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Abstract

The security exception enacted in Art. XXI of the General Agreement on Tariffs and Trade has been contentious over the years. Parties have either argued that the security exception has a completely ‘self-judging’ nature, or that it allowed for a limited review by the panels and the Appellate Body, in accordance with the ‘good-faith’ principle.

At first, states were reluctant to rely on the security exception provided by the General Agreement on Tariffs and Trade, or to refer the matter to the WTO dispute resolution system when other states relied on it. Even when panels were established under the General Agreement on Tariffs and Trade 1947 in respect to a dispute relating to the security exception, they usually had to act upon a limited mandate which hindered their possibility to examine the scope and limits of the exception.

The debate over the extent of the ‘self-judging’ nature of the security exception lasted for more than seventy years, and it finally ended with the ruling in Russia — Measures Concerning Traffic in Transit. In this case, the panel asserted the jurisdiction over the security matters of states and provided a ‘roadmap’ to be followed in future examinations. The legal test devised by the panel consists of two parts. The first part is an objective assessment of whether there is a ‘war’ or an ‘emergency in international relations’ and whether the measures were taken during such state of affairs, according to subparagraph (iii) of Art. XXI of General Agreement on Tariffs and Trade. The second part consists of a two-prongs ‘subjective test.’ It involves a deferential review of the veracity of the state’s security interests and of the necessity of the measures adopted by the invoking state. In doing so, the panel will use a ‘sliding-scale’ test, which enables it to modify the degree of scrutiny based on the gravity of the ‘emergency.’

Keywords: Public International Law, trade law, World Trade Organization, national security exception, Art. XXI of GATT, trade war, trade protectionism.
Chapter 1 – Introduction

Security rhetoric has gained more and more momentum over the past years, whereas all the former adversaries of the Cold War (United States, Russia and China) are now part of the same international trade organization, namely the World Trade Organization (WTO). Additionally, the concept of security has constantly expanded during the years to include economic issues, terrorism threat or climate change. In the light of such dynamics, the ambiguous language of the security exception of the previous General Agreement on Tariffs and Trade (GATT 1947) was left unchanged at the moment of establishment of WTO, and the adoption of the new General Agreement on Tariffs and Trade (GATT or GATT 1994). The ambiguity stems from the wording of the security provision of Art. XXI of GATT, with regards to its status as a ‘self-judging’ clause and the standard of review applicable to it. As such, an important chance to revise the 72 years old security exception was lost during the Uruguay rounds of negotiations.

Despite a number of disputes where contracting parties have relied on the security exception to justify their GATT inconsistent measures, up until recently, only one panel report confronted the issue of the security exception, which nevertheless did not settle the question regarding the ‘self-judging’ nature of the provision, due to the panel’s limited mandate. The question of justiciability of Art. XXI of GATT was finally decided in the Russia – Measures Concerning Traffic

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3 See Heath, supra note 1, at 14; See also Neuwirth, supra note 2 at 907; J.Y. Yoo & D. Ahn, Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?, 19 Journal of International Economic Law 441 (2016).
4 General Agreement on Tariffs and Trade, GATT Doc. LT/UR/A-1A/1/GATT/2 (1947).
6 General Agreement on Tariffs and Trade, WTO Doc. LT/UR/A-1A/1/GATT/1 (1994).
7 See Neuwirth, supra note 2, at 892.
8 See Yoo, supra note 3, at 426.
11 See Yoo, supra note 3, at 430; See also Bossche, supra note 5, at 619.
in Transit case,\textsuperscript{12} (Russia – Traffic in Transit). By interpreting Art. XXI of GATT, the panel found in its report\textsuperscript{13} that it did have jurisdiction to review whether a contracting party can rely on the security exception. The review was done according to the overarching principle of good faith, enshrined in Art. 31(1) of the Vienna Convention on the Law of Treaties (Vienna Convention).\textsuperscript{14} The panel’s report was adopted and remained final.

The way in which the panel has reached this conclusion, together with the question of whether the panel’s test can cope with the increasing tendency of the contracting states to rely on the security exception, as well as whether the 72 years old security exception is still suitable to address the current challenges of international trade make the object of this paper. As such, I have structured my work into six different chapters. The second chapter describes the circumstances under which Art. XXI of GATT was negotiated and adopted, in order to examine the purpose and scope of the security exception envisaged at that time.\textsuperscript{15} The third chapter analyses the Russia - Traffic in Transit report\textsuperscript{16} and the fourth chapter uses the test provided by the panel in Russia - Traffic in Transit\textsuperscript{17} case in the United States - Certain Measures on Steel and Aluminium Products\textsuperscript{18} dispute (US – Steel and Aluminium Products). The fifth chapter examines some improvements that could be added to the ‘security test’ and the last chapter concludes the analysis made with respect to the security exception. My focus will be with respect to Art. XXI(b)(iii) of the GATT, as it is the security exception most relied upon by the states over the years.\textsuperscript{19}

Chapter 2 - Negotiating History of Art. XXI of GATT

2.1 Introduction

Essentially the same provision as the one of Art. XXI of GATT is found in Art. 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights\textsuperscript{20} (TRIPS) and Art. XIVbis of the General Agreement on Trade in Services\textsuperscript{21} (GATS). The most contentious part of the security exception provision is the

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\textsuperscript{12}Russia – Measures Concerning Traffic in Transit, DS512 (2016).
\textsuperscript{15}See Yoo, supra note 3, at 418.
\textsuperscript{17}See Russia – Traffic in Transit, supra note 12.
\textsuperscript{18}United States - Certain Measures on Steel and Aluminium Products, DS548 (2018).
\textsuperscript{19}See Yoo, supra note 3, at 431.
\textsuperscript{21}General Agreement on Trade in Services, WTO Doc. LT/UR/A-1B/S/1 (1994).
wording ‘it considers’, and whether it provides the invoking state with the absolute discretion to determine its security interests and adopt the measures it desires to.22

Much of Art. XXI of GATT is based on the final drafts of the International Trade Organization (ITO) Charter,23 which the provisional GATT 1947 incorporated at that time, to allow the conclusion of negotiations of the broader ITO Charter. Therefore, in order to better understand the scope of Art. XXI of GATT and navigate through the ambiguity of its language, we must assess the intention of the contracting parties at the moment of drafting the security clause. Subsequently it is my view that (i) the security exception was drafted in order to cope with the threats of the Cold War, (ii) that it was drafted such that political matters were left to be handled by the United Nations (UN) and that (iii) the drafters of the security clause did not envisage the clause to be completely ‘self-judging.’

2.2 The Cold War threats

The negotiations for the ITO Charter commenced immediately after WWII. The first United States of America (US) proposal24 was published in November 1945.25 The GATT system was established in 194726 and the demise of ITO Charter occurred in 1950, together with the failure of the US Congress to approve it.27 At that time, the representatives of the victorious superpowers (United States of America, United Kingdom and the Soviet Union) were dividing their territories and spheres of influences at Yalta Conference.28 The iron curtain fell over the Eastern Bloc, and the US and its Western allies identified the Soviet Union as posing an ideologic, economic and existential threat. This threat has eventually degenerated into the Cold War.

Under these circumstances, professor Clair Wilcox29 recounted that there were ‘two roads leading to industrial power’30 and it was imperative that other

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22 See Heath, supra note 1, at 31.
25 See Yoo, supra note 3, at 418.
26 See Heath, supra note 1, at 30.
28 Yalta Conference (1945).
29 Prof. Clair Wilcox was an US economist that served as the head negotiator for the ITO Charter and chaired the International Trade Conference (https://en.wikipedia.org/wiki/Clair_Wilcox), last visited (15-07-2019).
trading nations would follow the US road, rather than the Soviet one. Another US negotiator stated that the insertion of the security exception reflects that ‘the effort to adopt an orderly basis for the growth of economic relations between countries is taking place at a time when it is necessary for the Western world to keep itself well prepared to deal with the assault by the Soviet Union.’

The desire of the US to rely on an ‘escape clause’ for reasons of security was thus related to the direct military, ideological and economic threat the Soviet Union represented at that time. This is reflected in the conventional language employed by Art. XXI(b) of GATT, which contains expressions such as ‘traffic in arms’, ‘war’ or ‘military establishment.’ As such, one of the challenges of Art. XXI of GATT is to assimilate new and non-conventional national security threats, such as cybersecurity, climate change or protection of telecommunication.

2.3 Power division between the ITO and the UN

At the Havana Conference, the final draft of the ITO Charter regulated the security exception in two different parts. Part I of the exception was very similar to what now exists in Art. XXI of GATT and was inserted in Art. 99(1)(b) of the ITO Charter. Part II of the security exception was found in Art. 86(3) of the final draft and clarified how the ITO could not override the obligations of other UN peace treaties.

Art. 86(3) of the ITO Charter thus allocated the responsibilities between the ITO and UN. The former organisation was meant to be a purely economic one, while the latter was left to deal with political matters. In this respect, the sixth negotiating committee noted that paragraph 3 of Article 86 was designed to deal with any measure connected to political matters, which was to be brought before the UN in a manner which avoided conflicts of responsibility between the UN and ITO. The drafting committee further noted that ‘the important thing was to maintain the jurisdiction of the UN over political matters and over economic measures of this sort taken directly in connection with such a political matter [...].’

The final draft of the ITO Charter, together with the reports of the drafting committees, reveal how the security exception was meant to operate in an integrated system, which divided the competences between the ITO and UN.

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33 See Heath, supra note 1, at 21; See also Neuwirth, supra note 2 at 907.
34 See Yoo, supra note 3, at 421.
35 Id.
36 Id., at 425.
38 Id., at 4.
Thus, the security exception currently incorporated in Art. XXI of GATT was not meant to be dealt with solely by the trade organization. With the demise of the ITO Charter, the current Art. XXI of GATT subsisted with an embedded ambiguity of jurisdictional division, which offered the contracting parties an open-ended discretion and a potential power to abuse it.³⁹

2.4 The scope of the security exception and its exceptional character

2.4.1 Security exception as a safety valve

The necessity of a security exception in international legislations stems from the need of sovereign states to be able to rely on a ‘safety valve’ before adhering to and complying with the rules of an international organisation.⁴⁰ Overreach by international institutions can represent a menace to the sovereignty of states, and security exceptions can alienate such concerns.⁴¹

The ‘exceptional’ character of Art. XXI of GATT is reflected in its very wording. The exception allows states to adopt GATT inconsistent measures only when there are threats towards their ‘essential’ security interests, and not just any security interests. As such, security exceptions are not meant to be relied upon frequently. Doing so would erode the rule-based system used. So far, the binding character of WTO Agreements provisions (normative theory), the risk of retaliation from other states (rational choice theory), the threat of WTO sanctions (coercion theory), as well as diplomacy have all played a role when it came to limiting the opportunism opened to states by the ‘escape mechanism.’⁴² Additionally, the contracting states might have feared relying on the security exception due to its inherent ambiguity regarding its scope and the fear of the consequences of an interpreting decision with respect to it.

2.4.2 A possible loophole

The ambiguity of the security provision proposed by the US did not pass unnoticed during the negotiations of the ITO Charter. During one meeting⁴³ the Dutch representative - Dr. Antonius Bernardus Speekenbrink sought clarification as to the meaning of ‘essential security interests’ and ‘emergency in international relations’, which were ‘difficult to understand’ and could represent ‘a very big loophole in the whole Charter.’⁴⁴ Mr. John Leddy - the US representative

³⁹ See Yoo, supra note 3, at 423.
⁴⁰ See Heath, supra note 1, at 29.
⁴³ See Pinchis-Paulsen, supra note 31, at 26.
explained that the wording ‘essential security interests’ stemmed from US government’s concern of having ‘too wide an exception’ that would ‘permit anything under the sun.’\textsuperscript{45} The interpretation of the security exception relates to a ‘question of balance’ which could not be too narrow, it could not ‘prohibit measures which are needed purely for security reasons’ and could not be too broad, such that ‘under the guise of security, countries will put on measures which really have a commercial purpose.’\textsuperscript{46}

As the US representative stated,\textsuperscript{47} the draft reflected the original position of the United States. More precisely, it represented the position of Professor Wilcox, which rejected the Department of State and Department of War pleadings for ‘a free hand in controlling international transactions for military purposes.’\textsuperscript{48} When drafting the clause, Mr. Wilcox insisted that this must be done ‘in a way that would not give a carte blanche to other countries to violate their commitments with respect to commercial policy under the clock of a sweeping security exception.’\textsuperscript{49}

\textbf{2.4.3 Security exception, a scarecrow?}

During the Cold War and up until recently, the exceptional character of Art. XXI GATT prevailed, with just several disputes\textsuperscript{50} occurring during a time-frame of over 70 years.\textsuperscript{51} As stated earlier, the normative theory\textsuperscript{52} and the rational choice theory\textsuperscript{53} might have played a role in the limited number of disputes that occurred with respect to Art. XXI of GATT.\textsuperscript{54} Other factors contributed as well. For example, the fact that GATT 1947 created a ‘trading club’ in which only the countries of the Western Bloc were admitted, certainly had a limiting role on the number of occasions Art. XXI was invoked.\textsuperscript{55} Additionally, GATT system remained institutionally too weak to cope with strong political and economic powers, such as the US.\textsuperscript{56} Under Articles XXII and XXIII of former GATT 1947, consensus was required for both the establishment and adoption of panel reports. However, after the Uruguay round of negotiations and the establishment of WTO in 1995, the existence of an independent DSB and the automatic dispute

\begin{itemize}
\item \textsuperscript{45} Id., at 20.
\item \textsuperscript{46} Id., at 21.
\item \textsuperscript{47} Id., at 20.
\item \textsuperscript{48} See Pinchis-Paulsen, \textit{supra} note 31, at 9.
\item \textsuperscript{49} Id., at 9.
\item \textsuperscript{50} See cases cited at note 9, \textit{supra}.
\item \textsuperscript{51} See Yoo, \textit{supra} note 3, at 430.
\item \textsuperscript{52} See Alford, \textit{supra} note 42, at 753 – 755.
\item \textsuperscript{53} Id., at 755 – 757.
\item \textsuperscript{54} See Neuwirth, \textit{supra} note 2 at 908, 909.
\item \textsuperscript{55} See Yoo, \textit{supra} note 3, at 429.
\item \textsuperscript{56} Id., at 432.
\end{itemize}
settlement procedure created by the Dispute Settlement Understanding\textsuperscript{57} (DSU) eliminated the old obstacles existent under the previous system.

2.4.4 Opening pandora’s box

The contracting parties, however, remained reticent in relying on the security exception, and this was probably related to the ambiguity of Art. XXI of GATT and the effects which an interpretation of the exception might have had on the trading system. Thus, the contracting states preferred bargaining in the ‘shadow of law’ than risking the consequences of a binding decision.\textsuperscript{58} Opening Pandora’s box could have led to only two results. The first would have seriously frustrated the contracting party relying on the security exception, while the second would have questioned the entire system. Exercising control over the security interests of a contracting state would encourage the invoking party to either leave the WTO regime or to disobey the panel’s decision - which in itself erodes the rule.\textsuperscript{59} A ruling that Art. XXI of GATT was completely ‘self-judging’, inspires others to play the security card, making the system obsolete.\textsuperscript{60} Today, thanks to Russia – Traffic in Transit\textsuperscript{61} panel’s report,\textsuperscript{62} we know that the DSB opted for the former possibility of interpreting Art. XXI of GATT, eliminating the risk of undermining the entire rule-based system by means of a loophole.

2.4.5 The surge in the national security rhetoric

This decision was inevitable, as the security provision has not been reformed since its original draft in 1947, and nowadays contracting parties show little hesitation in relying on it in order to evade their GATT obligations.\textsuperscript{63} In the last five years, Russia relied on the security exception for adopting measures against Ukraine which restricted the traffic of goods in transit.\textsuperscript{64} The United Arab Emirates (UAE) have relied on the security exception in its effort of isolating Qatar, alleging it was ‘forced to take the measures in response to Qatar’s funding of terrorist organizations.’\textsuperscript{65} The United States have imposed, with few exceptions, general tariffs on steel and aluminium relying on Section 232 -

\textsuperscript{57} Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Doc. LT/UR/A-2/DS/U/1 (1994).
\textsuperscript{58} See Neuwirth, supra note 2 at 908.
\textsuperscript{59} See Heath, supra note 1, at 29.
\textsuperscript{61} See Panel Report Russia – Traffic in Transit, supra note 13.
\textsuperscript{64} See Panel Report Russia – Traffic in Transit, supra note 13 at 53.
\textsuperscript{65} Dispute Settlement Body Minutes, WTO Doc. WT/DSB/M/403, para. 4.4.
Safeguarding security of the Trade Expansion Act of 1962.\textsuperscript{66} In addition to that, the US have banned all US companies from trading with Huawei and its affiliates while citing security concerns.\textsuperscript{67} This latter measure is now under question, as the latest declarations of Mr. Trump signals that the US administration is ready to lift the ban, at least partially.\textsuperscript{68} However, the surge in adopting GATT inconsistent measures justified by security interests is reflected in the increased number of WTO disputes.

In my view, the recent increase of such disputes can be explained on two accounts. Firstly, the former Cold War geopolitical rivals (Russia, China and US) are now part of the same integrated trade system. Thus, when adopting strategic economic measures, one has to rely upon an exception, and the loophole created by the equivocal security exception represents a convenient choice. Secondly, the meaning of the security exception has changed over the years.\textsuperscript{69} The states have expanded the scope of national security to include threats such as terrorism, economic issues, infectious diseases, cyber-attacks, transactional crime, climate change and others.\textsuperscript{70}

In this context, the exception will probably lose its exceptional character, and it is hard to see how this setting could be reversed. Before, it was thought that the establishment of a multilateral trading system will lead towards increasing the living standard, prosperity and thus the avoidance of costly wars.\textsuperscript{71} This allowed China and Russia to accede to the WTO system.\textsuperscript{72} But while relying on this very system, China closed in the technological and economic gap with the US. This, in turn, prompted the US to view China as a security threat.\textsuperscript{73}

The paradigm has changed, as economic interdependence is now seen as a security risk, rather than a benefit.\textsuperscript{74} States should not forget however that this vulnerability is strategic and represents the price to be paid for increased economic prosperity and peace. Ultimately, the economic interdependence


\textsuperscript{67} US Presidential Order 13873, Presidential Doc. 84 FR 22689 (2019); See also US Department of Commerce BIS Rule, Rules and Regulations 84 FR 22961 (2019).


\textsuperscript{69} See Heath, supra note 1, at 4.


\textsuperscript{71} K. J. Vandevelde, The First Bilateral Investment Treaties: US Postwar Friendship, Commerce, and Navigation Treaties, Oxford University Press 30 (2017); See also Heath, supra note 1, at 26; Pinchis-Paulsen, supra note 31, at 9.

\textsuperscript{72} See Heath, supra note 1, at 26.


\textsuperscript{74} See Heath, supra note 1, at 26, 27.
fulfilled over the years one of the most important peace-keeping functions of transnational trade.75

2.4.6 Final remarks

In the wake of all these factors, it is clear that the 72 years old GATT security exception, originally drafted to deal with cold-war threats had to be revised.76 With the failure of the Doha round of negotiation,77 it was left to the DSB to settle the scope and meaning of Art. XXI of GATT. First it did so in the Russia - Traffic in Transit dispute, which concerned a conflict that closely resembled a war-like situation, and thus was in harmony with the original purpose of the security exception.79

This paper continues to analyse the report in the Russia - Traffic in Transit dispute, and thereafter examines the more recent US’ tariffs on steel and aluminium imports, in order to determine whether or not, in my view, such measures could be justified under Art. XXI of GATT, based on the ‘roadmap’ provided by the Russia - Traffic in Transit report.81

Chapter 3 – Russia - Traffic in Transit

3.1 Background of the dispute

3.1.1 Introduction

The dispute between Russia and Ukraine occurred in 2014, and resulted in Russia’s annexation of the Crimean Peninsula and the occupation of Donetsk and Luhansk regions by the pro-Russian forces, a matter which was acknowledged by the December 2016 Resolution of the UN General Assembly.84 Since then, a number of economic sanctions and trade restrictive measures have been imposed by Russia and Ukraine.85

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76 See Yoo, supra note 3, at 442.
78 See Russia – Traffic in Transit, supra note 12.
79 See Neuwirth, supra note 2 at 907.
80 See Russia – Traffic in Transit, supra note 12.
82 See Russia – Traffic in Transit, supra note 12.
83 UN Resolution no. 71/205, UN Doc. A/71/484/Add.3 (2016).
85 The contested measures: a. 2016 Belarus Transit Requirements: Requirements that all international cargo transit by road and rail from Ukraine destined for the Republic of Kazakhstan or the Kyrgyz Republic, through Russia, be carried out exclusively from Belarus, and comply with
3.1.2 Parties’ arguments regarding the security exception

In the request for the establishment of a panel, Ukraine argued that the restrictions adopted by the Russian Federation with respect to the goods in transit on the Russian territory are inconsistent with Articles V and X of GATT.

Russia replied in the written submissions that there was an emergency in international relations that arose in 2014 and which threatened Russia’s ‘essential security interests.’ In defending itself, Russia relied on the complete ‘self-judging’ nature of the security exception. As a result, Russia contended that the panel lacked jurisdiction to rule on the matter.

Ukraine, on the other hand, contended that according to Articles 7 and 11 of the Dispute Settlement Understanding, the panel had jurisdiction ‘to examine and make findings and recommendations with respect to each of the provisions of the covered agreements [...]’, including Art. XXI of GATT 1994.

Australia, Brazil, Canada, China and the EU, as intervening third parties argued in favour of the panel’s jurisdiction to review the legality of the measures based on the security exception. Most notably, the EU argued that the existence of a ‘war’ or other ‘emergency in international relations’ in subparagraph (iii) should be interpreted to refer to objective factual circumstances, which are a number of additional conditions related to identification seals and registration cards at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border.

b. 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods: Bans on all road and rail transit from Ukraine of:
(i) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU; and (ii) goods that fall within the scope of the import bans imposed by Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic. Transit of such goods may only occur pursuant to a derogation requested by the Governments of Kazakhstan or the Kyrgyz Republic, which is authorized by the Russian Government, in which case, the transit is subject to the 2016 Belarus Transit Requirements (above).

c. 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods: Prohibitions on transit from Ukraine across Russia, through checkpoints in Belarus, of goods subject to veterinary and phytosanitary surveillance and which are subject to the import bans implemented by Resolution No. 778, along with related requirements that, as of 30 November 2014, such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints on the Russian side of the external customs border of the EaEU and only pursuant to permits issued by the relevant veterinary surveillance authorities of the Government of Kazakhstan and the Rosselkhoznadzor, and that, as of 24 November 2014, transit to third countries (including Kazakhstan) of such plant goods take place exclusively through the checkpoints across the Russian state border.

87 First Written Submission by Russia, WT/DS512 para. 16 (not publicly available); Second Written Submission by Russia, WT/DS512 at paras. 19, 21 (not publicly available); Second Written Submission by Russia, WT/DS512 at para. 18 (not publicly available).
89 Id., para. 7.26.
90 Id., para. 7.23.
91 Id., at paras. 7.31-7.34.
capable of being fully reviewed by the panels. An important but perhaps not so surprising caveat was made by the US. In a letter addressed to the panel’s Chairman, it contended that the panel lacked jurisdiction to review the state’s discretion of relying on Art. XXI of GATT, based on the ‘inherent right’ the contracting parties have on determining the matters which they consider necessary for the protection of their security interests.

3.1.3 Panel’s approach

In a landmark decision, that has been praised by some to represent a ‘constitutional’ moment, the panel considered that Art. XXI of GATT is not completely ‘self-judging.’ In doing so it provided a ‘roadmap’ with respect to the examination of security exceptions, that could be used in the future by other WTO panels or trade and investment international courts. The WTO panel has asserted its role in maintaining an oversight on security aspects, by carving out the legal space required for it to operate.

The space was created by the panel’s refusal to characterize the conflict, or to assign any responsibility for it, and by limiting itself to examining matters of facts only. With this approach, the panel ensured that a line is dividing itself, as an international dispute resolution institution, from other international fora, such as the UN, which has the role of assessing political questions of international law, such as breaches of the UN Charter. Thus, the panel reassured the contracting parties that it will not make a legal characterization of the conflict (such as the existence of a state of war), and it will not rule upon a state’s responsibility, due to the irrelevance of determining which actor bears international responsibility for the emergency. In doing so, the panel increased the legitimacy-preserving and authority-enhancing of the WTO DSB, defending itself against possible

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93 See Panel Report Russia – Traffic in Transit, supra note 13 at paras. 7.51, 7.52.
95 See Panel Report Russia – Traffic in Transit, supra note 13 at paras. 7.102.
98 See Panel Report Russia – Traffic in Transit, supra note 13, para. 7.5.
100 See Panel Report Russia – Traffic in Transit, supra note 13, para. 7.121.
critics that states might have made as a result of concerns that WTO assumed a too broad role in examining the national security of states.\(^{101}\)

As stated earlier, the most contentious part of Art. XXI of GATT is the expression ‘it considers’ in subparagraph (b) of Article XXI of GATT, which gave rise to different opinions regarding its ‘self-judging’ nature.\(^{102}\) The panel adopted a bifurcated test in its reasoning,\(^{103}\) with an objective test reserved for the subparagraphs (i) to (iii) of Art. XXI(b) of GATT, and a more deferential, subjective review, of the chapeau of Art. XXI(b) of GATT.\(^{104}\) The objective test involves the even-handed determination of the existence of a ‘war’ or other ‘emergency in international relations’, and whether or not the measures were taken ‘in time of’ such emergency. The subjective test is applied to the chapeau of Art. XXI(b) of GATT and is two-pronged. The test involves a deferential review of the veracity of the state’s security interests and the suitability of those measures to address the state’s security concerns. The subjective test is applied under the overarching principle of good faith.

3.2 Panel’s jurisdiction

The panel then determined the extent of the ‘self-judging’ nature of the provision, and whether it only affected the standard of review applicable to the test, or it also influenced the jurisdiction of the panel.\(^{105}\)

Considering the logical structure of the provision, the panel noted that the three subparagraphs of Art. XXI(b) of GATT operate as ‘limitative qualifying clauses’, which restrict the ‘exercise of the discretion accorded to Members under the chapeau to these circumstances.’\(^{106}\) It further noted with respect to subparagraph (iii) that the words ‘taken in time of’ and ‘emergency in international relations’ express objective aspects, capable of determination by the panel.\(^{107}\) It therefore concluded that the adjectival clause ‘which it considers’ in the chapeau of Article XXI(b), does not qualify the determination of the

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\(^{102}\) See Yoo, *supra* note 3, at 427.


\(^{104}\) Id.


\(^{107}\) Id., para. 7.77.
circumstances in subparagraph (iii).\textsuperscript{108} In other words, WTO panels and the AB have the competence to assess, in an objective manner, whether or not the measures adopted by a state is ‘taken in time of war or other emergency in international relations.’\textsuperscript{109} This conclusion was reached based on the textual and contextual interpretation of Art. XXI of GATT.

The negotiating history of Art. XXI of GATT 1947 was served only to confirm the above conclusion, according to Art. 32 of the Vienna Convention.\textsuperscript{110} The panel noted the two different approaches existent in the US proposals. The first approach provided for the unlimited discretion of the contracting states to rely on the security exception, while the second one devised some boundaries which restricted states’ discretion.\textsuperscript{111} The panel observed that the latter opinion was eventually majoritarian amongst the members of the US delegation.\textsuperscript{112} After analysing the negotiating history of Article XXI of GATT 1947, it concluded that the exception presents a question of ‘balance’, where ‘Members would have ‘some latitude’ to determine what their essential security interest are […]’, while ‘in the light of the balance, the security exceptions would remain subject to the consultations and dispute settlement provisions […].’\textsuperscript{113}

3.3 \textit{Objective test}

3.3.1 \textit{Emergency in international relations}

In assessing whether the measures adopted by Russia, were ‘taken in time of war or other emergency in international relations’, according to subparagraph (iii) of Art. XXI(b) of GATT, the panel found that an ‘emergency in international relations’ generally refers to a situation of: a) armed conflict; b) latent armed conflict; c) heightened tension or crisis; or d) general instability engulfing or surrounding a state.\textsuperscript{114}

Few mentions must be made in respect to the examples of emergencies. Firstly, even though the terms should be capable of ‘objective determination’,\textsuperscript{115} some of them are new and undefined, such as ‘heightened tension or crisis’ and ‘general instability.’\textsuperscript{116} Some authors reached the conclusion that the definition of ‘emergency in international relations’ provided by the panel can be read very

\begin{itemize}
\item \textsuperscript{108} \textit{Id.}, para. 7.82.
\item \textsuperscript{109} \textit{Id.}, para. 7.76.
\item \textsuperscript{110} \textit{Id.}, para. 7.83.
\item \textsuperscript{111} \textit{Id.}, at paras. 7.89, 7.92.
\item \textsuperscript{112} \textit{Id.}, para. 7.90.
\item \textsuperscript{113} \textit{Id.}, para. 7.98.
\item \textsuperscript{114} \textit{Id.}, para. 7.111.
\item \textsuperscript{115} \textit{Id.}, para. 7.77.
\item \textsuperscript{116} \textit{See} Heath, \textit{supra} note 103.
\end{itemize}
broadly. Thus, future panels will have enough space to accommodate different types of emergencies which can generate new security threats, such as cyberthreats and climate change.

This interpretation is upheld by another argument. In adopting a ‘sliding-scale’ test when it comes to applying the subjective test, the panel took the view that the closer the ‘emergency in international relations’ is to situation of ‘armed conflict’ or a ‘breakdown of law and public order’, the easier it will be for the state to articulate its ‘essential security interests.’ Per a contrario, the panel accepted the hypothesis that an event which does not involve an armed conflict, or which does not infringe public order (and which is not limited in any way by how ‘mild’ it can be), is in principle capable of giving rise to an ‘emergency in international relations.’

This approach moves away from the initial purpose of the security exception, which aimed at allowing states the possibility to adopt measures that would contain Russia’s military and economic threat during the Cold War. Applying the ‘legal test’, the panel took the view that the situation between the countries represents an ‘emergency in international relations.’ In doing so, it relied on the scarce evidence presented by Russia, which maintained a veil on the details of the conflict, in order to avoid potential self-incrimination. Russia presented the panel with a ‘hypothetical question’, which presumably reflected the factual aspects of the conflict, but refused to admit that such was indeed the case. Faced with a world-wide known conflict and with Russia’s refusal to provide evidence as to its affirmative defence, the panel avoided assigning the burden of proof to Russia, or saying anything about it, despite Ukraine’s argument that Russia did not discharge its burden of proof.

In making the decision, the panel relied upon some of the vague facts presented by Russia, such as: a) the time-period in which the conflict arose; b) the fact that the situation involved Ukraine; c) the fact that the conflict affected the security of Russia’s border with Ukraine; and d) that the situation in question was publicly known. The panel also relied on several UN General Assembly

\[\text{References}\]
\[118\] See Heath, supra note 103.
\[120\] See Heath, supra note 1, at 4.
\[121\] See Panel Report Russia – Traffic in Transit, supra note 13, para. 7.134
\[122\] Id., paras.7.114, 7.115.
\[125\] Id., para. 7.119.
Resolutions,\textsuperscript{126} as well as the Ukraine’s 2016 Trade Policy Review (TPR) report.\textsuperscript{127} Despite the fact that the TPR Mechanism\textsuperscript{128} itself states that it is not ‘intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures’, the panel accepted Ukraine’s TPR report as evidence for Russia’s argument, contrary to the previous DSB interpretations in similar cases.\textsuperscript{129} In doing so, it contended that a distinction must be made between contracting parties relying on TPR reports in order to determine factual aspects, and their use for determining legal responsibility.\textsuperscript{130} While the parties cannot use TPR reports in the latter case, they are allowed to rely on the reports in order to determine factual circumstances.\textsuperscript{131} Thus, the panel assumed a wide factfinder role, presumably under Art. 13.1 of the DSU and as a result of the ‘different character’\textsuperscript{132} Art. XXI has, as opposed to Art. XX of GATT.\textsuperscript{133}

3.3.2 Measures ‘taken in time of’ the emergency

The panel explained in para. 7.70 of the report that ‘taken in time of’ simply requires that the measures are adopted during the ‘emergency in international relations.’ Although it had to rely on some vague evidences, the panel managed to objectively determine that there was an ‘emergency in international relations’ according to Art. XXI(b)(iii) of GATT, and that Russia’s measures were ‘taken in time of’ the emergency. Thus, the panel concluded that the conditions of subparagraph (iii) of Art. XXI(b) of GATT were met.\textsuperscript{134}

3.4 Subjective test

3.4.1 Good faith principle

The assessment of the chapeau of Art. XXI(b) of GATT is subject to a deferential approach. The panel took the view that security interests ‘can be

\textsuperscript{126} See UN Resolution no. 71/205, supra note 83; UN Resolution no. 68/262, UN Doc. A/RES/68/262 (2014).
\textsuperscript{127} TPR Report Ukraine, WTO Doc. WT/TPR/G/334 (2016).
\textsuperscript{131} See Panel Report Russia – Traffic in Transit, supra note 13, para. 7.118.
\textsuperscript{132} Id., para. 7.98.
\textsuperscript{133} See Heath, supra note 130.
\textsuperscript{134} See Panel Report Russia – Traffic in Transit, supra note 13, paras. 7.124, 7.125.
expected to vary with changing circumstances.”\textsuperscript{135} Again, the panel defines the concept of ‘security interest’ in a way that will allow for future adjustments needed for incorporation of the twenty-first-century threats.\textsuperscript{136}

The panel interpreted the segment ‘which it considers […] for the protection of its essential security interests’ of the chapeau of Art. XXI(b) of GATT as leaving, in general, to each contracting party the discretion ‘to define what it considers to be its essential security interests.’\textsuperscript{137} However, the discretion of a contracting party is not unlimited, and it is bounded by the ‘obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith.’\textsuperscript{138} Based on Article 3.2 of the DSU, the interpretation of WTO provisions is done in accordance with the rules of interpretation of the Vienna Convention.\textsuperscript{139} Articles 31(1) and 26 of the Vienna Convention provide that a treaty shall be interpreted and performed in good faith. The panel referred to in paragraph 7.132 of the report\textsuperscript{140} to several previous case-law\textsuperscript{141} which examined the principle of good faith in relation to the chapeau of Art. XX of GATT. It concluded that Article XXI of the GATT cannot be used by the contracting parties ‘as a means to circumvent their obligations under the GATT 1994 […]’ and the member relying on the security exception must ‘articulate the essential security interests […] enough to demonstrate their veracity.’\textsuperscript{142} Thus, the reference to the ‘good faith principle’ is judicious\textsuperscript{143} and has been praised in the previous legal doctrine.\textsuperscript{144}

3.4.2 Essential security interests

The already mentioned ‘sliding-scale’ test is used for determining the veracity of the state’s security interests, which stem out of the emergency in international relations. The closer the conflict is to the notion of ‘armed conflict’ or ‘breakdown of law and public order’, the less burdensome will be for the state

\textsuperscript{135} See Panel Report Russia – Traffic in Transit, \textit{supra} note 13, para. 7.130.

\textsuperscript{136} See Heath, \textit{supra} note 103.

\textsuperscript{137} See Panel Report Russia – Traffic in Transit, \textit{supra} note 13, para. 7.131.

\textsuperscript{138} \textit{Id.}, para. 7.132.

\textsuperscript{139} \textit{Id.}, para. 7.59.

\textsuperscript{140} \textit{Id.}, para. 7.132.

\textsuperscript{141} \textit{Id.}, note 212.

\textsuperscript{142} \textit{Id.}, paras. 7.133, 7.134.

\textsuperscript{143} See Cho, \textit{supra} note 94.

to demonstrate that there is a peril for its ‘essential security interests.’\textsuperscript{145} The conflict between Russia and Ukraine was ‘very close to the hard core meaning of war or armed conflict.’\textsuperscript{146} Therefore, the panel viewed the scarce articulation of Russia’s ‘security interests’ as being ‘minimally satisfactory’, taking into account the hypothetical scenario presented by Russia with respect to the issue of security at the border of an adjacent country, and presuming that the economic sanctions imposed by Russia under the Federal Law No. 281-FZ\textsuperscript{147} were the result of Russia’s security interests being threatened.\textsuperscript{148}

Although a sliding-scale test provides a flexible framework for the future panels to adopt either a more deferential or stricter review, depending on the circumstances of the disputes, it is interesting to note that in this particular case the panel was left with no other option, if it were to rule in favour of Russia.\textsuperscript{149} That is because Russia did very little to articulate its ‘essential security interests’, and under a determined standard of review, Russia’s burden of proof would not have been met.\textsuperscript{150}

3.4.3 The necessity of the measures

The panel proceeded towards analysing the expression ‘which it considers necessary’ of the chapeau of Art. XXI of GATT. Similarly, it found that states have a discretion to determine the necessary measures for their security interests, bounded by the overarching principle of ‘good faith.’\textsuperscript{151} The test seems to be pretty loose, as the measures must meet a ‘minimum requirement of plausibility.’\textsuperscript{152} In practice, it would be interesting to see how the two subjective tests operate together. A strict scrutiny of the ‘sliding-scale’ test involves the requirement that the state’s ‘essential security interests’ be better articulated. This makes it correspondingly harder for that state to plausibly establish the measure’s necessity, as the panel will have a clearer picture of the interests at stake.\textsuperscript{153}

In the end, the panel found that the measures adopted by Russia were not so remote or unrelated to the 2014 emergency, such as to make it ‘implausible that Russia implemented the measures for the protection of its essential security interests […].’\textsuperscript{154} Thus, the panel rejected Ukraine’s claims, finding that Russia

\textsuperscript{145} See Panel Report Russia – Traffic in Transit, supra note 13, para. 7.135.
\textsuperscript{146} Id., para. 7.136.
\textsuperscript{148} See Panel Report Russia – Traffic in Transit, supra note 13, para.7.137.
\textsuperscript{149} See Heath, supra note 103.
\textsuperscript{150} See Panel Report Russia – Traffic in Transit, supra note 13, paras. 7.137, 7.146.
\textsuperscript{151} Id., para. 7.138.
\textsuperscript{152} Id.,
\textsuperscript{153} See Heath, supra note 103.
\textsuperscript{154} See Panel Report Russia – Traffic in Transit, supra note 13, para. 7.145.
had judiciously relied on the security exception when adopting the GATT inconsistent measures.155

3.5 Importance of the ruling

3.5.1 Security exception is not completely self-judging

The importance of the Russia - Traffic in Transit156 ruling stems from two considerations. Firstly, the panel established that the DSB has jurisdiction to rule on security issues, putting an end to the 72 years old debate regarding the ‘self-judging’ nature of the security exception. Secondly, while ruling on the matter, the panel provided a ‘roadmap’ on how to examine the security exception in the future. This is particularly important, because in the past five years WTO has seen an escalation of the number of cases157 in which contracting states relied upon the security exception in order to derogate from their GATT obligations.158

3.5.2 Remarks

In my opinion, the ruling presents a politically sensitive and flexible approach.159 The test ensures that the DSB will not encroach upon sensible political questions160 and provides future panels with enough levers, such as the ‘sliding-scale’ test, in order to ensure that new security threats can be scrutinized.161 A few things could be said with respect to the legal test. Firstly, the test is not corelated with some of the previous interpretations of the DSB. In EC – Sardines,162 the AB stated that WTO panels must presume that members act in good faith in fulfilling their WTO obligations. Notwithstanding the above, the subjective test demands some proof that the state acted in good faith when

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155 Id., paras. 8.2, 8.3.
156 See Russia – Traffic in Transit, supra note 12.
157 United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, DS526 (2017); United States – Certain Measures on Steel and Aluminium Products, DS550 (Canada) (2018), United States – Certain Measures on Steel and Aluminium Products, DS544 (China) (2018); United States – Certain Measures on Steel and Aluminium Products, DS547 (India) (2018); United States – Certain Measures on Steel and Aluminium Products, DS548 (EU)(2018); United States – Certain Measures on Steel and Aluminium Products, DS551 (Mexico) (2018); United States – Certain Measures on Steel and Aluminium Products, DS552 (Norway) (2018); United States – Certain Measures on Steel and Aluminium Products, DS554 (Russia) (2018); United States – Certain Measures on Steel and Aluminium Products, DS556 (Switzerland) (2018); United States – Certain Measures on Steel and Aluminium Products, DS564 (Turkey) (2018); Russia – Measures Concerning Traffic in Transit, DS512 (2016).
158 See Heath, supra note 1, at 3.
159 See Heath, supra note 96.
160 See Panel Report Russia – Traffic in Transit, supra note 13, para. 7.4.
161 See Heath, supra note 96.
determining its ‘essential security interests’, and the ‘necessity’ of the measures. Perhaps this anomaly can also be put on the account of the ‘different character’ Article XXI of GATT has.\textsuperscript{163} Secondly, the panel might have considered the usefulness of introducing a procedural review of the administrative process that led to the adoption of security measures.\textsuperscript{164} Under the good faith principle, states could be compelled to follow certain procedural steps, \textit{i.e.} providing transparency of the process, stating the reasons, and informing in advance other contracting states.\textsuperscript{165} This would incentivize states to bargain ‘in the shadow of the law’ and reach a consensus, avoiding bringing sensitive issues to the WTO dispute system. Imposing preliminary procedural obligations would also ease up the fact-finding work of the panels.

The test however can be improved, and panels may adopt more intrusive approaches. We must not forget that the \textit{Russia – Traffic in Transit}\textsuperscript{166} case is the first one in which a panel took jurisdiction over security matters.\textsuperscript{167} In time, the deferential approach proposed in the \textit{Russia – Traffic in Transit}\textsuperscript{168} case may act as a Trojan horse, expanding the reviewing powers of the WTO DSB.\textsuperscript{169}

3.5.3 \textit{Panel’s ruling in the current context}

The success of the panel’s decision is dependent upon the institutional context of the WTO. One must understand that the decision is not the result of some agreed policy development, but is a daring report delivered at a moment when the very future of the DSB is questioned.\textsuperscript{170} Developments of sensitive legal doctrines are successful when courts receive political signals that they have the space to do so, and when there is a relatively stable institutional context.\textsuperscript{171} At this time, none of these two conditions are fulfilled. The US, which is a founding and influential contracting state, has strongly voiced its opinions against the ‘judicial activism’ of the AB,\textsuperscript{172} and the authority of the DSB to assess national security grounds.\textsuperscript{173} This is somehow expected, as the US itself plays the security card in order to justify a series of trade restrictive measures. Additionally, US is

\begin{itemize}
\item \textsuperscript{163} See Panel Report \textit{Russia – Traffic in Transit, supra} note 13, para. 7.98.
\item \textsuperscript{164} See Heath, \textit{supra} note 1, at 53 \textit{et seq.}
\item \textsuperscript{165} \textit{Id.}, at 54.
\item \textsuperscript{166} See \textit{Russia – Traffic in Transit, supra} note 12.
\item \textsuperscript{167} See Panel Report \textit{Russia – Traffic in Transit, supra} note 13, para. 7.20.
\item \textsuperscript{168} See \textit{Russia – Traffic in Transit, supra} note 12.
\item \textsuperscript{169} See Heath, \textit{supra} note 1, at 48.
\item \textsuperscript{170} R. McDougall, \textit{Crisis in the WTO: Restoring the WTO Dispute Settlement Function Robert McDougall}, Centre for International Governance Innovation 3 (2018); G. Shaffer, \textit{A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations}, 44 \textit{The Yale Journal of International Law} 8 (2019).
\item \textsuperscript{171} See Heath, \textit{supra} note 96.
\item \textsuperscript{172} 2019 Trade Policy Agenda and 2018 Annual Report, US Trade Representative at 6 (2019).
\item \textsuperscript{173} See Panel Report \textit{Russia – Traffic in Transit, supra} note 13, para. 7.51.
\end{itemize}
currently blocking the appointment of members to the WTO AB, which will *de facto* bring to a halt the activity of the DSB by the end of 2019.\(^{174}\) Article 16.4 of the DSU provides that a panel report can only be adopted by the DSB and become binding, after the completion of the appeal procedure. As the former member of the AB - Prof. Peter Van den Bossche stated in his farewell speech, ‘one can predict with confidence that, once the AB is paralyzed, the losing party will in most cases appeal the panel report and thus prevent it from becoming legally binding.’\(^{175}\)

The effects and future of the panel’s interpretation in *Russia - Traffic in Transit*\(^{176}\) case will thus remain uncertain. We should not overlook that the parties agreed not to further submit the report to an appeal procedure and thus, the report stems from the panel. Such a situation does not remove the report’s binding effect, but it might cast a shadow on the panel’s interpretation, as in the previous case-law\(^{177}\) the AB indicated that panels’ reports do not constitute binding ‘subsequent practice’, as referred to in Art. 31 of the Vienna Convention. This increases the risk that future panels or the AB will distort the ‘roadmap’ provided in the *Russia - Traffic in Transit* report.\(^ {178}\)

**3.6 Table of the test**

The three-pronged test adopted by the panel when assessing whether a state can rely on the security exception of Art. XXI(b)(iii) of GATT in a given case, can be envisaged as it follows in Table 1:

<table>
<thead>
<tr>
<th>Type of test</th>
<th>Part</th>
<th>Article</th>
<th>Examination</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Objective test</strong></td>
<td>A</td>
<td>Art. XXI(b)(iii) of GATT – ‘war or other emergency in international relations’</td>
<td>Can it be objectively said that there exists a situation of: (i) war; (ii) armed conflict, (iii) latent armed conflict; (iv) heightened tension or crisis; (v) general instability or of (vi) political conflict and (vi) economic conflict?</td>
<td>If not, then the contracting state cannot rely on security exception. If yes, apply B</td>
</tr>
<tr>
<td></td>
<td>B</td>
<td>Art. XXI(b)(iii) of GATT –</td>
<td>Is the measure objectively taken during the war or the</td>
<td>If not, then the</td>
</tr>
</tbody>
</table>

\(^{174}\) See McDougall, *supra* note 170, at 1.


\(^{176}\) See *Russia – Traffic in Transit, supra* note 12


\(^{178}\) See Heath, *supra* note 96.
<table>
<thead>
<tr>
<th></th>
<th>Subjective test I – ‘sliding-scale’ approach under the good faith principle</th>
<th>Subjective test II – under the good faith principle</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘taken in time of’</td>
<td>emergency in international relations?</td>
<td>contracting state cannot rely on security exception</td>
</tr>
<tr>
<td></td>
<td>Chapeau - Art. XXI(b) of GATT – ‘essential security interests’</td>
<td>If not, then the contracting state cannot rely on security exception</td>
</tr>
<tr>
<td>C</td>
<td>Emergency closer to war or breakdown of law and public order – less articulation needed and less scrutiny by the panel</td>
<td>If yes, apply D</td>
</tr>
<tr>
<td></td>
<td>Did the state articulate its genuine security interests, such as protection of its territory, its population, maintenance of law and public order, arising from the emergency in international relations enough to demonstrate their veracity?</td>
<td>If yes, the state can rely on Art. XXI(b)(iii) of GATT</td>
</tr>
<tr>
<td></td>
<td>If not, then the contracting state cannot rely on security exception</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Emergency closer to tension or crisis – more articulation needed and more scrutiny by the panel</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Did the state articulate its genuine security interests such as protection of its territory and its population, maintenance of law and public order, arising from the emergency in international relations enough to demonstrate their veracity?</td>
<td></td>
</tr>
<tr>
<td></td>
<td>The measure must meet a minimum requirement of plausibility, i.e. it must not be implausible as measure protective of the claimed interests</td>
<td></td>
</tr>
<tr>
<td></td>
<td>If not, then the contracting state cannot rely on security exception</td>
<td></td>
</tr>
<tr>
<td></td>
<td>If yes, the state can rely on Art. XXI(b)(iii) of GATT</td>
<td></td>
</tr>
</tbody>
</table>
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1.2. EU Legislation


1.3. US Legislation


1.4. International Legislation

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