



**The concept of “essential security interests” and justification of economic sanctions under WTO law.**

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**ABSTRACT**

The concept of national security is not easily definable in categorical terms, given that it may not remain constant over time. Historically, vague terms employed in national security provisions, when read in light of the margin of appreciation doctrine, allow states to deal with unanticipated national security threats. This article engages in important debate attempts to uncover the meaning of “essential security interests” for the future implications of the article XXI in WTO dispute settlement proceedings. It also points on debate over self-judging nature and vagueness of the language of the article for the purpose of balancing such provision with notion with state sovereignty. This article attempts to crystallize standards and criteria that need to be taken into account by Member states when imposing economic sanctions under the GATT security exception. Analysis of article XXI, cases of ICJ and unadoped reports of WTO Dispute Settlement Body distinguish following criteria: necessity, good faith, principles of sovereignty and non-intervention. In addition to that, these criteria could be helpful for WTO Dispute Settlement Body while assessing legality of such measures.

**Key words:** national security, Article XXI GATT, sanctions, necessity, good faith, sovereignty



## **1. INTRODUCTION**

In the era of growing industrialization, rapid growth of global supply chains and as a consequence – inevitable economic interdependence, safeguarding Member states from arbitrary violation of their rights seems to be one of the primary goals for international trade organization. Before mid-XX century, when conflicts used to have mainly militaristic character, “essential security interests” were perceived in the context of military warfare, territorial integrity, security of the civilians etc. Military intervention, accompanied by abuse of sovereignty of a state as well as abuse of human rights was qualified as internationally illegal act in the middle of XX century. Nowadays, many conflicts are followed by unilateral economic sanctions that has no legal basis in international law. No need to say, that those sanctions have their primary goal as to intervene in the internal and external affairs of another nation and influence the “choices” being made by that sovereign. Therefore, there is obvious need in effective regulation of economic warfare and economic sanctions as an essential part of it. The idea to carve out exceptions for essential security roots back to the early twentieth century. The US-Austria Friendship, Commerce, and Navigation Treaty in 1931 included a provision stating that, “in the event either High Contracting Party shall be engaged in war, it may enforce such import or export restrictions as may be required by the national interest”. After World War II, due to post-war sentiment and rapid international economic integration, the security clause was included in bilateral trade agreements as well as was adapted as a part of the original GATT agreement (Article XXI), signed in 1997 (Moon,2012).

The inclusion of the security exception facilitated integration by allowing Member states to retain sovereignty to deal with national security threats (Emmerson,2008). It could be clearly seen from the drafting process, when delegates recognized that the exception gave “latitude for security as opposed to commercial purposes”. At the same time, drafters acknowledged that there was a great danger having too wide wording of an exception because it would permit anything under the sun (Analytical Index: Guide to GATT Law and Practice (WTO, 1995)). The solution was to include the word “essential” as to underline the importance of finding a balance between state’s real



security interests and respect to obligations towards other Members of the Organization, in other words-between sovereignty and multilateralism.

How could the “essential security interest” be defined? What conditions to be present to fall under the scope of the article XXI GATT? What standards shall be taken into account when judging on legality of the sanctions? Neither GATT, nor WTO had adopted panel reports that interpret “essential national security interest” concept under article XXI GAAT. Due to disadvantages of the previous GATT dispute settlement system, which required procedural consensus to adopt the report, it is not surprising that Panel reports that somehow dealt with security exceptions did not go through. It is fair to note that unadopted panel reports have no formal legal status in the GATT and WTO system. However, Panel’s position and the reasoning contained in unadopted panel reports can provide useful guidance to a panel or the Appellate Body in a subsequent case involving the same legal question as it was stated by Appellate Body in *Japan-Alcoholic Beverages* (Japan — Alcoholic Beverages II, Appellate Body Report, WT/DS/9). Therefore, we find it useful to recall those cases to help to define “essential security interests”.

## **2. RESULTS**

Undoubtedly, "essential security interest" is, after all, subject to broad interpretation. While one might recognize the security threat to the United Kingdom during the Falkland Conflict, it is somewhat more difficult to recognize the threat posed to Canada and Australia during that crisis or the threat to the security of Sweden resulting from a decrease in the domestic production of footwear (Sweden-Import Restrictions on Certain Footwear, GATT Doc. L4250, at 1-4 (Nov. 17, 1975) GATT C/M/188). One of the most prominent cases to help clarify “security interests” notion could be *United State Trade measures affecting Nicaragua case* (1985), concerning US embargo on goods and services of Nicaraguan origin. Nicaragua stated that measures imposed by US contravened Articles I, II, V, XI, XIII and that “this was not a matter of national security but one of coercion”. Indeed, coercive measures are agreed to be unlawful; that is the measures which are coercive in the sense of seeking to require the target State to change its policies on any matter within its domestic jurisdiction, in particular with regard to its political, economic and social system (Happold,2016). However at that



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time, GATT dispute settlement system remained institutionally and legally weak to tackle politically sensitive questions. The case was launched under condition, established by the US, that the Panel will only examine whether there was nullification or impairment of economic benefits accruing to Nicaragua and will not assess application of article XXI GATT. In contrast, the International Court of Justice did in fact take the opportunity to examine the use of the security rationale (albeit in the context of a Treaty of Friendship, Commerce, and Navigation (FCN))(14) in *Military and Paramilitary Activities in and against Nicaragua* (Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice, 27 June 1986). The case is extremely significant because the Court clearly examined economic embargo imposed by US and its conformity with FCN security exception. The USA contended that Nicaragua was actively supporting armed groups operating in its neighboring countries and pointed to President Ronald Reagan’s 1985 Executive Order declaring that “the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States”. However the court rejected American defense based on the essential security clause, since it did not find the perceived threat posed by Nicaragua’s aggression in Central America to reach the requirement of essential security (Moon,2012). Meanwhile the court stated that “the concept of essential security interests certainly extends beyond the concept of an armed attack”, but significant militaristic threat is *necessary* to properly invoke the clause. Hereby, a criterion of “necessity” that was broadly examined by the ICJ in case of Nicaragua and is encrypted in the text of the Article XXI is one of the useful judging pillars in cases concerning unilateral economic sanctions.

The *Oil Platforms* case , decided by the ICJ in 2003, further supports this attitude on the national security provision, when court rejected essential security defense argument of the US. In that case the court informed its understanding of the essential security provisions by looking to the right to self-defense of “armed attack” under international law (*Oli Platforms (Iran vs.US)*, Judgment, International Court of Justice, 6 November 2003.). It was stated, that mining a single military vessel is insufficient to justify the American attacks on the Iranian oil platforms (Moon,2012).



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In April 1982 the GATT Council discussed trade restrictions imposed by ECC, Canada and Australia concerning suspension of imports into their territories of products of Argentina. This case is significant because despite the measures were removed in June 1982, Argentina sought an interpretation of Article XXI. These efforts led to the inclusion of para7 (iii) in the Ministerial declaration 29 November 1982: The contracting parties undertake, individually or jointly: ... to abstain from taking restrictive trade measures, for reason of a *non-economic character, non-consistent* with the General Agreement.

In abovementioned disputes in ICJ, as well as in unadopted reports of GATT developing countries were trying to set forward the position that “essential security interests” clause should be interpreted in the light of the basic principles of international law and in harmony with the decisions of the United Nations and of the International Court of Justice and should therefore be regarded as merely providing contracting parties subjected to an aggression with the right of self-defense. They pointed out that Article XXI cannot be applied in an arbitrary fashion for non-commercial reasons, appealing also to the paragraph 7(iii) of the Ministerial Decision of November 1982.

Although not being extensive enough, the practice of ICJ and GATT shows clearly that the threshold for invocation of the national security clause is quite high. It seems that in order to justify economic sanctions as an action necessary to protect essential security interests State has to face significant militaristic threat and meet an established requirement of “necessity”. This supports the view that article XXI was included into GATT Agreement for safeguarding states’ economic interests in wartime or other extreme national emergency situations. This also explains the reason why this provision was rarely used by Member States to justify their measures. Despite being vague, there are requirements to be met and state is obliged to present those “essential national security” interests it considered to be threatened while imposing economic sanctions towards other Member state. Besides, often countries feel that it is wasting of time to challenge economic sanctions imposed by stronger economies when the dispute is politically complicated and Agreement provisions are so vague.

It is shown by the previous cases, that for a specific measure that is claimed to have been adopted for national security purposes to be legal, it has to meet certain criteria. As



it was shown before, the notion of *necessity* is obligatory to consider while imposing unilateral economic sanctions according to the text of the article XXI. In addition to the cases, that was mentioned above, the actual Panel report on *United States-Restrictions on Imports of Tuna* case could be helpful in clarifying the issue of “necessity”.

Nevertheless this panel examination focused on the “necessity” requirement established in article XX, the panel’s findings are still relevant. The only difference between the language of the articles is actually “who” is the one to decide if it is necessary, while the meaning of the term “necessary” should be defined equally (2). In present case, the ECC argued that the term “necessary actually means “indispensable”, “requisite”, “inevitably determined”, or “unavoidable” (United States – Restrictions on Imports of Tuna, DS29/R, para. 3.71.). Therefore, a measure that is otherwise inconsistent with the GATT could only be justified as “necessary” if “there was no alternative measure...that was either consistent or less inconsistent with other GATT provisions” (United States – Restrictions on Imports of Tuna, DS29/R, para. 3.71.). Finally, the GATT Panel assumed the position advanced by ECC.

The biggest milestone and peculiarity of the article’s XXI language is that it allows the action that the member “*considers necessary*” giving this article a self-judging tint. However, as it was intentionally encrypted by drafters, it does not mean that state can do “anything under the sun”. An obligation to engage in its own analysis of whether the measure being contemplated is necessary and required by principles of the organization as well as by the good-faith principle.

In conclusion, in academic literature the “necessity” concept is closely intertwined with the doctrines of both “exhaustion of other peaceful options” and “least trade-restrictive alternative” (Cann, Wesley, 2001). These are extremely important to take into account along with the necessity requirement.

Besides the “necessity” doctrine that was discussed above and which is present in the wording of the article, *good faith principle* stands out as a general principle of international law. There is an opinion that it would be helpful to have a written Article XX-style good faith condition as chapeau for Article XXI as well (Yoo, J., & Ahn, D. (2016)), since the chapeau of the Article XX is known to be a detailed written description of what good faith principle should constitute. Shortly speaking, good faith



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shall be exercised in two stages: firstly, what interests are to be classified as “essential” for every other country; secondly, whether the member “genuinely believes” that regulations are “necessary” to protect those essential security interests. As long as the proper invocation of the article XXI shall seek the proper balance between free trade and security interests, such balance can be achieved and maintained through particularization of the principle of good faith by WTO dispute settlement body.

When imposing unilateral economic sanctions under security exception, it is important to keep in mind that all nations are bound by both treaty and customary international law to the fundamental *principles of sovereignty and non-intervention*. As ICJ stated in Military and Paramilitary Activities case: “nations are prohibited from intervening either directly or indirectly in the internal or external affairs of another State regarding matters that it permitted to decide freely itself, including the choice and implementation of political, economic, social and cultural systems; the formation of foreign policy; the adoption of ideology” (3). We witness a clash of two sides of sovereignty: one state has always sovereignty to implement its own foreign policy while the other state has a right to be free from any kind of interference by others. The proper balance is hard to find and in present times occasionally some states consider themselves “more sovereign than the others”. The matter of interpretation makes this issue even more complicated. For example, while Helms-Burton Act viewed by the US as a mere extension of the an established foreign policy, the ECC, Canada and Latin American States believed that this act in an extraterritorial application of US law and clear invasion to their state sovereignty (Cann, Wesley ,2001).

### 3. CONCLUSION

The security exception represents today an indispensable escape mechanism or international consensus without which the General Agreement on Tariffs and Trade would not be adopted, and probably, would cease to exist. Nations are unwilling to participate in such agreements without the assurance that they have retained the right to protect their sovereignty from external threat. US has been avoiding by any means usage and interpretation of the article XXI throughout GATT/WTO history, as well as undermining their jurisdiction in this regard. Therefore, there is a possible peril that once this provision will be challenged under WTO legislature and the practice will be



established, US might take into consideration to exit the Organization and focus on regional trade agreement policy.

The nature of “essential security interests” of a state is changing as well and needs to be reflected in modern international trade law. It is important to avoid an outdated stuck-in-time system on regulations and to realize that the acceptance of need of regulation will be beneficial for both sides of the conflict. From one side, there will be protection from abuse of the real security interests and authority to invoke economic measures against another state if the clause is more specified. From the other hand, it would promote protection of the essential economic rights established by the WTO Agreement as well as compliance with principles of international law, such as principles of necessity, sovereignty and non-intervention.

How to make one provision that obviously is not workable, effective enough to face challenges of the modern economic relations? The text of the article XXI is outdated and does not reflect relevant security issues, which makes it hard for states to invoke it. There is an opinion that it would be helpful to have a written Article XX-style good faith condition as chapeau for Article XXI as well. The present language of the article XXI also does not take into consideration newly emerged security concerns like terrorism, weapons of mass destructions or cybersecurity issues, which would make it easier for the states to justify their economic sanctions once they have strong reason of such (Lobsinger,2006) (Peng, 2015). However, it depends on the will of the Member States and their trust in WTO system, whether they will allow the WTO to rule on such sensitive issues.

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