

# Adjudication of the GATT security clause: to be or not to be, this is the question

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## Abstract

The interpretation of the GATT 1994 security exception raises a number of vexed questions. Thus, the WTO Members deliberately refrained from relying upon the security exception to justify trade-restrictive measures. Yet it seems that the utmost caution with regard to the security clause is in the past: the Russian Federation invoked the security exception in a recent dispute with Ukraine.

In the present article, we discuss the WTO tribunals' jurisdiction over the security exception as well as justiciability of the security clause. The article starts with a brief summary of the arguments, expressed by the WTO Members in the ongoing dispute between Ukraine and the Russian Federation. The article proceeds with the vigorous debate on the jurisdiction over the security exception. The inquiry into the justiciability of the security clause follows. The paper affirms jurisdiction and justiciability of the security exception, but argues in favor of the partial deference granted to the WTO Members invoking Article XXI of the GATT 1994.

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## Introduction

The current crisis between Ukraine and the Russian Federation brought into being numerous economic sanctions imposed by both sides of the conflict as well as by other states. These sanctions, which consist of various trade restrictions, gave a new impetus to the debate on their alleged WTO-inconsistency and a possible invocation of the security exception as justification.<sup>1</sup> Despite the official statements on the sanctions' incompatibility with the WTO commitments<sup>2</sup>, none of the WTO Members has challenged them.<sup>3</sup> Yet, the military tension between the two countries still triggered the invocation of the security exception in the dispute regarding restrictions on transit.<sup>4</sup>

The interpretation of the security exception is not only crucial for the ongoing dispute between Ukraine and the Russian Federation, but also for the dispute between Qatar and the United Arab Emirates, where the United Arab Emirates will allegedly rely upon the security exception.<sup>5</sup> Furthermore, the additional import duties on steel and aluminum imposed by the United States triggered a number of consultation requests from the affected WTO Members.<sup>6</sup> These requests for consultations were followed by the requests to establish a panel. The United States justifies these additional duties on the national security grounds.<sup>7</sup> Therefore, it is hard to deny that this inquiry is clearly well-timed.

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<sup>1</sup> Rostam J Neuwirth and Alexandr Svetlicinii, "The Economic Sanctions over the Ukraine Conflict and the WTO: 'Catch-XXI' and the Revival of the Debate on Security Exceptions" (2015) 49 *Journal of World Trade* 891.

<sup>2</sup> Shawn Donnan and Kathrin Hille, 'Russia Threatens US with WTO Action over Crimea Sanctions' *Financial Times* (16 April 2014) <<https://www.ft.com/content/5418ad46-c57c-11e3-97e4-00144feabdc0>> accessed 18 November 2018; Benjamin Fox, 'Poland Demands WTO Challenge over Russia Food Ban' (20 August 2014) <<https://euobserver.com/news/125295>> accessed 18 November 2018.

<sup>3</sup> The Russian Federation initiated the consultations with Ukraine regarding restrictive economic measures (economic sanctions) unilaterally imposed by Ukraine (DS525). The parties are in consultation since 19 May 2017.

<sup>4</sup> 'WTO | Dispute Settlement - DS512: Russia — Measures Concerning Traffic in Transit' <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds512\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm)> accessed 18 November 2018.

<sup>5</sup> The United Arab Emirates raised the security exception justification during the DSB meeting, on which Qatar requested establishment of a panel. World Trade Organization, 'Dispute Settlement Body, Minutes of Meeting Held on 23 October 2017, WT/DSB/M/403'.

<sup>6</sup> The WTO members that filed the requests for consultations are: China, India, the European Union, Canada, Mexico, Norway, the Russian Federation, and Switzerland.

<sup>7</sup> The representatives of the United States in their responses to the consultations requests argued the following: "The President determined that tariffs were necessary to adjust the imports of steel and aluminum articles that threaten to impair the national security of the United States. Issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement. Every Member of the WTO retains the authority to determine for itself those matters that it considers necessary to the protection of its essential security interests, as is

The panels discussed the security exception on a number of occasions,<sup>8</sup> yet the WTO Members deliberately refrained from interpreting the ambiguous and politically-tainted security clause<sup>9</sup>. One might say for a good reason: the metaphor of opening a Pandora's Box illustrates the prevailing attitude towards the adjudication of the security clause. Some scholars use the "Catch 22" analogy in this respect.<sup>10</sup> The political nature of the clause reinforced by the future implications of its interpretation - panel and AB reports establish a *de facto* precedent<sup>11</sup>, are to blame.

Unfortunately, the WTO's crown jewel is facing a severe crisis, which is instigated by the allegations of the tribunals' judicial activism.<sup>12</sup> Against this backdrop, interpretation of the security clause might be particularly burdensome. ☐

To proceed with the interpretative questions, the preliminary inquiry into whether the WTO tribunals can adjudicate the security exception is needed. The recent dispute between Ukraine and the Russian Federation, as well as the previous discussions of the issue, demonstrates the lack of unanimity between the WTO Members in this regard. For the reason that the ongoing dispute is the first incident where the disputing parties can submit their arguments for the panel's consideration, these arguments are of profound importance. Unfortunately, the written submissions of the parties are not available for the public; however, a number of third-party submissions are available.

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reflected in the text of Article XXI of the GATT 1994." 'United States - Certain Measures on Steel and Aluminium Products (DS544), Communication from the United States, WT/DS544/2, 17 April 2018'.

<sup>8</sup> The article presents a good summary of the disputes, in which the security exception was discussed. Ji Yeong Yoo and Dukgeun Ahn, 'Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?' (2016) 19 Journal of International Economic Law 417.

<sup>9</sup> *ibid.*

<sup>10</sup> Neuwirth and Svetlicinii (n 2).

<sup>11</sup> *Appellate Body Report, United States – Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p 513 paras. 158-161.*

<sup>12</sup> The seven-member Appellate Body of the World Trade Organization is facing a serious crisis. The crisis was provoked by the decision of the United States government to block the reappointment of South Korean AB member Seung Wha Chang for a second term. The decision was announced in May 2016 and the representatives of the United States accused the AB member "of making "wrong" decisions, as well as decisions that went beyond what was needed to settle an individual dispute based on the parties' specific arguments." For more details, please, see Manfred Elsig, Mark Pollack and Gregory Shaffer, 'The U.S. Is Causing a Major Controversy in the World Trade Organization. Here's What's Happening.' *Washington Post* (6 June 2016) <<https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/>> accessed 18 November 2018; The position of the United States has not changed since then and in September 2018 the United States blocked the reappointment of the judge from Mauritius. For more details, please, see Tom Miles, 'U.S. Blocks WTO Judge Reappointment as Dispute Settlement Crisis Looms' *Reuters* (27 August 2018) <<https://www.reuters.com/article/us-usa-trade-wto-idUSKCN1LC19O>> accessed 18 November 2018.

Before delving into the discussion of jurisdiction over the security exception and its justiciability, we clarify the terminology. An analysis of the parties' submissions demonstrates that the concepts jurisdiction and justiciability are used. Despite their supposed similarity, they are not identical. The term jurisdiction denotes power and competence to adjudicate. In other words, jurisdiction to adjudicate 'addresses the question of whether the court or tribunal seized of a case can entertain that case and render a decision that is binding on the parties.'<sup>13</sup> The justiciability can be defined as follows: "An issue is considered to be justiciable in a particular forum if it is capable of being decided in that legal forum and it is considered appropriate to do so."<sup>14</sup>

Yet, to draw the distinction between the two concepts, - jurisdiction and justiciability, is not that simple.<sup>15</sup> Any detailed discussion of the matter goes far beyond the scope of this article. Therefore we are of the view that the clarification provided by the United States suffices for the purposes of this article. In this regard, the United States submitted the following: 'we might define jurisdiction in this context as the extent of power of the Panel under the DSU to make legal decisions in this dispute, and justiciability as whether an issue is subject to findings by the Panel under the DSU.'<sup>16</sup> This proposition must be qualified in several ways. In this article we do not discuss the standard of review exercised by the WTO adjudicators when the security exception is invoked; neither do we address the issue of the burden of proof. In the following summary, we use the terms as the relevant party used them. ☐

We start with a brief summary of the arguments, expressed by the WTO Members. With this factual context sketched, we delve into the discussion if the WTO tribunals are authorized to exercise jurisdiction over the security exception. Subsequently, the argument that the security exception clause is non-justiciable is properly dispelled.

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<sup>13</sup> Shabtai Rosenne, 'International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications', *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2006) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e56>> accessed 21 November 2018.

<sup>14</sup> Dominic McGoldrick, 'The Boundaries of Justiciability' (2010) 59 *International and Comparative Law Quarterly* 981, 983.

<sup>15</sup> *ibid.*

<sup>16</sup> 'Russia – Measures Concerning Traffic in Transit (DS512), Third-Party Oral Statement of the United States of America' 1–2.

## **Arguments of the parties in *Russia - Measures Concerning Traffic in Transit* dispute (DS512)**

### **A. Arguments of the Russian Federation**

*The WTO tribunals have no jurisdiction over the security exception*

As it has been mentioned earlier, the written submissions of the Russian Federation are not publicly available, yet some of the arguments can be derived from the European Union submissions.<sup>17</sup> Firstly, the Russian Federation claims that the security exception is an entirely self-judging clause and the panel lacks jurisdiction to adjudicate it. Secondly, the Russian Federation argues that it does not bear the burden of proof under the security clause by virtue of Article XXI(a)<sup>18</sup>, which effectively exempts a defendant from this duty.

### **B. Arguments of the United States**

*The WTO tribunals have jurisdiction, yet the security exception is non-justiciable*

The United States argues that the security exception is a non-justiciable clause. According to the US position, the text and context, as well as the negotiating history and the previous state practice, substantiate this conclusion.<sup>19</sup> In its submissions the United States clarifies the difference between the terms jurisdiction and justiciability: while the former relates to the panel's power to make legal decisions, the latter 'relates to the nature of the inquiry that an adjudicator could make over a matter put before it.'<sup>20</sup> In other words, the security exception is a political escape clause, and neither panels nor the Appellate Body (AB) can adjudicate it or make recommendations to the dispute settlement body, as required under Article 19 of the DSU.<sup>21</sup>

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<sup>17</sup> 'Russia - Measures Concerning Traffic in Transit (DS512), European Union, Third Party Written Submission'; 'Russia - Measures Concerning Traffic in Transit (DS512), Third Party Oral Statement by the European Union'.

<sup>18</sup> Article XXI(a) reads as follows: "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". 'GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)'.

<sup>19</sup> 'Russia – Measures Concerning Traffic in Transit (DS512), Third-Party Oral Statement of the United States of America' (n 17); 'Russia – Measures Concerning Traffic in Transit (DS512), Third Party Executive Summary of the United States'; 'Russia – Measures Concerning Traffic in Transit (DS512), Responses of the United States of America to Questions from the Panel and Russia to Third Parties'.

<sup>20</sup> 'Russia – Measures Concerning Traffic in Transit (DS512), Responses of the United States of America to Questions from the Panel and Russia to Third Parties' (n 20).

<sup>21</sup> Article 19 of the DSU, in the relevant part, reads as follows: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest

Further discussion of this argument is closely intertwined with the legal claim of an entirely self-judging nature of the security exception. In advancing this claim, the United States relies on the text, context and supplementary means of interpretation.

At the outset, it is argued that the ordinary meaning of the text ‘it considers’ entitles a WTO Member to make its own determinations on the necessity of any measure taken for essential security interests.<sup>22</sup> The United States presents a number of contextual arguments to buttress this conclusion. The bulk of these arguments is the comparison between the language ‘which it considers’ in Article XXI(b) with the other paragraphs of Article XXI<sup>23</sup>, with the general exceptions of Article XX<sup>24</sup>, with the other provisions of the WTO agreements<sup>25</sup>.

According to the United States, the supplementary means of treaty interpretation, such as the negotiating history, consideration of Article XXI by the GATT 1947 panels and the statements of the contracting parties to the GATT 1947, prove an entirely self-judging nature of the clause.<sup>26</sup>

### **C. Arguments of Australia**

*The WTO tribunals have jurisdiction and the security exception is justiciable, yet the scope of a review shall be narrowly-defined*

Discussing the panel’s jurisdiction, Australia relies upon the panel’s terms of reference<sup>27</sup> and Article 7.2 of the DSU<sup>28</sup> to argue that the panel has jurisdiction to examine all the legal claims advanced by

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ways in which the Member concerned could implement the recommendations.” ‘DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994)’.

<sup>22</sup> ‘Russia – Measures Concerning Traffic in Transit (DS512), Third-Party Oral Statement of the United States of America’ (n 17) 4.

<sup>23</sup> Contrary to Article XXI(c), Articles XXI(a) and XXI(b) stipulate the language “which it considers”; therefore these exceptions are self-judging. *ibid* 5–8.

<sup>24</sup> Article XX stipulates the following exceptions: “(a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; (d) necessary to secure compliance with laws or regulations.” Contrary to the exceptions in Article XX, Article XXI uses the language “which it considers necessary” and does not prescribe the chapeau test; therefore, members have the discretion to determine measures’ necessity and apply them in the way they consider appropriate. *ibid*.

<sup>25</sup> The United States presented examples of the instances when the wording “it considers” is used in other provisions of the WTO agreements. In the US view, such wording authorizes the subjects to whom it is addressed to undertake any measures which they consider necessary. Furthermore, contrary to the other provisions, where the language “it considers” is followed by the text that expressly allows a review of the member’s determination, the security exception lacks similar language. This circumstance certifies that the security exception is non-justiciable. *ibid*.

<sup>26</sup> *ibid* 8–13.

<sup>27</sup> The panel was established with the standard terms of reference: “The Panel’s terms of reference are the following: To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Ukraine in document WT/DS512/3 and to make such findings as will assist the DSB in

the parties and make necessary findings.<sup>29</sup> Australia considers that if the panel declines its jurisdiction, it will violate Ukraine's rights guaranteed under Articles 3.2 and 3.3 of the DSU<sup>30</sup> as well as it will violate its obligations under Articles 7.2<sup>31</sup>, 11<sup>32</sup> and 19.2<sup>33</sup> of the DSU.<sup>34</sup>

In the meantime, Australia emphasizes the significance of national security.<sup>35</sup> Notwithstanding the panels' right to adjudicate the security exception, panels are restricted in their review.<sup>36</sup> In Australia's view, the ambit of the review granted under the security exception is limited to a *factual review*: (i) whether the Member considers the action necessary for the protection of its essential security interests; and (ii) whether that action is taken *for the protection of* its essential security interests.<sup>37</sup>

#### **D. Arguments of the European Union**

*The WTO tribunals have jurisdiction and the security exception is fully justiciable*

The European Union argues that the WTO tribunals have jurisdiction to rule over the security matters and denies any restrictions on the exception's justiciability.<sup>38</sup>

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making the recommendations or in giving the rulings provided for in those agreements." World Trade Organization, 'Russia - Measures Concerning Traffic in Transit (DS512), Constitution of the Panel Established at the Request of Ukraine, Note by the Secretariat'.

<sup>28</sup> Article 7.2 of the DSU reads as follows: "Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."

<sup>29</sup> 'Russia - Measures Concerning Traffic in Transit (DS512), Third Party Written Submission of Australia' 4–5.

<sup>30</sup> Articles 3.2 and 3.3 of the DSU reads as follows: "2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. 3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."

<sup>31</sup> see footnote 27

<sup>32</sup> Article 11 reads as follows: "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."

<sup>33</sup> Article 19.2 reads as follows: "In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

<sup>34</sup> 'Russia - Measures Concerning Traffic in Transit (DS512), Third Party Written Submission of Australia' (n 30) 5–6.

<sup>35</sup> *ibid* 7.

<sup>36</sup> 'Russia - Measures Concerning Traffic in Transit (DS512), Third Party Oral Statement of Australia' 4.

<sup>37</sup> *ibid* 3.

<sup>38</sup> 'Russia - Measures Concerning Traffic in Transit (DS512), European Union, Third Party Written Submission' (n 18).



The essence of the European Union's arguments is that a non-justiciable security exception runs counter to the legal rules of the DSU. More precisely, dispute settlement rules of the GATT 1994 and the DSU do not prescribe any exceptions for the disputes, in which the security exception is invoked.<sup>39</sup> Furthermore, the non-justiciable security exception disregards the panel's terms of reference and the requirement of Article 7.2 of the DSU.<sup>40</sup>

The non-justiciable security exception deprives panels of their duty to 'make an objective assessment of the matter before it' as required under Article 11 of the DSU<sup>41</sup> and undermines the fundamental objectives of the dispute settlement system enshrined in Article 3.2 of the DSU<sup>42</sup>. The European Union concludes that the non-justiciable security exception has far-reaching implications: 'a WTO Member, rather than the WTO dispute settlement bodies, would be deciding unilaterally the outcome of a dispute.'<sup>43</sup>

## **Our analysis**

### **A. The WTO tribunals' jurisdiction over the security exception**

#### *I. General observations on the WTO tribunals' jurisdiction*

The DSU does not stipulate rules on when panels or the AB shall exercise or decline jurisdiction. Despite this silence, the WTO jurisprudence provides a number of rules on ascertaining the tribunal's jurisdiction over legal claims.

The rule of thumb is that a panel's terms of reference establish jurisdiction for a panel<sup>44</sup> and therefore panels are deprived of the right to adjudicate claims that had not been included in a request to establish a panel<sup>45</sup>. Moreover, panels do not have jurisdiction to determine the rights

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<sup>39</sup> *ibid* 3–4.

<sup>40</sup> *ibid* 4.

<sup>41</sup> *ibid*.

<sup>42</sup> *ibid* 5.

<sup>43</sup> *ibid*.

<sup>44</sup> *Appellate Body Report, Brazil – Measures Affecting Desiccated Coconut, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, p 167 p. 21.*

<sup>45</sup> *Appellate Body Report, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p 9 para. 92.*

and obligations of the parties' under the agreement that is not included in the list of the covered agreements.<sup>46</sup>

The AB pronounced in US - 1916 Act that the WTO tribunals are entitled to determine their own jurisdiction.<sup>47</sup> In Mexico - Corn Syrup (Article 21.5 - US) the AB endorsed the view that the panel must address the issue of its jurisdiction. It was noted:

We believe that a panel comes under a duty to address issues in at least two instances. First, as a matter of due process, and the proper exercise of the judicial function, panels are required to address issues that are put before them by the parties to a dispute. Second, panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. In this regard, we have previously observed that '[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings.' For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed.<sup>48</sup>

The jurisdiction of the WTO dispute settlement system is compulsory, and neither a panel nor the AB has ever declined to exercise jurisdiction.<sup>49</sup> In this regard, Isabelle Van Damme accurately concluded: 'If they [WTO Members] want a third party to settle their dispute, recourse to dispute settlement under the DSU is the only option.'<sup>50</sup>

We argue that the panel has jurisdiction over the security exception. A number of arguments support this conclusion. Firstly, the text of the security exception does not explicitly deny the jurisdiction of the panels or the AB. Secondly, the title of the provision 'Security Exceptions' implies that it applies as an affirmative defense. The exception is placed between the general exceptions and the dispute settlement rules, and such placement confirms that the security clause is an exemption from the substantive obligations, not from the dispute settlement rules. Furthermore,

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<sup>46</sup> *Panel Report, European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report WT/DS316/AB/R, DSR 2011:II, p 685 para. 7.89.*

<sup>47</sup> "We note that it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it." *Appellate Body Report, United States – Anti-Dumping Act of 1916, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p 4793 para. 54.*

<sup>48</sup> *Appellate Body Report, Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 215 of the DSU by the United States, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p 6675 para. 36 (citing Appellate Body Report, United States – Anti-Dumping Act of 1916, para. 54).*

<sup>49</sup> Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press 2009) 175.

<sup>50</sup> *ibid* 9.

the DSU does not stipulate any exceptions; it only refers to the special or additional rules that might apply and the security exception is not mentioned there.<sup>51</sup> Additionally, Article 6 of the DSU guarantees to every WTO Member a right to the establishment of a panel, which might be overruled only by the consensus and a WTO Member cannot be deprived of this right on any other ground.<sup>52</sup> Finally, the interpretation that disregards the Member's entitlement to preserving its rights and obligations under the WTO agreements, which is the ultimate goal of the dispute settlement mechanism, runs counter to Article 3.2 of the DSU.<sup>53</sup>

## *II. The practice of the International Court of Justice in ascertaining jurisdiction over the security clauses*

The WTO law does not function in a clinical isolation from public international law<sup>54</sup> and therefore adjudicators, when faced with intricate interpretative questions, frequently seek guidance from other international courts and tribunals<sup>55</sup>. Thus it is worthwhile to analyze the jurisprudence of the International Court of Justice (ICJ) regarding the court's jurisdiction over the security exemptions.

In a number of disputes, the ICJ had to decide whether it had jurisdiction to adjudicate the security exceptions, the wordings of which are similar to the one prescribed by the GATT 1994. The dispute between Nicaragua and the United States was the first dispute in which the court's jurisdiction over the security clause was questioned.<sup>56</sup> The United States challenged the court's

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<sup>51</sup> 'DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994)' (n 22) Appendix 2.

<sup>52</sup> Article 6 of the DSU reads as follows: "If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel."

<sup>53</sup> Article 3.2, in the relevant part, reads as follows: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."

<sup>54</sup> *Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p 3 p. 17.*

<sup>55</sup> 'We would agree with the European Communities that it may be appropriate for panels to look to the practice of international tribunals for inspiration, particularly in situations where the WTO agreements, GATT/WTO jurisprudence or practice provide no useful guidance.' *Panel Reports, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, Add1 to Add9 and Corr1 / WT/DS292/R, Add1 to Add9 and Corr1 / WT/DS293/R, Add1 to Add9 and Corr1, adopted 21 November 2006, DSR 2006:III, p 847 para. 7.1663.*

<sup>56</sup> In 1984 Nicaragua filed an application instituting proceedings against the United States on the ground that the United States was responsible for illegal military and paramilitary activities in and against Nicaragua. The United States

jurisdiction by relying upon the following treaty text: ‘the present Treaty shall not preclude the application of measures: (d) ... necessary to protect its [Member’s] essential security interests’.<sup>57</sup> The court pronounced that this exception is an affirmative defense, which does not deprive the court of its jurisdiction.<sup>58</sup> In the same paragraph, the ICJ reinforced its conclusion by comparing the provision in question with the GATT 1947 security exception.<sup>59</sup> Although the court pointed out the self-judging language “it considers” in the GATT 1947 security exception, such manoeuvre might be interpreted as a mere reflection of the ambit of the court’s power to interpret such clause and not as a restriction on the court’s ability to entertain the dispute.

In *Oil Platforms* the ICJ was confronted with the preliminary objections to entertain the dispute between the Islamic Republic of Iran and the United States.<sup>60</sup> The court had to interpret whether the treaty text, which reads: ‘The present Treaty shall not preclude the application of measures: ... necessary to protect its [a High Contracting Party’s] essential security interests’ shall be interpreted as excluding certain measures from the scope of the treaty and as a result, ‘as excluding the jurisdiction of the Court to test the lawfulness of such measures’<sup>61</sup>. After citing its previous jurisprudence, the court concluded that the provision ‘does not restrict its jurisdiction in

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challenged the jurisdiction of the court as well as the admissibility of the claims. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) Merits, Judgment ICJ Reports 1986, p 14.*

<sup>57</sup> *ibid.*

<sup>58</sup> ‘Article XXI defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court as contemplated in Article XXIV.’ *ibid* 116.

<sup>59</sup> ‘That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear a contrario from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it “considers necessary for the protection of its essential security interests”, in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of “necessary” measures, not of those considered by a party to be such.’ *ibid.*

<sup>60</sup> On 2 November 1992, the Islamic Republic of Iran filed an application instituting proceedings against the United States of America with respect to the destruction of Iranian oil platforms. The Islamic Republic founded the jurisdiction of the Court upon a provision of the Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States, signed at Tehran on 15 August 1955. In its Application, Iran alleged that the destruction caused by several warships of the United States Navy, in October 1987 and April 1988, to three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, constituted a fundamental breach of various provisions of the Treaty of Amity and of international law. *Oil Platforms (Islamic Republic of Iran v United States of America), Preliminary Objection, Judgment, I C J Reports 1996, p 803.*

<sup>61</sup> *ibid* 811.

the present case, but is confined to affording the Parties a possible defense on the merits to be used should the occasion arise.’<sup>62</sup>

In the recent dispute between the Islamic Republic of Iran and the United States over the unilateral economic sanctions imposed by the US, the parties could not agree if the security clause excludes the jurisdiction of the ICJ.<sup>63</sup> The provision in question, in the relevant part, reads as follows: ‘The present Treaty shall not preclude the application of measures: ... necessary to protect its [a High Contracting Party’s] essential security interests.’<sup>64</sup> In essence, Iranian arguments were comprised of the two main points: the court’s pronouncements in *Oil Platforms*, where the same provision was interpreted as not depriving the court of its jurisdiction, and the argument that the security exception does not relieve the state from the obligation of good faith.<sup>65</sup> The United States submitted that if the disputed measures fall under the security exception clause, such measures automatically fall outside the material scope of the treaty, and thus the court’s jurisdiction is excluded.<sup>66</sup> The ICJ referred to its previous jurisprudence, where the court found that the security exception ‘did not restrict its jurisdiction’ and granted *prima facie* jurisdiction.<sup>67</sup>

The practice of the other international tribunals in considering national security measures suggests that the matter can be adjudicated. As Dapo Akande and Sope Williams pointed out: ‘The practice of the European Court of Justice (ECJ), the European Court of Human Rights (ECHR), and the International Court of Justice in regard to cases raising national security claims shows that whilst in practice those tribunals afford a wide margin of discretion to States in determining whether or not particular interests are national security interests, in principle those courts have held themselves competent to determine those interests.’<sup>68</sup>

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<sup>62</sup> *ibid.*

<sup>63</sup> *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America), Request for the indication of provisional measures, Order of 3 October 2018* 7–14.

<sup>64</sup> *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Request for the indication of provisional measures, Order of 3 October 2018* (n 64).

<sup>65</sup> *ibid* 9–10.

<sup>66</sup> *ibid* 10–11.

<sup>67</sup> *ibid* 11–12.

<sup>68</sup> Dapo Akande and Sope Williams, ‘International Adjudication on National Security Issues: What Role for the WTO’ (2002) 43 *Virginia Journal of International Law* 365, 382.

## B. Justiciability of the security exception

The security exception's justiciability, - the question if it is subject to findings by the panel, is a self-standing issue. Although justiciability of the clause is closely related to the discussion of its self-judging nature, we examine these legal claims independently. For the subsequent analysis, the term justiciability is used in the meaning of a tribunal's competence to make determinations regarding the security exception.

The DSU does not define the term justiciability, and the AB referenced it only once by pronouncing: 'the justiciability of the commitments set forth in China's Accession Protocol has been well accepted without recourse to China's interpretation.'<sup>69</sup>

The United States defines justiciability as the concept that 'relates to the nature of the inquiry that an adjudicator could make over a matter put before it' and argues that panels are deprived of the right to conduct an inquiry into the security exception.<sup>70</sup> The distinction between justiciable and non-justiciable legal claims is rooted in the US constitutional law and is more known as the 'political question' doctrine that dates back to 1803.<sup>71</sup> The essence of the 'political question' doctrine is that courts cannot adjudicate some claims due to their political nature and therefore courts must dismiss such claims for lack of jurisdiction without reaching the merits. The arguments advanced by the United States reflect the desire to transpose the 'political question' doctrine, as well as its implications, into the reality of international trade law.

These statements echo the opinion the United States held in a number of disputes over the national security measures. The United States took a similar position in the case initiated by

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<sup>69</sup> *Appellate Body Reports, China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p 805 para. 2.90.*

<sup>70</sup> 'Russia – Measures Concerning Traffic in Transit (DS512), Third-Party Oral Statement of the United States of America' (n 17); 'Russia – Measures Concerning Traffic in Transit (DS512), Third Party Executive Summary of the United States' (n 20); 'Russia – Measures Concerning Traffic in Transit (DS512), Responses of the United States of America to Questions from the Panel and Russia to Third Parties' (n 20).

<sup>71</sup> *Marbury v. Madison*, a U.S. Supreme Court case, was the first case where the doctrine was acknowledged. The six essential characteristics of the issue that falls under the "political question" were outlined in another U.S. Supreme Court case, - *Baker v. Carr* (1962). Despite the recognition in the U.S. Supreme Court jurisprudence, the political question doctrine has been criticised by some legal scholars. For example, Louis Henkin in his article 'Is There a "Political Question" Doctrine?' reached the following conclusion: 'The "political question" doctrine, I conclude, is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts.' Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 *The Yale Law Journal* 597, 622.

Nicaragua before the ICJ.<sup>72</sup> Professor Abram Chayes, who acted as a counsel for the government of Nicaragua, demonstrated how the 'political question' doctrine lay at the core of the US argument in the jurisdictional phase.<sup>73</sup> In the WTO context, the United States threatened to boycott the proceedings in the dispute over the Cuban sanctions on the same grounds.<sup>74</sup>

The possibility for international tribunals to rely upon the 'political question' doctrine was amply discussed in relation to the notorious Lockerbie case, in which the ICJ had to decide whether it had jurisdiction over the political body of the United Nations, - the Security Council.<sup>75</sup> In the context of that dispute, many scholars suggested that there is a variety of reasons to argue in favor of 'political question' doctrine adopted by the international tribunals.<sup>76</sup> Conceivably, the adoption of such doctrine might entail somewhat paradoxical outcome as it was accurately pointed out by Marcella David: such adoption 'simultaneously encourages the Court to extend its authority and to adopt a rule setting future limits on its power.'<sup>77</sup>

We argue that any attempt to apply the 'political question' doctrine in international law contradicts the fundamental principles of international law. The emergence of the 'political question' doctrine was possible only in a national legal system, as one of the means to restrain

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<sup>72</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14. (n 57).*

<sup>73</sup> Abram Chayes, 'Nicaragua, the United States, and the World Court' (1985) 85 Columbia Law Review 1445.

<sup>74</sup> C Todd Piczak, 'The Helms-Burton Act: U.S. Foreign Policy toward Cuba, the National Security Exception to the GATT and the Political Question Doctrine' (1999) 61 University of Pittsburgh Law Review 287.

<sup>75</sup> On 3 March 1992 the Libyan Arab Jamahiriya filed in the Registry of the Court two separate Applications instituting proceedings against the Government of the United States of America and the Government of the United Kingdom, in respect of a dispute over the interpretation and application of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed in Montreal on 23 September 1971, a dispute arising from acts resulting in the aerial incident that occurred over Lockerbie, Scotland, on 21 December 1988. Each of the respondent States filed preliminary objections. On 27 February 1998, the Court delivered two Judgments on the preliminary objections raised by the United Kingdom and the United States of America. In these judgements, the Court dismissed the objection to admissibility based on Security Council resolutions 748 (1992) and 883 (1993). By two letters of 9 September 2003, the Governments of Libya and the United Kingdom on the one hand, and of Libya and the United States on the other, jointly notified the Court that they had "agreed to discontinue with prejudice the proceedings". *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom), Preliminary Objections, Judgment, I CJ Reports 1998, p 9.*

<sup>76</sup> Dapo Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46 International and Comparative Law Quarterly 309; Marcella David, 'Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court' (1999) 40 Harvard International Law Journal 81.

<sup>77</sup> David (n 77) 148.

courts from intervening in the domains of the other branches of government.<sup>78</sup> Contrary to national legal systems, separation of powers is not ingrained in international law, and international law is based predominantly on the contractual relations between states. Therefore, it remains unclear whether it is practical and prudent to transpose this doctrine into the reality of international law.

It can be argued that from an institutional perspective the justiciability might be reflected in the separation of powers between different bodies of an international organization. Seen this way, the matter might appear non-justiciable only if it falls squarely within the competence of another body. To put it differently, if the General Council of the WTO would have been entitled to decide on the invocation of the security exception, the WTO adjudicators ought to acknowledge the matter as non-justiciable. It suffices to say that it is not the case.

In our view, the security exception clause is an affirmative defense, and it is justiciable due to the following: interpretation of the security exception according to the general rule of interpretation confirms that some elements of the clause can be adjudicated. This conclusion draws support from the supplementary means of interpretation as well. Furthermore, the legalization of the WTO dispute settlement and the impact of such institutional change on the security exception's interpretation ought to be accounted for.

*I. The general rule of interpretation and justiciability of the security exception*

The panels are entitled to clarify the existing provisions of the covered agreements 'in accordance with customary rules of interpretation of public international law'.<sup>79</sup> Customary rules of interpretation are codified in Articles 31-32 of the Vienna Convention on the Law of Treaties (VCLT).<sup>80</sup> The general rule of interpretation, which is of paramount importance for any interpretative exercise, reads as follows: 'A treaty shall be interpreted in good faith in accordance

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<sup>78</sup> "Doctrines of justiciability commonly appear as attempts to determine the limits of judicial or quasi-judicial functions and to distinguish them from 'political' functions and processes. As such resort to justiciability can expressly or implicitly reveal the decision-makers' perception of the nature and limits of their role and function." McGoldrick (n 15) 985.

<sup>79</sup> 'DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994)' (n 22) Article 3.2.

<sup>80</sup> 'Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, Entered into Force Jan. 27, 1980.'



with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'<sup>81</sup>.

Panels and the AB elaborated further on the application of the general rule of interpretation. The panel in US - Section 301 Trade Act affirmed that 'text, context and object and purpose as well as good faith - are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order'<sup>82</sup>. Besides this, the AB followed the ICJ<sup>83</sup> and declared its preference for the textual interpretation by stating: 'interpretation must be based above all upon the text of the treaty'<sup>84</sup>.

Despite the apparent preference for the textual interpretation, the WTO adjudicators rely on the various manifestations of the contextual reasoning as well. The list of contextual elements includes 'immediately surrounding words, other sentences of the same paragraph of a provision, other paragraphs in a provision, the title of a provision, immediately adjacent articles, other articles in the same part of the treaty, or other articles in other parts of the treaty'.<sup>85</sup>

Additionally, the object and purpose of a provision, as well as the object and purpose of a treaty itself, can be taken into consideration.<sup>86</sup> The AB does not disentangle the text and context from the object and purpose. The AB put it as follows: 'It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.'<sup>87</sup>

The text of the security exception reads as follows:

*Nothing in this Agreement shall be construed*

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<sup>81</sup> ibid Article 31(1).

<sup>82</sup> Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, p 815 301 para 7.22.

<sup>83</sup> *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Reports 1994, p 6; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgment, ICJ Reports 1995, p 6.

<sup>84</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p 97 page 11.

<sup>85</sup> Graham Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (First published, University Press 2015) 15.4 Context – Article 31(1).

<sup>86</sup> ibid 15.6 Object and Purpose.

<sup>87</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p 2755 para. 114.

*(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.*

On its face, the text of the security exception does not deny tribunal's competence to adjudicate it. The security clause is comprised of a number of exceptions: paragraphs (a), (b), and (c) enumerate them. If the common intention of the parties was to agree to a non-justiciable security exception, there would be no need to draft such an elaborate text.

The context does not support the argument that panels are deprived of their competence to review an invocation of the security clause. For example, the title of the provision and its placement between the general exceptions and the dispute settlement rules imply that the exception applies as an affirmative defense.

The drafters of the initial text intended not to allow the security exception to justify 'anything under the sun'.<sup>88</sup> Therefore, the object and purpose of the security exception can be significantly undermined if its invocation is not reviewed.

Additionally, the object and purpose of the dispute settlement system, which is 'a central element in providing security and predictability to the multilateral trading system'<sup>89</sup>, can be threatened by an entirely non-justiciable security clause. The risk inherent in a non-justiciable

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<sup>88</sup> World Trade Organization, 'WTO Analytical Index: Guide to WTO Law and Practice, Article XXI - Security Exceptions' <[https://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art21\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf)> accessed 28 November 2018 p. 600.

<sup>89</sup> 'DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994)' (n 22) Article 3.2.

security exception can be illustrated as ‘the risk of creating, at least in theory, the power of the losing party to block adverse Panel ruling’.<sup>90</sup>

## *II. Subsequent practice and the justiciability of the security exception*

Article 31 (3) of the VCLT reads as follows: ‘There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties.’ In the next few paragraphs, we discuss the GATT 1947 and the WTO disputes involving the security exception and the Decision Concerning Article XXI of the General Agreement adopted on 30 November 1982 and if they support our argument on the justiciability.

The security exception of the GATT 1947 was relied upon in several pre-WTO disputes. The dispute between Czechoslovakia and the United States was the first occasion when it was invoked.<sup>91</sup> The contracting parties did not reject jurisdiction to rule over the disputed issue, although the original claim by Czechoslovakia was dismissed.<sup>92</sup> After justifying its measures under the security clause, the United States provided a comprehensive explanation of the measures at issue, their operation and the security risks addressed by them.<sup>93</sup> The deliberations demonstrate that the security clause was considered as an affirmative defense to justify violations of the GATT 1947 provisions.

Legal scholars come to similar conclusions. Raj Bhala points out that the dispute was decided under Article XXIII(2) of the GATT 1947 and concludes as follows: ‘the Contracting Parties appear to have thought that mere invocation of Article XXI did not immunize a sanctioning member from an

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<sup>90</sup> Antonio F Perez, ‘WTO and U.N. Law: Institutional Comity in National Security’ (1998) 23 The Yale Journal of International Law 301, 312.

<sup>91</sup> Contracting Parties to the GATT 1947, ‘Twenty-Second Meeting, GATT/CP.3/SR.22, p. 9; II/28, 8 June 1949 (Request of Czechoslovakia for Decision under Article XXIII)’.

<sup>92</sup> At that time the WTO judicial process was at its rudimentary form, and therefore after a brief exchange of views, the contracting parties agreed to reject the claim. *ibid.*

<sup>93</sup> *ibid.*

Article XXIII action.<sup>94</sup> Schloemann and Ohlhoff infer that: ‘the Contracting Parties did not altogether decline their (formal) Article XXIII jurisdiction over matters involving Article XXI.’<sup>95</sup>

Twelve years later Ghana imposed restrictive measures against Portugal and justified them under the security exception.<sup>96</sup> Ghana explicitly built its defense on the particular facts of the case.<sup>97</sup> On this occasion, justiciability of the security clause was not discussed.

In 1975 Sweden defended its import quota system on footwear as necessary for its national security.<sup>98</sup> Faced with strong disapproval and diplomatic pressure, the Swedish government withdrew the quota system, and the measure was not adjudicated.<sup>99</sup>

The Falkland crisis in 1982 fueled the debate on the security interests and the international trading system. It was in the context of this crisis that the European Community made its notorious statement that ‘they had taken these measures [unilateral trade sanctions against Argentina] on the basis of their inherent rights of which Article XXI of the General Agreement was a reflection.’<sup>100</sup> The matter was not adjudicated, yet led to an adoption of the Decision Concerning Article XXI of the General Agreement, which is discussed below.

The dispute between Nicaragua and the United States (1986) sheds some light on the justiciability of the clause.<sup>101</sup> The established panel acknowledged that it did not examine the security exception because of its terms of reference, which explicitly prohibited such assessment, and not due to the general non-justiciability.<sup>102</sup> In this regard, Schloemann and Ohlhoff point out that the explicit prohibition to adjudicate the security clause confirms the weakness of the argument on non-justiciability of the clause.<sup>103</sup>

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<sup>94</sup> Raj Bhala, ‘National Security and International Trade Law: What the GATT Says, and What the United States Does’ (1998) 19 *University of Pennsylvania Journal of International Economic Law* 263, 278.

<sup>95</sup> Hannes L Schloemann and Stefan Ohlhoff, ‘“Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence’ (1999) 93 *The American Journal of International Law* 424, 432.

<sup>96</sup> World Trade Organization, ‘WTO Analytical Index: Guide to WTO Law and Practice, Article XXI - Security Exceptions’ (n 89) p. 600.

<sup>97</sup> Schloemann and Ohlhoff (n 96) 436.

<sup>98</sup> World Trade Organization, ‘WTO Analytical Index: Guide to WTO Law and Practice, Article XXI - Security Exceptions’ (n 89) p. 603.

<sup>99</sup> *ibid* p. 603.

<sup>100</sup> ‘GATT Council, Minutes of Meeting Held on May 7, 1982, GATT Doc. C/M/157, June 22, 1982.’

<sup>101</sup> *United States - Trade measures affecting Nicaragua, Report by the Panel (unadopted), Doc L/6053, 13 October 1986.*

<sup>102</sup> *ibid*.

<sup>103</sup> Schloemann and Ohlhoff (n 96) 435.

In the dispute between the European Communities and Yugoslavia in 1992 the panel's terms of reference did not exclude security justification from the panel's consideration<sup>104</sup>, yet the dispute was resolved on the other grounds<sup>105</sup>.

The three WTO disputes, in which the invocation of the security exception was discussed, are the European Communities' attempt to question the US sanctions against Cuba<sup>106</sup> and Colombia's and Honduras claims against Nicaragua for imposing sanctions after these countries concluded a bilateral treaty on delimiting the maritime boundary<sup>107</sup>. In the first dispute, the panel was established with the standard terms of reference prescribed by the DSU without any exceptions.<sup>108</sup> In respect of Colombia's claims, it was agreed that the Chair of the Dispute Settlement Body would consult with the parties in order to determine the panel's terms of reference.<sup>109</sup> All disputes were resolved by the political means, without any recourse to the formal adjudication.

As illustrated above, the practice of the pre-WTO and the WTO panels ascertains that the security clause was considered to be justiciable. Justiciability of the security exception is also confirmed by the Decision Concerning Article XXI of the General Agreement adopted in 1982.<sup>110</sup> The text of the decision, in the relevant part, states: 'when action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement'. It preserves the rights of the affected parties and allows them to request a review of the security clause's invocation. Despite the ambiguity of the text that leaves doubts as to its relevance<sup>111</sup>, the text still may serve as an additional argument to support the justiciability of the security clause.

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<sup>104</sup> World Trade Organization, 'WTO Analytical Index: Guide to WTO Law and Practice, Article XXI - Security Exceptions' (n 89) p. 604.

<sup>105</sup> The proceedings were suspended because of the uncertain legal status of the Federal Republic of Yugoslavia. *ibid*.

<sup>106</sup> DS38: United States - The Cuban Liberty and Democratic Solidarity Act.

<sup>107</sup> DS188: Nicaragua - Measures Affecting Imports from Honduras and Colombia; DS201: Nicaragua - Measures Affecting Imports from Honduras and Colombia.

<sup>108</sup> 'United States - The Cuban Liberty and Democratic Solidarity Act, Constitution of the Panel Established at the Request of the European Communities, Communication by the DSB Chairman, Doc. WT/DS38/3, 20 February 1997.'

<sup>109</sup> 'Dispute Settlement Body, Minutes of Meeting, Held on 18 May 2000, Doc. WT/DSB/M/80 of 26 June 2000.' paras. 41-42.

<sup>110</sup> 'Decision Concerning Article XXI of the General Agreement, Nov. 30, 1982, GATT B.I.S.D. (29th Supp.) at 23 (1983).'

<sup>111</sup> 'It could be argued that this paragraph was intended to establish that the dispute settlement provisions of the GATT were still applicable even when a matter of national security was involved. However, given that at the time, a respondent party also had the "right" to block the establishment of a panel, this decision did not advance matters much.' Akande and Williams (n 69) 374-375; Michael Hahn expressed similar views. Michael J Hahn, 'Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception' (1991) 12 Michigan Journal of International Law 558.

### *III. The legalization of the dispute settlement and justiciability of the security exception*

The WTO tribunals generally ascertain the common intention of the parties. In EC – Computer Equipment the AB disagreed with the panel’s interpretation of good faith as a requirement to consider the contracting party’s ‘legitimate expectations’. Moreover, the AB stated: ‘The purpose of treaty interpretation under Article 31 of the VCLT is to ascertain the common intentions of the parties. These common intentions cannot be ascertained on the basis of the subjective and unilaterally determined ‘expectations’ of one of the parties to a treaty.’<sup>112</sup>

During the Uruguay Round of negotiations, the dispute settlement rules were significantly changed, and the dispute settlement process became more legalized and formalized. Notwithstanding these drastic changes, the parties did not re-negotiate the security clause. Thus, a treaty interpreter can presume that the common intention of the WTO Members was to incorporate Article XXI in the GATT 1994 without any amendments, even though the dispute settlement rules fundamentally changed.<sup>2</sup>

The DSU does not prescribe any security exception, and the security clause of the GATT 1994 cannot amend the DSU rules. Schloemann and Ohlhoff warned against the opposite conclusion: ‘Such a direct jurisdictional defense would transform a primarily substantive security exception into a procedural national security exception, and thus would empower Members to block dispute settlement proceedings within the WTO. This result would directly contradict the purpose of “strengthening the multilateral system” and the carefully established negative-consensus rule.’<sup>113</sup>

### **Conclusion**

Considering current political discourse, which does not favor multilateralism, pronouncements that restrict the Member’s right to define its national security priorities might be considered immensely intrusive. Against this backdrop, the WTO tribunals might exercise considerable caution when interpreting the security exception clause. Despite this, we argue that the WTO adjudicators have jurisdiction over the security exception and the security exception clause is justiciable.

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<sup>112</sup> Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, p 1851 para. 84.

<sup>113</sup> Schloemann and Ohlhoff (n 96) 439–440.

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