Sovereignty, National Security and International Treaty Law

The Standard of Review of International Courts and Tribunals with regard to 'Security Exceptions'

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I. Introduction

Security is at the core of a State's right to exist. The Hobbesian concept of a State as the protector against threats from inside or outside of its walls is one of the theoretical bases of State sovereignty. Although the idea of unlimited State sovereignty today is no longer undisputed, the pivotal obligation of a State to protect its citizens' security makes the right to do so one of the bedrock features of this concept. This obligation to protect has consequences in the law of international treaties: When a State binds itself through the conclusion of a treaty, it reserves the right to protect its national security, even if this implies a departure from its treaty obligations. Therefore, many international treaties contain so-called security exceptions.

From early on, international lawyers were reluctant to scrutinize State security concerns and doubted that 'any tribunal acting judicially can override the assertion of a state that a dispute affects its security'.[1] However, the so-called security exceptions cannot be invoked without limitation. While being able to bind itself under international law is the very expression of a State's sovereignty,[2] the possibility of unrestricted reliance on security exceptions for treaty derogations would render the accepted obligations under a treaty subject to the sole discretion of the State parties and thus meaningless. Therefore, the evocation of security exceptions needs to be limited to specific conditions determined by their wording and scrutinized by international courts and tribunals. Whereas the first restrictive means, i.e. the

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[1] *H. Lauterpacht*, The Function of Law in the International Community, 1933, at 188.

[2] Case of the S.S.Wimbledon (Great Britain et al. v. Germany), PCIJ 1923, Ser. A 14, at 25.

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negotiation of restricting conditions in the treaty language, remains exclusively in the hands of the parties to the treaty, the latter may lead to the involvement of the international judiciary. It is therefore much more threatening to State sovereignty. The interpretation of the treaty terms would be left up to objective third parties which may not fully appreciate States' individual security concerns. The extent of judicial review as to the reliance on security exceptions can thus be perceived as a question of vertically delineating the competences of the State party to a treaty and the international legal regime to which it adhered to.

This article aims to clarify the standard of review to be applied by international courts and tribunals when dealing with the invocation of security exceptions. The international judiciary has ruled on this question in different contexts. The International Court of Justice (ICJ) examined security exceptions in so called Friendship, Commerce and Navigation (FCN)-treaties in the Nicaragua and Oil-Platforms cases; investment tribunals scrutinized similar exceptions in investment protection agreements in the context of the Argentinean economic crisis of 2001; and the European Court of Justice (ECJ) has ruled on the scope of the different security exceptions in the former EC Treaty, now renamed as Treaty on the Functioning of the European Union (TFEU).

However, other security exceptions, for instance Article XXI of the General Agreement on Tariffs and Trade (GATT), have never been thoroughly examined by the international judiciary. Also, States have relied on such exceptions without invoking them formally and without being challenged by other parties of the relevant treaty.[3] Even in situations where courts and tribunals have ruled on security exceptions, their findings are inconsistent. The current case law has not yet established a general and accepted standard of review for them. Regarding identical provisions, tribunals have come to different conclusions as to the legitimacy of security claims in like situations. This lack of consistent case law has also led to diverging interpretations in academic writing. The present article aims to contribute to this debate by examining relevant case law across the different legal regimes. Such comparative analysis could be useful, if common patterns of the court's reasoning are to be deduced.

[3] *J. Jackson*, The World Trading System, 1997, at 230–231. For a recent example see the Al-Yamamah affair in the United Kingdom, in which the Serious Fraud Office was ordered to halt investigations of possible bribes in relation to a military aircraft contract between BAe Systems and Saudi Arabia because of security considerations. The closing of the investigation might infringe the OECD Bribery Convention and cannot be legitimized by security concerns, as the Convention does not contain a security exception. See *S. Williams*, The BAE/Saudi Al Yamamah contracts: implications in law and public procurement, (2008) 57 ICLQ, 200 and *S. Rose-Ackermann/B. Billa*, Treaties and National Security, (2008) 40 International Law and Politics, at 437.

The article will first look at the different types of security exceptions in international treaties. Secondly, it will examine the existing case law in the context of FCN treaties, investment treaties and world trade law. This case law will then be compared to the jurisprudence of the European Court of Justice in the field of security exceptions. Finally, a proposal for an adequate common standard of review for security exceptions will be put forward.

II. A brief typology of security exceptions

Many international treaties contain explicit security exceptions.[4] These specific safeguard provisions are necessary because customary international law does not provide for a global and abstract security exception that could flatly be applied to international treaties. As Rose-Ackermann and Billa have shown,[5] neither the Vienna Convention on the Law of Treaties (VCLT) nor the International Law Commission's draft Articles on State Responsibility contain such an exception, although they do contain exceptions for other scenarios, notably for cases of necessity,[6] fundamental change of circumstances[7] or the sanctioning of a breach of a treaty on another party to the treaty.[8] E contrario to the general acceptance and codification of these exceptions, it becomes clear that security concerns cannot be invoked without a corresponding provision in the relevant treaty. Moreover, the differing language of security exceptions across different treaty regimes shows that there is not one standard safeguard, but provisions differing in scope and requirements and which are negotiated for every individual treaty.

Regarding these differing wordings, two main distinguishing features can be identified. Firstly, many security exceptions are limited in their scope ratione materiae, being applicable only to certain goods or situations. For example, Art. XXI (b) of the GATT can only be invoked with respect to

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[4] For provisions in the field of world trade law see notes 9 and 50 below. For EU Law see notes 10 and 13 below. For an overview over security exceptions in investment treaties see *W. Burke-White/A. von Staden*, Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties, (2008) 48 Virginia Journal of International Law 307, at 318–320. Many international human rights treaties do also contain these exceptions. See for example European Convention for the Protection of Human Rights and Fundamental Freedoms (11 April 1950) 213 UNTS 221, Arts. 8(2), 9(2), 10(2), 11(2), 15 and International Covenant on Civil and Political Rights (16 December 1966), GA Res. 2200A (XXI) UN Doc. A/6316, Arts. 4(1), 12(3), 13, 19(3), 21, 22(2).

[5] *S. Rose-Ackermann/B. Billa*, (note 3), at 443 et seq.

[6] See *International Law Commission*, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001), Art. 25.

[7] Vienna Convention on the Law of Treaties, (adopted 23 May 1969) 1155 UNTS 331, Art. 60.

[8] *Ibid.*, Art. 62.

nuclear materials and military equipment or in cases of war or emergency in the international relations of a State.[9] Similarly, Articles 346 and 347 TFEU, respectively, contain precise limitations regarding the scenarios in which they are applicable.[10]

Secondly, and more importantly in our context, security clauses vary between those that contain 'as it considers necessary' language and those that don't. The former are often called 'self-judging.'[11] A typical provision of this type is the security exception in the United States 2004 model bilateral investment treaty which reads as follows:

'Nothing in this Treaty shall be construed: [...] 2. to 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.'[12]

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[9] General Agreement on Tariffs and Trade (30 October 1947) 55 UNTS 194, Article XXI. The Article reads as follows:
'Security Exceptions
Nothing in this Agreement shall be construed
(*a*) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
(*b*) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
(i) relating to fissionable materials or the materials from which they are derived;
(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
(iii) taken in time of war or other emergency in international relations; or
(*c*) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.'

[10] Treaty on the Functioning of the European Union, OJ 2008 C 115/1, Art. 346 paragraph 1 (former Art. 296 of the Treaty Establishing the European Community, OJ 2002 C 325/33). Article 346 reads as follows:
'1. The provisions of this Treaty shall not preclude the application of the following rules:
(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.'
Art. 347 TFEU (former Art. 297 ECT) has the following wording:
'Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.'

[11] See for example *R. Briese/S. Schill*, Self-Judging Clauses before the International Court of Justice, (2009) 10 Melbourne Journal of International Law, 1 or *S.Rose-Ackermann/B. Billa* (note 3), 437.

[12] Art. 18 US Model Bilateral Investment Treaty, available at www.ustr.gov/trade-agreements/bilateral-investment-treaties (emphasis added). For similar language see e.g. Art. 10(4)

The same language can be found in Article XXI GATT and equivalent provisions in other WTO-agreements, in Article 346 TFEU and in Article 2102 of the North American Free Trade Agreement (NAFTA). Other treaties, however, do not contain such subjectification of their security clauses and require the taken measures plainly to be 'necessary' for the protection of essential security interests.[13] This difference in language will be proven to be the main distinguishing feature between security clauses regarding the standard of review applied by international courts and tribunals. The following section will examine the jurisprudence of international courts and tribunals interpreting these two types of exceptions.

III. Judicial Practice with regard to security exceptions

1. The International Court of Justice judging on security exceptions in the Nicaragua and Oil Platforms cases

The ICJ had to assess the relevance of security exceptions on two occasions. In both cases, the exception was contained in an FCN treaty concluded by the United States with, respectively, Nicaragua and Iran.[14] The language of the exception in the two FCN-treaties is identical:

'[T]he present Treaty shall not preclude the application of measures: [...] *(d)* necessary to fulfil the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests'.[15]

In both cases, the United States had first of all denied jurisdiction of the ICJ because of this section. The ICJ, however, has made it clear that a security exception of the kind enclosed in the United States-FCN treaties does not limit the scope of the treaty, but can only lead to the exclusion of the illegality of a measure contrary to the treaty in the merits:

'This article cannot be interpreted as removing the present dispute as to the scope of the Treaty from the Court's jurisdiction. Being itself an Article of the Treaty, it is covered by the provision in Article XXIV that any dispute about the "interpretation or application" of the Treaty lies within the Court's jurisdiction. Article XXI defines the instances in which the

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of the Canadian Model Treaty, available at http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf.

[13] For example Art. 36 TFEU (note 10) and most security exceptions in FCN-treaties and BITs. The language of these objective clauses varies across different treaties. Instead of necessary the terms required, directed to etc. are also used. See *W. Burke-White/A. von Staden*, (note 4), at 330–331 and 336.

[14] On FCN Treaties in general see *A. Paulus*, Treaties of Friendship, Commerce and Navigation, in *R. Wolfrum* (ed.), EPIL, Heidelberg 2009.

[15] Treaty of Friendship, Commerce and Navigation (US-Nicaragua) (21 January 1956) 367 UNTS 3, Art. XXI (d) and Treaty of Amity, Economic Relations, and Consular Rights (US-Iran) (15 August 1955) 284 UNTS 93, Art. XX (d), respectively. For the sake of completeness it shall be added that the US-Iran FCN treaty refers to the 'High Contracting' Parties.

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.'[16]

Secondly, the United States had argued that the security clause was 'self-judging' and its invocation thus in the exclusive discretion of the parties. The Court clearly rejected the 'self-judging' argument put forward by the United States. In explaining its finding, the Court relied on an argumentum e contrario with regard to Article XXI of the GATT. As this provision was explicitly at the subjective disposition of the State parties ('considers necessary'), the same disposition could not be granted with respect to the differently worded FCN treaty provision.[17] It could be argued that by this reasoning, the ICJ has at the same time excluded deference of the judiciary with regard to normal security exceptions. However, it is appropriate to emphasize that the argumentum e contrario with regard to Art. XXI GATT was only used to exclude the self judging character of the FCN-provision. The Court did not express itself explicitly on the adequate standard of review regarding this provision. When assessing the fulfilment of the conditions of the clause, it limited itself to the rather vague statement:

'[W]hether a measure is necessary to protect the essential security interests of a party is *not [...] purely* a question for the subjective judgement of the party: The text does not refer to what the party "considers necessary" for that purpose.'[18]

The 'not purely' passage leaves open as to what extent the assessment of the necessity of security measures can be reviewed. By inserting the word purely, the Court must have assumed some form of discretion for the State invoking the exception. However, the Court remained silent regarding the features of such discretion.

Not much further light was shed on the review of security exceptions when the ICJ had to decide a dispute between Iran and the USA regarding mutual allegations of illicit use of force in the Persian Gulf. Initially, the Court, following the precedent of its earlier Nicaragua-judgment, unsurprisingly asserted its jurisdiction on measures taken for security reasons.[19] At the merits stage, it examined the question whether the destruction of Iranian oil platforms by American warships was covered and thus justified by the security exception of the US-Iranian FCN-treaty. Regarding their invocation of the security exception, the United States contended that '[a] measure of discretion should be afforded to a party's good faith application of measures to protect its essential security interests,' herewith referring

[16] Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), Merits, ICJ Reports 1986, 14, at para. 222. See also Case concerning Oil-Platforms (Iran v. USA), Preliminary Objections, ICJ Reports 1996, 803, at para. 20.

[17] Nicaragua Case, Merits (note 16), at para. 222.

[18] *Ibid*, at para. 282 (emphasis added).

[19] Oil-Platforms Case, Preliminary Objections (note 16), at para. 20.

clearly to a wide discretion available for the State pursuing its security interests.[20] The Court, however, failed to embrace the opportunity to clarify the interpretation of security exceptions in that regard. It proceeded, on the basis of Art. 31(3)(c) of the VCLT, to interpret the exception in the light of the UN Charter and notably the right to self-defence. Finding that the conditions of Art. 51 UN Charter had not been met, the Court held that it did not have to interpret the treaty's security exception any further:

'The Court does not [...] have to decide whether the United States interpretation of Article XX, paragraph 1 (d), on this point is correct, since the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion".'[21]

Yuval Shany has pointed at the ambiguity of this statement.[22] At first sight, it seems to contain a categorical rejection of a margin of appreciation with regard to necessity-defences in general. This interpretation is supported by the separate opinions of Judges Simma and Higgins, both of whom explicitly rejected any margin of appreciation with regard to Article XX (1) (d) of the FCN-treaty.[23] However, as the Court rejected any 'measure of discretion' only regarding the right to self-defence, the judgment in Oil-Platforms does not exclude the possibility that such discretion would be appropriate with respect to security exceptions. In his separate opinion, Judge Koojimans has embraced the idea of discretion for the State relying on the exception:

'The evaluation of what essential security interests are and whether they are in jeopardy is first and foremost a political question and can hardly be replaced by a judicial assessment. Only when the political evaluation is patently unreasonable [...] is a judicial ban appropriate.'[24]

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[20] Case concerning Oil-Platforms (Iran v. USA), Merits, ICJ Reports 2003, 161, at para 73.

[21] *Ibid*, at para 73.

[22] *Y. Shany*, Toward a General Margin of Appreciation Doctrine in International Law, (2005) 16 EJIL 907, at 932. However, *Shany* eventually seems to interpret the judgment itself as a general rejection of the margin of appreciation-doctrine, *ibid* at 933.

[23] Case concerning Oil-Platforms (Iran v. USA), Sep. Op. Judge Higgins, ICJ Reports 2003, 225, at para. 48 and, interpreting Art. XX (d) in the light of the aim of the FCN-treaty: Case concerning Oil-Platforms (Iran v. USA), Sep. Op. Judge Simma, ICJ Reports 2003, 324, at para. 11: 'I also strongly subscribe to the view of the Court expressed in the Judgments paragraph 73 according to which the requirement of international law that action taken avowedly in self-defence must have been necessary for that purpose, is strict and objective, leaving no room for any "measure of discretion." In my view, this is also due to Article 1 of the 1955 Treaty ("There shall be firm and enduring peace and sincere friendship between the United States ... and Iran") which, according to the Court's Judgment of 1996 on the Preliminary Objection of the United States, must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied. [...] Since Article XX, paragraph 1 (d), of the 1955 Treaty is the exception to the rule of freedom of commerce and navigation enshrined in the same Treaty, and, as stated, in light of Article 1, all these terms have to be subjected to extremely careful scrutiny.'

[24] Case concerning Oil-Platforms (Iran v. USA), Sep. Op. Judge Koojimans, ICJ Reports 2003, 246, at para. 44. This statement of Judge Koojimans seems to be strongly influenced by the 'political questions'-doctrine in US constitutional law. Regarding the political questions

In the same vein, Judge Buergenthal, in his separate opinion, argued for a margin of appreciation-approach specifically – and in delineation to general international law as applied by the Court – with regard to stipulated security exceptions in international treaties such as the US-Iranian FCN-treaty:

'[W]hile a government's determination is ultimately subject to review by the Court, it may not substitute its judgement completely for that of the government which, in assessing whether the disputed measures where necessary, must be given the opportunity to demonstrate that its assessment of the perceived threat to its essential security interests was reasonable under the circumstances.'[25]

The diverging views among the judges arguably show that the Court did not intend to comprehensively interpret the standard of review regarding the security exception. Its statement on the appropriate standard of review is far from being clear. The Court was explicitly criticised for that by Judge Higgins.[26] It once again refused to bind itself to an abstract standard, thus preserving its flexibility to react to the circumstances of the individual case before it.

In summary, despite being very clear on the matter of jurisdiction, the case law of the ICJ does not give clear guidance as to the appropriate standard of review for security exceptions. Both the judgements in the Nicaragua case and in Oil-Platforms are rather vague on this question. The judgment in Oil-Platforms remains mute on the question altogether, whereas the Nicaragua judgment does not grant any margin of discretion when assessing the US-measures, while at the same time stating that the determination of essential security interests was not purely up to the State parties, a passage that can be easily interpreted as making the case for granting certain margin of appreciation of the State parties. To make the confusion complete, the latter passage of the Nicaragua judgment is approvingly cited by the Court in Oil-Platforms.[27] Thus, the ICJ case law cannot be used as supporting any view on the appropriate standard of review.[28]

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doctrine and its role in international law see *T. Franck*, Political Questions, Juridical Answers, Princeton 1992 and, in the context of security exceptions *C. Piczak*, The Helms Burton Act: U.S. Foreign Policy toward Cuba, the national security exception to the GATT and the political questions doctrine, (1999–2000) 61 University of Pittsburgh Law Review, 287, at 318–326.

[25] Case concerning Oil-Platforms (Iran v. USA), Sep. Op. Judge Buergenthal, ICJ Reports 2003, 270, at para. 37.

[26] Oil-Platforms Case, Sep. Op. Judge Higgins (note 23), at para. 48.

[27] Oil-Platforms Case, Merits (note 20), at para. 43.

[28] For a different opinion see *J. Alvarez/K. Khamsi*, The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime, (2008) Jean Monnet Working Paper 05/08, available at jeanmonnetprogram.org, at 56.

2. The Argentinean Crisis: ICSID Arbitral Awards dealing with security exceptions

In 2001 Argentina underwent the worst economic crisis in its history. Due to, inter alia, an unhealthy linkage of the Argentinean Peso to the US Dollar, the Argentinean economy collapsed within a few months and the State faced bankruptcy. Governments succeeded one another within days and people took to the streets in desperation over the loss of their savings in the aftermath of the collapse of the currency. The Argentinean State reacted with harsh emergency measures vis-à-vis the financial sector, freezing assets in banks and blocking money transfers abroad. Suppliers of public services such as gas, water or electricity companies were forced to renegotiate their contracts so as to provide affordable commodities to the impoverished population. The companies affected by these measures, if controlled by foreign investors, reacted with the initiation of arbitral proceedings on the basis of the numerous bilateral investment treaties (BIT) Argentina had concluded, seeking compensation for expropriation and violation of the fair and equitable treatment standard.

In many of these proceedings, most prominently with respect to US investors in the Argentinean gas sector, Argentina based its defence, amongst others, on the security exceptions in the BIT, claiming that the crisis of 2001 amounted to a threat to its national security. Thus, it contended, the measures taken were covered by the security exception and could not amount to a violation of the BIT. The relevant provision in the US-Argentina BIT reads as follows:

'This treaty shall not preclude the application by either party of measures necessary for the maintenance of public order [...] or the protection of its own essential security interests.'[29]

The investment awards in the aftermath of the Argentinean crisis have raised a number of important questions with regard to the preclusion of wrongfulness due to a state of necessity and/or the reliance on a specific security exception in the treaty. Tribunals and scholars have expressed different views on the relation of the customary international law standard of necessity to security exceptions such as Art. XI of the US-Argentina BIT and on the question whether an economic crisis can amount to a threat for a State's security.[30] These questions are not the object of this paper. However, the tribunals also had to deal with the question whether Article XI BIT precludes their jurisdiction or can be reviewed against the facts of the cases.

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[29] Treaty concerning the reciprocal encouragement and protection of investment (US-Argentina) (14 November 1991) S. Treaty Doc. No. 103–2, Art. XI.

[30] For an overview see *A. Bjorklund*, Emergency Exceptions: State of Necessity and Foce Majeure, in *P. Muchlinski/F. Ortino/Ch. Schreuer* (eds.), Handbook of International Investment Law, 2008, 459.

Argentina had argued that the clause was self-judging, thus limiting review by international tribunals to bona fide considerations and being exclusively up to the discretion of the government.[31] Basing its reasoning on expert opinions of Anne-Marie Slaughter and William Burke-White, Argentina submitted that this interpretation was the intention of the parties when they concluded the treaty and that the self-judging nature of the clause was necessary to preserve the sovereign flexibility of a State to react to severe crises.[32] All the tribunals rejected this view.[33] Referring to the jurisprudence of the ICJ in the Nicaragua and Oil-Platforms cases, they found that the wording of Article XI BIT, which does not include the typical 'as it considers necessary' passage, indicates that the clause was not meant to be self-judging.[34] This view was also supported by the change in US treaty practice with respect to security exceptions, which reflected the intended self-judging nature of these exceptions, as recent US BITs contain explicit 'as considers necessary' language.[35] E contrario, it can be deduced that the old wording has not been drafted with the aim of a 'self-judging'-exception.[36] Furthermore, the tribunals pointed out that unlimited autonomy of a State party to interpret Article XI would enable it to decide unilaterally over the applicability of the investment protection standards laid down in the treaty. This would deprive investors of protection whenever a State would claim an emergency situation, for example in times of political or economical unrest. However, under usual circumstances, this is precisely when investment protection is needed the most.[37]

As all tribunals held that the provision was not self-judging, they further had to answer the question of the appropriate standard of review when assessing these safeguards. Whereas Argentina argued for a highly deferential

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[31] See LG&E Energy Corp. v. Argentine Republic, ICSID Case No. Arb/02/01, Decision on Liability, 3 October 2006, para. 208; Enron Corp. Ponderosa Asset L.P. v. Argentine Republic, ICSID Case No. Arb/02/01, Award, 22 May 200, paras. 324 et seq.

[32] For a comprehensive explanation of Argentina's arguments see *W. Burke-White/A. von Staden* (note 4), at 368 et seq. The claimants partly relied on the expert opinion of Professor *José Alvarez*. For his view see *J. Alvarez/K. Khamsi* (note 28).

[33] See CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. Arb/01/8, Award, 12 May 2005, para. 373, LG&E (note 31), para. 212, Enron (note 31), paras. 332 et seq., Sempra Energy International v. Argentine Republic, ICSID Case ARB/02/16, Award, 28 September 2007, paras. 374 et seq., Continental Casualty Company v. Argentine Republic, ICSID Case No. Arb/03/9, Award, 5 September 2008, paras. 182 et seq.

[34] For a discussion of the ICJ jurisprudence see Continental Casualty (note 33), paras. 186–187.

[35] See note 12 above.

[36] See for example *Sempra* award (note 33), at para 379: 'Truly exceptional and extraordinary clauses, such as a self-judging provision, must be expressly drafted to reflect that intent, as otherwise there can well be a presumption that they do not have such meaning in view of their exceptional nature.'

[37] See also *P. Muchlinski*, Trends in International Investment Agreements – Balancing Investor Rights and the Right to regulate the issue of National Security, in *K. Sauvant* (ed.), Yearbook on International Investment Law and Policy 2008–2009, 2009, at 62–63.

standard, the claimants wanted to apply the standard used for necessity in customary law which would require the indispensability of the security measure. Alas, in the five cases decided so far, the tribunals did not adhere to a common interpretation of the clause. While the tribunals in the CMS, Sempra and Enron awards decided that Argentina's measures during the crisis were not necessary in the sense of Article XI and therefore in breach of the BIT, the awards in the LG&E and Continental Casualty cases did accept the invocation of the exception, thereby legitimising the measures for a certain period of time during the crisis.

Although the outcome of the cases was different, common patterns of the different tribunal's review can however be deduced. All tribunals examined the underlying factual situation in Argentina in detail and subsumed them under the elements of the security exception in Article XI.[38] Without making explicit statements as to the appropriate standard of review, the CMS, Sempra, Enron and LG&E tribunals' factual and legal analysis thus show that the applied standard of review has been a rather thorough one. This interpretation is in line with the understanding by the tribunals of their task. In the Enron award, for example, the tribunal held that 'judicial control must be a substantive one as to whether the requirements under [...] the Treaty have been met.'[39] In reaction to Argentina's arguments for its interpretative autonomy regarding security, the tribunal continued as follows:

'Judicial determination of the compliance with the requirements of international law in this matter should not be understood as if arbitral tribunals might be wishing to substitute for the functions of the sovereign State, but simply responds to the duty that in applying international law they cannot fail to give effect to legal commitments that are binding on the parties and interpret the rules accordingly...'[40]

So far, only the tribunal in the Continental Casualty case tried to abstractly define an 'applicable standard'[41] for its review. It rejected both the submissions of Argentina and the claimant, rejecting, in turn, the adequacy for 'highest deference' to the State's decision and the application of the 'indispensability" standard derived from the customary international law standard of necessity.[42] It argued that Article XI of the BIT was modelled in view of Article XX (a), (b) and (d) of the GATT and could therefore be interpreted in light of the WTO case law on this general exception to GATT commitments.[43] An interpretation to that effect led the tribunal to assess

[38] Sempra (note 33), paras. 388 et seq., CMS (note 33), paras. 347 et seq., LG&E (note 31), paras 226 et seq., Continental Casualty (note 33), paras 196 et seq.

[39] Enron (note 31), para. 339.

[40] Ibid, at para. 340. The tribunal in the CMS case also spoke of a 'substantive review' (CMS (note 33), para. 374).

[41] Continental Casualty (note 33), para. 84.

[42] Ibid, paras. 189 et seq.

[43] The tribunal made reference to several WTO panel and Appellate Body reports, such

whether the Argentinean measures were 'materially contributing' to the protection of its security interests.[44] Applying this standard, it examined, firstly, if alternative effective measures which would not have breached the BIT were available. Secondly, it determined whether the early adoption of other policies could have averted the crisis.[45]

Although it is commendable that the tribunal attempted to define the standard of review it applied, the chosen method is not without its problems. Indeed, Article XX (a), (b) and (d) GATT contain exceptions and require that these are 'necessary' for their aims. It thus resides in a similar context with Article XI of BIT. However, with Article XXI, the GATT contains another exception, and one that, unlike Article XX, is tailor-made for security issues. This provision contains significantly different language from Article XX GATT as it features the 'as it considers necessary' wording and therefore hints at a different standard of review for security exceptions than that which is used in the context of Article XX GATT. Also, the tribunal does not explain why it believes that Article XI of the BIT was modelled in view of Article XX. It is doubtful whether one can apply the standard of review established for this exception to article XI of the BIT. Even though the substantial review of the facts in Continental Casualty does not seem to differ from that in the other Argentinean cases dealing with Article XI of the BIT, its abstract explanations as to the appropriate standard of review are doubtable.

Nevertheless, like in the other awards mentioned above, the thorough assessment of the facts with regard to the conditions laid down in Article XI of the BIT shows that the standard of review applied by investment tribunals with regard to security exceptions without 'as considers necessary' language is a close one.[46] All tribunals have examined in detail whether Argentina's crisis in 2001 posed a threat to its security and if the reaction of the government was reasonable and the least harmful measure at hand. Thus, the applied standard can be described as one that is much closer to comprehensive review than to far-reaching deference.

At the same time, however, one tribunal made explicit reference to a margin of appreciation for the State parties when taking security measures.[47]

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as Korea Beef, EC Tyres, EC Asbestos and US-Gambling, notably citing the finding of the Appellate Body in Korea Beef that in order to be necessary, a measure has to be 'indispensible.' See Continental Casualty (note 33), paras. 193 et seq.

[44] Ibid, para. 196. For a further description of the appropriate standard see ibid, at para. 199: '[T]he tribunal is mindful that it is not its mandate to pass judgment upon Argentina's economic policy during 2001–2002, nor to censure Argentina's sovereign choices as an independent state... [It] is not called upon to make any political or economic judgment on Argentina's policies and of the measures adopted to pursue them.'

[45] Ibid, para. 198.

[46] To date, no tribunal had to decide on the interpretation of a security exception containing 'as considers necessary'-language.

[47] Continental Casualty (note 33), para. 187.

Others have implicitly granted such discretion.[48] As will be argued below, the case law in the field of the law of foreign investment does therefore support the case for a comprehensive reviewability of the evocation of security exceptions and deference only within the boundaries of a clearly defined margin of appreciation for the State parties.

3. Article XXI GATT: Security in the WTO

The most prominent security exception containing 'as it considers necessary' language is Article XXI of the GATT.[49] Exemptions with identical wording can be found in most other WTO agreements.[50] Although the provision has been part of the WTO law from the beginning, its exact meaning has remained obscure to date.[51] While some WTO Member States argue for a self-judging nature of the provision, others, in line with the majority of commentators, favour a more restricted interpretation of the norm. In practice, Article XXI GATT has always been treated as a predominantly political provision. Hence, no GATT or WTO panel has so far dealt with the exception in detail. Nevertheless, some panels under the old GATT '47 and one WTO panel had to deal with certain aspects of the clause.

In 1949, in the wake of the emerging conflict with the Soviet Union and its allies, the United States imposed an export ban on certain products vis-à-vis Czechoslovakia. When confronted with dispute settlement procedures under Article XXIII GATT, the United States invoked, inter alia, Article XXI GATT. The Czechoslovakian complaint was subsequently rejected, without any reasons and apparently based on a broad and cursory draw on the exception.[52] Although the decision does not indicate the stand-

[48] See e.g., Sempra (note 33), para. 389: 'A judicial determination as to compliance with the requirements of international law in this matter should not be understood as suggesting that arbitral tribunals wish to substitute their views for the functions of sovereign States.'; LG&E (note 31), para. 239: 'A State may have several responses at its disposal...' See also Enron (note 31), para. 309 and Continental Casualty (note 33), para. 199: 'The tribunal is mindful that it is not its mandate to pass judgment upon Argentina's economic policy during 2001–2002, nor to censure Argentina's sovereign choices as an independent state.'

[49] See note 9 above.

[50] See, for example, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (15 April 1994), 33 ILM 1125, 1177, Annex 1B, General Agreement on Trade in Services Art. XIV bis; Ibid.at 1225, Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 73; Ibid., Annex 4, Agreement on Government Procurement, Article XXIII (1).

[51] On the drafting history of the Article see *W. Cann*, Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism, (2001) 26 Yale Journal of International Law 413, at 421–422.

[52] Decision of 8 June 1949, 2 GATT BISD 28 (1952). For the discussions of the GATT parties in the matter see Doc. GATT/CP.3/SR.22 (1949). For thorough analysis see *H. Schloemann/S. Ohlhoff*, 'Constitutionalisation' and Dispute Settlement in the WTO: National Security as an Issue of Competence, (1999) 93 AJIL 424, at 432–433; *M. Hahn*, Vital

ard of review applied by the Member States (or the exclusion of review altogether), one important conclusion can be drawn from the case: By issuing a formal decision, the States in principle acknowledged jurisdiction under Article XXIII GATT for invocations of Article XXI GATT.[53]

In another situation, in support of the United Kingdom in the Falkland/Malvinas conflict of 1982, the European Community, Australia and Canada restricted Argentinean imports into their countries, relying on 'their inherent rights of which Article XXI of the GATT is a reflection.'[54] The import ban was discussed by the WTO Member States, but no formal procedures under Article XXIII GATT were initiated. Many Member States made it clear that they considered measures such as those taken by the EC, Australia and Canada to be exclusively in the discretion of the States and 'required neither notification, justification, nor approval'.[55] Others disagreed and insisted on a duty to submit such measures to the GATT Council. The dispute remained undecided. But, resulting from the discussions in the Council, a formal decision on the application of Article XXI GATT was adopted. This decision, however, was too vague to clarify the appropriate procedure.[56]

It was only one year later that another dispute involving Article XXI GATT emerged. This time, the dispute led to the formation of a panel, and a report was issued in 1984.[57] The panel had to assess the legality of United States trade measures against Sandinist Nicaragua. The United States refused to defend its measures in front of the panel, insisting that the measures

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Interests and the Law of the GATT: An Analysis of GATT's Security Exception, in (1991) 12 Michigan Journal of International Law 558, at 569 et seq.

[53] See also *R. 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, at 278. Further evidence for jurisdiction on the merits of the DSB has been deduced from the statement of Ghana as to its defense of trade restrictive measures vis-à-vis Portugal. In defending its measures, Ghana explicitly referred to the prerequisites of Article XXI and thus implicitly accepted their review by the panel. See Contracting Parties to the GATT, Basic Instruments and Selected Documents, Supplement No. 12 (1961), at 196. See also *H. Schloemann/S. Ohlhoff* (note 52), at 436, *M. Hahn* (note 52), at 571.

[54] GATT Doc. L/5319/Rev. 1 (5 May 1982).

[55] GATT Council, Minutes of Meeting held on 7 May 1982, GATT Doc. C/M/157 (22 June 1982), at para. 10. See also *M. Hahn* (note 52), at 574.

[56] In its operative part, the 'Decision concerning Article XXI of the General Agreement' reads as follows: '1. Subject to the exception in Article XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI. 2. When action is taken under Article XXI, all contracting parties affected by such actions retain their full rights under the General Agreement. 3. The Council may be requested to give further consideration to this matter in due course.' The Decision also mentions the possibility of a future "formal interpretation" of Article XXI. See Contracting Parties to the GATT, Decision of 30 November 1982, Basic Instruments and Selected Documents, Supp. No. 29, at 23 (1981–1982).

[57] Panel Report, United States – Imports of sugar from Nicaragua, 13 March 1984, GATT B.I.S.D. (31st supplement 1985).

were of a purely political nature and could not be scrutinized by a GATT panel, even though they had implications on trade.[58] As the panel could not examine any possible defence in favour of the USA due to the passivity of the defendant, it inevitably found a violation of Article XXIII (2) GATT. The United States disregarded the report.

When confronted with a second dispute settlement procedure initiated by Nicaragua one year later, the United States changed its strategy. During the negotiations of the terms of reference for the panel, they made sure that an assessment of Article XXI GATT, on which it this time explicitly relied, was excluded from the review.[59] Thus, the panel could not tackle the security defence issues at all. Being accordingly restrained, the panel 'could find the United States neither to be complying with its obligations under the General Agreement nor to be failing to carry out its obligations under that Agreement.'[60] However, it stated its opinion as to the legal nature of the provision obiter dictuma:

'If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the CONTRACTING PARTIES ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than that set out in this provision.'[61]

In any case, the panel report was never adopted. In sum, the two GATT Nicaragua cases at least show that a self-judging interpretation of Article XXI continued to evoke opposition both from within the WTO Dispute Settlement Body (DSB) and from many Member States. Due to this opposition, the United States found it necessary to assert the explicit exclusion of the security exception from the second panel's terms of reference.[62] It could be argued that the United States thereby implicitly acknowledged that without such restriction, a panel could have examined the provision to some extent.[63]

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[58] Ibid, at paras. 3.10–12.

[59] Under the 'old' GATT '47 procedure, the terms of reference could only be agreed unanimously. For further analysis see *H. Schloemann/S. Ohlhoff* (note 52), at 424–425; *M. Hahn* (note 52), at 575 et seq.

[60] Panel Report, United States – Trade measures affecting Nicaragua, 13 October 1986 (unadopted), GATT Doc. L/6053, paras 5.2–3.

[61] Ibid, para 5.17.

[62] For a comprehensive analysis of the second Nicaragua dispute see *R. Whitt*, The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua, (1987) 19 Law and Policy of International Business, 603.

[63] It should be noted here that under the new GATT '94, the complaining party has the right to the establishment of a panel (see Article 6 (1) DSU) and thus the defendant cannot dictate the terms of reference any more. In this context see also *A. Perez*, The Judge between the Nations: Post Cold War Transformations in National Security and Separation of Powers – Beating Nuclear Swords into Plowshares in an Imperfectly Competitive World, (1996–1997) 20 Hastings International and Comparative Law Review, 331, at 409–410 and *C. Piczak* (note 24), at 308–310.

In 1991 it were the European Communities (EC) who faced proceedings under Article XXIII GATT because of an embargo against ex-Yugoslavia. Although here again, the GATT panel did not examine the EC's Article XXI defence on the merits,[64] one important detail of the dispute has been pointed out:[65] At no point during the proceedings did the EC oppose the establishment of a panel in the matter as such. Neither did it attempt to restrict the terms of reference for the panel with regard to Article XXI. Thus, it implicitly accepted the jurisdiction (and – to an extent as yet to be defined – reviewability) of the DSB over Article XXI in principle.

Finally, the most prominent case involving Article XXI was the Article XXIII-procedure initiated by the EC against the United States in 1996 against the so-called Helms-Burton Act.[66] The Act severely sanctioned the trafficking of confiscated pre-revolutionary Cuban property for every individual or company doing business in or with Cuba.[67] The EC contended that these measures infringed WTO law and, following its request, a panel was established.[68] Although, here again, no panel report was eventually adopted due to an extra-judicial settlement of the matter,[69] the arguments of the two parties clearly articulated the different viewpoints on the legal nature of Article XXI. Whereas the United States argued that the alleged self-judging language of the exception made the dispute non-justiciable by the DSB, the EC claimed the contrary. In the aftermath of the Helms-Burton dispute, Article XXI has received increased attention in legal writing, especially in America.[70]

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[64] The panel was established and then suspended due to the unresolved question whether the Federal Republic of Yugoslavia was the legitimate successor of the former Socialist Federal Republic of Yugoslavia.

[65] *P. Lindsay*, The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?, (2003) 52 Duke Law Journal 1277, at 1294; *D. Akande/S. Williams*, International Adjudication on National Security Issues: What Role for the WTO?, (2003) 43 Virginia Journal of International Law 365, at 375–376.

[66] Cuban Liberty and Solidarity Act of 12 March 1996, Pub. L. No. 104–114 (1996), 110 Stat 785, 22 U.S. C. § 6021 (28), reprinted in 35 I.L.M. 357. The Act was commonly named *Helms-Burton* after the two congressmen pushing for the adoption of the legislation. For the relating WTO proceedings see Doc. WT/DS38/1, 13 May 1996.

[67] See *R. Bhala*, Fighting Bad Guys with International Trade Law, (1997) 31 University of California Davis Law Review 1, at 37 et seq.

[68] WTO Doc. WT/DS38/1 (13 May 1996).

[69] See Memorandum of Understanding concerning the US Helms-Burton Act and the US Iran and Libya Sanctions Act of 11 April 1997, 36 I.L.M. at 529–530. In the diplomatic solution to the dispute, *Lindsay* sees an example for the superiority of negotiated solutions to legal rulings in the WTO in certain controversial fields involving, most notably, 'high politics' such as national security. See *P. Lindsay* (note 65), at 1307, 1311 et seq.

[70] *R. Bhala* (note 53, *id.*, note 67), arguing that Article XXI has to be interpreted as being self-judging, but that, in practice, trade sanctions for political reasons are ineffective. See also *C. Piczak* (note 24); *H. Schloemann/S. Ohlhoff* (note 52), *J. Spagnole*, Can Helms-Burton be challenged under WTO, (1997–1998) 27 Stetson Law Review 1313.

In sum, the dispute settlement practice with regard to Article XXI under GATT '47 and the WTO gives only little guidance as to the correct interpretation of the norm. It only seems safe to say that the discussions among the Member States and subsequent panel practice show that the GATT security exception does not exclude jurisdiction of the DSB in the first place.[71] Member States, by and large, have implicitly accepted jurisdiction through demanding deference of the panels when examining Article XXI. Whether the provision is genuinely self-judging or can be reviewed on the merits remains unclear. In the latter case, the appropriate standard of review still has to be defined. Numerous commentators have expressed their views on the matter.[72] While some argue for a self-judging nature of the provision, the majority militate against the self-judging arguments and put forward different possible standards of review.[73] As will be explained below, this article argues for principal deference regarding 'as considers necessary' provisions that finds its limits in the requirements of general treaty law, and notably Article 26 VCLT.

4. EU Law: The ECJ judging upon both types of exceptions

An interesting comparison of the aforementioned jurisprudence can be drawn to that of the European Court of Justice regarding the security exceptions in the TFEU. The case law of the ECJ is especially interesting because the TFEU contains both security exceptions that use 'as considers necessary' wording and others that are confined to mere necessity. The ECJ has ruled on both types of exceptions. However, taking into consideration the unique level of integration reached in the European Union and its sui generis legal nature, which goes beyond categories of classical international law,[74] it could be doubted whether the jurisprudence of the European courts can be of any use to determining the appropriate standard of review for other international courts and tribunals. Of course, interpretative tools

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[71] For convincing arguments see *H. Schloemann/S. Ohlhoff* (note 52), at 438–447 and *D. Akande/S. Williams* (note 65), at 379.

[72] See *P. Lindsay* (note 65); *D. Akande/S. Williams* (note 65); *A. Perez* (note 63); *Id.*, WTO and UN Law: Institutional Comity in National Security, (1998) 23 Yale Journal of International Law 301 (making the case for an assessment of Art. XXI GATT in the light of decisions by the UN Security Council); *A. Emmerson*, Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse?, (2008) 11 Journal of International Economic Law 135; *R. Goodman*, Norms and National Security: The WTO as a catalyst for inquiry, (2001) 2 Chicago Journal of International Law 101 (arguing for a 'constructivist' approach to Art. XXI GATT); *R. Whitt* (note 62); *H. Schloemann/S. Ohlhoff* (note 52); *M. Hahn* (note 52); *R. Bhala* (note 53); *Id.* (note 67); *J. Spagnole* (note 70); *C. Piczak* (note 24); *W. Cann* (note 51).

[73] *H. Schloemann/S. Ohlhoff* (note 52), at 447–449; *D. Akande/S. Williams* (note 65), at 386 et seq.; *W. Cann* (note 51), at 435–465.

[74] See *C. Stumpf*, in *J. Schwarze* (ed.), EU-Kommentar, 2nd edition, 2009, Art. 1 para. 6, with further references.

like the effet utile principle, or idiosyncrasies such as direct applicability and primacy of EU law, are EU-specific. It is certainly true that the rationale and the precise standards of the EU legal order cannot be transferred one-to-one to the international level.

However, the EU case law can be of some use on this level, as at the outset, the TFEU is a treaty under international law.[75] Its language regarding the security exception was inspired by precedents in earlier international treaties.[76] Especially in the field of security policy, EU law has to date hardly gone beyond cooperation under general international law.[77] When dealing with the security exceptions of the TFEU, the European Courts therefore have to take much of the same arguments into consideration as their purely international counterparts. Thus, it is submitted, its reasoning can give important guidance as to the appropriate standard of review in international law as such.

National security is mentioned in several contexts in the TFEU. First, and most prominently, national security concerns are part of the exceptions to the fundamental freedoms of the EU internal market. Article 36 (regarding the free movement of goods), Article 45 (3) (free movement of workers), Articles 52 (1) and 62 (right to establishment and freedom of services) and finally Article 65 (1) (b) for the right to free movement of capital all contain exceptions to allow a Member State to defer from its obligations to the internal market for reasons of 'public security.' Similar provisions can be found in many regulations and directives in EU secondary law.[78] From the beginning, the ECJ has interpreted these exceptions narrowly and did not exercise deference to Member States assessments of their security concerns.[79]

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[75] Article 1(1) EU Treaty. See *C. Stumpf*, (note 74), Art. 1 para. 11.

[76] See *S. Peers*, National Security and European Law, (1996) 16 Yearbook of European Law 363, at 379 et seq. and *M. Trybus*, The EC Treaty as an instrument of European Defence Integration: Judicial Scrutiny of Defence and Security exemptions, (2002) 39 CMLR 1347, at 1351.

[77] See Articles 4(2) sentence 3 TEU and 72 TFEU. For an analysis of the EU competences in the field of security on the basis of the 2008 Reform Treaty see *D. Eisenhut*, Delimitation of EU-Competences under the First and Second Pillar, (2009) 10 German Law Journal, 585, at 597 et seq., with further references. See also *I. Schwartz*, in FS U. Everling Vol. 2, 1995, 1331.

[78] See for example Art. 14 of Directive 2004/18, OJ 2004 L 134/114 on the coordination of procurement procedures; Art. 8(1) of Regulation 2009, OJ 428/2009 L 134/1 on the export of dual-use goods; Art. 10 of Regulation 1061/2009, OJ 2009 L 291/1 on common rules for exports.

[79] For judgments on security exceptions to the fundamental freedoms see ECJ Case 222/84, ECR 1986, 1651 – Johnston; Case 72/83, ECR 1984, 2727 – Campus Oil; Case 13/68, ECR 1968, 680 – Salgoil; Case C-273/97, ECR 1999, I-7403 – Sirdar; Case 387/89, ECR 1991, 4621– Richardt; Case C-70/94, ECR 1995, I-3189 – Werner; Case C-83/94 ECR 1995, I-3231 – Leifer; Case C-186/01, ECR 2003, I-2479 – Dory; Case C-423/98, ECR 2000, I-3951 – Albore; Case C-124/95, ECR 1997, I-81 – Centro Com; Case C-285/98, ECR 2000 I-69 – Kreil.

According to Article 19 (1) EU Treaty, the ECJ and the Court of First Instance (CFI) 'shall ensure that in the interpretation and application of this Treaty the law is observed'. Part of this task is the scrutiny of the use of the TFEU's security exceptions. At the same time, security policy as such is not part of the 'supranational' competences of the EU.[80] It is considered as domaine reservé of the Member States and merely coordinated in the framework of the Common Foreign and Security Policy (CFSP). This is now explicitly stated in Article 4 (2) sentence 3 TEU, according to which 'national security remains the sole responsibility of each Member State'.[81] Only if the Member States unanimously agree to act within the CFSP can a measure be taken on the EU level.[82]

However, as in every area of conflict between supranationalised EU competences and the Member States prerogatives in the remaining policy areas, this domaine reservé finds its limits where national security measures touch upon EU policies such as the internal market.[83] The Courts thus have to balance the Member States prerogative in the field of security policy with the aim of functioning supranational EU policies. This balance has to be struck in the same way as in all other areas legitimizing derogations from EU law, such as health, public order or public morals: Exceptions to the fundamental freedoms have to be construed narrowly.[84] The scrutiny of the Court is only limited by a closely defined margin of appreciation as to the proportionality of the measures taken by the Member States:

'Article 30 [now Art. 36 TFEU], as an exception to a fundamental principle of the Treaty, must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which it is intended to secure. Measures adopted on the basis of Article 30 can therefore be justified only if they are such as to serve the interest which that article protects and if they do not restrict intra-Community trade more than is absolutely necessary.'[85]

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[80] Under the old legal framework and the pillar structure of the EU, this type of competences could be called Community competences. Under the new structure of the Lisbon treaty and with the integration of the European Community into the EU, this terminological distinction is no longer possible. Substantive differences between supranational policies and intergovernmental CFSP, however, remain.

[81] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 9 May 2008, OJ 2008 C 115/1. See also Article 72 TFEU.

[82] See Art. 24(2) TEU.

[83] ECJ, Case 186/87, ECR 1989, 195 – Cowan/Trésor Public, para. 19; Case C-186/01, ECR 2003, I-2479 – Dory, para. 30; and recently Case C-337/05, ECR 2008, I-2173 – Commission/Italy, para 42: 'It should be noted at the outset that measures adopted by the Member States in connection with the legitimate requirements of national interest are not excluded in their entirety from the application of Community law solely because they are taken in the interests of public security or national defense.' See also N. Grief, EU law and security (2007) 32 European Law Review 752, at 754.

[84] See for example ECJ Case C-450/93, ECR 1995, I-3051 – Kalanke, para. 21; Case Salgoil (note 79), at 694.

[85] ECJ Case Richardt (note 79), para. 20.

All other criteria of the exceptions, such as the pertinence of security concerns, can be fully reviewed. In the Johnston case, the ECJ had for the first time expressed its strict approach to the scrutiny of security considerations.[86] It stated that security exceptions had to be interpreted narrowly.[87] At the same time, it respected a certain margin of appreciation for the Member States, which, however, did not prevent the Court from reviewing the proportionality of a measure which was taken because of security considerations.[88] In sum, 'the court demonstrated unwillingness to abandon judicial review in foreign policy questions and holds the position that even rules in the area of national security are susceptible to a certain degree of judicial review.'[89]

The standard applied by the Court can be further exemplified by its reasoning in the Tanja Kreil case.[90] Here, Germany tried to defend the complete exclusion of women from service in the armed forces with security considerations. In assessing the relevant exception in EU secondary law on non-discrimination,[91] the Court laid out the appropriate standard of review in detail:

'[The] principle [of proportionality] requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view [...]. However, depending on the circumstances, national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State. [T]he question is therefore whether [...] the measures taken by the national authorities, in the exercise of the discretion which they are recognised to enjoy, do in fact have the purpose of guaranteeing public security and whether they are appropriate and necessary to achieve that aim.'[92]

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[86] Case Johnston (note 79). The case concerned an alledged exception to the old non-discrimination directive 76/207, OJ 1976, L 39/40 on equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, repealed by Directive 2006/54, OJ 2006, L 204/23.

[87] Ibid, para. 26.

[88] Ibid, para 38.

[89] *I. Canor*, The limits of judicial discretion in the European Court of Justice, 1998, at 261. See also *M. Schröder*, in *R. Streinz* (ed.), EUV/EGV, 2003, Art. 30 para. 12; *P.-C. Müller-Graff*, in *H. von der Groeben/J. Schwarze* (ed.), EUV/EGV, 2003, Art. 30 para. 55.

[90] Case Kreil (note 79).

[91] Article 2(2) of Directive 76/207 (note 87).

[92] Case Kreil (note 79), at paras. 23–25. See also the relevant sections of the judgments in Case Albore (note 79), at para. 19 ('However, the requirements of public security cannot justify derogations from the Treaty rules such as the freedom of capital movements unless the principle of proportionality is observed, which means that any derogation must remain within the limits of what is appropriate and necessary for achieving the aim in view') and Case Leifer (note 79), at paras. 34–35 ('It is for the national court to consider [...] to assess whether the measures in question are necessary and appropriate to achieve the objectives pursued and whether or not those objectives could have been attained by less restrictive measures. However, depending on the circumstances, the competent national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State.').

In the Centro Com case (note 79), in which the Commission challenged unilateral sanctions of the United Kingdom against the former Yugoslavia, the Court went even further than just to

Taking stock regarding the public security exceptions to the fundamental freedoms of the TFEU and EU secondary law, the Court has established standing case law according to which it is competent to review the invocation of these exceptions in full. Only with regard to the proportionality of the taken measures to their aim does it grant a certain – closely scrutinized – margin of appreciation. Therefore, the standard of review in the field of security measures does not differ from the standard for all other exceptions.

What makes the jurisprudence of the ECJ so interesting is that the TFEU not only contains the plain security exceptions in Articles 36 et al. TFEU and in EU secondary law, but also provisions with language often described as self-judging. According to Article 346(1)(a) TFEU, Member States can refuse to supply information if they invoke essential security interests. The same interests, under paragraph (1)(b), can legitimize measures in violation of EU law that are considered to be necessary in the field of the production and trade in arms.[93] Article 347 TFEU, in turn, allows for derogations from European law in cases of internal or external threats to the security of a Member State.[94]

Article 346 explicitly contains the 'as considers necessary' caveat, which is also used in Art. XXI GATT, Article 2102 NAFTA, and recent model BITs.[95] The meaning of this 'wholly exceptional clause'[96] has been obscure until recently due to a lack of clarification by the ECJ and idleness of the Commission vis-à-vis the use of these exceptions by the Member States. Whereas in the context of the fundamental freedoms, neither Commission nor ECJ shied away from a strict approach to the use of the security excep-

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assess the proportionality of the measures taken for security reasons. In its judgment, it identified possible measures, which would have the same effect as those taken by the UK, but which would be less harmful for the EU acquis communautaire (Ibid, at paras. 51 et seq.). This judgment shows how closely the Court is willing to scrutinize the recourse to security exceptions. However, by replacing the UK assessment of the measures best suited to reach the aim with its own, it might well have gone beyond the boundaries of its right to review.

[93] On the interpretation of Article 346 TFEU see also *M. Trybus*, On the application of the EC Treaty to armaments, (2000) 25 European Law Review 664; *S. Trombetta*, La protection des intérêts nationaux de la défense quand la défense deviant européenne, (2005) Revue du Marché Commun et de l'Union Européenne 441; *P. Gilsdorf*, Les reserves de securité du traité CEE, (1994) Revue du Marché Commun et de l'Union Européenne 17; *A. Weber*, Safeguards in International Economic Organizations in times of crisis, (1984) 27 GYIL 212; *U. Karpenstein*, in *J. Schwarze* (ed.) (note 74), Art. 296; *J. Kokott*, in *R. Streinz* (ed.) (note 89), Art. 296; *K. Eikenberg*, Article 296 and External Trade in Strategic Goods, (2000) 25 European Law Review 117; *E. Bratanova*, Legal Limits of the National Defence Privilege on the the European Union, (2004) 34 BICC Paper and *C. Vedder*, in *id./W. Heintschel von Heinegg* (eds.), EVV, 2007, Art. III-436 on the identical provision of the EU Constitutional Treaty.

[94] On Article 347 TFEU (former Article 297 TEC) see *P. Koutrakos*, Is Article 297 EC a "Reserve of Sovereignty"?, (2000) 37 CMLR 1339, at 1342.

[95] See notes 9 and 12 above.

[96] ECJ Case C-120/94R, ECR 1996, I-1513 – Commission/Greece , Opinion Advocate General *F. Jacobs*, para. 44.

tions of Article 36 etc. TFEU, they were much more reluctant to interfere with Member States in the areas covered by Articles 346 and 347 TFEU. Both provisions address core interests of States, such as arms supply, foreign policy and intelligence. Due to the sensitivity of these issues and the differing language compared to the other security exceptions, Member States have for a long time used these exceptions as a carte blanche for their national policies in these fields.[97] Moreover, the legal nature of the provision itself is ambiguous: On the one hand, being an exception to the TFEU-commitments of the Member States, it has to be construed narrowly. On the other hand, allowing for an evocation of the exception as the States 'consider necessary', the wording hints – at least – at a wide margin of appreciation.[98]

However, in the last years, the Commission has made clear that it will no longer be lenient on this issue.[99] It has brought several actions against Member States to the ECJ and, so far, has always prevailed.[100] The Court has refused to see the provisions as entirely self-judging. At the same time, due to the 'as considers necessary'-wording, it was obliged to use a different standard from that used for the normal security exceptions. Although the few cases before the Court with regard to Articles 346 and 347 TFEU have to date failed to establish a well-defined standard of review, important indications can be derived from the cases decided so far.

The first case dealing explicitly with a Member State's defence in the context of Articles 346 and 347 TFEU was the so-called FYROM case.[101] Greece had imposed unilateral sanctions against the Former Yugoslav Republic of Macedonia, claiming that the policy of the new state threatened its own security. The Commission was not convinced by the pertinence of this argument and initiated an infringement procedure according to Article 258 TFEU. The ECJ, however, did not have the chance to decide on the matter. Greece and the Commission agreed on a political solution of the dispute and the case was removed from the docket. Nevertheless, the opinion of Advocate General Jacobs in the case and the order of interim

[97] This is especially evident in the field of defense procurement. See *A. Georgopoulos*, Defence Procurement and EU Law, (2005) 30 European Law Review 559 and *M. Trybus*, Procurement for the armed forces: balancing security and the internal market, (2002) 27 European Law Review 692.

[98] The CFI has explicitly recognized this antagonism; see CFI Case T-26/01, ECR 2003, II-3951 – Fiocchi Munizioni, paras. 58–60.

[99] See Commission Interpretative Communication on the Application of Article 296 of the Treaty in the field of Defense Procurement, COM (2006) 779 final.

[100] See ECJ Cases C-414/97, ECR 1999, I-5585 – Commission/Spain and recently the ECJ judgments of 15 December 2009 in the cases C-294/05 – Commission/Sweden; C-284/05 – Commission/Finland, C-372/05 – Commission/Germany, not yet published. The cases decided in December 2009 concerned unilateral customs exemptions of Member States for defense goods. They entirely confirm the position of the Court in Commission/Spain, see, respectively, paras. 45 et seq.

[101] ECJ Case C-120/94R – Commission/Greece. See also *W. Hummer*, in FS U. Everling Vol. 1, 1995, 511.

measures by the ECJ give guidance for the understanding of the exceptions enshrined in Articles 346 and 347 TFEU. Advocate General Jacobs argued for an 'extremely limited nature of the judicial review that may be carried out in this area.'[102] He regarded the scrutiny of the Court to be strongly limited by considerations of State sovereignty and believed the Court's standard of review to be confined to assessing whether the measures taken by Greece were 'wholly unreasonable.'[103] In the area of 'high politics' such as foreign relations, Courts should not interfere with assessments of the States, as '[t]here are simply no juridical tools of analysis for approaching such problems'.[104]

The Court, however, did not follow the approach of the Advocate General. Although it did not decide the case on the merits, it found the opportunity to express its view in the decision on provisional measures in the matter. In this decision, the ECJ announced a comprehensive review in the merits-phase. It explicitly referred to the unclear standard of review with regard to Article 346 and 347 TFEU and expressed its willingness to examine this question in the final judgment.[105] This statement can be seen as a first indication of the willingness of the Court to scrutinize the provisions beyond a mere control of abuses.

This tendency was confirmed by the first case decided by the Court on the basis of Article 346 TFEU. In Commission v. Spain,[106] it had to decide whether Spain could defend an exception from value added tax for defence procurement by the Spanish armed forces. This exception clearly violated the EU Directive on the harmonization of the laws of the Member States relating to turnover taxes.[107] Spain argued that it was nevertheless legitimized by Article 346 TFEU due to its security needs because the necessary modernization of the Spanish armed forces would be too costly without such an exception.[108]

The Court did not accept this reasoning. Contrary to the opinion of most Member States, it made clear that Article 346 TFEU has to be construed narrowly and that its application was subject to review by the ECJ, stating that:

'It must be observed [...] that the only articles in which the Treaty provides for derogations applicable in situations which may involve public safety are Articles 36, 48, 56, 223 and 224 of

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[102] Case Commission/Greece, Opinion Advocate General F. Jacobs (note 96), para. 60.

[103] Ibid., at para 56.

[104] Ibid, at para 59.

[105] ECJ Case C-120/94, ECR 1994, I-3037 – Commission/Greece, Decision of 29 June 1994 on the application of provisional measures, at paras. 69 et seq.

[106] ECJ Case Commission/Spain (note 100).

[107] See Art. 28(3)(b) of Council Dir. 77/388, OJ 177 L 145/1, now repealed by Dir. 2006/112, OJ 2006 L 347/1.

[108] For the whole argumentation see Commission/Spain (note 100), opinion of Advocate General A. Saggio, at para. 6.

the EC Treaty [now Articles 36, 45, 52, 34 and 347 TFEU], which deal with exceptional and clearly defined cases. Because of their limited character, those articles do not lend themselves to a wide interpretation.'[109]

Furthermore, the Court clearly allocated the burden of proof for the applicability of a security exception with the Member States, as 'it is for the Member State which seeks to rely on those exceptions to furnish evidence that the exemptions in question do not go beyond the limits of such cases.'[110]

Having thus laid the foundation for a thorough substantial assessment of Spain's security claim, the Court proceeded to examine the individual conditions set out in Article 346 TFEU. Whereas the Court acknowledged the 'essential security interest' of Spain in functioning and modern armed forces, it refused to find the tax exemption as 'necessary' for that goal.[111] It thereby demonstrated that it would not shy away from reviewing Member States appraisals of their security interests and the measures necessary to pursue these interests. In the rather clear-cut case before it, it did not even find it necessary to mention a certain margin of appreciation for the Member States, as implied by the 'as considers necessary' wording of the norm. However, it is very likely that the Court will grant such discretion in future cases in which the intention to abuse Article 346 TFEU is less straight-forward. The CFI, which had to deal with the exception subsequently, explicitly conceded such deference:

'The regime established by Article 296(1)(b) EC [now Art. 346 TFEU] is intended to preserve the freedom of action of the Member States in certain matters affecting national defense and security ... [B]y providing that it does not preclude a Member State from taking, in relation to the activities concerned, such measures as it considers necessary for the protection of the essential interests of its security, *Article 296(1)(b) EC confers on the Member States a particularly wide discretion in assessing the needs receiving such protection.*'[112]

Nevertheless, the CFI immediately limited this statement by holding that '[t]he terms of Article 296 EC show, in the light of the regime established by Article 296(1)(b) EC, that the authors of the Treaty intended to limit resort by the Member States to that provision.'[113]

These statements of the European Courts do not comprehensively clarify the appropriate standard of review for 'as considers necessary'-exceptions in the TFEU. The court did not yet have to decide any hard cases in which the precise standard of review would have been decisive for the applicability of Articles 346 and 347 TFEU. However, some important conclusions can be drawn from the existing case law.

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[109] Commission/Spain (note 100), at para 21.
[110] Ibid, at para 22.
[111] Ibid, at paras. 20–22.
[112] Fiocchi Munizioni (note 98), at para. 58 (emphasis added).
[113] Ibid, at para 60.

In Commission/Spain and Fiocchi munizioni, the Courts have scrutinized the elements of the Article 346 exception in detail. Although they did not make any general statements as to the standard of review, the references to cases decided under the normal security exceptions in Articles 36, 45 and 52 TFEU, indicate a principally similar approach to the assessment of these exceptions.[114] However, the distinct wording of the 'as considers necessary'-exceptions makes a certain differentiation necessary.[115] Such differentiation can arguably be found in the willingness of the Courts to grant wider discretion than with respect to normal exceptions. Within this margin the Member States can thus determine their security interests and the measures necessary for their pursuit independently. The Court hinted at its acceptance of certain deference in stating that 'the exemptions in question [must] not go beyond the limits of such cases.'[116] However, the view that it is limited to controlling outright abuses of Article 346 TFEU goes too far.[117] The mention of improper use in Article 348(2) TFEU cannot be used as an argument for such a deferential standard of review because this provision contains rules for special treaty violation proceedings, that are not obligatory, as the word may in Article 348(2) TFEU proves. As an alternative, the Commission can always use the normal violation procedure under Art. 258 TFEU, which is not limited to 'improper use' of EU law.[118] This interchangability of procedures would lead to inconsistant results, if it would imply a different standard of review depending on the provision on which the Commission is basing its action.[119] Moreover, Article 346 speaks of 'necessity' of a measure, which implies a weighing and balancing exercise in the assessment of a case. Certainly, a necessary measure has to fulfill higher criteria than the mere absence of abuse.

Thus, this weighing and balancing obligation of the judiciary has to be translated into an appropriate standard of proportionality review. Due to the important security interests of the Member States in the field of armament, a certain deference with regard to the standard proportionality review is indispensible. It is also implied by the 'as considers' language of Article 346 TFEU. Indeed, such deference is acknowledged in many national jurisdictions, as for example the political questions-doctrine in US and UK

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[114] See for example Commission/Spain (note 100), para. 21.

[115] This has also been accepted by the Commission. See Commission Interpretative Communication on the Application of Article 296 of the Treaty in the field of Defense Procurement (note 99), at 6.

[116] Ibid, para. 22 (emphasis added).

[117] For this opinion see *O. Lhoest*, La production et le commerce des armes et l'Article 223 du Traité instituant la Communautée Européenne, Revue Belge de Droit Européen 1993, 192 and also *K. Eikenberg* (note 93), 123 et seq.

[118] *W. Hummer*, in *E. Grabitz/M. Hilf* (eds.), Das Recht der Europäischen Union, Art. 225 para. 8.

[119] See also *M. Trybus*, European Union Law and Defence Integration, 2005, at 156.

constitutional law demonstrates.[120] As has been shown in the analysis of the cases Commission/Spain and Fiocchi Munizioni above, ECJ and CFI are ready to exercise such deference. This becomes also evident when the assessment of the Courts in these cases is compared to its scrutiny with regard to 'normal' security exceptions, as for example in the Albore case.[121] In Albore, the Court had to rule on restictions on purchases of land by foreigners in Italy in areas designated as military sensitive, which the Italian government defended with the security exception to the free movement of capital in Article 65(1)(b) TFEU. The Court, despite the core military concerns at the heart of the Italian practice, refused to limit its usual assessment of proportionality of a measure.[122] It held the Italian restriction to be in breach of the TFEU because the designation of the sensitive areas was schematic and without differentiation with regard to different areas and their individual military relevance.[123] Compared to the ruling in Commission/Spain, it can be established that in the latter case, due to the special wording and context of Article 346 TFEU, the Court was more deferential with regard to a proportionality assessment. In Commission/Spain, it did not use classical proportionality criteria such as 'appropriate' or 'less restrictive,'[124] but limited itself to assessing whether Spain had proven the necessity of the exemption from VAT.[125] The use of the word necessary, however, is not to be perceived as a reference to the established criteria of a proportionality test, but to the wording of Article 346 TFEU itself. Unlike in Albore and also the Campus Oil case,[126] the Court refrained from examining the appropriateness and the evaluation of possible less restrictive alternative measures and limited itself to judging whether Spains arguments regarding the necessity of the measures were convincing. This is clearly less than the full scale proportionality review under Article 36 TFEU and the other normal security exceptions.

An attempt to describe the appropriate standard of review could thus be made, being that scrutiny of security exceptions goes beyond a mere control of outright abuses. However, this does not amount to a full scale proportionality review regarding the soft elements of the exception, i.e., the essential security interests and necessity. The case law indicates that in obvious cases in which security is not at stake (but, for example, economic interests), or in which a measure is clearly not suited to reach the acclaimed

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[120] See the comprehensive analysis of *T. Franck* (note 24) and also *I. Canor* (note 90), at 36 et seq. GA F. Jacobs, in his opinion in the FYROM case (note 96), seems to make reference to this doctrine; see para . 50.

[121] See above note 79.

[122] ECJ Case Albore (note 79), paras. 19, 22.

[123] Ibid., at paras. 23 and 24.

[124] Ibid, at paras. 19 and 22.

[125] See ECJ Case Commission/Spain (note 100), para. 22.

[126] See ECJ Case Campus Oil (note 79), paras. 44 et seq.

goal, or in which the harm caused by the measure is excessively great in relation to the intended security aim, can the Court declare a measure to be in violation of the as considers necessary exceptions. It can thus assess the reasonableness of the Member States arguments with regard to its security concerns.[127] Under no circumstances can it impose its own assessment of a situation and the adequate reaction to a security threat over the diverging but reasonable assessment of the relevant Member State.

IV. Scrutinizing security exceptions in international law: The case for a uniform standard of review

As noted initially, two forms of security exceptions can be identified: Some exceptions contain a passage allowing the States to take security measures 'as they consider necessary' while others plainly refer to the necessity as such. Within each of these two groups, the wording of the different treaty provisions is virtually uniform. It should therefore be possible to deduce a common standard of scrutiny for the two sorts of exceptions. An attempt in this direction will be undertaken subsequently. However, it shall be conceded at the outset that this exercise is likely to face an important objection, as every individual treaty exception is embedded in a specific treaty regime with idiosyncratic features and different levels of integration.[128] In the context of the WTO, for example, much has been said about the 'constitutionalisation' and 'legalisation' of the world trading system since the founding of the WTO, thus elevating it above conventional international law regimes.[129] With regard to the European Union, this ever closer union has arguably left the framework of international law to a certain extent altogether and can be described as a supranational legal regime sui generis. Other regimes, for example the international law of foreign investment, to date still operate in a more traditional context of international law. Admittedly, this makes it difficult to compare the interpretation of security exceptions in different treaty regimes, even if their wording is identical. However, it is submitted that such a comparative analysis, with the necessary caution as to the differences

[127] For a different proposal of an adequate standard of review see *A. Georgopoulos* (note 97), at 570 et seq. For an analysis and rejection of this proposed standard see *D. Eisenhut*, Europäische Rüstungskooperation, 2010, at 188.

[128] For such criticism (in the context of using ECHR methods for the interpretation of provisions in investment treaties) see *J. Alvarez/K. Khamsi* (note 28), at 59–60 and (more generally) 75–76.

[129] See, for example, *D. Cass*, The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System, 2005, and *E.-U. Petersmann*, Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society, (2006) 19 Leiden Journal of International Law 633 and specifically in the context of the interpretation of Article XXI GATT *A. Perez* (note 72), at 330 et seq.

of the individual contexts, can be fruitful. There is a vivid debate among international lawyers considering a 'constitutionalisation' of international law as such. Even before the possible emergence of this debate, international courts and tribunals have always interpreted specific provisions with regard to the jurisprudence of other international bodies in different contexts. As a basic principle, all security exceptions are to be interpreted according to the law enshrined in the VCLT, no matter what the substance of the individual treaty concerns. Thus, the following section can be seen as an attempt to deduce a common standard of review for security exceptions in international law. Voices being critical of an increasing 'fragmentation' of the international legal order might even find the present endeavour useful in order to preserve (or establish) a common standard in international law.

1. The review of security exceptions without 'as considers necessary' language: Close scrutiny beyond a margin of appreciation

The above review of the relevant case law shows that courts and tribunals have consistently exercised close scrutiny over non self-judging security exceptions. The ICJ, in the Nicaragua and Oil-Platforms cases, has examined every aspect of the FCN treaties security exceptions.[130] Similarly, ICSID tribunals have assessed all factual aspects of Article XI of the US-Argentina BIT, for example, whether Argentina's security was really at stake and if the government could have taken less harmful emergency measures instead.[131] Also, the ECJ, with regard to the security exceptions in Articles 36, 45 (3), 52 (1), 62 and 65 (1) (b) TFEU, has not altered its usual standard of review applied with regard to exceptions from the fundamental freedoms.[132]

It is therefore clear that the appropriate standard of review for the assessment of security exceptions without 'as considers necessary' language must be a close one. The judiciary is called upon to assess every aspect of these provisions against the facts. However, as security is at the heart of a State's sovereignty, it may not at the same time second-guess the measures a State finds necessary for the perseverance of its security. The necessary respect for the State's sovereignty creates a certain area of conflict.

In the field of foreign investment law, the question of the appropriate standard of review as regards security exceptions has lead to fierce academic debates. Notably William Burke-White (together with Andreas von Staden) and José Alvarez (with Kathryn Khamsi) have debated the issue at length.[133] Whereas the latter rejects every kind of deference in the assessment of security exceptions, Burke-White argues for judicial restraint

[130] See above, Section III.1.
[131] See above, Section III.2.
[132] Above, Section III.4.
[133] See *J. Alvarez/K. Khamsi* (note 28), and *W. Burke-White/A. von Staden* (note 4).

through the granting of a margin of appreciation as developed by the European Court of Human Rights (ECHR). In his view, Article XI of the US-Argentina BIT is 'implicitly self-judging' or at least lends itself to a very wide interpretation.[134] He argues that both parties to the treaty intended Article XI to be self judging and that investment tribunals are ill-placed to second-guess government's assessment of extraordinary situations.[135] Alvarez denies this interpretation by the parties and is neither convinced that BITs imply room for the application of proportionality considerations, nor that the jurisprudence of the ECHR is applicable in the context of foreign investment law.[136] Interesting and important as this controversy is, it indeed takes place in the very specific context of the US-Argentina BIT and therefore cannot be transferred one-to-one into the broader and more abstract context of this article. Nevertheless, the controversy also deals with general questions of such exceptions and therefore deserves attention.[137] Firstly, Burke-White interprets the intention of the parties from an ex post perspective. Although it may be true that both sides would like to consider the provision to be self-judging today, Alvarez and others have proven that the understanding at the time the treaty was concluded was different.[138] A very deferential standard, as proposed by Burke-White and von Staden, moreover, would de facto leave the application of investment protection law up to the host State which could in many cases invoke security concerns without them being really at stake. That would go against the very purpose of investment treaties, which aim at protecting investment especially in economically or politically unstable times. The strict approach chosen by Alvarez, on the other hand, poses problems as well. It has already been pointed out that threats to State security and the adequate reaction to such threats are not clear-cut situations. They imply a certain amount of subjective appraisal. Furthermore, security matters touch upon essential State interests and are thus protected by the principle of State sovereignty. Therefore, a certain kind of deference is necessary.

Taking these concerns into consideration, a middle course between the two extreme positions seems promising. Yuval Shany has convincingly argued for the introduction of a general margin of appreciation doctrine into

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[134] See *W. Burke-White/A. von Staden* (note 4), at 381–386 and 370–376.

[135] Ibid.

[136] *J. Alvarez/K. Khamsi* (note 28), at 34–43 and 54–62, respectively.

[137] See also *A. Reinisch*, Necessity and International Investment Arbitration – An unnecessary split of opinions in recent ICSID cases? Comments on CMS v. Argentina and LG&E v. Argentina, (2007) 8 Journal of World Investment and Trade 191; *J. Kurtz*, Adjudging the Exceptional in International Law: Security, Public Order and Financial Crisis, (2008) Jean Monnet Working Paper 06/08, available at jeanmonnetprogram.org and *P. Muchlinski* (note 37).

[138] For this special aspect of the controversy see *J. Alvarez/K. Khamsi* (note 28), at 37–40 and *W. Burke-White/A. von Staden* (note 4), at 381–385.

public international law. Subsequently, it will be submitted that this moderately deferential approach is even more suited to resolve existing tensions specifically with regard to security exceptions. As 'open ended' standard type[139] norms, their application inherently varies depending on the precise situation and its assessment by the State. They necessarily imply a judgment in the concrete situation and the appropriate measures to be taken.[140] Therefore, it is argued that it would be only truthful to openly incorporate this subjective element into the abstract standard of review.

The recourse to a margin of appreciation could also build on jurisprudence of international courts and tribunals although jurisprudential practice is admittedly ambiguous. As has already been shown above, the ICJ, in the context of security exceptions, has made contradictory and disputed statements regarding the acceptance of a margin of appreciation.[141] However, in different contexts, the Court has embraced this concept. In the Grabcikovo-Nagymaros Case, it has held that it was not exclusively up to the Court to assess whether the conditions of necessity under the law of State responsibility are fulfilled.[142] Thereby, it implicitly granted a certain margin of discretion to individual States.[143] Also, in the La Grand and the Avena cases, it has explicitly accepted that the United States could choose the ways and means how to fulfil its obligations under the Vienna Convention on Consular Relations.[144] Thus, the jurisprudence of the Court does acknowledge the existence of a deferential standard of review in international law. Its alleged rejection of a margin of appreciation in the Oil-Platforms case is much better explained by the special nature of the applied provisions, i.e. the jus cogens nature of Article 2(4) UN Charter, than with a general rejection of the concept.[145]

The margin of appreciation-approach could also draw upon established jurisprudence of the ECJ and also the ECHR. As has been demonstrated above, the ECJ applied this concept to all exceptions to the fundamental freedoms.[146] Within the boundaries of proportionality, it allows for an autonomous interpretation of security interests and the necessity of measures

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[139] *Y. Shany* (note 22), at 914.

[140] *J.-P. Cot* calls these norms 'obligations of conduct', as opposed to 'obligations of result', and also argues for the application of the doctrine to the former type. See *J.-P. Cot*, Margin of Appreciation, in *R. Wolfrum* (ed.) EPIL (note 14), para. 13.

[141] See above, Section III.1.

[142] See Draft Articles on State Responsibility (note 6), Article 25 and Case concerning the Grabcikovo-Nagymaros Project (Hungary v. Slovakia) ICJ Reports 1997, 7, at para. 40: '[T]he State concerned is not the sole judge of whether those conditions have been met.'

[143] *Y. Shany* (note 22), at 934.

[144] See Case La Grand (Germany v. USA), ICJ Reports 2001, 466, at para. 514 and Case Avena and Other Mexican Nationals (Mexico v. USA), ICJ Reports 2004, 12, at para. 131. See also *Y. Shany* (note 22), at 935–936.

[145] See above, Section III.1.

[146] Above, Section III.4.

taken in reaction to such a threat. The ECHR has also pursued this approach since its Handyside judgment in 1976, in which it explicitly acknowledged the existence of a margin of appreciation to the Member States, without this margin being unlimited: 'The domestic margin of appreciation thus goes hand in hand with a European supervision.'[147] Over time, the ECHR has developed a consistent framework of analysis, particularly differentiating between the different State interests at stake.[148] National security, in this hierarchy, allows for the largest extent of deference by the Court.[149] This framework, however, does not consist of a scheme to be applied uniformly in each case. Rather, the Court has to adopt the margin in every individual case, depending on the comparative advantage of the local authorities in assessing the factual situation, the indeterminacy of the applicable standard and the nature of the contested interests.[150] The Court itself has described the appropriate standard of review as follows:

'[The margin of appreciation] does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient.'[151]

This standard seems to be very well suited to balance national security concerns and the interest in functioning treaty regimes with regard to security exceptions.[152] Indeed, as Rosalyn Higgins has pointed out, the margin of appreciation approach of the ECHR has been developed precisely for si-

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[147] Handyside v. UK, 7. 12. 1976 Series A No. 24, paras. 22–23.

[148] See for example Leander v. Sweden, 26.3. 1987, Series A No. 116, at para. 59: '[T]he national authorities enjoy a margin of appreciation, the scope of which will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved.'

[149] See Article 15 ECHR. For a comprehensive analysis of the case law on Article 15 see *I. Cameron*, National Security and the European Convention on Human Rights, 2000, at 21 et seq. See also *R. St. J. Macdonald*, The Margin of Appreciation, in *id.et al. (eds.)*, The European System for the Protection of Human Rights, The Hague 1993, at 85–86 and (critical to the doctrine in the human rights-context, but acknowledging its legitimacy for 'matters that affect the general population') *E. Benvenisti*, Margin of Appreciation, Consensus, and Universal Standards, (1998–1999) 31 Journal of International Law and Politics 843, at 847.

[150] *E. Brems*, The Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights, (1996) 56 HJIL 240, at 256; *J.-P. Cot* (note 140), at 19. For a critical assessment of the Court's practice see *J. Brauch*, The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law, (2005) 11 Columbia Journal of European Law 113, at 115 et seq.

[151] Grigoriades v. Greece [1997] ECHRR 2575, at 2589 (quoting Vogt v. Germany [1995] ECHRR 323, paras. 25–26).

[152] In the context of the law of foreign investment, *P. Muchlinski* (note 37) and *J. Kurtz* (note 137) propose standards that appear to be similar to the one put forward here. *Muchlinski* argues for a presumption of reasonableness of a State's security measure, which has to be rebutted by prima facie evidence (*P. Muchlinski* (note 37), at 70–77). *J. Kurtz*, in turn, proposes a 'least restrictive means test', which would assess whether an as effective measure is available that would have less restrictive effects on the investor (*J. Kurtz* (note 137), at 49–54).

tuations of public emergencies and therefore for situations very similar to those that may lead to the invocation of security exceptions in different fields.[153] Within the balancing exercise, the necessary deference can be given to State sovereignty and to 'the extremely sensitive nature of the national interests involved in these cases.'[154] As a 'context-dependent'[155] concept, it can smoothly be adopted to the different situations in which these exceptions are invoked.[156]

2. *The review of exceptions containing 'as considers necessary' language: The bona fide requirement in Article 26 VCLT*

It has already been pointed out that scrutiny of 'as considers necessary'-provisions has to be somehow restrained compared to normal exceptions. A similar or identical interpretation of the two types would necessarily disregard the intention of the drafters of such provisions. The ICJ has emphasized this necessary differentiation in the Nicaragua case.[157] At the same time, even the deferential 'as considers necessary'-wording cannot lead to a complete self-judging nature of the exception, as this would bereave the commitments of a State to a treaty obligation of any legal force.[158] As long as the State invoked security concerns as the reason for an infringement, no breach of treaty could ever be established.

Concerning the concrete standard of review applied to 'as considers necessary'-provisions, little insight can be won by looking at the existing case law. The ICJ has so far not dealt with this type of exception. Both GATT and WTO panels have expressed themselves on Article XXI GATT only at the margins and have never ventured to interpret the clause on the merits.[159] Only the ECJ, regarding Article 346 TFEU, has taken a firm stand by scru-

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[153] *R. Higgins*, Derogations under Human Rights Treaties (1976–1977) 48 British Yearbook of International Law 281; *I. Cameron* (note 149), at 28.

[154] *J.-P. Cot* (note 140), at para. 33.

[155] *R.St.J. Macdonald* (note 149), at 85.

[156] Critics have advanced the special context of human rights treaties as an argument against the transfer of the margin of appreciation into other fields (*J. Alvarez/K. Khamsi* (note 28), at 59–60). This critique is already not viable for the jurisprudence of the ECJ, which is primarily dealing with economic law. Then, regarding the ECHR, the doctrine is flexible enough to provide for convincing solutions outside the human rights context. Depending on the closeness of the interests at stake, the adjudicating body can be more or less deferent within the margin.

[157] *Nicaragua Case*, Merits (note 16), at para. 222.

[158] See also *D. Akande/S. Williams* (note 65), at 383. With regard to Article 2102 NAFTA see *S. Rose-Ackermann/B. Billa* (note 3), at 469–470 and also *M. Kinnear et al*, Investment Disputes under NAFTA – An Annotated Guide to NAFTA Chapter 11, The Hague 2006, at 1138–1 – 1138–10.

[159] Notably *H. Schloemann and S. Ohlhoff* (note 52, at 448 et seq.) have tried to argue for a close scrutiny of Article XXI. However, their arguments do not rely on jurisprudential precedents, but rather on theoretical considerations.

tinizing the exception rather narrowly.[160] Some of the arguments used by the Court for the justification of close scrutiny can be used in the general context of international law as well. Certainly, the judgment shows that self-judging language must not exclude judicial review. It supports the view that the judiciary should be able to decide on the pertinence of a State's security concerns. The supranational particularities of EU law do not hinder the transfer of the Court's willingness to look into the real motivation behind a security measure. Such scrutiny is not a matter of competence but of the necessity to prevent abuses.

However, with regard to the judgments concerning Article 346 TFEU, the caveat made at the outset of this section concerning the institutional and legal context of a provision kicks in: Article 346 TFEU is a 'wholly exceptional clause' within the most integrated – even supranational – treaty regime that exists. With regard to the 'as considers necessary' wording and the reviewability of what is actually necessary, the EU Courts can find their interpretation on the factual and legal idiosyncrasies of the European Union and use arguments that would be ill-placed in the general context of international law. Security within the European Union is no longer a merely national matter and constructivists in political theory have made the case for the convergence of security policies within the EU.[161] As Article 346 TFEU has direct implications on the functioning of the EU internal market, which is at the very core of European integration, the European Courts are inevitably inclined to limit the damage caused by the invocation of this exception. Therefore, the conversion of the ECJ rationale into general international law would overstretch the similarities between the different legal regimes.

Instead, the expressed opinions of parties regarding the interpretation of 'as considers necessary'-clauses show that, at least since the self-judging question became prominent in the Argentinean Gas Sector cases, negotiators clearly intend very limited reviewability of these exceptions.[162] This intention of the parties has to be respected. Nevertheless, deference as to the use of security measures finds its limits in general principles of treaty interpretation. The relevant principle in the current context is the require-

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[160] See above, Section III.4.

[161] On the developments in European Security and Defense policy and arguments for converging security interests see *D. Eisenhut*, The special security exemption of Article 296 EC: Time for a new notion of "essential security interests"?, (2008) 33 European Law Review, at 577 and *P. Koutrakos*, Trade, Foreign Policy and Defence under the Law of the EU, 2001, at 193 et seq. For the constructivist approach to the European integration see *J. Checkel*, Social construction and integration, (1999) 6 Journal of European Public Policy 545 and *S. Jones*, The Rise of European Security Cooperation, 2007, at 49 et seq., basing on *C. Wendt*, Social Theory in International Politics, 1999, and *id.*, Anarchy is what the States make of it: The social construction of power politics, (1992) 46 International Organization 391.

[162] See *Burke-White/A. von Staden* (note 4), at 381–386 and 370–376.

ment to interpret and perform a treaty in good faith, as it is enshrined in Article 26 VCLT.[163] No treaty language whatsoever can exclude review according to the rules laid down in the VCLT or identical customary international law.[164]

The exact content of the bona fide obligation in Article 26 VCLT, however, is not entirely clear.[165] Drawing from general considerations of good faith obligations and arguments made in the different treaty contexts with regard to security exceptions, it can arguably be demonstrated that Article 26 VCLT allows for a relatively considerable review of State practice also with respect to 'as considers necessary'-exceptions. Firstly, the concept of good faith contains an obligation not to deprive the treaty of its practical effect.[166] This obligation includes a duty to 'refrain from abusing such rights as are conferred upon it by the treaty.'[167] Such abuse can, secondly, be seen in the exercise of a treaty right in order to evade from a treaty obligation.[168] A State infringes Article 26 VCLT whenever it uses a security exception without earnestly considering that security issues are at stake. It also acts illegally if it takes a measure in reaction to a legitimate security concern that is obviously not suited to counter the security threat or not even intended to do so (but to pursue some other, non-security related policy aim).

In sum, based on Article 26 VCLT, courts and tribunals are competent to review the abusive invocation of security exceptions, i.e. cases in which the State taking the measures does not seriously consider its security interests at stake or in which it is aware that the taken measures are not necessary to protect these interests. Beyond this reviewability of abuses, however, the explicit language of 'as considers necessary' provisions averts a closer scrutiny of the State's practice.

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[163] Vienna Convention on the Law of Treaties (note 7); Article 26 VCLT reads as follows: '"*Pacta sunt servanda*" Every treaty in force is binding upon the parties to it and must be performed by them in good Faith.'

[164] Even Judge Schwebel, who, in the Nicaragua case, opposed scrutiny of the security exception by the ICJ, accepted that the reliance on the clause in a way that would be 'on its face without basis' would give the court jurisdiction to declare the abuse illegal. See Nicaragua Case, Merits, Sep. Op. Judge Schwebel, ICJ Reports 1986, 259, at para. 105.

[165] For an overview see *M. Kotzur*, Good Faith (Bona Fide) in *R. Wolfrum* (ed.), EPIL (note 14). See also *W. Burke-White/A. von Staden* (note 4), at 378 ('a workable standard is yet to be developed'). A confusing statement in this regard can be found in the LG&E award (note 31), in which the tribunal held in para. 214 that a self-judging provision 'would be subject to good faith review anyway, which does not significantly differ from the substantive analysis presented here.'

[166] *B. Cheng*, General Principles of Law as applied by International Courts and Tribunals, 1953, at 117.

[167] *Ibid*, at 119. See also *J. O'Connor*, Good Faith in International Law, 1991, at 86, referring, inter alia, to the ICJ Nottebohm Case, and J. Salmon, Article 26, in *O. Corten/P. Klein* (eds.), Les Conventions de Vienne sur le Droit des Traités, 2006, at 1104–1106. See also *O. Corten*, Reasonableness in International Law, in *R. Wolfrum* (ed.), EPIL (note 14).

[168] *B. Cheng* (note 166), at 123–124.

V. Conclusion

It was the aim of this paper to demonstrate that security exceptions, to a certain extent, can be interpreted uniformly across different treaty regimes. Although the case law in this area is not completely consistent and scant, it can be used to show that scrutiny with regard to exceptions without an 'as considers necessary' passage should be performed rather closely. The doctrines of the ECJ and the ECHR can be used as guidance for other courts and tribunals dealing with this type of provisions. Both courts acknowledge the appropriateness of a margin of appreciation. Of course, the transfer of this concept into other treaty regimes must not be schematic but pay respect to the particularities and special requirements of each individual treaty regime.

Whereas comprehensive scrutiny under simultaneous deference to a certain margin of appreciation would thus lead to an appropriate uniform standard of review for normal security exceptions, a far more contained approach is necessary with regard to 'as considers necessary' provisions. The explicit wording of these provisions and the intention of the parties drafting them make it necessary to limit judicial review to their application in good faith. In this context, the case law of the ECJ seems too specifically embedded in the context of the EU to be applicable. Nonetheless, this restraint does not deprive international courts and tribunals of all ability to protect the functioning of treaty regimes from the putting forward of fabricated security concerns by States. The obligation to interpret and apply these clauses in good faith prevents abuses of the exception, and Courts are free to make their own judgment whether such abuse has taken place.

Nevertheless, it cannot be denied that States will be much more prone to use 'as considers necessary' security exceptions beyond their envisioned scope than provisions without that language, and that, as long as the invocation is convincingly reasoned, courts and tribunals will have difficulties to prevent such excessive use. Therefore, the increasing use of 'as considers necessary' wording in recent treaties can pose a serious threat to the functioning and uniform application of these treaty regimes. It remains to be seen if this safety valve will in practice damage the trust of State parties in the functioning of these regimes. If this proves to be the case, States will eventually have to change their practice again and, in order to re-establish mutual confidence and consequently the effectiveness of international treaty commitments, will likely have to depart from their incrementally deferential use of security exceptions in favour of more limited wording.

Summary

When a state binds itself under international law, it often reserves a right to take measures necessary to protect its national security. This security interest is reflected in special treaty clauses that allow states to derive from their treaty obligations if national security is concerned. Despite the long standing and established treaty practice with regard to these security clauses, their preconditions yet remain unclear. States tend to use them in a blanket way and only dependant on their subjective assessment.

However, international courts and tribunals have begun to scrutinize these security exceptions. In doing so, they have faced questions as to the standard of review they may apply and the discretion of the States with regard to their security. The judgment on the legitimacy of state measures taken in the interest of national security may infringe the most fundamental prerogatives of a state, and thus its sovereignty. If the use of security exceptions is left to the discretion of the States though, this might seriously harm the binding character of a treaty. The area of conflict between compliance with international treaty regimes on the one hand and the legitimate interest of states in preserving their prerogatives in the field of national security on the other hand shall be subject of the present article.

The article examines the case law of international courts and tribunals with regard to the standard of review for security exceptions in international treaties. It firstly lays out that two types of security exceptions have to be distinguished: Those allowing the states to take security measures as they consider necessary and those without such deferential wording. It then analyzes the jurisprudence of the International Court of Justice, of ICSID tribunals in the context of the Argentinean crisis, and of WTO panels with regard to the security exception in the GATT. Moreover, it compares the positions of these courts and tribunals to that of the European Court of Justice vis-à-vis the security exceptions of EU treaty law.

Based on this analysis, a common standard of review for security exceptions in international treaties is proposed. It is argued that not even provisions containing an as it considers necessary-section are entirely self-judging but subject to review regarding the good faith of the State invoking the exception. With respect to provisions without as it considers necessary-language, these, it is submitted, can be reviewed in depth and not limited to good faith-obligations. However, the article will also argue for a certain margin of discretion for the States invoking such an exception.