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Gabriela Feret

Uniwersytet Rzeszowski
ORCID: 0000-0003-3334-4283

INVOCATION OF THE GATT SECURITY EXCEPTION AFTER THE RUSSIA – TRAFFIC IN TRANSIT CASE

Introduction

The security exception provided by the Article XXI(b)(iii) of the General Agreement on Tariffs and Trade[1] (GATT), while recognizing the ever-increasing interdependence of states, works as the member states' sovereignty safeguard provision[2]. It reflects and accepts that the state sovereignty is the basis of present-day international law. In the past, the national security exception has functioned as a virtually unlimited escape clause from the GATT's obligations[3]. The situation changed after the establishment of the World Trade Organisation (WTO) and Dispute Settlement Mechanism (DSM) which aim is to provide security and predictability to the multilateral trading system[4] by, inter alia, reviewing cases and interpret particular provisions. Even though, some countries still believed that because of the specific wording of the national security clause, this provision is not the subject of DSM review. Even some European diplomats were agreeing that this interpretation could

[1] General Agreement on Tariffs and Trade, Annex 1A to the World Trade Organization Agreement (1994) 1867 UNTS 187; Article XXI b(iii): "Nothing in this Agreement shall be construed (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".

[2] M.J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, "Michigan Journal of International Law" 1991, vol. 12, p. 558, 560.

[3] D.T. Shapiro, *Be Careful What You Wish For: US Politics and the Future of the National Security Exception to the GATT*, "The George Washington Journal of International Law and Economics" 1997, vol. 31, no. 1, p. 97, 98.

[4] Article 3.2. Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187, (DSU).

prevail. Hugo Paemen, the European Union's (EU) ambassador to the United States (US), questioned whether the WTO can review a country's invocation of the national security exception except in cases of "flagrant and egregious abuse"[5].

The dispute regarding Article XXI(b)(iii) had to wait for its solution until 2019 when a panel issued a report on *Russia – Traffic in Transit*[6]. This was a historical moment for the international trade law as the national security provision for the first time was subjected to thorough analysis. The panel came into some interesting conclusions and limited States' discretion to the extent that no one could probably have imagined.

This article focuses on an analysis of the Article XXI(b)(iii) in a light of *Russia – Traffic in Transit* case. It sets out to examine the national security exception and the approach taken by the Dispute Settlement Body (DSB). In order to asses this, the interpretation of this clause in *Russia – Traffic in Transit* case is used as well as other relevant legal sources and scholars' articles.

Preliminary issues regarding national security

The first determination that the Panel must face when dealing with national security exception is whether invocation of the Article XXI(b)(iii) itself takes a complaint outside the jurisdiction of a panel. In other words, is a panel competent to deal with this matter or is the national security so "intimately connected to the sovereignty of a State (…), that it cannot conceivably be left to an international tribunal to determine"?[7] Problems related to adjudication of this provision arise from its peculiar wording combined with the delicate subject-matter and for a long time national security exception was a subject of multiples debates. Recent judgement in the *Russia – Traffic in Transit* put some light on this issue.

Jurisdiction

Despite the fact that the DSU does not contain rules on when panels or the Appellate Body (AB) shall exercise or decline jurisdiction it provides a number of rules on ascertaining the tribunal's jurisdiction over legal claims[8]. Article 6 stipulates that

[5] G.G. Yerkey, *European Union May Not File WT0 Case Against US. Over Cuba Bill, Aide Says*, "Int'l Trade Rep. (BNA)" 1996, no. 14, p. 560.

[6] Russia – Measures Concerning Traffic in Transit, Report of the Panel, (WTO) WT/DS512/R, April 2019, (*Russia – Traffic in Transit*).

[7] D. Akande, S. Williams, *International Adjudication on National Security Issues: What Role for the WTO*, "Va. J. Int'l L." 2003, no. 43, p. 365, 370.

[8] I. Bogdanova, *Adjudication of the GATT security clause: to be or not to be, this is the question*, WTI Working Paper 01/2019, p. 8.

it is members' right to ask for establishment of a panel if a dispute cannot be solved by consultation[9]. It also provides in paragraph 1 that the only time in which a panel will not be established is if the DSB decides by consensus not to establish one. Bearing in mind that the complaining party must be a member of the WTO and all WTO members are parties to the DSB, it is hard to imagine reaching such a consensus[10]. Another relevant provision is the Article 7 of the DSU which relates to standard terms of reference. According to that Article, a panel examine the matter referred to the DSB, taking into account the relevant provisions of the agreements suggested by parties and it makes findings as would assist the DSB[11]. That indicates that panel holds the power to examine all provisions of relevant agreements, including the national security one. Finally, Article 3.2 of the DSU in which members recognize that the dispute settlement system of the WTO serves to preserve the rights and obligations and to clarify the existing provisions of agreements[12]. It is worth to emphasise that the DSU itself is not subject to any national security exception[13].

This conclusion arrives from the fact that this provision is placed between the general exceptions/provisions and the dispute settlement rules. Such placement confirms that the security clause is an exemption from the substantive obligations and not from the rules of dispute settlement[14]. Therefore, WTO member has no direct legislative authority which it could turn to in order to refrain from using the system[15]. Further, tribunals are entitled to determine their own jurisdiction. This statement was confirmed in the United States – Anti-Dumping Act of 1916[16] and as noted neither a panel nor the AB has ever declined its jurisdiction[17]. Moreover, the jurisdiction of the WTO dispute settlement system is compulsory and therefore in this regard it could be concluded that "if they [WTO Members] want a third party to settle their dispute, recourse to dispute settlement under the DSU is the only option"[18].

Now turning to the Article itself. The text of the security exception does not explicitly deny jurisdiction of neither panels nor AB and additionally the title "Security Exceptions" implies that "it applies as an affirmative defence"[19].

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[9] DSU, note 4, Article 6, para. 2.

[10] See: D. Akande, S. Williams, *International Adjudication*…, p. 379.

[11] DSU, note 4, Article 7.

[12] DSU, note 4, Article 3.2.

[13] See: D. Akande, S. Williams, *International Adjudication*…, p. 379.

[14] I. Bogdanova, *Adjudication*…, p. 9.

[15] See: D. Akande, S, Williams, *International Adjudication*…, p. 379.

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

[17] I. Van Damme, *Treaty Interpretation by the WTO Appellate Body*, Oxford University Press 2009, p. 175.

[18] *Ibidem*.

[19] See: I. Bogdanova, *Adjudication*…, p. 9.

To sum up, once a panel is established, it has the jurisdiction to examine all legal issues relating to the dispute, even when one party invokes Article XXI(b)(iii)[20]. As noted, in principle if the matter is necessary or useful for the resolution of dispute submitted by the complainant, no matter within the scope of the WTO agreement is excluded from the panels resolution[21].

Non-justiciability

The fact that a WTO panel has power to interpret the national security exception does not automatically mean that it can also determine whether a state's security interests are threatened and what measures are needed to protect such interests[22]. In other words, tribunal must decide whether the case is justifiable or not. Non-justifiable case means that it is "not capable of being decided by legal principles or by a court of justice"[23].

It is essential to consider firstly, the self-judging nature of the provision. Article XXI (b) can be used to justify state's action, contrary to the GATT obligations, which *it(contracting party) considers necessary* for the protection of those essential security interests[24]. It can be therefore argue that the wording of this provision provides a very wide discretion to the party invoking national security provision to decide on what its essential security interests are and on what action is necessary to protect those interests.

However, the practice of other international tribunals, shows that besides of a wide margin of discretion afforded to states, in principle, courts have held themselves competent to determine security interests when the security exception was at stake. Moreover, some scholars consider even self-judging obligation as not a legal obligation. Thus, since the Article XXI was intended to create a legal obligation, it must be interpreted in a way that the final decision does not rest with the party invoking it but with the independent tribunal. For example, Judge Sir Hersch Lauterpacht in the *Norwegian Loans* case[25], stated in his separate opinion that the unilateral declaration accepting the compulsory jurisdiction of an international tribunal is invalid if later, after the dispute has come before the court and "in cases which cover potentially the entire field of possible disputes, (…) it determines that the Court has no jurisdiction"[26]. Further, he notes that such a self-judging instrument is unable to demonstrate the

[20] See: D. Akande, S. Williams, *International Adjudication*…, p. 380.

[21] *Ibidem*.

[22] See: *ibidem*, p. 381.

[23] Merriam Dictionary, https://www.merriam-webster.com/dictionary/nonjusticiable (7.05.2020).

[24] GATT, note 1, Article XXI.

[25] *Norwegian Loans* (Fr. v. Nor.), 1957 I.C.J. 9 (July 6).

[26] *Norwegian Loans* (Fr. v. Nor.), 1957 I.C.J. 9 (July 6), Separate opinion of Judge Sir Hersch Lauterpacht, 49.

acceptance of any legal obligation. He stated that, "an instrument in which a party is entitled to determine the existence of its obligation is not a valid and enforceable legal instrument of which a court of law can take cognizance. It is not a legal instrument. It is a declaration of a political principle and purpose"[27].

Secondly, as the panel in the *Russia – Traffic in Transit* noted in a footnote, the argument of non-justiciability comes directly from the "political question" doctrine. Such doctrine is rooted in the US constitutional law.

The US defines justiciability as the concept that "relates to the nature of the inquiry that an adjudicator could make over a matter put before it" and argues that panels are deprived of the right to conduct an inquiry into the security exception[28]. The essence of the "political question" doctrine is that "some disputes, although possibly justifiable as such, cannot be settledby judicial decision"[29] due to their political nature and therefore court must reject such claim without reaching the merits[30].

As can be seen in numerous scholarly works and numerous discussions on invoking national security exception in trade law, political doctrine has always been raised and carefully analyzed. The panel in the *Russia – Traffic in Transit* when recently reviewing for the first time in history, the Article XXI of the GATT did not address this issue as neither the panel nor the parties appear to have considered the possibility that a panel could refrain from exercising jurisdiction on this basis. However, political question argument was brought by the US and the panel did refer to this issue in footnote recognizing it as a potential argument for non-justiciability. Panel rejected this argument by invoking the ICJ statement that "as long as the case before it [ICJ] or the request for an advisory opinion turns on a legal question capable of a legal answer, it is duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue"[31]. Further, the panel noted that in the *Mexico – Taxes on Soft Drinks*[32], the AB stated that "a panel's decision to decline to exercise validly established jurisdiction would not be consistent with its obligations under Articles 3.2 and 19.2 of the DSU, or the right of a Member to seek redress of a violation of obligations within the meaning of Article 23 of the DSU"[33]. It can be therefore concluded that the panel simply lacks a procedural tool to decline to exercise jurisdiction[34].

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[27] *Ibidem*.

[28] Russia – Measures Concerning Traffic in Transit (DS512), Third-Party Oral Statement of the United States of America (n.17).

[29] See: M.J. Hahn, *Vital Interests*…, p. 613.

[30] See: I. Bogdanova, *Adjudication*…, p. 13.

[31] *Russia – Traffic in Transit*, note 6, note 183.

[32] *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Appellate Body Report, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I.

[33] *Mexico – Taxes on Soft Drinks*, note 87, para. 53.

[34] G. Vidigal, *WTO Adjudication and the Security Exception: Something Old, Something New, Something Borrowed – Something Blue?*, "Legal Issues of Economic Integration" 2019, no. 46(3), Amsterdam Law School Research Paper no. 2019-21, p. 7.

To sum up, the more legally plausible argument for the WTO panels regarding the security exception is the self-judging wording of the exception and not the political question doctrine. However, as noted by scholars even years before the *Russia – Traffic in Transit* case, assuming that the Article XXI is entirely self-judging would mean that a WTO member is entitled to determine the scope and existence of its obligations under the GATT and to unilaterally determine (with binding effect) when it was obliged to comply with the GATT obligations[35]. This would vitiate the legal effect of the Agreement, lead to the absurd and to multiple abuses of the national security provision. Therefore, in the *Russia – Traffic in Transit*, the panel decided that "Russia's jurisdictional plea indeed requires it to interpret Article XXI(b)(iii) in order to determine if the power to decide whether the requirements for the application of the provision are met is vested exclusively in the Member invoking the provision, or the Panel retains the power to review such a decision concerning any of these requirements"[36].

Analyses of elements of the security exceptions provisions

After dealing with the possible issues which opposing party may raise on the preliminary stage of the proceeding in connection to invocation of national security issue and overcoming the matter of tribunals competence, we can turn to the merits and the way of interpretation of the national security provision. In order to do this, there is a need to divide this clause and discuss each element separately.

Emergency in International Relations

In the *Russia – Traffic in Transit* case one of the first questions that panel pose was if the phrase included in the Article XXI(b)(iii) "which it considers" should be understood as to qualify only the word *necessary* (with regards to the necessity of the measures for the protection of "its essential security interests") or to qualify also the determination of these "essential security interests"; or as well to qualify the determination of the matters described in the three subparagraphs of the Article XXI(b)[37].

The panel started its interpretation from the latter and after analyzes of the wording and context of the provision, it reached the conclusion that the existence of an emergency in international relations is an objective state of affairs: "the determination of whether the action was «taken in time of» an «emergency in international relations» under subparagraph (iii) of the Article XXI(b) is that of an

[35] See: D. Akande, S. Williams, *International Adjudication*…, p. 384.
[36] *Russia – Traffic in Transit*, note 6, 7.58.
[37] *Ibidem*, 7.63.

objective fact, subject to objective determination"[38]. Leaving to the members of the WTO the discretion which allow them to determine whether a measure is within the scope of subparagraphs of the Article XXI would lead to the creation of escape clause and would empowered countries to avoid all jurisdictional oversight[39]. In order to prevent this situation the panel stated that the XXI(b) provision operates as limitative, qualifying clause. It limits the discretion accorded under chapeau to the circumstances provided in subparagphs i–iii[40].

Further, panel limited potentially broad meaning of emergency by interpreting the Article XXI(b) as whole including also subparagraphs i and ii and not analyzing subparagraph iii in isolation. By doing so, it reached an interesting outcome: they all concern issues relating to the "defence and military interests, as well as maintenance of law and public order interests"[41]. Therefore, the panel set a high threshold for invoking the national security exception which can be use only in "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 [which] give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests"[42]. At the same time the panel explicitly confirmed that "emergency in international relations does not cover mere political or economic conflicts with other Members or states [even if] considered urgent or serious in a political sense"[43]. Panel did not stated that the member taking the measure shall be specially affected by the emergency it invokes. Established framework require WTO member to justify the measure on the basis of a specific emergency in international relations not on the general concept of an emergency[44].

Good faith principle

In the *Russia – Traffic in Transit*, the panel also recalled that "the obligation of good faith is a general principle of law and a principle of general international law which underlies all treaties, as codified in (…) the Vienna Convention"[45]. The panel in the Russia–Ukraine case determined that the obligation of good faith, requires members not to use the national security exception only to "circumvent their obligations under the GATT"[46].

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[38] *Ibidem*, 7.77.
[39] See: G. Vidigal, *WTO Adjudication*…, p. 10.
[40] *Russia – Traffic in Transit*, note 6, 7.65.
[41] *Ibidem*, 7.74.
[42] *Ibidem*, 7.76.
[43] *Ibidem*, 7.75.
[44] See: G. Vidigal, *WTO Adjudication*…, p. 11.
[45] *Russia – Traffic in Transit*, note 6, 7.132.
[46] *Ibidem*, 7.133.

Panel also gave the example of behaviour which falls outside the requirements of bona fide: a member who tries to escape from the structure of reciprocal and mutually advantageous arrangements "by re-labelling trade interests, that it had agreed to protect and promote (…), as essential security interests"[47]. Panel's conclusion was reached when after having discussed the subparagraph, it turned to chapeau of the provision and performed two operations. Firstly, it divided the chapeau into two elements: the existence of "its essential security interests" and the necessity of the "action" taken by the Member to protect these interests. Secondly, the panel added to both of these elements the "obligation of good faith" according to which obligations must be both interpreted and performed in a good faith[48]. By imposing on members the obligation of good faith when invoking the Article XXI(b), and by the division of the chapeau of the provision, it created two additional legal hurdles requiring evidences to be provided[49]. Firstly, state must articulate before the panel the essential security interests that its measure seeks to protect, "sufficiently enough to demonstrate their veracity"[50]. Secondly, a measure should have a connection with the security interests articulated by the Member, in the sense that it could credibly be claimed to be "for the protection of" these interests. Both discussed in the next section.

Essential security interests

The threshold of the term *essential*

As noted by the panel in the *Russia – Traffic in Transit*, the word *essential* used in this provision evidently narrows the scope of the security interests[51]. Therefore, it should be read as interests relating to "the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally"[52].

In regard to sufficient level of articulation of essential, panel noted that "the specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances"[53]. For these reasons, it is left, in general, to every member to define what it considers to be its essential security interests[54] but its discretion

[47] *Ibidem*.
[48] See: G. Vidigal, *WTO Adjudication*…, p. 12.
[49] See: *ibidem*.
[50] *Russia – Traffic in Transit*, note 6, 7.134.
[51] *Ibidem*, 7.130.
[52] *Ibidem*.
[53] *Ibidem*, 7.131.
[54] *Ibidem*.

is limited by its obligation to interpret and apply the Article XXI(b)(iii) of the GATT in good faith[55].

Further, it noted that whether a sufficient level of articulation of essential security interests will depend on the emergency in international relations at issue. This suggests highly case-by-case approach. The panel also explicitly consider the situation when invocation of the security exception was not caused directly by an armed conflict, or a situation of breakdown of law and public order, stating that indeed such defence would be less obvious however not impossible[56]. "In such cases, a Member would need to articulate its essential security interests with greater specificity than would be required when the emergency in international relations involved, for example, armed conflict"[57].

The second issue that state would have to show is the connection between the measure and the security interests articulated by it. The test used in the *Russia – Traffic in Transit* by the panel was to review "whether the measures are so remote from, or unrelated to, the emergency that it is implausible that State implemented the measures for the protection of its essential security interests arising out of the emergency"[58].

Necessity of the measure

The complex three-tiered test in *Russia – Traffic in Transit* the panel noted that, once the measures were deemed to have been taken in time of emergency in international relations and to be sufficiently related to Russia's essential security interests articulated before the panel, it was "for Russia to determine the «necessity» of the measures for the protection of its essential security interests"[59].

In other words, Panel determined the necessity as the self-judging element of national security provision. It therefore does not need the in depth review of the necessity of the measure undertaken by panels under Article XXI and does not require the consideration whether the measures are discriminatory[60].

Even though the panel decided to allow states for the determination of the necessity, it limited significantly their discretion by requiring them to prove (i) the emergency in international relations, (ii) to present the precise character of the essential security interests that they seek to protect and (iii) the relationship between the measure and these interests in a minimally plausible manner, establishing a credible connection between measure, protected interests and circumstances which could justify the invocation of the measure.

[55] *Ibidem*, 7.132.
[56] *Ibidem*, 7.135.
[57] *Ibidem*.
[58] *Ibidem*, 7.139.
[59] See: G. Vidigal, *WTO Adjudication*…, p. 13.
[60] See: *ibidem*.

If the Panel had granted states with bigger discretion with regards to Article XXI(b), we could face some significant policy ramifications. Importing countries having the complete discretion on the judgment of essential national security under Article XXI would be allowed to impose trade restriction measures without the possibility of review what would open the gate for the rampant application of security interest exceptions to all kinds of products such as automobiles and semiconductors, all sorts of other "strategic" base materials under all kinds of circumstances[61].

Conclusions

The report issued by Panel in *Russia – Traffic in Transit case* without doubt took the debate about the national security exception to whole different level. It solved the discussion concerning the justifiability of that provision probably once for all. It also remarkably limited states discretion with regards to its interpretation which suggests that the DSB's aim was to reduce the risk of abuse to minimum before more countries follow recently frequent trend among members of invoking Article XXI to circumvent the obligations arising from GATT.

Although, the *Russia – Traffic in Transit* report put light on the issue of the security exception, it did not put the debate to an end. Quite contrary, it only exacerbated the conflict and added many new questions to it. For example, the Panel stated that emergency may also mean "heightened tension or crisis, or of general instability engulfing or surrounding a state" this being much broader and not even strictly précised therefore still leaving a lot of space for discussing what exactly may be included under this particular definition. Secondly, with regard to good faith and essential interests, Panel suggested strong case-by-case approach and noted the specific interests depend on the particular situation and can vary with changing circumstances. Further, Panel stated that where invocation of security exception was not caused directly by armed conflict, or a situation of breakdown of law and public order, the defence through Article XXI would be less obvious and would required greater specificity but it did not exclude such option.

It must be also noted that this was only the statement of the Panel in this particular dispute. Another panel may approach security exemption differently which may be seen soon as the national security exception has been invoked recently also by the United Arab Emirates, the Kingdom of Bahrain and the Kingdom of Saudi Arabia in three disputes initiated by Qatar and by the United States in a case concerning additional import duties on steel and aluminium.

[61] L. Yong-Shik, *Three Wrongs Do Not Make a Right: The Conundrum of the US Steel and Aluminum Tariffs*, "World Trade Review" 2019, no. 18(3), p. 490.

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Summary

This article sets out to examine the national security exception incorporated in an Article XXI(b)(iii) of GATT after a panel issued its final report in the *Russia – Traffic in Transit* case. This piece focuses on deep analyse of every element of above mention exception as to understand the significancy of each part and the approach taken by the Dispute Settlement Body. In order to do this, the interpretation of this clause in *Russia – Traffic in Transit* case is used as well as other relevant legal sources and scholars' articles.

Keywords: GATT, WTO*, Russia – Traffic in Transit* case, national security, exception, Article XXI(b)(iii)

POWOŁANIE SIĘ NA WYJĄTEK W ZAKRESIE BEZPIECZEŃSTWA GATT PO SPRAWIE RUSSIA–TRAFFIC IN TRANSIT

Streszczenie

Opracowanie ma na celu analizę zawartego w art. XXI(b)(iii) GATT wyjątku dotyczącego bezpieczeństwa narodowego w świetle ostatniego, końcowego rozstrzygnięcia w sprawie *Rosja – działania w zakresie ruchu tranzytowego*. Rozważania koncentrują się na ewaluacji poszczególnych elementów klauzuli i ocenie podejścia przyjętego przez Organ Rozstrzygania Sporów. W tym celu w artykule wykorzystano raport wydany w sprawie *Rosja – działania w zakresie ruchu tranzytowego*, a także źródła prawa dotyczące tej materii oraz wybrane pozycje bibliograficzne.

Słowa kluczowe: bezpieczeństwo narodowe, wyjątek, *Rosja – działania w zakresie ruchu tranzytowego*, art. XXI(b)(iii), GATT, WTO