.

[25] *See* Vandevelde, *supra* note 24, at 452-53; *see, e.g.*, U.S.–Greece FCN Treaty, *supra* note 23, art. XXIII(1).

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GATT 1947 indicates that drafters understood that the proposed security exception in Article XXI would also cover economic hardship situations. For example, during discussion a delegate for the Netherlands asked whether the exceptions relating to emergencies in international relations and the essential security interests of Members could be worded in such a manner as to clarify their intended interpretation, and the U.S. delegate mentioned these words had appeared in the U.S. draft Charter because it was thought that some latitude must be granted for security as opposed to commercial purposes.[26] The U.S. delegate stated:

> We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: "by any Member of measures relating to a Member's security interests," because that would permit anything under the sun. Therefore we thought it well to draft provisions which would take care of really essential security interests and, at the same time, so far as we could, to limit the exceptions and to adopt that protection for maintaining industries under every conceivable circumstance.[27]

The discussions at that time also describe the concern of the drafters that this exception, even though applicable to commercial contexts and economic situations, has its own bounds. It was pointed out that appropriate invocation of the provision requires a genuine linkage to a national security concern or a palpable impact on national security. The relevant part of the discussion is as follows:

> I think there must be some latitude here for security measures. It is really a question of a balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose. We have given considerable thought to it and this is the best we could produce to preserve that proper balance.[28]

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[26] U.N. ESCOR, 2d Sess., 33d mtg. at 3, U.N. Doc. E/PC/T/A/SR/33 (July 24, 1947) [hereinafter E/PC/T/A/SR/33].
[27] U.N. ESCOR, 2d Sess., 33d mtg. at 19, U.N. Doc. E/PC/T/A/PV/33 (July 24, 1947) [hereinafter E/PC/T/A/PV/33].
[28] *Id.* at 21.

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III. LEGAL MEANING OF ARTICLE XXI — AN ANALYTICAL APPROACH

Despite its utmost importance, the realm of security exceptions remains to be a relatively unexplored legal terrain. Presumably for many reasons, states have refrained from either invoking this provision or challenging measures of other countries invoking it. There have been only three (practically two) cases in the WTO regime in which the respondents have formally invoked security exceptions in their disputes: they are, *U.S. — The Cuban Liberty and Democratic Solidarity Act* (DS39) and *Nicaragua — Measures Affecting Imports from Honduras and Colombia* (DS188 and DS201).[29] Professor Peng once found that China in both *China — Measures Related to the Exportation of Various Raw Materials* and *China — Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* considered, but did not officially invoke, security exceptions.[30] In a recent dispute between Ukraine and Russia, parties were reported to have referred to the security exceptions,[31] but the panel proceeding is still pending as of late and a determinative jurisprudence on this issue has yet to be formulated. Noting a rare opportunity to look into this particular topic, other countries, as third parties, have also provided their own observations in this respect.[32]

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[29] There were several cases in the GATT era in which the responding state invoked security exceptions. However, in one case the specific import measure was voluntarily revoked. *See, e.g.*, Report of the Panel, *Sweden — Import Restrictions on Certain Footwear*, at 3, L/4250 (Nov. 11, 1975). Or, in another case, the GATT Article XXI was removed from terms of reference of the Panel. *See* Report of the Panel, *United States — Trade Measures Affecting Nicaragua*, ¶ 5.1, L/6053 (Oct. 13, 1986).

[30] Shin-yi Peng, *Cybersecurity Threats and the WTO National Security Exceptions*, 18(2) J. INT'L ECON. L. 449, 461 (2015).

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> [On September 14, 2016, Ukraine] . . . request consultations with the Government of the Russian Federation pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article XXII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") concerning multiple restrictions on traffic in transit from the territory of Ukraine through the territory of the Russian Federation to third countries ("the restrictions on traffic in transit") . . . .
>
> The restrictions on traffic in transit that the Russian Federation has recently adopted and implemented following Ukraine's decision to start the implementation of the Deep and Comprehensive Free Trade Area with the European Union on 1 January 2016 constitute measures inconsistent with the Russian Federation's WTO obligations.

Request for Consultations by Ukraine, *Russia — Measures Concerning Traffic in Transit on Ukrainian Products*, at 1, WTO Doc. WT/DS512/1 (Sept. 21, 2016).

[32] U.S. Third-Party Submission Regarding GATT Article XXI, *Russia — Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512 (Nov. 7, 2017), https://ustr.gov/sites/default/files/enforcement/DS/US. 3d.Pty.Sub.Re.GATT.XXI.fin.%28public%29.pdf; European Union Third Party Written Submission, *Russia — Measures Concerning Traffic in Transit*, WT/DS512 (Nov. 8, 2017), http://trade.ec.europ a.eu/doclib/docs/2018/february/tradoc_156602.pdf.

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A. Structure of Article XXI

Article XXI of the GATT 1994 provides for security exceptions as follows:

> Article XXI: Security Exceptions
> Nothing in this Agreement shall be construed:
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
> (b) to prevent any contracting party 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; or
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

In short, the above provision allows Members to be released from their otherwise existing GATT obligations under three specified conditions: i.e., (a) when a Member is trying to avoid requirement "to furnish any information the disclosure of which [the Member] considers contrary to its essential security interest"; (b) when the Member is trying to make an "action which it considers necessary for the protection of its essential security interest"; and (c) when the Member is taking an action to pursue the "obligations under the United Nations Charter for the maintenance of international peace and security."[33] As such, only three specific bases are permitted under Article XXI. Among the three, as paragraphs (a) and (c) are designed to address specific situations of disclosure of confidential information and implementation of United Nations (hereinafter "U.N.") Charter obligations respectively, and thus do not purport to address the "general" national security exceptions situations covering, most notably, commercial circumstances, it is arguably the case that only paragraph (b)

[33] General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

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may stand to apply to the present debates concerning the applicability of Article XXI at the time when national key industries are allegedly being threatened.[34]

In turn, actions to protect "essential security interests" under paragraph (b) are further specified in three sub-paragraphs: in turn, they are actions (i) "relating to fissional 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"; and (iii) "taken in time of war or other emergency in international relations."[35] While the language "essential security interests" offers a large room of ambiguity for scope and definition, and the term "it considers" critically explains who can make a determination in this respect, the three subparagraphs of paragraph (b) arguably set forth rather objective criteria.[36] Among the three sub-paragraphs, sub-paragraph (i) is again distinguished from the other two as it refers to specific instances of "fissionable materials". Thus, general situations of essential security interests are arguably covered by either sub-paragraphs (b) or (c). As such, these two subparagraphs are examined in this article.

Similarly, Article XIV*bis* of the *General Agreement on Trade in Services* (hereinafter "GATS") and Article 73 of the *Trade-Related Aspects of Intellectual Property Rights* (hereinafter "TRIPs") basically incorporate the same provision into their respective texts as security exceptions. However, one interesting observation is that sub-paragraph (b)(i) of GATS security

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[34] It is true that paragraph (a) may turn out to be applicable to a particular panel proceeding as a responding Member may invoke it to refuse to furnish relevant information to the panel, in an effort to virtually block a panel proceeding. If this happens, this would certainly pose practical and legal problems. That said, this paragraph does not address the issue of whether non-military, commercial activities are covered by Article XXI and if so, how much. At the same time, a refusal to provide information or respond to questions from a panel could take place in other WTO disputes as well and a reviewing panel has the authority to apply adverse inference rules when needed. For example, the panel in *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft* applied adverse inference rules based on the request by the U.S. It mentioned:

> We recall that paragraph 7 of Annex V provides that a panel "should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process." In the light of the foregoing, and consistent with our previous finding on the amount of the loan payments made to Airbus under the challenged PROFIT programmes, we conclude pursuant to paragraph 7 of Annex V, that the challenged subsidies under the PROFIT I and II are specific within the meaning of Article 2.1(c) of the SCM Agreement (citation omitted).

Panel Report, *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft*, ¶ 7.1580, WTO Doc. WT/DS316/R (adopted June 1, 2011).

[35] GATT, *supra* note 33, art. XXI.

[36] Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 (3) MICH. J. INT'L L. 558, 584-91(1991).

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exceptions includes the wording "fissionable and fusionable materials"[37] instead of referring to "fissional materials" as in the GATT and the TRIPs. It is unclear as to how this discrepancy would affect the interpretation and application of the condition in practice.[38] But in terms of the two general situations under sub-paragraphs (b) and (c) of the GATT, analogous analyses can equally apply to security exceptions provisions of the GATS and the TRIPs. Such being the case, it is imperative to look into these two sub-paragraphs of Article XXI of the GATT in order to determine the parameter of the security exceptions in the agreement as well as other agreements of the WTO regime.

B. Distinction from the Issue of "Self-Judging" Nature

There are various legal issues involved in the interpretation and application of Article XXI. It seems that most discussions revolve around the so-called "self-judging nature" of the provision based on its language of "it considers" in paragraphs (a) and (b), which controversially raises the questions of who makes a decision on circumstances under the two paragraphs, and further whether a WTO panel has jurisdiction over a dispute arising under the paragraphs. On the one hand, various scholars have argued that the provision is indeed self-judging in essence.[39] In other words, Members are allowed to invoke security exceptions "free from any judicial review."[40] This understanding virtually offers a "carte blanche" which means that there would be no boundary as to what can be accepted as a Member's essential security interest under the provision.

On the contrary, other scholars have argued that the provision does not provide a "blank check" to a Member invoking it. Notably, Scholemann and Ohlhoff have distinguished the "authority to define" by a Member from the "authority to interpret" by a panel.[41] The authors opine that a Member can self-define what their essential security interests are, but a panel still reserves the right to review the conformity of the measure at issue with the provision. Akande and Williams observe that Members can subjectively determine whether "it [is] necessary to protect," but also state that the scope of "essential security interests" relevant to this provision is bounded by the

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[37] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994), art. XIV*bis*.

[38] Ji Yeong Yoo & Dukgeun Ahn, *Security Exceptions in the WTO System: Bridge or Bottle-neck for Trade and Security?*, 19(2) J. INT'L ECON. L. 417, 424 (2016).

[39] Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the US Does*, 19(2) U. PA. J. INT'L ECON. L. 263, 276-77 (1998); Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011(3) UTAH L. REV. 697, 702.

[40] Bhala, *supra* note 39, at 268-69.

[41] Hannes L. Scholemann & Stefan Ohlhoff, *Constitutionalization and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93(2) AM. J. INT'L L. 424, 426-27 (1999).

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conditions set forth in sub-paragraphs (b)(i), (ii), and (iii).[42] In other words, Akande and Williams posit that only specific "essential security interests" subject to the sub-paragraphs (b)(i), (ii) and (iii) are able to fulfil the requirements of security exceptions of the provision. This observation is both meaningful and important because the term "essential security interests" are not in vacuum but instead stated in the specific context of three elements under sub-paragraphs (b)(i), (ii) and (iii).

As mentioned above, the focus of this article is placed on paragraph (b) of the provision. As such, the term "essential security interests" is arguably not open-ended but stands to cover only three specific instances described in the three sub-paragraphs. Such interpretation, however, does not deprive paragraph (b) of the self-judging nature in its entirety. To the extent that the term "it considers" exists in the text, it is the Member at issue that makes a (initial) decision on the existence of three situations under the sub-paragraphs at the time of the adoption of a measure. In that respect, an argument could be made that paragraph (b) does contain a critical self-judging element in comparison to other provisions of the WTO Agreements. It does not mean, however, that a decision made by a Member referring to the provision is somehow WTO challenge-proof, or should always be found to be consistent with the obligation under the provision. By way of comparison, consider a decision made by an investigating authority in an antidumping investigation. Even if the decision is made by the investigating authority based on facts "it considers" relevant and according to jurisprudence "it considers" applicable, the decision still remains within the purview of the WTO scrutiny. Likewise, under this logic presumably various provisions in other covered agreements also contain implicitly the wording "it considers," it being the measure taking Member at issue. Thus, it seems questionable whether the term "it considers" in Article XXI should be elevated to the level where the judicial review authority of a WTO panel is deprived. It follows then that a decision made by a Member under Article XXI based on facts "it considers" relevant or justifiable should still be challengeable at a WTO panel by an aggrieved Member. A WTO panel does and should retain the authority to review an Article XXI dispute between Members.

If anything, more properly understood, the term "it considers" in paragraph (b)[43] might be understood to accord an invoking Member a higher

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[42] Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 399-402 (2003).

[43] There is a similar term found in other parts of the WTO Agreements. For instance, Article 2.10 of the Technical Barrier to Trade Agreement (TBT agreement) contains the term "as it finds necessary." But the scope of the term in Article 2.10 is quite limited: the term "as it finds necessary" only applies to whether and how to omit steps for publication requirements in certain situations. On the other hand, the term "it considers" in Article XXI permits a Member to determine whether a situation to invoke the provision has indeed arisen—arguably, a much broader and more fundamental decision.

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level of latitude when it comes to a factual determination under the provision. In other words, given the highly fact-intensive nature of the matter in the area of national security and the information disparity between an invoking Member and outsiders, a Member's decision on "factual" issues under paragraph (b) might deserve deference from a reviewing panel, if the decision does show prima facie the existence of the constitutive elements. A reviewing panel would have to defer to a decision of the Member on the "factual" issues even if it disagrees with the decision on certain factual points, as long as the Member presents its own rationale, together with attendant evidence, to show the existence of prerequisite legal elements. Failing this, a decision of the Member may not enjoy a deferential treatment: in a sense, it has not even crossed the initial threshold to enter the realm of Article XXI.

In reviewing disputes raised under Article XXI, a WTO panel should retain its standard of review at least on the genuineness and reasonableness of the measure. An invoking Member would have to carry the burden of proof to explain the consistency of its measure against the minimum criteria stated in the sub-paragraphs of paragraph (b). Under this standard, a reviewing panel would at least see to it whether an alleged measure is in fact an action in disguise or otherwise constitutes an apparent abuse.[44]

In short, even if paragraph (b) is deemed to contain a self-judging element, it still remains subject to the review of a WTO panel. Once challenged, a deferential standard might be applied by the panel to the invoking Member's decision on "factual" issues relating to the measure. In order to survive the scrutiny of the panel even under a deferential standard, however, any decision must show, or at least reasonably indicate, that the measure at issue satisfies prerequisite requirements of Article XXI. The next section looks into the prerequisite requirements set forth in paragraph (b) in a more detailed manner, so that a legal boundary can be discerned which distinguishes genuine instances of national security invocation from abusive or disguised attempts.

C. Two Key Terms in Article XXI

With this framework in mind, the question then boils downs to how to interpret the two terms in the sub-paragraphs of paragraph (b): *i.e.*, (i) "for the purpose of supplying a military establishment," and (ii) "other emergency situations". These two terms directly relate to an issue of whether non-military (that is commercial) situations can be covered by the provision and if so, how broadly or narrowly.

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[44] PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES, AND MATERIALS 596 (2013).

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1. "For the Purpose of Supplying a Military Establishment" — First of all, the phrase of "for the purpose of supplying a military establishment" constitutes a core element of sub-paragraph (ii) of paragraph (b). Successful invocation of the sub-paragraph hinges upon how to make of the meaning of this particular phrase. Notably, what is protected under the provision is not just a measure "relating to" the protection of national security in abstract, but a measure adopted "for the purpose of supplying military establishment." As there is no single definition for this term or a precedent that interprets this term, it needs to be dissected into different groups for interpretation.

To begin with, "a military establishment" also merits attention. It is not just "military," "armed forces" or "army", but "'a' military establishment". The use of an indefinite article "a" would mean that the provision is not about securing supply for the military in general, but aims to address supply for "specific" equipment, hardware or facility of the military. The negotiating history also includes discussions on this topic where direct linkage to a specific military equipment or hardware was being contemplated under this provision.[45] In addition, the term "establishment" means "an organized body of men, maintained at the expense of the sovereign or of the state for a specific purpose."[46] As such, an invoking Member would be required to explain how its proposed measure serves restoration, preservation or protection of "a military establishment" by dealing with a lack of supply, shortage of supply or a problem with supply. In other words, what is expected under the provision is a more systematized showing of the problem of supply directed to a particular entity or segment of a Member's military.

With respect to the term "for the purpose of," the following provisions in the WTO Agreements include the term:

(a) *Agreement for the Implementation of Article VI of the General Agreement on Tariffs and Trade* (hereinafter "Antidumping

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[45] GATT Analytical Index summarizes the discussion as follows:

> During discussions in the Geneva session of the Preparatory Committee, in connection with a proposal to modify Article 37(g) [XX(g)] to permit export restrictions on raw materials for long-term defense purposes, the question was put whether the phrase "for the purpose of supplying a military establishment" would permit restrictions on the export of iron ore when it was believed that the ore would be used by ordinary smelting works and ultimately for military purposes by another country. It was stated in response that "if a Member exporting commodities is satisfied that the purpose of the transaction was to supply a military establishment, immediately or ultimately, this language would cover it".

WORLD TRADE ORGANIZATION, THE GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 602 (1998); U.N. ESCOR, 2d Sess., 36th mtg., at 19, U.N. Doc. E/PC/T/A/PV/36 (Aug. 12, 1947); see also proposal referred to U.N. ESCOR, 2d Sess., U.N. Doc. E/PC/T/W/264 (Aug. 6, 1947).

[46] *See id.*

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Agreement"), Article 2.2: "*For the purpose of* paragraph 2 . . . ."

(b) Antidumping Agreement Article 3.1: "*for the purpose of* Article VI of GATT 1994 . . . ."
(c) GATT Article VI:6(b): "importation of any product *for the purpose of* offsetting dumping or subsidization which causes or threatens material injury . . . ."
(d) GATT Article III:6: "shall be treated as a customs duty *for the purpose of* negotiation."
(e) GATT Article XXV: "Representatives of the contracting parties shall meet from time to time *for the purpose of* giving effect to those provisions of this Agreement . . . ."

These instances notwithstanding, there are currently no precedents that interprets the wording "for the purpose of" in the WTO regime. According to Oxford English Dictionary, "purpose" means "the end to which an object or action is directed or aimed at."[47] Thus, "for the purpose of" would mean something along the lines of "in order to achieve a particular objective."

Likewise "supplying" means "to furnish or provide a person with something; to satisfy the wants of, provide for; or to furnish with regular supplies of a commodity."[48] This language therefore virtually negates a rationale to invoke the provision to restrict import because of the alleged oversupply of a product. If anything, "oversupply" would mean "supply" of a product is more than sufficient or too sufficient.[49] In addition, "establishment" means "an organized body of men, maintained at the expense of the sovereign or of the state for a specific purpose."[50] If that is the case, it would be difficult for "supply" to become an issue. At least, there would have to be a reliable connection between alleged oversupply and a possible problem of supply (for instance, a shortage of supply).

Therefore, the term "for the purpose of supplying a military establishment" in the sub-paragraph (b) would collectively mean "in order to achieve a particular objective of providing a state organization related to soldiers or armed forces with something." An ordinary meaning of these terms would arguably point to a rather confined situation, as opposed to an open-ended or remote relationship with the military in abstract.

2. "Other Emergency in International Relations" — Secondly, the term

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[47] *Purpose Definition*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/154972?rskey=aQzJM9&result=1&isAdvanced=false#eid (last visited Aug. 27, 2018).
[48] *Supplying Definition*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/194666?rskey=KkFNOB&result=1&isAdvanced=false#eid (last visited Aug. 27, 2018).
[49] According to Oxford English Dictionary, "oversupply" denotes "the action of supplying (goods or resources) in excess of what is demanded or required." *Oversupply Definition*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/235628?rskey=lTkeCC&result=2&isAdvanced=false#eid/ (last visited Aug. 27, 2018).
[50] *Establishment Definition*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/64536?redirectedFrom=Establishment#eid (last visited Aug. 27, 2018).

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"other emergency in international relations" in sub-paragraph (iii) of paragraph (c) of Article XXI also merits a careful scrutiny in terms of its meaning and scope. If anything, the term does not simply mean "a difficult situation" a country may face. To the contrary, it refers to a situation which is not a war but arguably causes a national threat which is measurable, comparable or equivalent to a war. The plain meaning of the phrase would support such a conclusion.

More than anything else, in the sub-paragraph, the terms "war" and "other emergency" are connected with the disjunctive term "or" in the sub-paragraph. This structure would support the proposition that the two terms would stand on a similar or equivalent footing of national importance. Otherwise, a single term of "emergency" would have been sufficient to cover all situations of national importance ranging a wide range of national difficulty spectrum. In other words, the invocation of this sub-paragraph does not necessarily require a war or similar military conflicts, but instead may cover other non-military situations as well. But such non-military situations would also have to reach the level of threatening the national interest as a war (or similar military conflict) would.[51]

Such interpretation of the wording is in line with similar language in other treaties. For example, consider the 1962 Draft Convention on the Protection of Foreign Property adopted by the Organisation of the Economic Co-operation and Development (OECD).[52] While the instrument has not evolved into a convention, its Article 6 offers helpful guidance in this respect.[53] It states: "A Party may take measures in derogation of this Convention only if: (i) involved in war, hostilities or other grave public emergency of a nation-wide character due to force majeure or provoked by

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[51] During discussion among delegates in Preparatory Committee, a U.S. delegate mentioned:

> "[I]n time of war" I think no one would question the need of a Member, or the right of a Member, to take action relating to its security interests and to determine for itself - which I think we cannot deny—what its security interests are. . . .
>
> "[O]r 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.
>
> I think there must be some latitude here for security measures. It is really a question of a balance.

E/PC/T/A/PV/33, *supra* note 27, at 20-21.

[52] OECD, *Resolution of the Council on the Draft Convention on the Protection of Foreign Property*, OECD Doc. C(67)102 (Oct. 12, 1967), https://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf.

[53] RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 2 (1995).

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unforeseen circumstances or threatening its essential security interests; or . . . ."[54]

The above provision presents three categories of instances for the invocation of the exception, namely war, hostilities and other grave public emergency of a nation-wide character. This formulation clarifies the non-military situation to be covered by the provision. It should be grave public emergency of a nation-wide character. The emergency situation is placed on the same footing with "war" or "hostilities" . Notably, the phrase is not formulated in a way where national emergency is broadly defined so as to cover various situations of national difficulty. If that had been the case, the wording would have been "grave public emergency of nation-wide character including (such as) war or hostilities." Enumeration of three items using a disjunctive word would be taken as indicating they are largely on par with one another in terms of the gravity or exigency.

In fact, the understanding of an "emergency situation" could be fundamentally retrieved from the concept of "necessity defense" [55] under customary international law. This is a concept that a state threatened with a self-preservation crisis possesses the right to take steps necessary to preserve its existence even if such an act would result in a breach of international law by itself. As a matter of fact, this concept has existed in international law for a long time. According to Hugo Grotius, during war a state is justified to occupy and control a neutral territory, an action which would constitute violation of relevant international law, if military necessity requires such action. However, it should be noted that Grotius also emphasized that invoking the right of necessity had to be based on a genuine belief that other states in similar situations would do the same [56] - apparently a rather objective criterion in applying the necessity defense. In this regard, Grotius further explained that "under the plea of necessity . . . nothing short of extreme exigency can give one power a right over what belongs to another no way involved in the war." [57] His reference to "extreme exigency" would certainly draw our attention. Grotius continued that "no emergency can justify anyone in taking and applying to his own use what the owner stands in equal need of himself." [58] His point is that the invocation of the necessity defense should also contemplate on the consequences on other states; for instance, such invocation should not put another state in equal peril. Thus, in short, according to Grotius, even if the necessity defense should be recognized under international law, there exists an outer boundary in relying upon the defense.

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[54] OECD, *supra* note 52, art. 6.
[55] HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 80 (A.C. Campbell trans., 2001) (1901).
[56] *Id*.
[57] *Id*. at 377.
[58] *Id*.

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Meanwhile, this necessity defense concept has found its way into the 2001 International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter "ILC Draft Articles").[59] Article 25 of the ILC Draft Articles thus provides:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
> (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
> (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
> (a) the international obligation in question excludes the possibility of invoking necessity; or
> (b) the State has contributed to the situation of necessity (emphases added).[60]

In particular, this provision of the ILC Draft Articles received careful attention and thorough scrutiny in recent investment arbitrations. Discussing "essential interests" in the context of a series of investment arbitrations initiated against Argentina, one of the core questions was whether a presumably defensive action against an economic emergency could somehow qualify as a measure to safeguard "essential interests against a grave and imminent peril" within the meaning of Article 25 of the ILC Draft Articles.[61] Investment arbitration tribunals composed under the International Center for the Settlement of International Disputes (hereinafter "ICSID"), while divergent on respective decisions in specific investment disputes, still appear to converge on the basic theme that preserving an essential interest of a nation would be seeking to maintain the core system or the very existence of the nation.

For instance, the *CMS* Tribunal applying the U.S.–Argentina BIT examined this provision of the ILC Draft Articles. The conclusion in the

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[59] *See, e.g.*, Jorge E. Vinuales, *State of Necessity and Peremptory Norms in International Investment Law*, 14(1) L. & BUS. REV. AM. 79, 79-80 (2008). *Cf.* Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106(3) AM. J. INT'L L. 447, 452-53 (2012) (arguing that ILC Article 25 should not be seen as the equivalent to the necessity doctrine under customary international law).

[60] Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries 2001*, art. 25, at 80, U.N. Doc. A/56/10 (2008).

[61] CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 305 (May 12, 2005).

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award was that an economic hardship rising to the level of the "total" economic collapse would be counted as an instance of invoking Article 25 of the ILC Draft Articles.[62] Using this standard as a benchmark, the tribunal found that the Argentine financial crisis in late 1990s failed to reach that level. The Argentine government's argument based on Article 25 of the ILC Draft Articles was thus dismissed.[63] In the *Enron* decision, yet another arbitral tribunal reviewing the necessity defense under Article 25 of the ILC Draft Articles pronounced that a deciding factor is not a mere economic hardship but the "out of control" nature of the events or unmanageability of the circumstances.[64] The same rationale was also adopted by the subsequent *Sempra* tribunal.[65] In summary, these tribunals agreed that economic hardships can trigger threatening of essential security of a nation, thereby opening the door for a necessity defense. The specific situation of Argentina, however, did not rise to that level, according to these tribunals.

On the other hand, other investment dispute tribunals have found that the situation of Argentina was indeed severe enough and entitled the South American country to rely upon the necessity defense of Article 25. For instance, the tribunal in *LG&E* determined that Argentina was facing "an extremely serious threat".[66] As such, its government had to take "immediate, decisive action to restore civil order and stop the economic decline".[67] Interestingly, the tribunal in the dispute opined that a severe economic problem of a certain scale may be equal to "[a] military invasion".[68] The tribunal in *Continental Casualty* also sided with the view of *LG&E* and determined that the Argentine situation met the requirement

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[62] The arbitral tribunal in this dispute quipped:

> A severe crisis cannot necessarily be equated with a situation of total collapse. And in the absence of such profoundly serious conditions it is plainly clear that the Treaty will prevail over any please of necessity. However, if such difficulties, without being catastrophic in and of themselves, nevertheless invite catastrophic conditions in terms of disruption and disintegration of society, or are likely to lead to a total breakdown of the economy, emergency and necessity might acquire a different meaning.

Id. ¶ 354.

[63] *Id.* ¶ 355.

[64] Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶ 307 (May 22, 2007); *see* Ibironke T. Odumosu-Ayanu, *International Investment Law and Disasters: Necessity, Peoples, and the Burden of (Economic) Emergencies*, *in* THE INTERNATIONAL LAW OF DISASTER RELIEF 314, 323 (David D. Caron et al. eds., 2014) ("Under this formula the necessity defense would be unavailable except the state was facing imminent collapse.").

[65] Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 349 (Sept. 28, 2007).

[66] LG&E Energy Corp. LG&E Capital Corp. LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 257 (Oct. 3, 2006).

[67] *Id.* ¶ 238.

[68] *Id.*

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for the invocation of Article 25 of the ILC Draft Articles.[69]

Through these investment disputes, it has been clarified as regards the "necessity defense" that the justification of a situation deviating from treaty obligations demands "grave and imminent peril" for the state in question. At the same time, the action so chosen should be "the only way" to counteract the identified problem. The "gravity and imminence" requirement and the "no-other-alternative" requirement are all related to and thus qualify "essential interest". It follows then that a proper "necessity defense" under customary international law as expressed in Article 25 of the ILC Draft Articles does not simply mean an "essential interest" but an "essential interest" in exigent contexts or in emergency situations. Since the security exceptions in Article XXI can trace its roots back to the "necessity defense" under customary international law, this understanding of Article 25 of the ILC Draft Articles should offer an important guideline for the interpretation of Article XXI. In particular, a claimed "emergency" situation under sub-paragraph (iii) of paragraph (b) should be understood and interpreted in connection with "essential interest," now "essential security interest" as phrased in the chapeau of paragraph (b). If anything, this analysis could be regarded as an instance of 'contextual' interpretation, a prong under Article 31 of the VCLT. Likewise, the concept of 'essentiality' can be also reflected from the WTO case law as well as the illustrated investment disputes discussed above.

For example, consider how the adjective "serious" is interpreted to qualify the nature of "injury" in the Agreements on Safeguards (hereinafter "Safeguards Agreement") or "material" to qualify "injury" in the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures (hereinafter "SCM Agreement"). As a matter of fact, the Appellate Body attaches an important meaning to the qualifying word of "essential" in the WTO Agreements.[70] The Panel in *Russia — Commercial Vehicles* stated that: [71] "[a] fact is essential where it is 'extremely important and

[69] *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶ 180 (Sept. 5, 2008). *See* Odumosu-Ayanu, *supra* note 64, at 324 (commenting that the lack of "clear rules before emergencies occur" has contributed to the diverging opinions of the Argentine ICSID tribunals).

[70] *See* Appellate Body Report, *European Union — Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, ¶ 5.123, WTO Doc. WT/DS442/AB/R (adopted Sept. 29, 2017) (citing Panel Report, *European Union — Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, ¶ 7.226, WTO Doc. WT/DS442/R (adopted Sept. 29, 2017)).

[71] Panel Report, *Russia — Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, ¶ 7.256, WTO Doc. WT/DS479/R (adopted Apr. 9, 2018).

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necessary'[72], 'indispensable'[73] or 'significant, important or salient'[74] in the process of reaching a decision as to whether or not to apply definitive measures."

The Panel in *China — Raw Material*[75] has reaffirmed this understanding of "essential" in its interpretation of GATT XI:2(a).[76] According to the panel, something should be "extremely important and necessary" to be essential.

All in all, the tribunals interpreting the necessity defense and WTO panels interpreting similar wordings, which arguably provides a theoretical underpinning of the security exceptions at present, seem to agree that economic situations can be counted as instances of exigency threatening an essential interest (thus, triggering a national security concern). They do, however, point to the fact that the economic situations thus cited should be severe enough and grave enough, amounting to the level of near collapse of the economy. Variations in specific determinations notwithstanding, the legal standard regarding circumstances triggering the necessity or similar defenses seems to have been established. This would in turn shed light on the analyses of the security exceptions in Article XXI.

In this respect, the term "in time of . . . emergency" under the context of GATT Article XXI could also cover a situation of economic emergency of which the level of imminence is readily observable and palpable. Notably, the term used here is not just "in relation to" emergency or "in anticipation" of emergency or "in the likelihood" of emergency. It arguably demands an "actual" emergency or "existence" of emergency, an interpretation that would further narrow the scope of "other emergency in international relations" under sub-paragraph (iii) of Article XXI. The negotiating history also supports this interpretation. According to the negotiating history, the term in Article XXI was introduced only to cover "real security" interests

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[72] *Essential Definition*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/essential (last visited Aug. 27, 2018).

[73] *Essential Definition*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/64503?redirectedFrom=essential#eid (last visited Aug. 27, 2018).

[74] Appellate Body Report, *China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United State*, ¶ 240, WTO Doc. WT/DS414/AB/R (adopted Nov. 16, 2012).

[75] Panel Report, *China — Measures Related to the Exportation of Various Raw Materials*, ¶¶ 7.238-353, WTO Doc. WT/DS394/R; WT/DS395/R; WT/DS398/R (adopted Feb. 22, 2012). Furthermore, the Appellate Body in *China — Raw Materials* interpreted the term "essential" as "[a]bsolutely indispensable or necessary." It concluded that GATT Article XI:2(a) refers to critical shortages of foodstuffs or otherwise absolutely indispensable or necessary products. *See* Appellate Body Report, *China — Measures Related to the Exportation of Various Raw Materials*, ¶ 326, WTO Doc. WT/DS394/AB/R; WT/DS395/AB/R; WT/DS398/AB/R (adopted Feb. 22, 2012).

[76] This provision states that "export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products *essential* to the exporting contracting party." GATT, *supra* note 33, art. XI:2(a) (emphasis added).

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and was not supposed to cover "anything under the Sun".[77] Hence, the view that this provision should not be interpreted overly broadly so as to cover a wide range of national activities or circumstances with remote relevance to national security was even raised during the initial discussion concerning this provision. It can therefore be said that the present provision of sub-paragraph (iii) of Article XXI was introduced based on such shared understanding during the negotiation.

D. Addressing "Commercial" Concerns

Coming back to the case at hand, the security exception of Article XXI of the GATT 1994 should be analyzed in accordance with the general rules of treaty interpretation of Article 31 of the VCLT, with the examination of the historical backgrounds of the introduction of the provision and how similar terms have been interpreted in other fora of international law. Analyses of Section 232 of the United States, which has been declared and agreed to be based on Article XXI, should also be conducted with the same legal framework in mind.

1. Economic Emergency Covered — Most importantly, the above analyses show that commercial situations can also be covered by Article XXI of the GATT. Members are permitted to rely upon the provision on account of their economic concern. There does not seem to be any specific reason or rationale to exclude an economic peril from the scope of the exception. In that respect, referring to commercial reasons to invoke Article XXI does not disqualify, in and of itself, the measure at issue from the universe of Article XXI. This is more so these days, because non-physical force could in fact threaten the existence of a state more seriously and effectively than other conventional threats. Consider a comprehensive economic retaliation or cyber-attacks that could instantly disrupt the operation of a government.

Consequently, such commercial situations should be severe and grave enough to be eligible under the provision. Likewise, commercial concerns should elevate to the level of preserving the core national interest in response to an economic emergency or something equivalent to it. It is quite telling that even the financial crisis of Argentina toward late 1990s was not deemed to be sufficient to meet the threshold of emergency according to some arbitral tribunals reviewing a comparable provision.

So, the mere fact that Section 232 aims to address domestic commercial

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[77] *See* WTO, *supra* note 45, at 600; E/PC/T/A/PV/33, *supra* note 27, at 20-21; U.N. ESCOR, 2d Sess., 33d mtg. at 19, U.N. Doc. E/PC/T/A/PV/33.Corr.3 (July 30, 1947); *see also* E/PC/T/A/SR/33, *supra* note 26 ("We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: 'by any Member of measures relating to a Member's security interests,' because that would permit *anything under the sun*. Therefore we thought it well to draft provisions which would take care of *real security* interests . . . .").

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or business issues of the U.S. would not disqualify the measure from the realm of Article XXI. The question is whether the situation surrounding the measure is shown to be urgent, pressing and/or exigent. A situation that lacks exigency may be simply an economic difficulty or hardship, not to be remedied with the invocation of Article XXI. If anything, this is a situation to be remedied by other means available in the WTO Agreements. Antidumping Agreement and SCM Agreement provide options to address unfair trade and Safeguards Agreement offers options to deal with fair trade. If needed, even a waiver can be secured.[78]

2. Outer Parameters for Security Exception — The requirement that an economic emergency should be presented certainly lays down an important outer parameter for the application of the provision. At the same time, more generally, the structure and languages of Article XXI evidence that the provision is designed to provide a "narrow" exception for genuine essential security interest preservation measures. This article incorporates specific terms and conditions for the invocation of the provision. In particular, paragraph (b), the focal point in the invocation of the exception for commercial reasons, allows security exceptions only in confined situations: a candidate measure must be "relating to fissionable materials or the materials from which they are derived," "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials . . . for the purpose of supplying a military establishment," and "taken in time of war or other emergency in international relations." All these wordings in the provision clearly set forth detailed requirements to be satisfied for proper invocation of the exception. These languages of the provision do not support the view that a measure to protect a domestic industry that produces products which may be related, even remotely, to the production of defense related products falls under the provision. Analyses of Section 232 investigations into steel and aluminum products and automobiles should be carried out from this standpoint.

More importantly, as an exception the provision should be construed in a manner that can prevent abuse of the exception. The premise of essential security interests requires a linkage between the measure at issue and (i) military security, or (ii) non-military security (such as commercial interest) whose national importance at least rises to an equivalent level. The wording of the article apparently conveys the meaning that it should guard against improper imposition of trade-barriers for commercial, business or political purposes under the guise of national security. Otherwise, the measure may turn out to be an illegitimate carte blanche or a "self-proclaimed" waiver.

In this respect, the relevant circumstances surrounding a measure merit

[78] *See* Marrakesh Agreement Establishing the World Trade Organization art. IX.3, Apr. 15, 1994, 1867 U.N.T.S. 154.

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a careful scrutiny. For instance, the U.S. has made it clear that the proposed Section 232 investigation into automobiles and auto imports is in fact intended as an instrument for a general economic policy,[79] as opposed to address an "essential security interests" as the term is written or understood under the WTO Agreements and international law. Relevant U.S. domestic law also seems to indicate that basic tenets of Article XXI are not satisfied. For instance, according to 10 U.S. Code § 2533b (also known as the "Berry Amendment") and Subpart 225.70 of the *Authorization Acts, Appropriations Acts, and Other Statutory Restrictions on Foreign Acquisition* (revised Jan. 1, 2018), a commercially available off-the-shelf (COTS) vehicle is explicitly categorized as an automotive item to which domestic source restrictions on national security grounds do not apply (225.7003-1(b)(2)(i)). Furthermore, ground vehicles for defense purposes are manufactured by original equipment manufacturers (OEMs) specializing in defense products, most of which are U.S. brands based in the U.S., before they are procured by the U.S. Department of Defense. This system is presently being rated by the U.S. Department of Defense as providing "stability to the prime OEMs in this [ground vehicles] sector."[80] As such, the present investigation does not stand in line with the existing U.S. statutes or explanation. These contradicting elements of domestic law and policies would probably work against showing the satisfaction of the requirements of Article XXI, which are not merely hortatory but set forth detailed terms and conditions for WTO Members relying upon the provision for national security reasons.

With the danger of a premature forecast, should analyses or explanations showing the satisfaction of the constitutive elements of paragraph (b) not be provided during the ongoing investigation, an imposition of import-restriction measure may be found to be inconsistent with Article XXI. This would be a probable conclusion, even if the provision is understood to be self-judging. On the other hand, should analyses and explanations be provided prima facie with a minimum level of rationale and objectivity, then the decision would deserve deference from a reviewing panel. Such a decision would probably overcome the scrutiny of a panel in the future.

IV. CONCLUDING THOUGHT

The security exceptions under GATT Article XXI set forth an important carve-out for WTO Members in terms of fulfilling their legal obligations under the WTO Agreements while preserving the very existence of their

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[79] *U.S. Department of Commerce Initiates Section 232 Investigation into Auto Imports*, *supra* note 8 ("This investigation will consider whether the decline of the domestic automobile and automotive parts production threatens to weaken the internal economy of the United States . . . .").

[80] U.S. DEP'T OF DEF., FISCAL YEAR 2017 ANNUAL INDUSTRIAL CAPABILITIES REPORT TO CONGRESS 71 (2018).

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statehood. Compared to other exception provisions of various sorts contained in the WTO Agreements, the coverage of this provision is arguably broad and open-ended to a significant extent. The provision also provides an invoking Member with a high level of leeway in making a factual determination, as underscored by the so-called "self-judging" element of the provision. Based on the textual analysis of the provision, the exception also applies to other non-military sectors and non-military interests. Thus, its coverage could arguably extend to commercial sectors and business interests as well.

That said, the provision also sets forth specific requirements to be fulfilled before it is properly invoked even with respect to commercial sectors or business interests. In particular, the terms "for the purpose of supplying a military establishment" and "other emergency in international relations" included in the article suggest an important outer parameter for the application of the provision. Negotiating history and ordinary meaning interpretation of these two terms also indicate that Article XXI stands to cover only a specifically defined, limited set of commercial activities and business interests under this exception. This interpretation is critical since these two terms are most directly related to raising Article XXI in order to address a presumably commercial concern or business interest.

In other words, Article XXI's coverage would not extend to situations where there is a mere relationship between a product at issue and military activities. Therefore, it does not cover situations where an import restriction may help domestic industries that may in turn help the military one way or another. In interpreting and applying Article XXI, these outer parameters should receive adequate attention and deserve a careful scrutiny.

As such, irrespective of and without prejudice to the self-judging nature of the article, proper invocation of Article XXI on account of domestic industries' situations would mandate showing of the satisfaction of these two requirements of the article. An invoking Member, therefore, needs to show how these two elements are satisfied beyond making references to a self-judging nature of the provision and to a mere relationship between the measure at issue and military interests being protected.

This interpretation should provide a useful guidance for Members who consider the invocation of the national security exceptions in their trading relations, which increasingly seems to be the case. The analysis of Article XXI should also apply to similar security exceptions in Article XIV^{bis} of the GATS and Article 73 of the TRIPs, as well as comparable exceptions in various Free Trade Agreements and Regional Trade Agreements.

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