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GATT Article XXI, the Continuous Quest for Clarifying its Material Scope, and the WTO Panel Report on *Russia - Measures concerning Traffic in Transit*

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Abstract

It has been witnessed - especially for the last couple of years - that several states have relied on GATT Article XXI (or the so-called the WTO national security exception) to derogate from their WTO obligations. GATT Article XXI states that contracting parties are not precluded from taking any action which they consider necessary for the protection of their essential national security interests. In turn, such an exception has raised difficult legal questions since the inception of the GATT. First, is the authority vested in the contracting parties self-judging, or can it be reviewed by WTO adjudicatory bodies? Second, what is the standard for a review to be conducted in respect of Article XXI *ratione materiae*? This Article examines the reviewability and meaning of the WTO national security exception in depth. It also pays specific attention to *Russia – Measures Concerning Traffic in Transit* (DS 512), which is the first ever adjudication of GATT Article XXI by a WTO panel. Overall, this Article argues that while the question of its reviewability should no longer be disputable, there still exists a continuous quest to clarify the entire material scope of GATT Article XXI.

Keywords

GATT Article XXI, WTO National Security Exception, Russia – Measures Concerning Traffic in Transit, the Good Faith Obligation, *Djibouti v. France*, *Certain Iranian Assets*

Gümrük Tarifeleri ve Ticaret Genel Anlaşması Madde XXI, Süregelen Muğlak İçeriğinin Açıklığa Kavuşturulması ve *Russia-Measures Concerning Traffic in Transit Kararı*

Öz

Dünya Ticaret Örgütü'ne taraf birçok devlet, son yıllarda Gümrük Tarifeleri ve Ticaret Genel Anlaşması Madde XXI tahtında DTÖ Anlaşmalarındaki yükümlülüklerinden kaçınmaya başlamıştır. DTÖ Anlaşmalarında istisnai bir hüküm olarak kabul edilen Madde XXI, üye devletlere ulusal güvenliğin korunması adına önemli bir takdir yetkisi vermektedir. Ancak hem bu Maddenin muğlak ve tartışmalı olan içeriği hem de şimdiye kadar olan uygulaması uluslararası hukuk açısından ayrıntılı bir incelemeyi gerektirmektedir. Bu bağlamda, bu makale Madde XXI ile ilgili iki temel soruya cevap aramaktadır. Makalede, ilk olarak üye devletlere verilen takdir yetkisinin münhasır olup olmadığı yada DTÖ panelleri tarafından yargılanıp yargılanamayacağı irdelenmektedir. Daha sonra ise, söz konusu takdir yetkisinin yargılanabilir olduğu kabul edildiği durumda, yapılacak olan yargılamanın hangi ölçütlere göre yapılması gerektiği tartışılmaktadır. Yapılan bu incelemeler, Madde XXI uygulaması ile ilgili ilk DTÖ panel kararı niteliğini haiz ve çok yakın zamanda verilmiş olan *Russia- Measures concerning Traffic in Transit* kararı ışığında ele alınmıştır. Makale, özetle, üye devletlere bırakılan takdir yetkisinin münhasır olmadığını, ancak bu yetkinin süregelen muğlak içeriğinin açıklığa kavuşturulma ihtiyacının devam etmekte olduğunu iddia etmektedir.

Anahtar Kelimeler

Dünya Ticaret Örgütü, Gümrük Tarifeleri ve Ticaret Genel Anlaşması Madde XXI, *Russia- Measures concerning Traffic in Transit*, Uluslararası hukukta iyiniyet kuralı, *Djibouti v. France*, *Certain Iranian Assets*

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GATT Article XXI, the Continuous Quest for Clarifying its Material Scope, and the WTO Panel Report on *Russia - Measures concerning Traffic in Transit*

Introduction

One salient point of difference between international law and national law is that the former lacks a strong centralised system. International law does not have hierarchical law-making and judicial institutions akin to those existing in domestic legal orders.¹ Such a weakness consequently causes the eruption of certain problems, one of which is that unilateral security measures are frequently being invoked by states. It has been a common practice in international affairs for states to widely opt for taking unilateral actions outside the framework of the collective security system enshrined in the United Nations Charter.²

What has recently been called “trade wars” or “economic warfare” taking place between certain powerful countries in particular represents a good illustration in point.³ The United States has been the most prominent country to invoke unilateral measures during the last couple of years. For example, in April 2017, President Donald J. Trump asked the US Department of Commerce whether steel and aluminium imports could threaten the national security of the country.⁴ In January 2018, the Secretary of Commerce transmitted reports to the President, which found that the foreign import quantities of steel and aluminium at that time could result in the closure of domestic production facilities, thereby “*threatening to impair the national security of the United States*” as defined in Section 232 of the Trade Expansion Act of 1962.⁵ Claiming that the welfare of his nation related to the national security of the country, President Trump exercised his authority under the Trade Expansion Act, and signed executive orders on 8 March 2018 imposing a 25 percent ad valorem tariff on steel imports and a 10 percent ad valorem tariff on aluminium imports.⁶

The US measures on steel and aluminium products in turn created a mounting tension in the international trade world. Several World Trade Organisation (“WTO”)

1 Jack Goldsmith & Daryl Levinson, “Law for States: International Law, Constitutional Law, Public Law” (2008-2009) 122 (1) *Harvard Law Review* 1791, 1803.

2 Alain Pellet, “Sanctions Unilatérales et Droit International / Unilateral Sanctions and International Law” (2015) 76 *Yearbook of Institute of International Law* 721, 725-726.

3 Diane Desierto, “Protean ‘National Security’ in Global Trade Wars, Investment Walls, and Regulatory Controls: Can ‘National Security’ Ever Be Unreviewable in International Economic Law?” (2018) <<https://www.ejiltalk.org/national-security-defenses-in-trade-wars-and-investment-walls-us-v-china-and-eu-v-us/>> accessed 14 April 2019.

4 Jaemin Lee, “Commercializing National Security? National Security Exceptions’ Outer Parameter under GATT Article XXI” (2018) 13 *Asian Center for WTO & International Health Law and Policy* 277, 279-280.

5 White House, “Presidential Proclamation on Adjusting Imports of Steel into the United States” (2018) para 2 <<https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states/>> accessed 14 April 2019; White House, “Presidential Proclamation on Adjusting Imports of Aluminium into the United States” (2018) <<https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states-4/>> accessed 14 April 2019.

6 Ibid.

members, e.g. Turkey on 15 August 2018, requested consultations with the United States concerning the abovementioned US imposed measures. On 25 January 2019, WTO panels were established to deal with the complaints raised by Turkey, China, India, the European Union, Canada, Mexico, Norway, the Russian Federation and Switzerland in each respective consultation.⁷ Dozens of member states reserved their third party rights in relation to joining the proceedings. The term of reference of each panel has the same wording, apart from the different names and reference numbers of the complainants:

“to examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by China in document WT/DS544/8 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements”.⁸

In accepting the consultation request from each complainant prior to the establishment of the panels, the United States relied on Article XXI of the General Agreement on Tariffs and Trade 1994 (“GATT”) or the so-called the WTO national security exception,⁹ which reads as follows:

“Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; 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”.

The United States asserted that the requests in question were pursuant to Article 14 of the *Agreement on Safeguards*, whereas the measures taken under Section 232 of the Trade Expansion Act of 1962 were not safeguard measures but rather tariffs on the import of steel and aluminium products threatening to impair the country’s national security. According to Article XXI, issues of national security cannot be reviewed by

7 World Trade Organization, “United States- Certain Measures on Steel and Aluminium Products” <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds556_e.htm> accessed 14 April 2019.

8 World Trade Organization, “United States- Certain Measures on Steel and Aluminium Products- Constitution of the panel Established at the Request of China- Note by the Secretariat” <[https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%40Symbol%3d+wt%2f544%2F*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%40Symbol%3d+wt%2f544%2F*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true)> accessed 14 April 2019.

9 Brandon J. Murrill, “The ‘National Security Exception’ and the World Trade Organization” (2018) *Congressional Research Service Legal Sidebar*, 1 <<https://fas.org/sgp/crs/row/LSB10223.pdf>> accessed 14 April 2019.

panels, since appraising the kind of actions to be taken to protect essential national security interests falls within a country's inherent rights. That is to say, the authority conferred on member states by Article XXI is self-judging.¹⁰

Invocation of Article XXI by the United States was certainly not a surprise. It adopted a similar stance even in support of Russia, which itself has actually been subject to severe unilateral sanctions by the United States. In its Third Party Oral Statement in *Russia – Measures Concerning Traffic in Transit* (DS 512), which concerns a dispute between Ukraine and Russia where the latter invoked Article XXI (b) (iii), the United States sided with Russia, and claimed that the panel cannot make findings on Russia's claims, other than to conclude that the security exception contemplated under Article XXI has been invoked.¹¹

Invocation of Article XXI by the United States in the above topical disputes gives rise to a number of significant legal questions. Considering that the national security exception in the GATT might be seen an “*all embracing*” clause –owing to the phrase “*nothing in this Agreement...*” it contains,¹² can Article XXI serve as a blanket legal basis for member states to derogate from any of their GATT obligations? On that footing, can a panel review Article XXI? What would be the legal effect of a term of reference delegated to a panel? If a panel is empowered to make a review of Article XXI *ratione materiae*, how should the standard of such a review be defined? Article XXI being invoked by a country for justifying its unilateral measures is nothing new. Reviewability and scope of the WTO national security exception have in fact been questionable since the promulgation and even negotiation of the GATT.¹³ Such questions and debates in turn necessitate a rigorous and holistic scrutiny of GATT Article XXI to discuss its reviewability as well as the meaning of the various terms included in paragraphs (a), (b), and (c).

In this respect, the main aim of this article is to provide a comprehensive and robust analysis to deal with the above-mentioned set of legal questions. Given that the WTO Panel on *Russia – Measures Concerning Traffic in Transit* (DS 512) very recently released its Report on 5 April 2019, this article also examines the findings and implications of this Report, since it is the first ever WTO ruling centring on the

10 World Trade Organization, “United States- Certain Measures on Steel and Aluminium Products- Communication from the United States” <[https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%40Symbol%3d+wt%2fds564%2f*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICChanged=true](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%40Symbol%3d+wt%2fds564%2f*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICChanged=true)> accessed 14 April 2019.

11 Third Party Oral Statement of the United States of America, *Russia- Measures concerning Traffic in Transit* (DS512), (2018), para 6 <<https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Stmt.%28as%20delivered%29.fin.%28public%29.pdf#page=7>> accessed 14 April 2019.

12 Raj Bhala, “National Security and International Trade Law: What the GATT Says, and What the United States Does” (1998) 19 *University of Pennsylvania Journal of International Law* 263, 267-268.

13 Jaemin Lee (n 4) 281; Roger P. Alford, “The Self-Judging WTO Security Exception” (2011) 3 *Utah Law Review* 697, 698.

justiciability and scope of the WTO national security exception.¹⁴ The article begins a brief introduction of the WTO, which is followed by some further preliminary remarks. Thereafter, the questions concerning the reviewability of GATT Article XXI and its scope are handled in turn. Overall, this article argues that now owing to *Russia – Measures Concerning Traffic in Transit*, the question whether Article XXI is self-judging should no longer be disputable, whereas there still exists a continuing quest for clarifying its scope, namely the standards in respect of its material review. Particularly, the meaning of the phrase “*the protection of its essential national interests*” in the chapeau of paragraph (b) calls for further clarification.

I. The World Trade Organisation in a Nutshell

The World Trade Organisation was created on 1 January 1995 as a result of the efforts began after the end of the Second World War.¹⁵ In 1947, twenty-three countries negotiating tariff concessions reached a conclusion and signed the General Agreement on Tariffs and Trade (“GATT 1947”).¹⁶ The tariff concessions came into effect in 1948 by virtue of “Protocol of Provisional Application”. The founding members of the GATT 1947 also negotiated to create the International Trade Organisation (“ITO”) under the auspices of the United Nations.¹⁷ They intended to turn the GATT 1947 into part of the ITO in order to protect the value of the tariff concessions they agreed on.

Shortly after the adoption of the GATT 1947, the Havana conference commenced on 21 November 1947. A draft had finally been signed in March 1948 but could not come into force due to non-ratification by some negotiating countries. Although the US Government at the time pioneered the creation of the ITO, the US Congress showed a serious opposition to the adoption of the ITO Charter. In 1950, the United States government declared that the United States would not ratify the Havana Charter.¹⁸ Hence, the ITO could not be established, meaning that the GATT 1947 remained as the sole multilateral legal instrument governing international trade from 1948 until the WTO was founded in 1995.

Initial practices of the GATT 1947 concerned further reductions in tariffs. In the mid-1960s, a GATT Anti-Dumping Agreement was reached in the Kennedy Round. This was followed by efforts in the Tokyo Round aimed at improving the system in

14 Panel Report, *Russia – Measures Concerning Traffic in Transit* (DS 512) <https://www.wto.org/english/tratop_e/dispu_e/512r_e.pdf> accessed 25 April 2019.

15 World Trade Organization, “The GATT Years: from Havana to Marrakesh” <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm> accessed 14 April 2019.

16 For further details, see the 1947 Press Release of the European Office of the United Nations concerning the “Adoption and Signature of the Final Act” <<http://sul-derivatives.stanford.edu/derivative?CSNID=90260240&mediaType=application/pdf>> accessed 14 April 2019.

17 Shahrzad Fazeli, “Restrictions on Trade for Security Reasons: A Legal Analysis of the Scope of Article XXI of the GATT in Light of the Ukraine Crisis and the EU Sanctions on the Export of Dual-Use Goods to Russia” (2015), 10 <<http://www.diva-portal.org/smash/get/diva2:792425/FULLTEXT01.pdf>> accessed 14 April 2019.

18 Meredith A. Crowley, “An Introduction to the WTO and GATT” (2003) 4 *Economic Perspective* 42, 43.

respect of non-tariff related trade barriers.¹⁹ The Uruguay Round of 1986-94 was an important step in updating the structure of the GATT 1947. It led to the adoption of the Final Act and the Agreement Establishing the WTO signed in Marrakesh in 1994. The latter serves as an umbrella agreement, which has a number of annexes, one of which is the GATT adopted in 1994.²⁰ While the GATT 1947 mainly regulated trade in goods, the WTO and its agreements also encompass trade in services and intellectual property. The WTO now has 164 members, representing over 98 percent of international trade.²¹

The reforms creating the WTO also established new procedures for the settlement of disputes between the contracting parties. The main legal text regulating settlement of disputes in the WTO is Annex 2 of the WTO Agreement, namely “Understanding on Rules and Procedures Governing the Settlement of Disputes” (“Dispute Settlement Understanding or DSU”). The DSU largely draws on Article XXII and Article XXIII of the GATT.²² The former prescribes consultation procedures for any matter affecting the operation of the GATT. Article XXIII also deals with consultation requests, along with any subsequent procedures where the consultation process fails. According to this provision, a consultation may be requested by a country, where it considers that:

“any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
(a) the failure of another contracting party to carry out its obligations under this Agreement, or
(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
(c) the existence of any other situation”.

The DSU system is mainly based on formal consultations and panel procedures. Article 4 of the DSU provides for consultation procedures, and requires member states to afford adequate opportunities for consultation. Other WTO members are also informed of the process, so that any member having a substantial trade interest may decide to join the consultation. If no satisfactory result or settlement is reached through consultation between the member states concerned, the panel procedures come into play.

19 Chad P. Pown, *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Brookings Institution Press, 2009) 14.

20 World Trade Organization, “WTO Legal Texts” <https://www.wto.org/english/docs_e/legal_e/legal_e.htm> accessed 14 April 2019.

21 World Trade Organization, “Members and Observers of the WTO” <https://www.wto.org/english/thewto_e/countries_e/org6_map_e.htm> accessed 14 April 2019.

22 Article 3 of the DSU; Frieder Roessler & Petina Gappah “A Re-Appraisal of Non-Violation Complaints under the WTO Dispute Settlement Procedures in Patrick F. J. Macrory, Arthur E. Appleton & Michael G. Plummer (eds) *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005), 1372; Ministry of Economy, Trade and Industry of Japan, “2015 Report on Compliance by Major Trading Partners with Trade Agreements- WTO, FTA/EPA and IIA-“ (Part II WTO Rules and Major Cases Chapter 17), 717 <https://www.meti.go.jp/english/report/data/2015WTO/02_17.pdf> accessed 14 April 2019. (hereinafter “the METI Report”)

The panel procedures are run by the Dispute Settlement Body (“the DSB”). The WTO General Council convenes as the DSB to settle disputes between the contracting parties.²³ Following a failure to settle a dispute through consultation, the complaining party can ask the DSB to establish a panel. A panel is established by the negative consensus method,²⁴ meaning that its establishment can be blocked only if the whole DSB unanimously decide not to establish it.²⁵ Each panel is equipped with a term of reference. The standard wording for a term of reference is laid down in Article 7 of the DSU, and it is the same as the one quoted above for the case between China and the United States. However, parties to the dispute may request a change in the panel’s term of reference within 20 days of its establishment.

Once a panel is composed,²⁶ the ensuing stages involve submission of written statements by parties,²⁷ panel meetings,²⁸ issuing an interim and then a final report.²⁹ Parties have the right to appeal to the Appellate Body the final report of the panel.³⁰ The final report by a panel or, where an appeal is submitted, the report by the Appellate Body, becomes the official recommendation or ruling of the DSB after it has been adopted in a DSB meeting.³¹ The adoption of a report is followed by the implementation of the official recommendations.³² If the party concerned does not implement the recommendations to bring the measure found to be inconsistent with a WTO agreement covered by the DSU into compliance therewith or the parties to the dispute fail to agree on compensation, the aggrieved party can take counter-measures with the approval of the DSB.³³

II. Not National Security Exception in each Treaty has the Same Legal Effect

Having introduced the WTO in brief, the focus of this Article now turns to tackling the reviewability and scope of Article XXI of the GATT. A preliminary observation must be made at the outset that a national security exception contained in each treaty does not have the same meaning or legal effect.³⁴ It is a common practice that bilateral

23 World Trade Organization, “Dispute Settlement Body” <https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm> accessed 14 April 2019.

24 The METI Report (n 22) 720.

25 Article 6 of the DSU.

26 Article 8 of the DSU.

27 Article 12 of the DSU.

28 World Trade Organization, “Appendix 3 to Article 12 of the DSU” <https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_app3_jur.pdf> accessed 14 April 2019.

29 Article 15 and Article 16 of the DSU.

30 Article 17 of the DSU.

31 Article 16 and Article 17 of the DSU.

32 Article 21 of the DSU.

33 Article 22 of the DSU.

34 Susan Rose-Ackerman & Benjamin Billa, “Treaties and National Security Exceptions” (2008) 40 *New York University Journal of International Law and Politics* 437, 443.

or multilateral treaties contain national security exceptions in order to deal with future problems in advance or to give the contracting parties a certain degree of comfort in entering into international agreements.³⁵ But since a national security exception is often inserted into a treaty or designed for a particular reason or background, not every national security exception in a treaty might be relevant to the assessment of the reviewability and scope of Article XXI.

For example, security exceptions included in human rights or humanitarian law treaties do not afford to member states considerable latitude in derogating from their obligations. Protection of human rights forms one basic principle of the United Nations, which arguably is more important than the proliferation of a multilateral trade mechanism between the UN member states. Therefore, the exercising of security exceptions under such treaties has been subject to strict rules and procedures, and member states are bound by certain non-derogable treaty and customary obligations developed as a result of abundant state practices and jurisprudence.³⁶

On the other hand, the GATT is exclusively about cooperation in trade between the contracting parties, and up until now Article XXI has been subject to a review by a WTO dispute settlement panel only once. Nor can it be said that state practice regarding this security exception is well-established.³⁷ For that reason, scrupulously adhering to the canons of treaty interpretation seems to be the proper strategy in examining the scope of the WTO national security exception.³⁸

According to Article 3(2) of the DSU, WTO agreements must be construed “*in accordance with customary rules of interpretation of public international law*”. In a number of reports it has rendered in respect of various WTO agreements, the WTO Appellate Body relied on the general rule of treaty interpretation, namely Article 31 of the Vienna Convention on the Law of Treaties,³⁹ which has gained the status of customary international law.⁴⁰ This general rule of interpretation states that:

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes...”

35 Ibid., 441; Shahrzad Fazeli (n 17) 12; Michael J. Hahn, “Vital Interests and the Law of the GATT- An Analysis of GATT’s Security Exception” (1991) 12 *Michigan Journal of International Law* 620, 561.

36 For example see Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights.

37 Brandon J. Murrill (n 9) 2.

38 Ibid.

39 A detailed list of such reports by various Appellate Bodies can be found at <https://www.wto.org/english/tratop_e/dispu_e/repertory_e/i3_e.htm> accessed 14 April 2019.

40 Appellate Body, *United States- Standards for Reformulated and Conventional Gasoline* (1996) WT/DS2/AB/R, 17; *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)* [1994] ICJ Reports 6.

A quick glance at the above reveals that the “ordinary meaning”, “text”, “context” and “object and purpose” of a treaty or a “term” of a treaty are crucial to its interpretation.⁴¹ Furthermore, the notion of “good faith” emerges as another significant tool of treaty interpretation.⁴² The Appellate Body in some instances also invoked the drafting history of a rule, which is incorporated in Article 32 of the Vienna Convention on the Law of Treaties.⁴³

In setting out the legal framework with respect to clarifying the justiciability and scope of Article XXI, a corresponding question is whether and to what extent rulings of the International Court of Justice (“ICJ”) may be applicable or relevant. In *United States – Trade Measures Affecting Nicaragua* (L/6053) dated 13 October 1986, Nicaragua claimed that Article XXI (b)(iii) was to be interpreted in harmony with decisions of the ICJ, whereas the Respondent United States stated that the ICJ decisions were irrelevant to the proceedings before the dispute settlement panel.⁴⁴ This author argues that ICJ rulings are relevant in the context of WTO adjudications for a number of reasons. First, the Appellate Body established firmly in *United States- Standards for Reformulated and Conventional Gasoline* that the General Agreement cannot be isolated from international law.⁴⁵ Second, in *United States – Trade Measures Affecting Nicaragua*, the panel did not apply the ICJ judgment in question only because of its limited mandate,⁴⁶ which states that:

”to examine, in the light of the relevant GATT provisions, of the understanding reached at the Council on 10 October 1985 that the Panel cannot examine or judge the validity of or motivation for the invocation of Article XXI.(b)(iii) by the United States, of the relevant provisions of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/211-218), and of the agreed Dispute Settlement Procedures contained in the 1982 Ministerial Declaration (BISD 29S/13-16), the measures taken by the United States on 7 May 1985 and their trade effects in order to establish to what extent benefits accruing to Nicaragua under the General Agreement have been nullified or impaired, and to make such findings as will assist the CONTRACTING PARTIES in further action in this matter” (C/M/196, page 7).“

Although this term of reference was restricted in certain ways, it would be questionable or hard to allege inapplicability or irrelevance of ICJ decisions, where a panel has been tasked with the standard term of reference laid down in Article 7 of DSU and a party has made a reference to Article 3(2) of the DSU in submitting a complaint, as is the case in the aforementioned dispute between the United States and China. Moreover, even in *United States – Trade Measures Affecting Nicaragua*,

41 *United States- Standards for Reformulated and Conventional Gasoline*, *ibid.* 17.

42 Appellate Body, *US – Anti-Dumping and Countervailing Duties (China)* WT/DS379/AB/R, paras 326–327.

43 Appellate Body, *US – Gambling*, WT/DS285/AB/R, WT/DS285/AB/R/Corr.1, paras 196–197.

44 Panel Report, *United States- Trade Measures Affecting Nicaragua* (1986) L/6053, para 4.16.

45 *United States- Standards for Reformulated and Conventional Gasoline* (n 38) 17.

46 *United States- Trade Measures Affecting Nicaragua* (n 44) para 5.15.

the panel explicitly denied refuting the argumentation of Nicaragua. It added that the relevant GATT provisions in the light of which the case was to be examined could not be adequate and complete for the purpose of the examination.⁴⁷

To this end, it is crucial to note that the WTO Panel in *Russia – Measures Concerning Traffic in Transit* firmly adopted the above framework in tackling the question of reviewability of Article XXI. Namely, the Panel employed an interpretative approach and construed the terms of Article XXI⁴⁸ as well as its drafting history through⁴⁹ the lens of treaty interpretation techniques. The Panel also took into account the wording of its terms of reference⁵⁰ and the likely impact of the principle of good faith on the competence of the contracting parties contemplated in Article XXI.⁵¹

III. Reviewability of the WTO National Security Exception

The question concerning reviewability of Article XXI should not be conflated with that regarding the extent of its scope. Claiming that the WTO national security exception falls under the jurisdiction of a dispute settlement panel does not necessarily mean that the discretion resting with a country with respect to appraisal of measures aimed at protecting essential security interests is slim or non-existent. The latter is a separate and difficult question that ought to be dealt with once the answer to the question whether Article XXI is justiciable is affirmative. However, it must be stressed equally that clarification of the reviewability question also merits careful attention, especially when it has been explicitly put forward by the United States in the recent disputes mentioned above.

A. An Analysis through Text, Context and Purpose of Article XXI

The text of Article XXI does not provide clarity as to whether the authority left to the contracting parties therein is entirely self-judging or, in contrast, reviewable by dispute settlement mechanisms fully or at least to some extent.⁵² The phrase “*it considers*” in paragraphs (a) and (b) is certainly a source of confusion,⁵³ and has led to divergent approaches in legal literature.

Some commentators make a textual reading of expression “*it considers*” and argue that the word “*it*” indicates that a country is the sole judge in deciding what action

47 Ibid.

48 *Russia – Measures Concerning Traffic in Transit* (DS 512) (n 14) paras 7.62-7.82.

49 Ibid. paras 7.83- 7.100.

50 Ibid. paras 7.53-7.58.

51 Ibid. para 7.59.

52 Brandon J. Murrill (n 9) 3; Shahrzad Fazeli (n 17) 7; Raj Bhala (n 12) 268; Wesley A. Cann, Jr., “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, 415.

53 Jaemin Lee (n 4) 290.

is required for the protection of essential national security interests.⁵⁴ Such a broad understanding of Article XXI may be considered as offering the invoking contracting party a “*carte blanche*” in justifying its national security concerns as it wishes. In other words, the WTO dispute settlement bodies, as well as the targeted or other contracting parties are precluded from appreciating validity or reasonableness of invocation of measures taken under the national security exception.⁵⁵ In corroborating this line of reasoning, as noted by Murrill, proponents of this broad view make a comparison between Article XX and Article XXI of the GATT and emphasise the objective of the WTO.⁵⁶

Article XX prescribes general exceptions, whereas Article XXI concerns security exceptions. The former provides for the contracting parties to take measures against their GATT obligations in a number of circumstances, where, for example, it is necessary for the protection of public morals or human, animal or plant life or health. However, this provision, unlike Article XXI, enjoins the contracting parties to ensure that such measures are not adopted or enforced “*in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade*”. The absence of such a restriction in Article XXI indicates that the authority contemplated in this provision is self-judging. Such a conclusion would also be warranted by the objective of the WTO that it is an international organisation charged with only trade issues, thereby lacking competence on security (related) matters.⁵⁷

On the other hand, Article XXI has also been interpreted narrowly.⁵⁸ The reasoning of this view, adopted by this author as well, rests on a reading of paragraph (b), which introduces three particular categories of actions that a country must take into account when appraising measures necessary for the protection of essential national security interests. If Article XXI is taken to be completely self-judging - in other words if a panel cannot review whether a measure adopted or enforced pursuant to paragraph (b) is actually for security, political or economic reasons, it follows then that the inclusion of the enumerated categories into paragraph (b) of Article XXI would only be in vain.⁵⁹ Importantly, in *Russia – Measures Concerning Traffic in Transit*, the

54 Raj Bhala (n 12) 268-269; Roger P. Alford (n 13) 702. However, it must be noted that these authors, after having concluded the self-judging nature of Article XXI, suggest some grounds to limit the exclusive authority resting with the WTO contracting parties. For such a broad view, see also Andrew Emmerson, “Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse” (2010) 11 *Journal of International Economic Law* 135, 142.

55 Jaemin Lee (n 4) 290.

56 Brandon J. Murrill (n 9) 3.

57 Ibid.

58 Jaemin Lee (n 4) 290; Hannes L. Scholemann & Stefan Ohlhoff, “Constitutionalization and Dispute Settlement in the WTO: National Security as an Issue of Competence” (1999) 93 *American Journal of International Law* 424, 426; Dapo Akande & Sope Williams, “International Adjudication on National Security Issues: What Role for the WTO?” (2003) 43 *Vanderbilt Journal of International Law* 365, 399.

59 Jaemin Lee (n 4) 291; Brandon J. Murrill (n 9) 4.

WTO Panel too interpreted the structure and terms of Article XXI narrowly. It stated that:

*“The mere meaning of the words and the grammatical construction of the provision can accommodate an interpretation in which the adjectival clause “which it considers” qualifies the determinations in the three enumerated subparagraphs. But if one considers the logical structure of the provision, it is apparent that the three sets of circumstances under subparagraphs (i) to (iii) of Article XXI(b) operate as limitative qualifying clauses; in other words, they qualify and limit the exercise of the discretion accorded to Members under the chapeau to these circumstances”.*⁶⁰

The Panel added that the existence of the three sub-paragraphs established alternative and further requirements that the security action in question must satisfy so as to fall within the purview of the chapeau of paragraph (b).⁶¹ In this dispute, Russia attempted to justify its measures in question under sub-paragraph (iii). The Panel accordingly held that the meaning of the term “war or other international emergency” in this paragraph must be determined objectively.⁶² Hence, a country invoking this national security exception must present objective security reasons, which is to say that it cannot totally self-judge the necessity for adopting the measures in question.

B. An Analysis through Legislative History of Article XXI and Earlier GATT Practices

Legislative history of Article XXI and earlier state practices on the matter have also been critical in dealing with the question of justiciability of this provision. The need for inclusion of a security exception existed even during the negotiations of the International Trade Organisation,⁶³ resulting in various drafts adopted in conferences held in London, New York, Geneva and Havana in 1946 and 1947.⁶⁴ In the London draft, security exceptions were combined with general exceptions, and they were both regulated in Article 37 of the London draft (and the New York draft) under the commercial policy chapter.⁶⁵ In order to avoid any abuse of Article 37, a reservation was inserted that invocations to any measures pursuant to this provision would have to be justifiable and non-discriminatory. So, the reservation inserted into the text applied to the security exceptions as well.

However, in the Geneva draft, the security exceptions were split from the general exceptions. The latter was dealt with in Article 43 (identical to Article XX presently),

⁶⁰ *Russia – Measures Concerning Traffic in Transit* (DS 512) (n 14) para 7.65.

⁶¹ *Ibid.* para 7.68.

⁶² *Ibid.* paras 7.70, 7.71 and 7.101.

⁶³ Michael J. Hahn (n 35) 565-566.

⁶⁴ Shahrzad Fazeli (n 17) 18.

⁶⁵ GATT Multilateral Trade Negotiations – the Uruguay Round, “Article XXI- Note by the Secretariat” (1987), 2 <<https://docs.wto.org/gattdocs/q/UR/GNGNG07/W16.PDF>> accessed 15 April 2019. (hereinafter “the Uruguay Round Note”)

whereas Article 94 (identical to Article XXI presently) concerned the security exceptions. The intention of the drafters was to detach national security concerns from the commercial policy chapter. In doing so, the general exception would solely be applicable to commercial issues, while Article 94 would be an exception to the entire ITO Charter.⁶⁶ Such a binary formulation was decided in the midst of discussions regarding the likely abuse of the security exception.⁶⁷ One approach stated that “*some latitude must be granted for security as opposed to commercial purpose*”. In the opposition, it was held that “*the spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuse*”.⁶⁸

The discussions concerning the scope of Article 94 continued in the Havana conference. The question at stake was what if the security exception was used for political (including economic) reasons. Consequently, Article 94 was turned into Article 99 of the ITO Charter (identical to XXI), and paragraph 1(c) of Article 94 was moved to Article 86, which set out the relationship between the ITO and the United Nations. According to interpretative notes on Article 86, a member state would have been able to raise a question whether a measure in question had been taken in connection with a political matter or for security reasons. Determining such a query would have fallen under the ambit of the ITO, if it had concerned Chapters IV or VI of the United Nations Charter. The United Nations would have been competent to determine the matter, had it related a political issue beyond the mandate of the ITO.⁶⁹

Considering the self-judging nature and reviewability of Article XXI in light of its legislative history, it is clear that both matters were problematic and unclear even prior to the establishment of the WTO. Although some elements of justiciability were envisaged through procedures at the UN level, the ITO Charter did not enter into force ultimately. Overall, as was held by the WTO Panel in *Russia – Measures Concerning Traffic in Transit* as well,⁷⁰ *travaux préparatoires* does not establish that the security exception was, without a doubt, self-judging or immune from reviewability.⁷¹ Having said that, whether earlier state and judicial practices with respect to Article XXI reveal the same must also be investigated.

Measures taken under Article XXI, mostly under paragraph (b) (iii), in the past have also been the subject of discussions between the contracting parties. In 1949, the United States launched an export control regime as part of the Marshall plan.⁷² One of the aims of the program was to stop Eastern European countries exporting products

66 Ibid.

67 Shahrzad Fazeli (n 17) 22.

68 The Uruguay Round Note (n 65) 2.

69 Ibid. 3.

70 *Russia – Measures Concerning Traffic in Transit* (DS 512) (n 14) para 7.100.

71 Shahrzad Fazeli (n 17) 25-26.

72 Roger P. Alford (n 13) 709.

that could be used for the supply of military establishments.⁷³ In turn, Czechoslovakia submitted a complaint against the United States by relying on Article XXIII (2). The United States justified its measures by virtue of the exception enshrined in Article XXI (b) (ii). During the sessions concerned, the Chairman held that Article XXI was an exception to the general rule contained in Article I, setting out the most-favoured-nation treatment obligations including non-discrimination. It was added that “*every country must be the judge in the last resort on questions relating to its own security*”. In the end, the complaint was rejected by roll-call vote.⁷⁴

In 1961, at the occasion of Portugal’s accession, Ghana declared that it would boycott Portuguese goods on the basis of Article XXX (b) (iii). Ghana stated that this Article empowered each contracting party to solely decide what was necessary for protection its essential security interests. A potential or actual danger could perfectly endanger national security of a country. The situation in Angola was a constant threat to the peace of the African continent. Hence, any action putting pressure on Portugal for the purpose of lessening the danger in question would be justifiable by Ghanaian essential security interests.⁷⁵ The observation of Ghana was well noted by other contracting parties. Following the said statement during the accession proceedings, Ghana imposed measures on Portugal under Article XXXV of the General Agreement.⁷⁶

In 1975, Sweden imposed a quota with respect to importing certain footwear. The particular reason was that a “*decrease in domestic production has become a threat to the planning of Sweden’s economic defence in situations of emergency as an integral part of its security*”. Sweden claimed that the measure taken conformed to the spirit of the GATT national security exception. Yet, this justification was doubted by many representatives of other contracting parties. Sweden consequently terminated the quota in respect of leather and plastic shoes as of 1 July 1977.⁷⁷

In 1982, Argentina occupied the Falkland Islands, which in turn prompted a trade embargo imposed on Argentina by the European Community, Australia and Canada.⁷⁸ The representative of the European Community stated that the measures were enforced owing to their inherent rights reflected in Article XXI. The representative of Canada expressed that the action taken related to the sovereignty of his country. It was a political response to a political issue, the assessment of which would fall outside the competence of the General Agreement. The same line of reasoning was

73 Ibid.

74 The Uruguay Round Note (n 65) 5.

75 World Trade Organization, “Article XXI- Security Exceptions”, GATT-AI-2012-Art21, 600 <https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf> accessed 15 April 2019. (Hereinafter “the Analytical Index of the GATT”)

76 The Uruguay Round Note (n 65) 6.

77 Ibid. 7.

78 Roger P. Alford (n 13) 710.

also held by Australia and the United States. The latter asserted that other contracting parties cannot judge a measure adopted by a state for national security reasons.⁷⁹ On the other hand, some states raised concerns over the likely destructive impact of an unlimited national security exception on the GATT system and its purposes. Japan claimed that tying political issues with GATT activities would undermine the fulfilment of the task entrusted to the General Agreement. Brazil added that the specific interests for exercising the security measures in question were not shown, and it was not tenable how the interests of third parties imposing the embargo were or could be at stake. Consequently, no panel was formed to deal with the justifiability of the trade embargo under the national security exception.⁸⁰

In 1985, President Reagan of the United States signed an executive order to deal with unusual and extraordinary threats existing in relation to the national security of the country. He ordered the imposition of a trade embargo on Nicaragua, which covered all export and import of goods and services between the two countries. The US justified its actions under Article XXI. Upon Nicaragua's request, the GATT Council held a meeting, where nineteen states out of forty-three found the national security exception to be self-judging.⁸¹ However, dissenting voices were also heard. Sweden agreed to the self-judging nature of the national security exception, but reserved that the United States' interpretation of Article XXI had gone too far. India contended that the imposing state must show a real link between the security interests and the trade action in question.⁸² After lengthy consultations, a panel was formed to deal with the complaint, but as quoted above its term of reference was limited. During the written submissions, the United States countered that the panel did not have the power to appraise its security interest justifications because of its limited term of reference as well as the scope of Article XXI.⁸³ With respect to whether the national security exception was self-judging, the Panel concluded that:

*“The Panel did not consider the question of whether the terms of Article XXI precluded it from examining the validity of the United States' invocation of that Article as this examination was precluded by its mandate. It recalled that its terms of reference put strict limits on its activities because they stipulated that the Panel could not examine or judge the validity of or the motivation for the invocation of Article XXI:(b)(iii) by the United States (cf. paragraph 1.4 above). The Panel concluded that, as it was not authorized to examine the justification for the United States' invocation of a general exception to the obligations under the General Agreement, it 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”.*⁸⁴

79 The Analytical Index of the GATT (n 75) 601.

80 Roger P. Alford (n 13) 712.

81 Ibid. 713.

82 Ibid. 715.

83 *United States- Trade Measures Affecting Nicaragua* (n 44) para 4.6.

84 Ibid. para 5.3.

In 1991, the European Community imposed a package of economic measures on Yugoslavia due to the violent civil war taking place in this country.⁸⁵ The European Community explicitly based its actions on Article XXI. Yugoslavia responded that the measures were of a punitive nature and adopted for non-economic reasons.⁸⁶ The GATT Council approved the establishment of a panel and asked the parties to negotiate the term of reference of the panel. However, no further progression was made with respect to the hearing of the matter by the panel, as Yugoslavia underwent dissolution.⁸⁷

Based on a reading of the above landmark trade disputes between the GATT members, there has been a tendency to assert that the national security exception is indeed left to the unfettered competence of a country invoking it.⁸⁸ In addition to arguing that the text of Article XXI establishes that it is self-judging, Bhala contends that such a conclusion is reinforced by various practices of the contracting parties.⁸⁹ Alford takes the view that in the absence of conclusive judicial decisions or clarity from canons of treaty interpretation, state practices offer a useful guidance, which strongly supports that it is up to the contracting parties to decide what action is required for tackling national security concerns.⁹⁰

On the other hand, several arguments can be adduced to claim that earlier state and judicial practices have not exempted Article XXI from a judicial review. First, they do not expressly establish that the national security exception is self-judging, thereby falling outside the realm of an adjudication by WTO dispute settlement mechanisms.⁹¹ Given the lack of clarity in practices of the contracting parties, it is in fact questionable whether this source of treaty interpretation can be the sole ground for appreciating justiciability of Article XXI. For example, whilst the European Community was a leading advocate of the broader reading of the national security exception in the above discussed trade disputes; the European Union has taken an opposite view in recent disputes where Article XXI has been addressed by respondent contracting parties. In its Third Party Oral Statement in *Russia – Measures Concerning Traffic in Transit* (DS 512), the European Union clearly stated that justiciability of Article XXI is now out of question, and that Russia cannot escape its burden of explaining how Article

85 Roger P. Alford (n 13) 717.

86 Ibid.

87 Ibid. 718.

88 Ibid. 705; see also Peter Lindsay, “The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure” (2003) 52 *Duke Law Journal* 1277, 1297; Todd Piczak, “The Helms-Burton Act: US Foreign Policy toward Cuba, the National Security Exception to the GATT and the Political Question Doctrine” (1999) 61 *University of Pittsburgh Law Review* 287, 319.

89 Raj Bhala (n 12) 269-270.

90 Roger P. Alford (n 13) 707.

91 Shahrzad Fazeli (n 17) 33; George-Dian Balan, “On Fissionable Cows and the Limits to the WTO Security Exceptions” (2018) Society of International Economic Law (SEIL) Sixth Biennial Global Conference, 5-6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3218513> accessed 15 April 2019.

XXI (b) (iii) might be applicable by simply citing various unilateral statements of the contracting parties to the GATT 1947.⁹²

Take the situation of Russia as another example. It would be interesting to observe what Russia will claim against the United States in the recent dispute they had due to the steel and aluminium tariff increases imposed by President Trump. Would it comfortably say that Article XXI is not entirely self-judging, unlike what the United States as a third party submitted in Russia's favour in the dispute between Russia and Ukraine?⁹³ Hence, with the eruption of the recent disputes between several states and where many states joined in the proceedings as a third party, it is no longer plausible to rely on practices or pronouncements of the contracting parties to propound the self-judging nature of the national security exception.

Second, a reading of the earlier cases discussed above does not reveal that the issue of justiciability was settled owing to the existence of state practice establishing the self-judging nature of Article XXI. Rather, it points out that the disputes could not be handled properly because of the difficulty in forming a (suitable) panel in the GATT Council meetings. The negative consensus method, aimed at preventing the respondent contracting party from blocking formation of a panel to hear a complaint, did not exist before the introduction of the WTO dispute settlement rules and processes.⁹⁴ A country could easily veto establishment of a GATT panel or restrict the scope of its term of reference. It was also possible to block adoption of a panel report.⁹⁵ Therefore, the question of reviewability could not be addressed properly by a panel at the time of each dispute discussed above.

The foregoing is clearly supported by *United States – Trade Measures Affecting Nicaragua* (L/6053), where the United States asserted that the panel lacked jurisdiction over the matter not only due to its restricted term of reference but also the self-judging nature of Article XXI.⁹⁶ The Panel agreed with the United States that it did not have power to appraise the validity of or motivation for the invocation of Article XXI:(b)(iii) by the United States. However, it did not conclude explicitly that it was barred by the nature of Article XXI to conduct a review of the measures taken for security reasons. The Panel crucially held that:

“The above considerations and the conclusions to which the Panel had to arrive, given its limited terms of reference and taking into account the existing rules and procedures of

92 Third Party Oral Statement by the European Union, *Russia – Measures Concerning Traffic in Transit* (DS 512), paras 5-8 <http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156603.pdf> accessed 15 April 2019.

93 Third Party Oral Statement of the United States of America, *Russia- Measures concerning Traffic in Transit* (DS512) (n 11) para 6.

94 Judith L. Goldstein & Richard H. Steinberg, “Negotiate or Litigate? Effects of WTO Judicial Delegation on U.S. Trade Politics” (2008) 71 *Law and Contemporary Problems* 257, 263.

95 Roger P. Alford (n 13) 211.

96 *United States- Trade Measures Affecting Nicaragua* (n 44) para 4.6.

the GATT, raise in the view of the Panel the following more general questions: 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 those set out in this provision? If the CONTRACTING PARTIES give a panel the task of examining a case involving an Article XXI invocation without authorizing it to examine the justification of that invocation, do they limit the adversely affected contracting party's right to have its complaint investigated in accordance with Article XXIII:2? Are the powers of the CONTRACTING PARTIES under Article XXIII:2 sufficient to provide redress to Contracting Parties subjected to a two-way embargo?⁹⁷

So, arguably, the Panel hinted that if it were not restricted by its term of reference, it would (or might) deal with whether invocation of Article XXI was in accordance with the purpose of this provision. Furthermore, the Panel implied that unless having been restricted by a term of reference, a panel must review security related measures in order to give an effect to a contracting party's right to have its complaint investigated in accordance with Article XXIII (2).

In connection with the foregoing, it is ground-breaking and novel that in *Russia – Measures Concerning Traffic in Transit*, the WTO Panel highlighted the importance of its standard term of reference set out in Article 7 of the DSU 7, which according to the Panel included an authority to review the invocations of Russia under Article XXI (b) (iii).⁹⁸ It must be observed that the recent panels established to hear the disputes between the United States and a group of other countries and the European Union are also tasked with the same standard term of reference laid down in Article 7 of the DSU. For that reason, it is most likely that such panels will follow the Panel in *Russia – Measures Concerning Traffic in Transit* and establish its jurisdiction over the claims of the United States, thereby putting a firm end to the prolonged issue of justiciability of the WTO national security exception. It must be added that all the third parties in *Russia – Measures Concerning Traffic in Transit*, except the United States, agreed that a measure taken pursuant to Article XXI can be judged by a WTO judicial body tasked with a standard term of reference.⁹⁹ So, in addition to arguing that earlier state practices did not clearly set aside the jurisdiction of a WTO panel over Article XXI, it can now be said that virtually all states concerned have considerably given up their sovereignty in solely appraising what actions might be necessary in protecting their essential national security interests. And such an attitude may have significant ramifications for the emergence of a new customary rule in the future.

⁹⁷ Ibid. 5.17.

⁹⁸ *Russia – Measures Concerning Traffic in Transit* (DS 512) (n 14) para 7.56.

⁹⁹ Ibid. paras 7.35- 7.52.

C. An Analysis through Pronouncements of the International Court of Justice

Alongside the framework above, an analysis of the rulings of the International Court of Justice also gives succour to the approach claiming the justiciability of GATT Article XXI by a WTO judicial body. Invocation of a measure aimed at protecting essential security interests has also been discussed by the ICJ in a number of its pronouncements. The ICJ did not deal with the reviewability of Article XXI directly. Its rulings rather centred on certain other treaties, but the issue at stake was the same, namely whether a national security exception included in a treaty with the same or a similar language to that employed in Article XXI could be relied on in derogating from other obligations set forth by that treaty.

The leading case by the ICJ is *Nicaragua v. the United States*.¹⁰⁰ One of the disputes between the parties concerned the interpretation or application of the 1956 Treaty of Friendship, Commerce and Navigation between the Parties, which, *inter alia*, states that:

“the present Treaty shall not preclude the application of measures:

...

(c) regulating the production of or traffic in arms, ammunition and implements of war; or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment;

*(d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests”.*¹⁰¹

The ICJ remarked that the foregoing could not create a barrier to entertaining its jurisdiction *ratione materiae* over the disputes in question. Any article of the treaty, including just such an exception, was subject to a review by the Court. The ICJ added that the language employed in this treaty as opposed to that devised in Article XXI of the GATT opened the leeway for establishing its jurisdiction.¹⁰² It held that:

*“This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it “considers necessary for the protection of its essential security interests”, in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of “necessary” measures, not of those considered by a party to be such”.*¹⁰³

The ICJ faced the same question in *Certain Iranian Assets*, which concerns a very recent dispute between Iran and the United States.¹⁰⁴ On 14 June 2016, Iran filed an application in the registry of the Court instituting proceedings against the United

¹⁰⁰ *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* [1986] ICJ 14.

¹⁰¹ *Ibid.* para 221.

¹⁰² *Ibid.* para 222.

¹⁰³ *Ibid.*

¹⁰⁴ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* [2019] ICJ Preliminary Objections <<https://www.icj-cij.org/files/case-related/164/164-20190213-JUD-01-00-EN.pdf>> accessed 15 April 2019.

States for the latter having breached the Treaty of Amity, Economic Relations, and Consular Rights. According to Article XX (1) of the treaty, the parties, *inter alia*, are not precluded from taking actions relating to fissionable materials,¹⁰⁵ regulating the production of or traffic in arms, ammunition and implements of war,¹⁰⁶ or “necessary” to protect its essential security interests.¹⁰⁷ The United States raised several preliminary objections, one of which propounded that the Court lacked jurisdiction to review measures it had taken to block or freeze assets of the Iranian government or Iranian financial institutions pursuant to paragraph (1) (c) of Article XX of the treaty.¹⁰⁸

On 13 February 2019, the ICJ released its findings on preliminary objections. The Court referred to its provisional measures rendered on 3 October 2018, which established that the treaty contained no provision excluding certain matters from its jurisdiction. The ICJ also made a reference to its *Nicaragua v. the United States* judgment, in which it established its jurisdiction over the disputes, where the exception in question invoked by the United States was akin to that enshrined in paragraph (1) (d) of Article XX of the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States.¹⁰⁹ In the Court’s view, there was no reason in the present case to distinguish paragraph (1) (c) from paragraph (1) (d), meaning that it entertains jurisdiction for measures taken regulating traffic in the materials listed in the former paragraph as well.¹¹⁰

As is clear from above, the ICJ has shown a firm stance in finding itself competent to review a claim against a national security exception. However, for the purpose of this article, it must be observed that the aforementioned articles do not include the language “*it considers*”. In fact, in *Nicaragua v. the United States*, the ICJ made a distinction between the wording employed by the treaty in question and the GATT.¹¹¹ As pointed out by Briese, the statement of the Court may be read as restricting its jurisdiction in case a security measure is taken pursuant to Article XXI of the GATT or another treaty using the same language.¹¹² At this point, it is helpful to look into the *Djibouti v. France* judgment of the ICJ.

Djibouti v. France concerns a dispute arising out of France’s refusal to transmit a criminal investigation file requested by Djibouti under the Convention on Mutual Assistance in Criminal Matters between the Government of the Republic of Djibouti

105 Para (1) (b) of Article XX (1).

106 Para (1) (c) of Article XX (1).

107 Para (1) (d) of Article XX (1).

108 *Certain Iranian Assets* (n 104) para 40.

109 *Ibid.* para 45.

110 *Ibid.* para 46.

111 *Nicaragua v. United States of America* (n 100) para 222.

112 Robyn Briese & Stephan Schill, “Djibouti v France: Self-Judging Clauses before the International Court of Justice” (2009) 10 *Melbourne Journal of International Law* 308, 318-319.

and the French Republic. Article 2 (c) of the treaty reads that “*assistance may be refused... if the requested State considers that execution of the request is likely to prejudice its sovereignty, its security, its ordre public or other of its essential interests*”.¹¹³ Therefore, the finding of the ICJ in this judgment is relevant to the question of the reviewability of the WTO national security exception, as it includes the wording “*the requested State considers*”.

Djibouti contended that France could not rely on Article 2 (c) because for the invocation of this exception to be valid, France was required to adduce reasons for adequately justifying its refusal to execute its treaty obligations.¹¹⁴ It also acknowledged that even if Article 2 (c) could be seen as having a self-judging effect to a large extent, France would still have to act in good faith and reasonably.¹¹⁵ France maintained that penal matters fell within the ambit of the exceptions contemplated in Article 2 (c). Accordingly, it was not for another country to judge actions implemented by France pursuant to its sovereignty, security, public order or other essential interests.¹¹⁶ In dealing with the case, the ICJ held that it must review the circumstances (including those concerning the French measures taken pursuant to its internal law) under which French authorities refused the mutual assistance with Djibouti,¹¹⁷ and found that in spite of the very considerable discretion provided by Article 2 (c), France was still bound by the obligation of good faith set out in Article 26 of the Vienna Convention on the Law of Treaties.¹¹⁸ The conclusion of the Court did not pertain to a matter of jurisdiction; it was rather a judgment on merits. So, it can be averred that the ICJ would have no hesitation in establishing its jurisdiction to review the self-judging Article 2 (c), if it were claimed by France that the existence of the said article by its nature was also a barrier to its justiciability by the Court.

IV. Standards of Review Applicable to the WTO National Security Exception

Above, it was discussed in detail that the phrase “*it considers*” in Article XXI of the GATT cannot be interpreted as totally precluding a WTO panel from reviewing unilateral actions adopted and enforced by the contracting parties for national security reasons. Although it is undoubtedly very wide, the authority left to a country in appraising the kind of measures to deal with security concerns is or should be subject

113 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* [2006] ICJ Application Institution Proceedings, 25 <<https://www.icj-cij.org/files/case-related/136/13104.pdf>> accessed 16 April 2019.

114 *Case Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* [2008] ICJ Judgment, para 134 <<https://www.icj-cij.org/files/case-related/136/136-20080604-JUD-01-00-EN.pdf>> accessed 16 April 2019.

115 *Ibid.*, paragraph 135.

116 *Ibid.*, paragraph 136; see also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* [2008] ICJ Oral Proceedings of France 12.

117 *Djibouti v. France* (n 114) para 140.

118 *Ibid.* para 145.

to some forms of limitations.¹¹⁹ However, the extent of the limitation is not free from controversy. How would a panel be expected to review a measure under the WTO national security exception? What would be the standards of the review? Below, such troubling issues concerning the material scope of Article XXI are tackled.

A. Reviewing paragraph (c) of Article XXI reading that “*nothing in this Agreement shall be construed to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.*”

In introducing the focus of this Article, a reference to *Russia – Measures Concerning Traffic in Transit* (DS 512) was made above alongside the recent disputes between the United States and a number of complainants. Such disputes centre mainly on the applicability of paragraph (b). Paragraph (a) is also of particular relevance, as it includes the phrase “*it considers*”. On the other hand, paragraph (c) concerns the invocation of measures in a rather specific context, namely pursuant to obligations of the invoking country under the United Nations Charter for the maintenance of international peace and security. Whilst dealing with the applicability of paragraph (c) demands a separate and detailed inquiry, which is outside the scope of this article, below –for the purpose of providing a full picture of the matter, is a brief analysis of the security exception enshrined in paragraph (c).

Paragraph (c) refers only to obligations under the United Nations Charter for the maintenance of international peace and security. It does not articulate what those measures are or by which organ of the United Nations they are adopted. However, it can be easily deduced from the common practices of the United Nations that the likely scenario contemplated in paragraph (c) concerns UN mandated sanctions imposed by the Security Council acting under Chapter VII of the UN Charter.¹²⁰ If so, the answer is facile. By virtue of Article 25 and Article 103 of the UN Charter, the Chapter VII decisions of the Security Council are binding on the UN member states, and any obligation imposed by such an order of the Security Council shall prevail over any conflicting obligations of member states stemming from any other treaty. While the Chapter VII Security Council orders cannot override human rights obligations subject to the high and strict standards set out by human rights monitoring bodies,¹²¹ the same cannot be said for treaties of a commercial or economic nature.

¹¹⁹ George-Dian Balan (n 91) 1.

¹²⁰ The Analytical Index of the GATT (n 75) 605.

¹²¹ *Al-Jedda v. United Kingdom* (App No 27021/08) ECHR 07 July 2011; *Nada v. Switzerland* (App No 10593/08) ECHR 12 September 2012; Alexander Orakhelashvili, ‘R (On the Application of Al-Jedda) (FC) v. Secretary of State for Defence: UK House of Lords Judgment on Relationship between UN Security Council Resolution Authorising Detention in Iraq and European Convention on Human Rights’ (2008) 102 *American Journal of International Law* 337, 343; Marko Milanovic, ‘Norm Conflict in International Law: Whither Human Rights?’ (2009) 20 *Duke Journal of Comparative & International Law* 69, 97-98; Omer Faruk Direk, *Security Detention in International Territorial Administration of Kosovo, East Timor, and Iraq* (Brill Nijhoff, 2015) 41.

Owing also to the well-established jurisprudence,¹²² a country is entitled to invoke the security exception in paragraph (c) in pursuance of a binding sanction imposed by the Security Council.

But what if the order by the Security Council is not mandatory?¹²³ Would a Security Council decision calling on member states to act in voluntary or a decision taken by other organs of the United Nations, such as the General Assembly whose resolutions are advisory, also give a country the right to derogate from its WTO obligations by invoking paragraph (c) of the national security exception? In the author's view, while an answer can be offered on a case-by-case basis, it can be contended that such non-binding UN decisions may also provide a country with the power to rely on paragraph (c). At least, they can constitute a moral ground for a country invoking a unilateral measure against another WTO contracting party, which the Security Council found to have breached or threatened international peace and security.

B. Reviewing paragraph (a) of Article XXI reading that “*nothing in this Agreement shall be construed to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests.*”

It must be discerned at the outset that notifying a targeted country of measures adopted for national security reasons is a different matter from disclosing the reasons for why such measures have been adopted. The former has already been dealt with and settled by WTO members. During the above-mentioned dispute arising as a result of the trade embargo imposed on Argentina by the European Community, Australia and Canada, the representative of the European Community, alongside his claim that every contracting party was the sole judge in appraising the reasons for invoking the national security exception, held that Article XXI did not create an obligation to notify the targeted contracting party of the security measures in question.¹²⁴ Whether Article XXI contained a notification requirement was then discussed in the Council meeting. The contracting parties adopted that “*subject to the exception in Article XXI: a, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXF*”.¹²⁵ Thus, Article XXI does not exclude service of notification on a targeted contracting party.

On the other hand, whether Article XXI requires a disclosure of the reasons for a security measure is a rather different and more difficult inquiry. Take the case of

122 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* [1992] ICJ Rep 3.

123 For a detailed analysis, see Alain Pellet (n 2) 726-730.

124 The Analytical Index of the GATT (n 75) 605.

125 Ibid. 606.

the United States explained above as an example. On 8 March 2018, the United States imposed a 25 percent ad valorem tariff on steel imports and a 10 percent ad valorem tariff on aluminium imports, which were adopted mainly due to the report transmitted to President Trump by the Secretary of Commerce. The report concluded that the steel and aluminium imports into the country posed a serious threat to the national security of the United States. So, the question is whether the United States, for instance during the review by the WTO panel, can be asked to adduce more specific reasons or information, perhaps which could be classified as “state secrets”, for why such tariff increases were implemented. In the same vein, is a country under an obligation to disclose any or specific reasons for taking a measure pursuant to paragraph (c)? Or does the scope of paragraph (a) cover situations other than those set out in paragraph (b) and paragraph (c)?

Observing the language employed in paragraph (a), namely “*which it considers contrary to its essential security interests*”, it is obvious that this paragraph undoubtedly confers on the contracting parties a very considerable discretion in appraising what sort of information they should furnish in relation to exercising the WTO national security exception. The contracting parties should enjoy a broad margin of appreciation in regard to actions falling within the ambit of paragraphs (b) and (c). The same must be said for any other matter concerning other provisions of the General Agreement. However, this textual reading of paragraph (a) never means that the power vested in the contracting parties therein is unrestrained.¹²⁶ There certainly exists a limitation that can be placed on the freedom of action envisaged in paragraph (a). In uncovering the extent of such a limitation, it is helpful to revisit *Djibouti v. France*—which, *inter alia*, directly discussed whether France could be required to give reasons to justify its refusal to comply with its mutual assistance obligations.

The two provisions of the Convention on Mutual Assistance in Criminal Matters between the Government of the Republic of Djibouti and the French Republic relevant to the discussion here are Article 2(c) and Article 17. The former, as set out above, is a national security exception and allows each party to refuse the assistance request, if either of them considers that the execution of the request may prejudice its security, public order, sovereignty or other essential interests. The latter requires each party to disclose reasons for any action taken under the Convention. Djibouti contended that France’s refusal to transmit the file requested (or to execute the letter rogatory submitted to it by Djibouti) was a breach of not only the discretion envisaged in Article 2(c) but also that of the disclosure obligation enjoined by Article 17.¹²⁷ In response, France claimed that it was the sole judge to appraise its authority under

¹²⁶ George-Dian Balan (n 91) 8.

¹²⁷ *Djibouti v. France* (n 114) paras 134-135.

Article 2(c), and since it relied on the national security exception, the requirement under Article 17 to state reasons for its action would not be applicable.¹²⁸

The ICJ discussed in detail whether France had violated its disclosure obligation under Article 17, or in other words whether France could escape responsibility under Article 17 by simply making a bald reference to its invocation of Article 2(c). In respect of France's reliance on Article 2(c), the Court found that – subject to the good faith obligation – the refusal of the French authorities to execute the letter rogatory fell within the scope of authority under the national security exception. However, in spite of such a judgment in favour of France, the ICJ held that since Djibouti learned the reasons for refusal of assistance only from the French media and press,¹²⁹ France breached its disclosure obligation under Article 17. It stated that:

*“The bare reference it was said to contain to Article 2 (c) would not have sufficed to meet the obligation of France under Article 17. Some brief further explanation was called for. This is not only a matter of courtesy. It also allows the requested State to substantiate its good faith in refusing the request. It may also enable the requesting State to see if its letter rogatory could be modified so as to avoid the obstacles to implementation enumerated in Article 2”.*¹³⁰

As is clear from above, a country invoking a national security exception clause is bound to adduce reasons for the unilateral action concerned. One, at this point, may claim that the disclosure requirement in case of *Djibouti v. France*, unlike the situation with Article XXI of the GATT, was set out in a separate provision, which was not part of the national security exception. So, the above finding of the ICJ does not apply to paragraph (a) of Article XXI, meaning that each country should be the sole judge in deciding not only the type of actions that can be taken under paragraphs (b) and (c) but also the type of information it should disclose under paragraph (a). Such an account or a line of reasoning can be easily challenged.

The International Court of Justice, in dealing with the scope of Article 2(c) – which is a provision comparable to paragraph (b) of Article XXI – did not find that the authority given to each party was unlimited. It clearly held that France was bound by the principle of good faith. Therefore, even if the national security exception in the Convention between Djibouti and France included an authority to appraise disclosure of reasons for any action under Article 2(c) or other provisions of the Convention, it is clear that such an authority would still be limited by the principle of good faith.

In fact, the ICJ did not remain oblivious to the fact that Article 17 was not a section in the national security exception. In considering whether the refusal to transmit the requested file was in line with Article 2(c), the Court stated that:

¹²⁸ Ibid. para 136.

¹²⁹ Ibid. para 150.

¹³⁰ Ibid. para 152.

“The terms of Article 2 provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties... This requires it to be shown that the reasons for refusal to execute the letter rogatory fell within those allowed for in Article 2”.¹³¹

Hence, France was required to “show reasons” to justify its refusal to cooperate with Djibouti. That is to say, since the actions of France under Article 2(c) were reviewable, it had to adduce reasons, so that the International Court of Justice, as well as Djibouti, could judge whether the French authorities acted in line with the authority laid down in Article 2(c) and the principle of good faith.

In *Russia – Measures Concerning Traffic in Transit*, the WTO Panel adopted a similar line of reasoning. Ukraine claimed that Russia simply relied on the 2014 incidents between the two countries, thereby failing to show legal and factual elements to justify its measures under Article XXI (b) (iii).¹³² On this issue, the Panel held that it is “*incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity*”.¹³³ Therefore, it can now be contended vociferously that the contracting parties invoking Article XXI must give reasons and justifications to an extent which is required at least to appraise whether actions in question meet various standards and conditions set out in the WTO national security exception.¹³⁴

C. Reviewing paragraph (b) of Article XXI

In deciphering the scope of paragraph (b) of Article XXI, guidance may be first sought from the ruling of the International Court of Justice in *Djibouti v. France*. As explained above, the ICJ in its judgment clearly held that the self-judging clause in question was subject to the principle of good faith. In other words, the discretion vested in France under Article 2(c) of the Convention was not unlimited. That being said, the ICJ failed to clarify the extent of such a limitation. As noted by Judge Keith in his Declaration as well,¹³⁵ all the Court did was to quote and admit six sentences of a local French judge claiming simply that the information requested by Djibouti was related to intelligence and declassified documents.¹³⁶ The Court did not explain how the internal measures adopted by local French authorities fell within the discretion

¹³¹ Ibid. para 145.

¹³² *Russia – Measures Concerning Traffic in Transit* (DS 512) (n 14) para 7.32.

¹³³ Ibid. para 7.134.

¹³⁴ For an opposing view see; Raj Bhala (n 12) 269.

¹³⁵ *Djibouti v. France* (n 114), Declaration by Judge Keith, para 4 <<https://www.icj-cij.org/files/case-related/136/136-20080604-JUD-01-06-EN.pdf>> accessed 16 April 2019.

¹³⁶ *Djibouti v. France* (n 114) para 147.

envisaged in Article 2(c). Nor did the Court discuss whether and, if so, how the justifications raised by France were in line with the principle of good faith.

Given that *Djibouti v. France* does not offer a substantial assistance in regard to construing the material scope of paragraph (b) of Article XXI, support can be drawn basically from the canons of treaty interpretation. Such a strategy was employed by the WTO Panel in *Russia – Measures Concerning Traffic in Transit* as well. Accordingly, below first provides a general framework on interpretation of paragraph (b) in its entirety. Thereafter, a specific inquiry is conducted into the findings of *Russia – Measures Concerning Traffic in Transit*, which dealt only with the terms set out in the chapeau of paragraph (b) and the sub-paragraph (iii).

1. Reviewing paragraph (b) through canons of treaty interpretation

The examination may begin with a look into the literal meaning of the terms in this paragraph of Article XXI. A literal reading of paragraph (b) shows that it includes terms which can lead to both a broad and narrow interpretation.¹³⁷ Paragraph (b) first of all contains a chapeau for the exceptional security measures laid down in sub- paragraphs (i), (ii) and (iii). Three phrases in the chapeau of paragraph (b) come to the fore. “*Any action*” can be read as giving the invoking country a broad power in choosing the type of measures to be adopted and implemented. Likewise, “*which it considers*”, when compared to a wording “*which is necessary*”, confers on a member states a broader authority in exercising Article XXI for security reasons.¹³⁸ However, the phrase “*for the protection of its essential security interests*” certainly puts a limit on the authority of a country in appreciating whether it is necessary to take a security measure. The security interest concerned must be an essential one, and measures taken must be aimed at protecting such essential security interests.¹³⁹ The latter clearly implies that the essential security interest must be at stake, or threatened at least to some degree, so that there should be a need to protect it.

Sub-paragraphs (i), (ii) and (iii) specify the essential security interests further. Sub-paragraph (i) refers to the protection of essential security interests “*relating to fissionable materials or material from which they are derived*”. As Balan notes, this exception covers restrictions on exports.¹⁴⁰ The key term in sub-paragraph (i) is the reference to fissionable materials. It must be highlighted that such materials are of dual use.¹⁴¹ They can be used for both military and civilian purposes.¹⁴² Hence,

¹³⁷ Jaemin Lee (n 4) 292.

¹³⁸ Robyn Briebe & Stephan Schill (n 112) 319-320.

¹³⁹ Raj Bhala (n 12) 271.

¹⁴⁰ George-Dian Balan (n 91) 10; the Analytical Index of the GATT (n 75) 602.

¹⁴¹ Shahrzad Fazeli (n 17) 50.

¹⁴² George-Dian Balan (n 91) 10.

any security measure taken pursuant to sub-paragraph (i) should concern strictly the protection of essential security interests relating to such materials.

Sub-paragraph (ii) refers to the protection of essential security interests “*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 and indirectly for the purpose of supplying a military establishment*”. This exception too applies to restrictive measures on export.¹⁴³ The terms in sub-paragraph (ii) refer to goods that can be used in war.¹⁴⁴ The reference to other goods and materials points to goods for military and civilian goods.¹⁴⁵ The key issue in regard to sub-paragraph (ii) is that a country should be allowed to take security measures for protection of its essential security interests when exporting the goods defined therein can be used for the purpose of supplying a military establishment by the importing country. Lee elucidates that the term military establishment refers to a military premise, hardware or equipment.¹⁴⁶

Sub-paragraph (iii), unlike the preceding ones, does not confine the discretion of a member state to a specific type of goods. It rather permits exercise of security measures for the protection of essential security interests “*in time of war and other emergency in international relations*”. Hence, this exception explicitly refers to the occurrence of certain factual situations.¹⁴⁷ Compared to those in sub-paragraphs (i) and (ii), the degree of security threat contemplated in sub-paragraph (iii) is or should be greater. The wording of sub-paragraph (iii) means that the invoking country need not be a party of the war or emergency in question. A country should be able to impose measures on an aggressive state causing a war or a similar form of casualty or emergency, as the text of Article XXI (b) (iii) deals only with the motivation of the invoking country rather than the type of targets.¹⁴⁸ Furthermore, war and other emergency should be understood with a view to what they mean in public international law. These terms can cover both armed and non-armed conflict situations.¹⁴⁹ Insertion of the word “*other*” before “*emergency*” can be interpreted as this exception containing various forms of casualties and threats. But it can also be construed as encompassing instances of other emergency, which must be in nature and magnitude comparable to a war.¹⁵⁰

143 Ibid.; the Analytical Index of the GATT (n 75) 602.

144 George-Dian Balan (n 91) 12.

145 Ibid.

146 Jaemin Lee (n 4) 293.

147 George-Dian Balan (n 91) 14.

148 Michael P. Malloy, “Où est Votre Chapeau? Economic Sanctions and Trade Regulations” (2013) 4 *Chicago Journal of International Law* 371, 382.

149 Raj Bhala (n 12) 274.

150 Shahrzad Fazeli (n 17) 56.

Above provides only an introductory account of the literal meaning of the terms in paragraph (b). A further inquiry into its meaning and scope can be conducted through investigating the legislative history of Article XXI and corresponding earlier GATT practices of the contracting parties.¹⁵¹ In regard to understanding the term “*essential security interests*” in the chapeau, it is worth noting that during the 1982 trade restrictions imposed by the European Community, Canada and Australia on Argentina, the representative of Canada stated that the trade embargo was “*necessitated*” by the situation leading to its adoption.¹⁵² Hence, it is plausible to contend that the phrase “*which it considers necessary for the protection of its essential security interests*” requires fulfilments of a necessity test. This line of reasoning is supported by Nicaragua’s statement, which in opposing the 1985 US sanctions asserted that “*there had to be some correspondence between the measures adopted and the situation giving rise to such adoption*”.¹⁵³

The meaning of “*supplying a military establishment*” in sub-paragraph (ii) was discussed by the Preparatory Committee in the Geneva Session. It was held that a country should be able to impose unilateral measures where raw materials exported could be used for long term defence purposes. Specific attention was given to iron ore (a commodity that is considered as an actual fissionable material¹⁵⁴) which could be smelted by the importing country to supply its military establishments. It was consequently held that “*if a Member exporting commodities is satisfied that the purpose of the transaction was to supply a military establishment, immediately or ultimately, this language would cover it*”.¹⁵⁵ A similar approach was taken during the 1949 trade restrictions adopted by the United States against Czechoslovakia. It was stated at the session concerned that “*goods which were of a nature that could contribute to a war potential*” fell within the ambit of sub-paragraph (ii).¹⁵⁶

Earlier GATT practices shed some light on the meaning of the term “*in time of war and other emergency in international relations*” in sub-paragraph (iii) as well. This exception, compared to sub-paragraphs (i) and (ii), is likely to be invoked widely by member states, since it does not concern any specific type of products.¹⁵⁷ During the 1961 boycott it declared against Portuguese goods, Ghana stated that “*a country’s security interests might be threatened by a potential as well as an actual danger*”.¹⁵⁸ As noted by Bhala, on that footing one may imply that the extent of authority resting

¹⁵¹ Ibid. 45.

¹⁵² The Analytical Index of the GATT (n 75) 600.

¹⁵³ Ibid. 603.

¹⁵⁴ Shahrzad Fazeli (n 17) 53.

¹⁵⁵ The Analytical Index of the GATT (n 75) 602.

¹⁵⁶ Ibid.

¹⁵⁷ George-Dian Balan (n 91) 13.

¹⁵⁸ The Analytical Index of the GATT (n 75) 600.

with member states under sub-paragraph (iii) is extremely broad.¹⁵⁹ However, it must be stressed at this juncture that member states were cautious to qualify such power vested in invoking countries. The Ministerial Declaration adopted in 1982 in respect of the embargo imposed on Argentina made it clear that member states were to “*abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement*”.¹⁶⁰ Hence, trade measures should be imposed only for genuine security and military defence reasons,¹⁶¹ meaning that Article XXI cannot be relied on to achieve some commercial purposes.¹⁶² Schloemann and Ohlhoff assert that imposing unilateral security measures for a commercial objective is not compatible with the very substance of WTO regulations.¹⁶³ A similar attitude was taken in 1975 against Sweden, which imposed a global import quota for certain footwear. Sweden claimed that the decrease in domestic industry concerning the production of such goods had become critical to planning its economic defence and so forming an integral part of its security. The justification provided by Sweden was seriously doubted and found unconvincing by representatives of many other member states,¹⁶⁴ as a result of which Sweden had to terminate the restrictions in respect of leather and plastic shoes.¹⁶⁵

Alongside the foregoing, the legal literature has also offered different means and accounts of interpreting the scope of paragraph (b). For the purpose of brevity, this article provides only a few of such sources. With respect to the meaning of the term “*necessary*” in the chapeau, Balan argues that the WTO panels can draw support from the notion of “*necessity*” under Article XX of the GATT,¹⁶⁶ which prescribes general exceptions to the GATT obligations. As noted by Balan, in *Korea – Various Measures on Beef*, the Appellate Body held that the necessity test to explain the nexus between adoption of a measure and the reasons and circumstances giving rise to such adoption might depend on several factors such as “(i) *the relative importance of the objective pursued by the measure*; (ii) *the contribution of the measure to that objective*; and (iii) *the trade restrictiveness of the measure*”.¹⁶⁷

On the same issue, Lee links the term “*necessary*” to the concept of “*necessity*” under the International Law Commission’s Articles on Responsibility of States for

¹⁵⁹ Raj Bhala (n 12) 270.

¹⁶⁰ The Analytical Index of the GATT (n 75) 601.

¹⁶¹ Shahrzad Fazeli (n 17) 43.

¹⁶² Jaemin Lee (n 4) 301; Raj Bhala (n 12) 273.

¹⁶³ Hannes L. Schloemann & Stefan Ohlhoff (n 58) 444-445; Eric Picket & Michael Lux, “Embargo as a Trade Defence against an Embargo: The WTO Compatibility of the Russian Ban on Imports from the EU” (2015) 10 *Global Trade and Customs Journal* 2, 36-38.

¹⁶⁴ Shahrzad Fazeli (n 17) 46.

¹⁶⁵ The Analytical Index of the GATT (n 75) 603.

¹⁶⁶ George-Dian Balan (n 91) 16.

¹⁶⁷ *Ibid.*

International Wrongful Acts. He claims that Article 25, which presents “*necessity*” as a ground precluding wrongfulness, can play a significant role in appraising when adoption of an action is necessary for the protection of essential security interests.¹⁶⁸ In support of his view, Lee makes references to various decisions of the International Centre for the Settlement of International Disputes tribunals. His basic finding is that the necessity requirement contemplated in Article 25 is satisfied, if the measure in question is aimed at maintaining “*the core system or the very existence of the nation*”.¹⁶⁹ The total economic collapse, for example, can justify departing from a treaty obligation, as it can be considered as a “*grave and imminent peril*” in the parlance of Article 25.¹⁷⁰

In regard to the meaning of “*fissionable material or materials from which they are derived*”, Bhala argues that this exception relates to cases of nuclear weapon threats. In his view, no sovereign country can be required to export the goods that can be used by the importer for the purpose of nuclear weapons proliferation.¹⁷¹ In listing the type of goods coming under the framework of the sub-paragraph (i), Balan contends that they can be identified objectively.¹⁷² He adds that Article XX of the Statute of the International Atomic Energy, which reads as follows, might be helpful in deciding what kind of materials can be seen as fissionable materials or materials from which they are derived.

“The term “special fissionable material” means plutonium-239; uranium-233; uranium enriched in the isotopes 235 or 233; any material” containing one or more of the foregoing; and such other fissionable material as the Board of Governors shall from time to time determine; but the term “special fissionable material” does not include source material.

...

The term “source material” means uranium containing the mixture of isotopes occurring in nature; uranium depleted in the isotope 235; thorium; any of the foregoing in the form of metal, alloy, chemical compound, or concentrate; any other material containing one or more of the foregoing in such concentration as the Board of Governors shall from time to time determine; and such other material as the Board of Governors shall from time to time determine”.¹⁷³

2. Interpretation of the chapeau of paragraph (b) and sub-paragraph (iii) in Russia – Measures Concerning Traffic in Transit

After finding that the competence contemplated in GATT Article XXI is not of a totally self-judging nature, the WTO Panel in *Russia – Measures Concerning Traffic in Transit* went on to examine whether the Russian measures in question

¹⁶⁸ Jaemin Lee (n 4) 297.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid. 298-299.

¹⁷¹ Raj Bhala (n 12) 277; see also Roger P. Alford (n 13) 703.

¹⁷² George-Dian Balan (n 91) 11.

¹⁷³ International Atomic Energy Agency Statute, 37 <<https://www.iaea.org/sites/default/files/statute.pdf>> accessed 18 April 2019.

were in accordance with the chapeau of paragraph (b) and sub-paragraph (iii). The background of this dispute concerns the deterioration of Ukrainian-Russian relations as of 2014. Especially with Russia's annexation of the Autonomous Republic of Crimea and the Ukrainian policy and moves to integrate with the European Union, the relations between the two countries have not been friendly for the last couple of years. Consequently, both countries reciprocally imposed sanctions on each other, including trade measures relating to their WTO obligations. In 2014, Russia issued Resolution No. 778 banning importation of certain agricultural products, raw materials and food originating from the countries imposing sanctions on Russia in favour of Ukraine. The Resolution also imposed certain restrictions in connection with the transit of goods subject to these bans and prohibited their transit through Belarus.¹⁷⁴ Ukraine challenged the Russian transit restrictions before the WTO panel. In respect of the material scope of GATT Article XXI, Russia, *inter alia*, contended that the emergency situation it had experienced with Ukraine as of 2014 warranted the imposition of certain measures aimed at protecting its security interests falling outside the scope of the WTO, which was not designed to settle such a crisis or matter.¹⁷⁵ Ukraine responded that Russia did not satisfactorily identify or explain the 2014 emergency and hence failed to discharge its burden of proof.¹⁷⁶ The Ukrainian statement was to say that Russia did not explain how the 2014 emergency or disruption of international relations between them could constitute a ground which entitled Russia to derogate from its WTO obligations purportedly for the protection of its security interests.¹⁷⁷

The Panel adopted a number of standards to deal with the question whether the Russian transit restrictions coming under its jurisdiction¹⁷⁸ were in line with both paragraph (b) and sub-paragraph (iii) of Article XXI. As discussed above, the Panel found that the term "*it considers*" did not give Russia a purely subjective discretion to take any action for national security reasons.¹⁷⁹ Rather, such discretion was qualified by the objective requirements set out in paragraph (b) and the conjunctive three sub-paragraphs, in light of which the Russian measures had to be judged.¹⁸⁰

In regard to the phrases included in sub-paragraph (iii), the Panel held that "*in time of*" means "*during*" and refers to a connection between the action in question and the events of "*war or other international emergency in international relations*".¹⁸¹ According to the Panel, the use of conjunction "or" means that "*war*" is a specific

¹⁷⁴ *Russia – Measures Concerning Traffic in Transit* (DS 512) (n 14) para 7.10.

¹⁷⁵ *Ibid.* para 7.112.

¹⁷⁶ *Ibid.* para 7.113.

¹⁷⁷ *Ibid.* para 7.32.

¹⁷⁸ *Ibid.* para 7.106.

¹⁷⁹ *Ibid.* para 7.102.

¹⁸⁰ *Ibid.* paras 7.66, 7.70, 7.71, and 7.132.

¹⁸¹ *Ibid.* para 7.70.

instance of the larger category of “*other emergency in international relations*”.¹⁸² The former refers to an armed conflict, whereas the latter involves a “*situation, esp. of danger or conflict, that arises unexpectedly and requires urgent action*”, and a “*pressing need ... a condition or danger or disaster throughout a region*”.¹⁸³ Noting that interests of a country under the three sub-paragraphs may be convergent and contain those such as defence and military interests or maintenance of law and public law interests,¹⁸⁴ the Panel stated that:

*“The reference to “war” in conjunction with “or other emergency in international relations” in subparagraph (iii), and the interests that generally arise during war, and from the matters addressed in subparagraphs (i) and (ii), suggest that political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii). Indeed, it is normal to expect that Members will, from time to time, encounter political or economic conflicts with other Members or states. While such conflicts could sometimes be considered urgent or serious in a political sense, they will not be “emergencies in international relations” within the meaning of subparagraph (iii) unless they give rise to defence and military interests, or maintenance of law and public order interests”.*¹⁸⁵

*“An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state”.*¹⁸⁶

Adopting the foregoing, the Panel discussed whether the tension between Russia and Ukraine that had existed since 2014 could be considered as coming under the ambit of the above understanding of the term “*other international emergency in international relations*”. The Panel observed that by December 2016, the UN General Assembly had recognised the situation between the two countries as involving armed conflict, which led to various concomitant sanctions imposed on Russia by a number of other states.¹⁸⁷ Hence, the Panel was satisfied that the unfriendly relations between Russia and Ukraine as of 2014 fell within the meaning of sub-paragraph (iii) of Article (b) of GATT XXI.¹⁸⁸

With respect to the terms laid down in the chapeau of paragraph (b), concerning what is necessary to protect essential security interests, the Panel accepted that “*essential security interests*” is a narrower concept than “*security interests*”, and relates to “*quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public*

¹⁸² Ibid. para 7.72.

¹⁸³ Ibid.

¹⁸⁴ Ibid. para 7.74.

¹⁸⁵ Ibid. para 7.75.

¹⁸⁶ Ibid. para 7.76.

¹⁸⁷ Ibid. para 7.122.

¹⁸⁸ Ibid. para 7.123.

order internally”.¹⁸⁹ In the Panel’s view, it was incumbent on each contracting party to articulate how the protection of national security interests could be necessary in the circumstances of a war or other international emergency.¹⁹⁰ The Panel held that the level of articulation would depend on the seriousness of a situation removing from a war or a breakdown of law and public order. The more likely the emergency involved the existence or risk of an armed conflict, the more likely there would arise military or defence interests.¹⁹¹ Applying this understanding to the dispute between Russia and Ukraine, the Panel found that there was a need for the former to take actions which it considered necessary to protect its essential security interests. However, it must be underlined that the Panel reached such a conclusion in the absence of any articulation submitted by Russia. The Panel stated that the circumstances of the dispute, which has been very close to the “*hard core war or armed conflict*”,¹⁹² were clear and sufficient enough to deduce that the national security interests of Russia deserved protection through the imposition of the measures at issue.¹⁹³

Furthermore, the Panel affirmed that while it is left to each contracting party to define the type of actions to protect its essential security interests,¹⁹⁴ such a wide discretion is limited by the obligation of good faith, which is a general principle of international law underlying all treaties owing to Article 26 and Article 31 of the Vienna Convention on the Law of Treaties.¹⁹⁵ In relation to the WTO national security exception, the Panel described the principle of good faith as follows:

*“The obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994. A glaring example of this would be where a Member sought to release itself from the structure of “reciprocal and mutually advantageous arrangements” that constitutes the multilateral trading system simply by re-labelling trade interests that it had agreed to protect and promote within the system, as “essential security interests”, falling outside the reach of that system”.*¹⁹⁶

Establishing the above limitations to the discretion of a country under the chapeau of paragraph (b), the Panel examined the particularities of the emergency between Ukraine and Russia to explore whether the transit restrictions by Russia were necessary for the protection of its essential security interests. The Panel held that the measures in question were not to be “remote” from the facts of the emergency, hence their implementation needed to be “plausible” in the circumstances.¹⁹⁷ In the end, the

¹⁸⁹ Ibid. para 7.130.

¹⁹⁰ Ibid. para 7.134.

¹⁹¹ Ibid. para 7.135.

¹⁹² Ibid. para 7.136.

¹⁹³ Ibid. para 7.137.

¹⁹⁴ Ibid. para 7.131.

¹⁹⁵ Ibid. para 7.132.

¹⁹⁶ Ibid. para 7.133.

¹⁹⁷ Ibid. para 7.139.

Panel found that the disputed measures were not remote from the 2014 emergency, and it was therefore plausible for Russia to protect its essential security interests.¹⁹⁸ Hence the Panel overall held that Russia satisfied the conditions of the chapeau of the paragraph (b) of GATT Article XXI.¹⁹⁹

3. Some Critical Remarks on the Entire Scope of Paragraph (b)

Once it is agreed that GATT Article XXI is subject to adjudication by WTO panels, the ensuing question concerns dealing with the material scope of the WTO national security exception. The first question is now well-clarified especially owing to the landmark Report on *Russia – Measures Concerning Traffic in Transit*, where the Panel held that the phrase “*it considers*” does not give the contracting parties an unfettered power to appraise the type of actions to be adopted for dealing with national security concerns. However, in the absence of an abundant and well-established precedent reviewing Article XXI materially, the task falling to the panels in regard to the latter question is not an easy one.

Needless to say, *Russia – Measures Concerning Traffic in Transit* offered some guidance in regard to the meaning of the terms set out in the chapeau of paragraph (b) and sub-paragraph (iii). The Panel introduced some very crucial and novel criteria qualifying the authority vested in the contracting parties. For example, with respect to the definition of the term “*war and other emergency in international relations*”, it professed that economic intentions cannot be pursued under the disguise of the national security exception. In regard to construing what action would be necessary to protect the essential security interests, the Panel held that the measure in question must be taken as a result of serious emergency, and it must be plausible in the circumstances. Yet, despite such acknowledgments, it is questionable whether the aforesaid criteria advanced by the Panel would be feasible in assessing the lawfulness of measures for different kinds of scenarios.

For instance, particularly for the last couple of years, Iran has been subject to severe sanctions imposed by the United States. The reason lying behind the sanctions is said to be Iran’s continuation with its nuclear program.²⁰⁰ If so, what should be the criterion in appraising the compatibility of a measure with paragraph (b) (iii), where the situation at stake does not concern an actual armed conflict or a breakdown of law and order, but rather the potential of aggression between the WTO member states? As another example, the US has warned Turkey over the purchase of the S-400 anti-aircraft missile system from Russia, and threatened that it could suspend delivery

198 Ibid. para 7.145.

199 Ibid. para 7.148.

200 United States Department of the Treasury, “Iran Sanction” <<https://www.treasury.gov/resource-center/sanctions/programs/pages/iran.aspx>> accessed 27 April 2019.

of F-35s to Turkey and impose sanctions on Turkey.²⁰¹ Likewise, what would be the yardstick in deciding whether the alleged essential national security interests of the United States against Turkey would be tantamount to those of Russia in *Russia – Measures Concerning Traffic in Transit*? Taking into account on top of the foregoing that *Russia – Measures Concerning Traffic in Transit* encompassed only paragraph (b) (iii), there exists an ongoing need to clarify paragraph (b) *ratione materiae*. WTO Panels, especially those established recently in respect of the disputes between the United States and a number of other states, must contribute to the improvement of methodology in explaining the meaning of the terms in paragraph (b). Particularly, the standard of review in respect of “*the protection of the essential national security interests*” merits further clarification from the WTO adjudicatory bodies. In this respect, this author underlines and reminds the following general remarks for assessment of invocations of any section of paragraph (b).

First, it must be ensured that the WTO national security exception is not invoked by the contracting parties as a blanket to pursue a commercial objective in contravention of their GATT obligations. In other words, Article XXI cannot be relied on to protect local economy or a specific local industry against foreign competitors. It is likely that unforeseen developments may render cooperation with other members undesirable. Particularly in an age of rapidly developing globalisation, the dynamics of the global economy have changed considerably.²⁰² New economic actors have emerged, and the centre of economic power has shifted from the west to other regions of the world. Accordingly, the authority contemplated in the WTO national security exception can easily be abused for commercial reasons. Against the likelihood of any abuse by a member state, it must be highlighted that the GATT already contains a provision which addresses consequences of unexpected developments for local markets. Article XIX of the GATT, *inter alia*, reads that:

“If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession”.²⁰³

Hence, it is clear that the GATT drafters were not unmindful of dealing with the results of unforeseen circumstances that might adversely affect a local industry. A contracting party is permitted to take emergency actions on the import of a particular

201 Sıtkı Egeli, “Making Sense of Turkey’s Air and Missile Defense Merry-go-round”, (2019) 8 *All Azimuth* 69, 75.

202 Christopher Layne, “The Global Power Shift from West to East” (2012) 119 *The National Interest* 21.

203 Paragraph 1(a) of Article XIX.

<https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art19_jur.pdf> accessed 8 April 2019.

product in order to protect its domestic producers from the threat of competitive products from another contracting party. The safeguard accommodated is certainly confined to the import of goods, and it may not be sufficient for thwarting any kind of commercial agenda which member states tend to present as a security reason under Article XXI. That being said, it must be stressed that the recent disputes between the United States and other states were caused by tariff increases imposed by the former allegedly in contravention of its WTO obligations. Hence, panels charged with reviewing tariff concessions or imports of a specific type of goods should judge the national security defence of the invoking country in connection with the existence, applicability and legal effect of Article XIX of the GATT.

Second, since sub-paragraphs (i) and (ii) concern the export of certain types of goods, a country wishing to execute a measure in regard to tariff concessions or the import of foreign goods mostly relies on sub-paragraph (iii), it being the only option left. This exception allows for the adoption and implementation of actions necessary to protect essential security interests in time of war and other emergency in international relations. It must be noted that international law already contains some rules and approaches with respect to the protection of national security interests against the type of events or situations referred to in sub-paragraph (iii). That is to say, regardless of the availability of Article XXI, a contracting party undergoing a serious emergency or entering into a war or another form of belligerent armed and non-armed tension with another contracting party is or should be able to take unilateral measures under the general rules of international law, such as “*countermeasures*” and “*sanctions*”. Although it has been raised only once so far,²⁰⁴ Article XXI (b) (iii) can represent one specific legal ground justifying a unilateral action taken by a country as a countermeasure or sanction.²⁰⁵ With this in mind, it can be suggested that a panel can appraise the justifiability of a national security defence under sub-paragraph (iii) by scrutinising whether the disputed action has met at least some of the standards that general international law requires in regard to the imposition of a countermeasure or sanction. For example, the standards set forth in Chapter II of ILC Articles on Responsibility of States for Internationally Wrongful Conducts, which concerns “*countermeasures*”, can be relevant to some extent. However, a note of caution is due. It must be stated that the different but overlapping concepts of countermeasure and sanction are not free from controversy either.²⁰⁶

Last but certainly not least, regards must be had to the legal effect of the principle of good faith, which according to the WTO Panel in *Russia – Measures Concerning Traffic in Transit* and the judgment of the International Court of Justice in *Djibouti*

204 Alain Pellet (n 2) 734.

205 Ibid.; Michael P. Malloy (n 148) 379.

206 Joaquín Alcaide Fernández, “Countermeasures” in Anthony Carter (eds), *Oxford Bibliographies in International Law* (Oxford University Press, 2013).

v. France poses a limitation on the exclusive authority of a country in respect of a self-judging clause. However, as indicated above, no adequate guidance was provided in regard to what this principle would mean in the context of exercising a national security exception or how it could restrain the power vested in a country. The meaning of the principle of good faith in international law is not exempt from controversy, thereby meriting a separate analysis which falls outside the limited scope of this article. In short, there is a difference between the national and international conception of good faith.²⁰⁷ It has been contended that the notion of good faith in international law may have different facets or modes of operation.²⁰⁸ For instance, in his Declaration in *Djibouti v. France*, Judge Keith, in line with the understanding of the WTO Panel in *Russia – Measures Concerning Traffic in Transit*, remarks that the term good faith enshrined in Article 26 of the Vienna Convention on the Law of Treaties requires the parties “to apply it in a reasonable way and in such a manner that its purpose can be realized (*Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 79, para 142)”.²⁰⁹ Given the preceding discussion, the panels reviewing Article XXI, particularly the terms set out in paragraph (b), must have a more careful resort to the legal effect of the principle of good faith, along with articulating in more details its meaning against a national security defence provision.

V. Conclusion

Modern international law was evolved as a result of the atrocities of World War II with the remarkable achievement of the victor states being the creation of the United Nations. Unlike its predecessor, the League of Nations, the new entity includes the Security Council to deal with maintenance of international peace and security through a collective security system. However, member states are also equipped with a power to unilaterally protect their own national security interests, where the collective security mechanism does not function adequately or in a timely manner. With the recent rise of populism around the world,²¹⁰ it has been witnessed that states do not refrain from taking unilateral actions against each other. In particular, the most powerful states, enjoying a wide range of economic and financial tools, have chosen to impose trade measures, which may be perceived as influential as the use of military options.

The WTO national security exception seemed to have been a legal basis or excuse, which has been frequently invoked by countries to justify the sanctions they have

207 Steven Reinhold, “Good Faith in International Law” (2013) 2 *UCL Journal of International Law* 40, 46.

208 Robert Kolb, “Principles as Sources of International Law: With Special Reference to Good Faith” (2006) 53 *Netherland International Law Review* 1, 20.

209 Declaration by Judge Keith (n 135) para 6.

210 Michael Cox, “The Rise of Populism and the Crisis of Globalisation: Brexit, Trump and Beyond” (2017) 28 *Irish Studies in International Affairs* 9.

imposed in contravention of their WTO obligations. The vague terms set out in this provision made it completely vulnerable to abuse by the WTO contracting parties. Namely, a country may not remain true to the nature and purpose of GATT Article XXI, rather it may make an attempt to disguise its commercial intentions. Given that the foundation of the United Nations was a lesson learnt from the grave consequences of populism between the two World Wars, the multilateral system it envisaged and sought to disseminate must be guarded against today's practices of populism in international affairs. Accordingly, the international legal community, including those WTO Panels established recently or those to be established in the future, must take a firm stance in protecting multilateralism against the arbitrary use of GATT Article XXI by the contracting parties. They must deliver a coherent methodology to ensure that the WTO national security exception is exercised only for genuine national security reasons.

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