PETRIFICUS TOTALUS: THE SPELL OF NATIONAL SECURITY!

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ABSTRACT

The "national security" exception is a preserve for sovereign power which finds a place in the 1947 General Agreement on Tariffs and Trade (hereinafter "GATT"), and practically all subsequent trade agreements, but has never been tested in a trade dispute. The reason is simple: while it has been invoked a few times, matters have never escalated sufficiently for it to be tested.

However, there are currently ten disputes (including eight against the United States) pending at the World Trade Organization (hereinafter "WTO") where the "national security exception" has been invoked as a defence for WTO-inconsistent policies. The timing of these disputes in view of the rising protectionism by various countries in itself raises interesting questions about the intent and purpose of such an exception, i.e., whether it is a genuine exercise of the security exception, or a cover for protectionist action.

This article will make an assessment of the wording used in the security exception under the GATT, and the circumstances wherein the current spate of disputes has invoked the exception. It will also reflect on how Free Trade Agreements (FTAs) are addressing this issue, and the extent to which they are deviating from the language of the GATT and WTO Agreements.

The article will also explain that it is not correct to attribute rising national security concerns to the U.S. alone. There is a growing body of regulatory measures on grounds of national security that are emerging worldwide. Perhaps the reason for this is because the

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narrow structuring of the "security exception" in the post-World War II era of the GATT, is ill-equipped to consider various emerging concerns.

A more realistic assessment of the situation therefore is needed to ensure that there is some streamlining and control of the use of the security exception. In the interests of predictability and certainty, it is important that the shroud of "security" does not become a carte blanche for any form of protectionism.

KEYWORDS: *national security, security exception, GATT Article XXI, WTO, FTAs, self-judging; Review*

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I. SECURITY CONCERNS IN TRADE AGREEMENTS

Since its incorporation into the General Agreement on Tariffs and Trade (hereinafter "GATT") in 1947, Article XXI, titled "Security Exception", has never been adjudicated in a dispute. This provision is a preserve for sovereign power which finds a place in practically all trade agreements since its incorporation under the GATT. At the time of writing of this article, however, there are ten disputes (including eight against the U.S.) pending at the World Trade Organization (hereinafter "WTO") where the "national security exception" has been invoked as a defence for WTO-inconsistent policies.

It is worthwhile to examine the text of Article XXI of GATT which deals with the national security exception:

> Nothing in this Agreement shall be construed
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> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests;
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> (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.

As can be seen in the text above, the provision provides wide latitude to a country to determine what *"it considers"* necessary for protection of its essential security interests. Questions have been raised as regards the ambit of judicial review that a WTO panel or Appellate Body can undertake when a country invokes the Article XXI exception. Most commentators are of the view that the self-judging nature of the provision presents a significant limitation on the nature of any review.[1] In their book on the WTO, Peter van

[1] For an overview of different views and literature review, please see 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. 417-44 (2016); Roger P. Alford, *The Self-judging WTO Security Exception*, 2011(3)

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den Bosche and Werner Zdouc explain that the WTO adjudicating bodies should examine whether the explanation is reasonable and whether the measure constitutes an apparent abuse.[2]

It has been noted that concerns about abuse of the security exception were recognized at the time of its incorporation into the charter of the International Trade Organization (hereinafter "ITO"), which was the precursor to the GATT. The preparatory meetings of the GATT record the views of negotiator from Netherlands that the exception would create "a very big loophole in the whole ITO Charter".[3] The delegation from the United States (hereinafter "U.S."), which drafted the exception, explained that:

> 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.[4]

The proceedings then record the U.S. delegate explaining the limiting ambit of each of the circumstances specified under the sub-paragraphs of the proposed security exception. At the conclusion of the proceedings the chairman of the session is quoted as saying that ultimately "the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind to which the Netherlands Delegate has drawn our attention."[5]

As noted by one commentator in his article in 2011, the hopes as expressed by the chair on the guarantee against abuse of the provision "have been realized. Despite the risks associated with a self-judging exception,

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UTAH L. REV. 697-760 (2011); Andrew D Mitchell & Glyn Ayres, *General and Security Exceptions under the GATT and the GATS*, *in* INT'L TRADE L. & WTO 226 (Indira Carr et al. eds., 2012); Tsai-fang Chen, *To Judge the "Self-Judging" Security Exception under the GATT 1994 — A Systematic Approach* 12(2) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 311 (2017); Adel Ilsiyarovich Abdullin & Liliia A. Khasanova, *The Concept of "Essential Security Interests" and Justification of Economic Sanctions under WTO Law,* 4(13) REVISTA PUBLICANDO 450 (2017); Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558 (1991); Shahrzad Fazeli, *Restrictions on Trade for Security Reasons* (2015), http://www.diva-portal.org/smash/get/diva2:792425/FULLTEXT01.pdf.

[2] Peter van den Bossche & Werner Zdouc, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 620 (2017).

[3] U.N. ESCOR, 2d Sess., 33d mtg. at 19, U.N. Doc. E/PC/T/A/PV/33 (July 24, 1947).

[4] *Id.* at 20.

[5] *Id.* at 21.

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Member States have exercised good faith in complying with their trade obligations."[6]

That "hopeful" situation, unfortunately, is no longer true in view of the ten disputes currently pending at the WTO where the security exception has been invoked. The ruling in the first of these disputes, involving Ukraine's challenge to Russia's measures against traffic in transit, is expected by the end of 2018, and is likely to set the tone for the panels in the other disputes. The panel will need to contend with the nature of self-justiciability of Article XXI, and assess the extent to which it can scrutinize the underlying reasons for the invocation of Article XXI.

Any eschewing by the panel of jurisdiction will, in this author's view, destabilize the system of rules of multilateral trade, since it would mean that the mere invocation of the security exception can paralyse the panel from making a reasoned assessment. This will be similar to the *Petrificus Totalus* spell in the iconic book *Harry Potter and the Philosopher's Stone*. In the story, the character of Hermione Granger uses this stupefying spell to temporarily paralyse a classmate Neville Longbottom.

If the incantation of "national security" or "essential security" were to have a similar effect at the WTO, it would be akin to invoking the "security spell" that can simply paralyse the action of a WTO dispute settlement body in situations where the security exception is invoked. Such an eventuality is prone to abuse since potentially any protectionist action can be justified by merely invoking the security exception. Excluding judicial review, therefore, is not the solution, since such an outcome will severely undermine the credibility of the WTO.

II. GATT AND WTO DISPUTES INVOLVING THE SECURITY EXCEPTION

As explained above, no adjudicating body has so far had an opportunity to examine the application of the security exception. However, in May 1985, in a dispute initiated by Nicaragua against restrictions by the U.S. of products of Nicaraguan origin, the panel made an observation regarding the exception when the U.S. invoked the same. The terms of reference in that dispute precluded the panel from making a finding on Article XXI.[7] Nevertheless, the panel explained the implications of the security exception by noting that:

> [E]mbargoes imposed for security reasons create uncertainty in trade relations and, as a consequence, reduce the willingness of governments to engage in open trade policies and of enterprises to make trade-related investments. The Panel therefore concluded

[6] Alford, *supra* note 1, at 699.
[7] Report of the Panel, *United States — Trade Measures Affecting Nicaragua*, L/6053 (Oct. 13, 1986).

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> that embargoes such as the one imposed by the United States, independent of whether or not they were justified under Article XXI, ran counter to basic aims of the GATT, namely to foster non-discriminatory and open trade policies, to further the development of the less-developed contracting parties and to reduce uncertainty in trade relations. The Panel recognized that the General Agreement protected each contracting party's essential security interests through Article XXI and that the General Agreement's purpose was therefore not to make contracting parties forego their essential security interests for the sake of these aims. However, the Panel considered that the GATT could not achieve its basic aims unless each contracting party, whenever it made use of its rights under Article XXI, carefully weighed its security needs against the need to maintain stable trade relations (emphases added).[8]

In another matter pertaining to *Sweden — Import Restrictions on Certain Footwear*,[9] discussions at the GATT Council record the various views on Sweden's measure restricting import of footwear. The discussions at the proceedings of the GATT Council reflect Members' concerns that Article XXI cannot be the cover for states' arbitrary declarations on the need to protect security interests.

The current spate of ten disputes include one initiated by Qatar against UAE, the second by Ukraine against Russia, and the remaining eight by various countries against the U.S. tariff increase on import of aluminum and steel. These are discussed briefly below.

A. The UAE's Trade Embargoes Against Qatar

The dispute initiated by Qatar against the United Arab Emirates (hereinafter "UAE"), raises the issue of the legality of trade embargoes that have been maintained by the UAE against Qatar on the reasoning that Qatar has been taking actions supporting terrorism and destabilizing the region. Qatar maintains that such allegations are baseless and unjustified, and has raised a dispute that the UAE's "coercive attempts at economic isolation imposed . . . against Qatar . . . . [A]ffect trade in goods, trade in services and trade-related aspects of intellectual property rights."[10]

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[8] *Id.* ¶ 5.16.

[9] GATT Secretariat, *Minutes of Meeting*, GATT Doc. C/M/109, at 8-9 (Nov. 10, 1975); GATT, *Sweden — Import Restrictions on Certain Footwear*, GATT Doc. L/4250 (Nov. 17, 1975).

[10] Request for Consultations by Qatar, *United Arab Emirates — Measures Relating to Trade in Goods, Services and Trade Related Aspects of Intellectual Property Rights*, ¶ 4, WTO Doc. WT/DS/526/1 (Aug. 4, 2017).

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Qatar's first request for establishment of a panel was, as is almost customary at the WTO, opposed by the UAE. The discussions at the meeting of the WTO's Dispute Settlement Body (hereinafter "DSB") where Qatar's request came up for consideration, reflects the strong views of various countries. [11] The WTO reports that the UAE objected to Qatar's panel request, saying that Article XXI of the GATT, Article XIVbis of the GATS and Article 73 of the TRIPS Agreement allows members to take action in the interests of national security. The UAE view was that the issues in this dispute cannot be considered as trade issues, the WTO's dispute system was not equipped to hear them, and clear language existed in the agreements excluding such disputes from the WTO.[12]

The UAE stand was supported by Bahrain, Saudi Arabia and Egypt.[13] The U.S. also said that national security issues were political and not appropriate for the WTO dispute system, and that if the parties are unable to resolve the issue bilaterally, the US suggested they ask for assistance from the Director-General or another WTO member.[14]

Qatar replied that the measures served a commercial purpose, and that WTO defences were subject to multilateral oversight and the UAE's measures were not immune from review.[15]

Although the Panel in this dispute was established in November 2017, it is yet to be composed.

B. U.S. Section 232 Measures on Steel and Aluminium Products: 8 Disputes So Far

While the Qatar dispute against the UAE is pending, China, India, the European Union (hereinafter "EU"), Canada, Mexico, Norway, Russia and Switzerland have individually taken on the U.S. at the WTO, claiming that the imposition by the U.S. of duties of 25% and 10% on imports of steel and aluminium products, respectively, are inconsistent with provisions of the GATT 1994 and the Agreement on Safeguards.[16] The U.S. defence has been

[11] *Qatar Seeks WTO Review of UAE Measures on Goods, Services and IP Rights*, WTO (Oct. 23, 2017), https://www.wto.org/english/news_e/news17_e/dsb_23oct17_e.htm.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Request for Consultations by China, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS/544/1 (Apr. 9, 2018); Request for Consultations by India, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS/547/1 (May 23, 2018); Request for Consultations by the European Union, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS/548/1 (June 6, 2018); Request for Consultations by Canada, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS/550/1 (June 6, 2018); Request for Consultations by Mexico, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS/551/1 (June 7, 2018); Request for Consultations by Norway, *United States — Certain Measures on Steel and Aluminium Products*,

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that the tariffs have been imposed pursuant to section 232 of its Trade Expansion Act, which authorizes the President of the U.S. to impose import restrictions to protect U.S. national security.[17]

Section 232 investigations can be initiated by petition, self- initiated by the Commerce Department, or initiated at the request of any government department or agency. The Commerce Department initially conducts an investigation to determine the effects of imports on U.S. "national security." The Trade Expansion Act lists various factors that must be considered in the course of such investigation "in the light of the requirements of national security". These include: domestic production needed for projected national defence requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defence, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the U.S. to meet national security requirements.[18] The law also emphasizes the need to 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," in determining whether the weakening of the domestic economy may impair national security.[19]

The Presidential Memorandum that initiated the section 232 investigations in respect of steel and aluminium noted that "core industries such as steel, aluminum, vehicles, aircraft, shipbuilding, and semiconductors are critical elements of our manufacturing and defence industrial bases, which we must defend against unfair trade practices and other abuses."[20]

The fact of the matter is that multilateral rules of trade are designed specifically to protect against abusive and unfair trade practices. The

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WTO Doc. WT/DS/552/1 (June 19, 2018); Request for Consultations by the Russian Federation, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS/554/1 (July 2, 2018); and Request for Consultations by Switzerland, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS/556/1 (July 12, 2018).

[17] Trade Expansion Act of 1962 § 232, 19 U.S.C. § 1862(c) (2012).

[18] Trade Expansion Act of 1962 § 232, 19 U.S.C. § 1862(d) (2012).

[19] *Id.*

[20] Presidential Memorandum for the Secretary of Commerce, *Aluminum Imports and Threats to National Security*, WHITE HOUSE (Apr. 27, 2017), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-commerce/ (which asks the Secretary of Commerce to initiate section 232 investigations on aluminium imports); Presidential Memorandum for the Secretary of Commerce, *Steel Imports and Threats to National Security*, WHITE HOUSE (Apr. 20, 2017), https://www.gpo.gov/fdsys/pkg/DCPD-201700259/pdf/DCPD-201700259.pdf.

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Presidential Memorandum initiating the investigation on steel import in fact acknowledged that 150 antidumping and countervailing duty orders on steel products are in place, but notes that they have not substantially alleviated the negative effects of "unfairly traded imports".[21] As of the time of the reports of the Department of Commerce in February 2018, the U.S. had 169 antidumping and countervailing duty orders in place on steel, of which twenty-nine were against China, and there are twenty-five ongoing investigations.[22]

The U.S. President announced the section 232 proclamations pursuant to the reports of the Secretary of Commerce and Secretary of Defense. Both reports acknowledged that there is no current shortage; but were based on the premise that a country cannot depend only on imports for such core industrial products. The report pertaining to steel for instance recognizes that the current defence requirements for steel are as low as 3% of total U.S. domestic steel shipments, and the Department of Defense procures exclusively from domestic sources. However, the report concludes that the projected demand *could* be higher, and "that the only effective means of removing the threat of impairment is to reduce imports to a level that should, in combination with good management, enable U.S. steel mills to operate at 80% or more of their rated production capacity."[23] There is however no explanation or rationale as regards how the percentage 80% has been arrived at.

The U.S. Department of Commerce has also reportedly started an investigation into automobile imports to determine whether they "threaten to impair the national security" of the U.S. It appears that "national security" —with regard to which countries have so far exercised great restraint— appears to be the panacea for all domestic incompetence.

A key issue for consideration is whether a country has a right to unilaterally determine that rules of trade are insufficient and hence can be broken? The U.S. action under section 232 comes close on the heels of the development of a Global Forum under the aegis of G-20, with technical support from the Organisation for Economic Co-operation and Development (OECD), to address steel excess capacity to which thirty-three countries (including the U.S., as well as several key steel exporting nations such as China, Brazil, India, South Africa), have agreed. The Report adopted by the

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[21] *Id.*

[22] Office of Public Affairs, *Secretary Ross Releases Steel and Aluminum 232 Reports in Coordination with White House*, DEP'T COM. (Feb. 16, 2018, 12:00 PM), https://www.commerce.gov/news/press-releases/2018/02/secretary-ross-releases-steel-and-aluminum-232-reports-coordination.

[23] BUREAU OF INDUSTRY & SECURITY, U.S. DEP'T OF COM., EFFECT OF IMPORT OF STEEL ON THE NATIONAL SECURITY 5 (2018), https://www.commerce.gov/sites/commerce.gov/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf.

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Global Forum provides guiding principles on the steps to be taken to address the issue of excess capacity.[24]

The U.S.' unilateral action in imposing the tariffs clearly appears to suggest that such multilateral solutions are not enough. In the consultations that have been held at the WTO since the submission of the consultation requests by the eight countries, the U.S.' standard response has been that the tariff measures imposed concern issues of national security, and hence these are not susceptible to review or capable of resolution by WTO dispute settlement.

While consultations have been completed in the eight disputes, panels are yet to be established. In a marked departure from standard practice of waiting for the outcome of the dispute to emerge, six countries- China, the EU, Canada, Mexico, Turkey and Russia, have imposed tariffs in response to President Trump's actions on trade in aluminum and steel. In response, the U.S. has launched separate disputes at the WTO against, challenging the tariffs that each of these WTO Members has imposed.[25]

This trend of unilateral retaliation by countries clearly demonstrates that they may not be patient and willing to await the outcome of the WTO dispute settlement process. The final unravelling of the disputes is likely to hinge on whether the WTO considers that the U.S. action to begin with, can be characterized as a "safeguard action" not in accordance with WTO laws, which can arguably give rise to retaliatory action by other countries. If however, the WTO DSB decides that the U.S. action under the section 232 investigations on steel and aluminium does not amount to safeguard action, then in that case, it is likely that the unilateral retaliation by the other countries would be seen as being against the principles of WTO law.

The impending crisis of there being no fully constituted Appellate Body at the WTO in a few months,[26] is likely to further enhance the uncertainty of outcomes of these various actions.

C. Russia: Traffic in Transit Dispute

[24] FED. MINISTRY FOR ECON. AFFAIRS & ENERGY, GLOBAL FORUM ON STEEL EXCESS CAPACITY REPORT (2017), https://www.bmwi.de/Redaktion/EN/Downloads/global-forum-on-steel-excess-capacity-report.pdf?__blob=publicationFile.

[25] Office of the United States Trade Representative, *United States Challenges Five WTO Members Imposing Illegal Tariffs Against U.S. Products* (July 2018), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/july/united-states-challenges-five-wto; *see also United States Initiates WTO Dispute Complaint Against Russian Duties on US Imports* (Aug. 29, 2018), https://www.wto.org/english/news_e/news18_e/ds566rfc_29aug18_e.htm

[26] The crisis at the WTO Appellate Body is a result of the U.S.' actions in blocking the reappointment of Appellate Body Members. *See e.g.*, Tom Miles, *U.S. Blocks WTO Judge Reappointment as Dispute Settlement Crisis Looms* (Aug. 27, 2018), https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN1LC19O.

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Before the U.S. and the UAE have their day in court, a ruling of the panel in *Russia — Measures Concerning Traffic in Transit*,[27] is likely to be the first dispute where a WTO panel would have had occasion to consider the security exception that has been invoked by Russia. The context for the dispute is the continuing conflict between Russia and Ukraine over Russia's annexation of Crimea in March 2014 and a war in eastern Ukraine. Russia imposed transit restrictions on Ukraine in January 2016 that cut off key markets in Central Asia and the Caucuses, which Ukrainian exporters can only reach by Russian roads and rail transport networks. Ukraine states that the Russian Federation has adopted and applied various measures concerning traffic in transit from the territory of Ukraine (either originating or passing through the territory of Ukraine) through the territory of the Russian Federation to third countries by means of road and rail transportation. Ukraine therefore initiated the complaint at the WTO, and the hearing by the panel has been completed. Russia's defence is that it imposed the restrictions as a national security measure under GATT Article XXI(b)(iii): "taken in time of war or other emergency in international relations", and that a panel lacks jurisdiction to review such an invocation.

The U.S. is a third party in the dispute, and in a letter addressed to the panel, it has agreed with Russia on the interpretation of GATT Article XXI, and noted that "Panel lacks the authority to review the invocation of Article XXI and to make findings on the claims raised in this dispute . . . Panel should limit its 'findings' to a recognition that GATT 1994 Article XXI has been invoked".[28] In contrast, the EU, in its third party submission, has explained in detail why the EU considers that Article XXI of GATT 1994 is a justiciable provision and that its invocation by a defending party does not have the effect of excluding the jurisdiction of a panel.[29]

The panel is expected to issue its ruling by the end of 2018. How it approaches the delicate and sensitive issue of national security will have significant implications for the other pending disputes.

III. THE EVOLUTION OF "SECURITY" CONCERNS IN FTAS AND DOMESTIC POLICY

The discussion on the security exception of trade agreements has assumed centre-stage in mainstream media in the past few months, primarily

[27] Communication from the Panel, *Russia — Measures Concerning Traffic in Transit*, WTO Doc. WT/DS/512/5 (Nov. 21, 2017).

[28] Letter from Office of the United States Trade Representative to Mr. Georges Abi-Saab, Chairperson, WTO (Nov. 7, 2017), https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Sub.Re.GATT.XXI.fin.%28public%29.pdf.

[29] European Union Third Party Written Submission, *Russia — Measures Concerning Traffic in Transit*, DS512 (Nov. 8, 2017), http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_ 156 602.pdf.

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as a result of President Trump's tariffs on imports of steel and aluminium into the U.S., and his threat to extend these to a wider category of products. However, it will be factually incorrect to characterize the use of the security exception as something that the U.S. is solely responsible for. As seen in the discussion above, at the WTO, two other countries other than the U.S. have invoked the security exception (Russia and the UAE).

The wording of the security exception has also been seeing a stretching of its boundaries in various free trade agreements. Furthermore, emergence of laws and regulations to address security concerns across countries, reflect the matters that countries are seeking to address as matters of 'national security'. These are discussed below.

A. Security Exception in Free Trade Agreements

Furthermore, it is insightful to note the evolution of the security exception in free trade agreements, especially those entered into by the U.S., which have used more unfettered language for the security exception, by removing the list of circumstances constituting essential security (as under Article XXI(b) of GATT 1994 discussed earlier). Most recently, such text was embodied in the Comprehensive and Progressive Agreement of Trans-Pacific Partnership (hereinafter "CP-TPP"), under which Article 29.2 states as follows:

> Nothing in this Agreement shall be construed to:
> (a) require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
> (b) preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests. (emphasis added).

The text used in the CP-TPP follows the approach used in U.S. Free Trade Agreements (hereinafter "FTA"), which has been retained despite the U.S. opting out of the agreement. In the extract of the CP-TPP security sub-clause (b) above, what is clear is that the circumstances when essential security concerns may be considered, which appear under GATT Article XXI(b), have been removed. The text above allows for any action that a country determines is for the "protection of its own essential security interests", without having to establish whether or not it is related to war or other emergency, or whether it relates to traffic in arms or ammunition, etc. This gives a wide canvas for countries to use this exception.

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It is also interesting to note the difference in the approach of the FTA between the U.S. and South Korea, which includes a clarificatory footnote to make it explicit that: "For greater certainty, if a Party invokes [the article on Security exception] in an arbitral proceeding initiated under Chapter Eleven (Investment) or Chapter Twenty-Two (Institutional Provisions and Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies."[30]

The U.S. approach however stands in stark contrast with the EU's approach in FTAs, which continues to use the text as used under the GATT and delineates the circumstances for exercise of the security exception, i.e., in situations of war, military use and for maintaining international peace.

FTAs entered into by Japan, such as the FTAs between Japan and the ASEAN, and between Japan and India, retain the circumstances as specified under GATT Article XXI(b). However, they have also expanded the grounds for exercise of the security exception to include action which a country considers necessary for the protection of its essential security interests to protect critical public infrastructure, including communications, power and water infrastructure, from deliberate attempts to disable or degrade such infrastructure.[31]

FTAs, therefore, appear to be pushing the boundaries for exercise of the security exception, to enable a wide variety of actions that may be inconsistent with the rules of the underlying agreements. These are however yet to be tested in any concrete situation. The approach of U.S. FTAs and the CP-TPP appear to be carving out unfettered policy space where presumably any kind of judicial scrutiny can be eliminated. Such an approach is likely to be subject to abuse, and be a clear use of Hermione's spell of *Petrificus Totalus*. On the other hand, the approach of other FTAs, such as those by EU, India, ASEAN, appear to adhere to the WTO approach, with some expansion of the circumstances wherein the security exception can be invoked. This, in this author's view, is likely to ensure greater stability of a rules-based system, and arguably keeps the door open for judicial review and scrutiny of whether the circumstances for the invocation of the security exception, are legitimate and not arbitrary.

B. Emerging Laws on Security Review of Investments

National security related issues also need to be seen in the context of worldwide developments where the concept of 'national security' is

[30] Free Trade Agreement Between the Republic of Korea and the United States of America, S. Kor.-U.S., art. 23.2 n.2, June 30, 2007.

[31] Agreement on Comprehensive Economic Partnership Among Member States of the Association of Southeast Asian Nations and Japan, ASEAN-Japan, art. 8, Apr. 14, 2008; Comprehensive Economic Partnership Agreement Between Japan and the Republic of India, Japan-India, art. 11, Feb. 16, 2011.

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becoming an integral part of economic laws and policies of several countries worldwide.

There is a growing body of regulatory measures on grounds of national security that are emerging worldwide. While it may be argued that such laws are concerned only with scrutiny of inbound foreign investments, the crucial fact that emerges from an assessment of these laws is the expanding grounds for exercise of national security. These grounds are not confined to the post-second-World-War GATT era enunciation of "security" concerns, which were confined to war and other international emergency. Rather, the underlying grounds for national security that are progressively being articulated in the laws of several countries, reveal an increasing recognition of cybersecurity, critical technologies and critical infrastructure, as areas which need to be considered as national security concerns.

This can be seen in legislative developments of several countries, which have either strengthened administrative mechanisms or are enacting laws for scrutinizing trade and investment from a security perspective.

Australia established a Critical Infrastructure Centre in 2017, which is responsible for making an assessment of foreign investments from a security perspective. In July 2018, the Security of Critical Infrastructure Act came into effect in Australia, which is administered by the Critical Infrastructure Centre. Critical infrastructure is defined to include electricity, gas, water and the port sectors.[32] Additionally, a separate law—the Telecommunications Act, 1997—governs security in the telecommunications sector.

The United Kingdom (hereinafter "U.K.") is currently considering proposals for legislative reform that would give it significantly greater powers to intervene in investments into the U.K. on national security grounds. The National Security and Infrastructure Investment Review Green Paper, published on Oct. 17, 2017, outlined the Government's plans to take "a staged approach to reforming how it scrutinises national security implications of business transactions."[33] The policy statement in this regard identifies core areas (the civil nuclear, communications, defence, energy, and transport sectors); advanced technologies (including computing, networking and data communication, and quantum technologies); critical direct suppliers to the government and emergency service sectors, and military or dual use technologies. Specific trigger events (in the form of direct or indirect control), which would lead to such increased scrutiny, are being considered in the proposed law.[34]

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[32] For an overview, see CRITICAL INFRASTRUCTURE CET., AUSTRALIAN GOV'T, THE SECURITY OF CRITICAL INFRASTRUCTURE ACT 2018 (2018), https://www.homeaffairs.gov.au/nationalsecurity/Documents/cic-factsheet-security-of-critical-infrastructure-act-2018.pdf.

[33] DEP'T FOR BUS., ENERGY & INDUS. STRATEGY, NATIONAL SECURITY AND INFRASTRUCTURE INVESTMENT REVIEW 33 (2017), https://www.gov.uk/government/consultations/national-security-and-infrastructure-investment-review.

[34] DEP'T FOR BUS., ENERGY & INDUS. STRATEGY, NATIONAL SECURITY AND INVESTMENT: DRAFT STATUTORY STATEMENT OF POLICY INTENT (2018), https://assets.publishing.service.gov.uk/gov

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Scrutiny by Canada over foreign investment is based on guidelines issued under the Investment Canada Act. These take into account consideration of aspects such as the effect of the investment on Canada's defence capabilities, transfers of sensitive technology or know-how outside of Canada, and impact on critical infrastructure.[35]

In the U.S., the Committee on Foreign Investment in the United States (hereinafter "CFIUS"), an inter-agency committee of the U.S. government, is authorized to review transactions that result in foreign control of a U.S. business on national security grounds. The U.S. recently enacted the Foreign Investment Risk Review Modernization Act of 2018 which expands and strengthens the CFIUS review to a broader range of non-controlling foreign investment involving sensitive personal data of U.S. citizens, U.S. critical technology, and U.S. critical infrastructure.[36]

While the aforementioned developments are limited to investment flows, the overarching theme is that of a wider canvas of policy objectives which need to be considered as constituting concerns relating to national security.

Clearly, ensuring national security is the sovereign preserve of governments. The emergence of specific laws in different countries is indicative of listing of circumstances wherein national security concerns can arise, such as cybersecurity, impact on critical technologies and critical infrastructure. These lead to the question whether it would make sense for countries to expand the security exception in trade agreements to include such circumstances, rather than leave an open-ended unfettered provision on exercise of the security exception?

What is needed is clarity and predictability as regards how government policies may impact trade and investments. It is in this regard that ensuring a transparent and rule-based system of functioning can allay concerns of any arbitrary action. This will be central to determining their impact on the confidence of investors and traders. The increasing use of inward looking domestic strategies, are also a reality check of the real and perceived concerns on measures needed for a country to have a strong domestic industry in certain key areas which it may consider to be important for its national security.

IV. WHERE DO WE GO FROM HERE?

ernment/uploads/system/uploads/attachment_data/file/728311/20180717_Statement_of_policy_intent_-_shared_with_comms.pdf.

[35] *Guidelines on the National Security Review of Investments*, GOV'T CAN. (Dec. 19, 2016), https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81190.html.

[36] Comm. on Foreign Inv. in the U.S., *Summary of the Foreign Investment Risk Review Modernisation Act of 2018* (2018), U.S. DEP'T TREASURY, https://www.treasury.gov/resource-center/international/Documents/Summary-of-FIRRMA.pdf.

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While the increasing use of national security as a ground for protectionist measure can be clearly traced to the U.S. and President Trump's actions, the issue needs a wider discussion and acknowledgement. Merely addressing whether or not, and to what extent, can WTO panels and the Appellate Body exercise the power of judicial review over a country's invocation of the security exception, is unlikely to address the underlying causes and concerns and how trade rules need to evolve to keep pace with growing realities.

The rising use of the security exception is also perhaps best understood when seen in the context of increasing protectionism across the world. The starting point of protectionist trends is often attributed to the financial crisis of 2008. A review of the World Trade Reports published by the WTO since 2008 reveals the consistent use of protectionist measures by countries. The 2016 World Trade Report noted that "in the current environment, a rise in trade restrictions is the last thing the global economy needs. This increase could have a further chilling effect on trade flows . . . ."[37] Recently, the WTO pointed to a stark increase in trade restrictions initiated by G20 nations, and warned that "the uncertainty created by a proliferation of trade restrictive actions could place economic recovery in jeopardy."[38] It noted that "[t]he multilateral trading system was built to resolve such problems and it has the tools to do so again. However, further escalation could carry potentially large risks for the system itself."[39]

In a recent provocative article for the Financial Times, Professor Dani Rodrik from Harvard's Kennedy School of Government argued that the WTO has become dysfunctional.[40] He attributes the reason for this to what he calls the over-reach of trade agreements to address beyond the border aspects such as rules constraining domestic policies in subsidies, health and safety and intellectual property, and a variety of domestic regulation that may have an adverse impact on imports.[41] He argues that trade agreements need to be reinvented on the basis of recognition of economic diversity.[42]

Several scholars disagree. In a counter-view published by the Financial Times, Professor Robert Wade from the London School of Economics argued that Western states have crafted WTO rules to enable them to use industrial policy instruments appropriate for frontier industries and to prohibit or make actionable instruments appropriate for developing country industries and companies well within the frontier (such as local content

[37] *Report Urges WTO Members to Resist Protectionism and "Get Trade Moving Again"*, WTO (July 25, 2016), https://www.wto.org/english/news_e/news16_e/trdev_22jul16_e.htm.
[38] WTO, REPORT ON G20 TRADE MEASURES 2 (2018).
[39] *Id.*
[40] Dani Rodrik, *The WTO Has Become Dysfunctional*, FIN. TIMES (Aug. 5, 2018), https://www.ft.com/content/c2beedfe-964d-11e8-95f8-8640db9060a7.
[41] *Id.*
[42] *Id.*

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requirements), and that the "global playing field" is "level" only from the perspective of the west.[43]

While the underlying politics and rightness or otherwise of rules of trade continue to be debated, a fundamental issue which needs to be addressed is how rules of trade should adapt to work with the current realities?

To address this, let us start with the basic premise that trade agreements provide security and certainty for businesses engaged in trade in goods and services, and protect their investments. Rules on trade in goods therefore involve pledges not to exceed bound tariff levels; rules relating to services pertain to commitments for market access; and rules on intellectual property rights (hereinafter "IPR") involve commitments to minimum standards of IPR protection. All of these are premised on the notion of providing "treatment no less favourable" for imported goods, as compared with domestically manufactured goods; and similarly, ensure equality in competitive conditions for both domestic and foreign services and service suppliers. Such commitments clearly involve the ceding of domestic policy space on the nature of measures that can be taken for protecting domestic industry interests.

It is important to emphasize that liberalized trade rules and protection of domestic industry are not necessarily antithetical to each other. The trade agreements concluded in the early postwar period left plenty of space for countries to pursue their own paths. The various trade rounds under the old GATT 1947 covered only explicit barriers to manufactured goods at the border, mainly import tariffs and quotas. Services and agriculture were excluded. When an import surge in garments threatened economic dislocation in developed countries in the early 1970s, a special regime was established that enabled these countries to re-impose quantitative restrictions.

The times we live in appear to suggest the need for increase in the space that countries need for addressing domestic policy concerns. Clearly, insisting on a preserve for unfettered action through the "security exception", which can be prone to abuse, can threaten the basis of the WTO system. Dialogue and discussion to address underlying problems and coming out with meaningful solutions are crucial.

A more realistic assessment of the situation therefore is needed to ensure that there is some streamlining and control of the use of the security exception. In the interests of predictability and certainty, it is important that the shroud of "security" does not become a carte blanche for any form of protectionism. The GATT and other WTO agreements currently use narrow list of circumstances that can constitute the use of the security exception. While the determination of these circumstances are self-judging in character, the text of the WTO

[43] Robert H. Wade, *Global Playing Field Is Level But Only for the West*, FIN. TIMES (Aug. 9, 2018), https://www.ft.com/content/c7cd567e-999e-11e8-9702-5946bae86e6d.

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agreements, in this author's view, allows for judicial scrutiny to assess whether or not the exercise of sovereign power is arbitrary or bona fide. Excluding judicial review over exercise of the "security exception" can simply sanction arbitrary actions. Instead, the focus needs to be on limited judicial review to check the grounds for invocation of the security exception, to ensure that there is no arbitrariness or abuse of process. The guidance that the WTO panel rulings on the current spate of disputes can provide in this regard will also be determinative of the extent to which WTO members can be held accountable for domestic policy choices.

At the same time, it perhaps needs to be acknowledged that the narrow structuring of the 'security exception' in the post-World War II era of the GATT, is ill-equipped to consider various emerging concerns on what can be considered as concerns relating to national security. The recent emergence of laws and regulations in various countries to enhance scrutiny of foreign investments based on their impact on cybersecurity, critical technologies and critical infrastructure, appear to suggest a growing perception of various aspects where security related scrutiny needs to be exercised.

Some FTAs too have started articulating "critical public infrastructure" as part of the security exceptions, expanding it beyond the traditional GATT approach of confining it to situations of war and international emergency. This articulation of circumstances appears to be a clearer and more transparent strategy than having open ended security exceptions, which is the case with most U.S. FTAs and the recently concluded CP-TPP agreement. The language in the latter set of agreements can potentially exclude any kind of judicial review of the security exception, and is more likely to be misused for protectionist purposes.

A realistic reassessment of when and how security exceptions should be invoked and the extent of judicial review of the exercise of such exceptions, is what is needed. Ultimately, the only guarantee against abusive behaviour, as noted in 1947 in the context of the ITO Charter, is the "atmosphere" inside the WTO. The collective wisdom of parties to address the threats to the system alone will ensure that the spell of national security does not work like Hermione's *Petrificus Totalus!*

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