The WTO security exception potentially at the center of the fight for a new trading order

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The United States' administration under President Trump reverted to the security exception under WTO rules in order to justify its broad tariff related measures. A statement by the United States Mission to international organizations in Geneva argued in April 2025 that "The United States is not, through this action [i.e. tariff measures], altering or abrogating its WTO tariff bindings or commitments. Rather, with this action, the United States is taking action it considers necessary for the protection of its essential security interests. For this reason, the United States invokes and is maintaining this measure pursuant to the essential security exception in the WTO Agreement".[1] To build towards this position, the US President on "April 2, 2025, … declared a national emergency under domestic law" referring that to "the extraordinary threat to U.S. national and economic security arising from conditions reflected in large and persistent annual U.S. goods trade deficits".[2]

In this approach the US is trying to assert its expansive reading of situations that might justify the application of the security exception. Multiple US administrations have sought to carve-out the WTO security exception from review under the WTO dispute settlement mechanism. In a non-paper circulated at the WTO during December 2024, the US argued for an authoritative interpretation of Article XXI GATT, asking WTO Members to agree that "in any dispute in which a responding party Member invokes GATT 1994 Article XXI, a WTO adjudicator shall not review a Member's invocation of Article XXI and shall instead limit its report to the DSB to note that invocation".[3]

[1] Statement by the United States at the WTO on Reciprocal Tariffs (April 10, 2025), released by the US Mission to the International Organizations in Geneva, available at: https://geneva.usmission.gov/2025/04/10/statement-on-reciprocal-tariffs/ (10th April, 2025)
[2] Ibid.
[3] "WTO: US seeks to terminate litigation of disputes involving security exceptions", published in SUNS #10138 dated 13 December 2024, available at: https://twn.my/title2/wto.info/2024/ti241205.htm

The US links its ask for an authoritative interpretation to the negotiations pertaining to reform of the dispute settlement mechanism. It has been observed that "[i[n the emerging area of great power competition, the United States is unlikely to accept a return to fully effective WTO dispute settlement absent a compromise that finds determinations of national security nonjusticiable"[4]. While this position has been taken by multiple US administrations rather than being a recent position of the Trump administration, the way it is being utilized by the Trump administration adds to the complexity of the matter, especially due to the expansive approach of the current administration to what a "essential security emergency" may entail.

This makes the security exception potentially one of the key elements that the US might seek to influence in the attempt to redraw the basis on which the multilateral trading system operates.

Basics about the security exception and its history

The security exception under Article XXI GATT would justify WTO-inconsistent measures to protect essential security interests in certain listed circumstances, only when related to fissionable materials, the traffic in arms, ammunition and implements of war, or when taken in time of war or other emergency in international relations, and when taken in pursuit of obligations under the United Nations Charter for the maintenance of international peace and security (See the full text of the article in annex). This article is largely replicated under the General Agreement on Trade in Services (Article XIV bis GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (Article 73 of the TRIPS Agreement).

Some history of the negotiations on the security exception

Article XXI GATT has been in force since the original agreement on the GATT 1947. GATS Article XIV*bis* and TRIPS Article 73 were added in 1995. This article finds its roots in a long history of negotiations and is considered one pillar of the architecture of the multilateral trading regime that the United States and allies drew up in light of the end of World War II. The United States played by far the key role in crafting the language that ultimately became GATT Article XXI.[5]

At the time of crafting the language, the United States did not view GATT Article XXI as a mechanism to excuse all restrictions on trade that might be labeled by the country imposing them as national security measures[6]. It is well-documented that "[t]he drafting history of GATT Article XXI shows that most contracting parties engaged in GATT negotiations, including the U.S. negotiators, had never intended the security exception to be construed in a purely self-judging manner. On the contrary, they advocated that national security and trade liberalization should co-exist in a balanced manner and national security should not be construed in a subjective manner so as to allow free flow of trade between members".[7]

During the early Geneva sessions of the Preparatory Committee negotiating GATT Article XXI, the delegate representing the US had noted that "there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: 'by any Member of

[4] Warren Maruyama and Alan Wm. Wolff, "Saving the WTO from the national security exception" (May 2023), available at: https://www.piie.com/publications/working-papers/2023/saving-wto-national-security-exception
[5] Panel report in Russia-Traffic in Transit (WT/DS512/), section 7.5.3.1.2 Negotiating history of Article XXI of the GATT 1947 of the WTO panel report in Russia-Traffic in transit. Report available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/512R.pdf&Open=True
[6] James Bacchus "The Black Hole of National Security" (page 3), available at: https://www.cato.org/policy-analysis/black-hole-national-security
[7] Daria Boklan and Amrita Bahri, "The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box," *World Trade Review* 19 (2020): 132. Referenced in Bacchus, supra n.6, page 6.

measures relating to a Member's security interests,' because that would permit anything under the sun…".[8]

The rationale underpinning Article XXI

There are several justifications for why WTO panels should not completely defer to a WTO Member's judgment about the appropriateness of invoking GATT Article XXI and must evaluate whether the use of the exception is proper. In order to allow for balance between the discretion provided by this provision and the rights and trade interests of other WTO members, reviewability by the WTO adjudicatory mechanism becomes a necessity, the absence of which would make the provision 'prone to abuse without redress'.[9]

In terms of the content of the provision, it can be noted that the article addresses essential rather than 'national' security exceptions. The absence of emphasis on 'national' reinforces to WTO members that justifying action inconsistent with international commitments does not strictly rest on a domestic determination.[10] Furthermore, it is made clear by the limiting of circumstances listed under Article XXI that the exception is not to be approached as self-judging. If it is to be self-judging, the list would arguably become ineffective, contravening the principle that an interpretation must give effect to all provisions of a treaty to ascertain the intended meaning.[11]

Arguably, allowing a WTO Member to take any measure it deems essential to its security interests would defeat one of the central purposes of the WTO agreements and its dispute settlement system, that of providing "security and predictability to the multilateral trading system".[12] As pointed out in a paper by the US Congressional Research Centre, "a reading of GATT Article XXI that permits WTO Members to retain complete discretion over use of the exception could lead countries to enact a multitude of protectionist measures under the guise of national security, potentially undermining the purpose of WTO rules".[13]

The principle of good faith requires from Member States to prove that the measures adopted for security reasons are not intended to circumvent trade obligations thus undermining the

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[8] The Geneva session of the Preparatory Committee negotiating Article XXI, in response to an inquiry as to the meaning of "essential security interests", it was stated by one of the drafters of the original Draft Charter (delegate of the US): "We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: 'by any Member of measures relating to a Member's security interests,' because that would permit anything under the sun. Therefore we thought it well to draft provisions which would take care of real security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance. ... there must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose". Source: Second session of the preparatory committee of the United Nations Conference on trade and employment, E/PC/T/A/PV/33 , 24 July 1947) https://docs.wto.org/gattdocs/q/UN/EPCT/APV-33.PDF#page=21

[9] P. Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge University Press, 2013) 596. See also: Daria Boklan and Amrita Bahri, "The First WTO's Ruling on National Security Exception: Balancing Interests or Open- ing Pandora's Box," *World Trade Review* 19 (2020).

[10] Mona Pinchis-Paulsen, Kamal Saggi, Petros Mavroidis, "The National Security Exception at the WTO: Should It Just Be a Matter of *When* Members Can Avail of It? What About *How*?", available at: https://www.cambridge.org/core/journals/world-trade-review/article/national-security-exception-at-the-wto-should-it-just-be-a-matter-of-when-members-can-avail-of-it-what-about-how/D19FC1EA38DCFF212101D70965CD46FA

[11] In line with rules for treaty interpretation incorporated into Articles 31-33 of the Vienna Convention on the Law of Treaties (Vienna Convention) as applied by the Appellate Body.

[12] Congressional Research Centre in the US states (November 28, 2018), The "National Security Exception" and the World Trade Organization, https://www.congress.gov/crs-product/LSB10223

[13] Ibid, Congressional Research Centre in the US states (November 28, 2018).

rights of other Member States.[14] For decades Members exercised self-restraint in invoking these exceptions, with view of preserving the delicate balance between members' legitimate pursuit of their security interests and their WTO obligations to reduce barriers to trade.[15]

The first Trump administration lost its bet on the security exception

The first trump administration lost its bet on an expansive reading of the security exception.[16] In 2018, during President Trump's first term, the US imposed steel and aluminum tariffs under Section 232 of the Trade Expansion Act of 1962,[17] citing national security concerns particularly issues of self-sufficiency and improved US steel and aluminium capacity utilization. WTO panels ruled in regard to these measures in four separate disputes brought by China, Norway, Turkey, and Switzerland,[18] finding that the measures could not be justified under the security exception. Besides the cases on steel and aluminum, WTO panels applied GATT Article XXI(b)(iii) and its chapeau, as well as its identical provision in the TRIPS Agreement[19] in three other cases (*Russia – Traffic in Transit* (DS512), *Saudi Arabia – IPRs* (DS567), and *US – Origin Marking (Hong Kong, China* DS597)).[20] The 2022 decision against the United States in the four cases brought by China, Switzerland, Norway, and Turkey built on the previous decisions and provided more clarity in regard to the language contained within Article XXI(b)(iii) GATT, how and when Article XXI(b)(iii) GATT should be applied in a given scenario, and who ultimately has the authority to make these determinations – the Member State or a WTO dispute resolutionpanel.[21]

Adjudicators in these cases grappled with questions pertaining to the jurisdiction of WTO dispute settlement panels to review the invocation of Article XXI(b), its scope of application, and the relationship required between the measure taken and the stated objective as enumerated under Article XXI(b) GATT. In the *Russia -Traffic* case, the panel ventured for the

[14] See for example Panel report in Russia–Traffic in Transit, paras 7.138 and para. 7.145. The Panel 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 Article 31(1) ('[a] treaty shall be interpreted in good faith …') and Article 26 ('[e]very treaty … must be performed [by the parties] in good faith') of the Vienna Convention." See also: Panel Report, Russia – Traffic in Transit, paras. 7.131-7.132. The panel found that the obligation of good faith imparted a minimum requirement of plausibility when examining the emergency at issue and the measures imposed in response.

[15] T. Voon, 'Can Interbational Trade Law Recover? The Security Exception in WTO Law Entering a New Era', 45 *American Journal of InternationalLaw* (2019) 113. Chicago 17th ed. See also: Daria Boklan; Amrita Bahri, "The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box?," World Trade Review 19, no. 1 (January 2020): 123-136.

[16] Klint W. Alexander, "The 2022 US Steel/ Aluminum Tariff Ruling: a Legal Reckoning for the United States and The WTO Over the National Security Exception in International Law". Available at: https://aulawreview.org/blog/the-2022-u-s-steel-aluminum-tariff-ruling-a-legal-reckoning-for-the-united-states-and-the-wto-over-the-national-security-exception-in-international-law/

[17] During Trump's first term, tariff impositions were preceded by formal investigations under statutory provisions. For instance, tariffs on steel and aluminium were introduced under Section 232 of the Trade Expansion Act of 1962, following a Commerce Department investigation into national security concerns. Similarly, tariffs on Chinese imports were imposed under Section 301 of the Trade Act of 1974, which required a prior investigation by the USTR.

[18] See WTO disputes DS544, DS552, DS556, DS564. Summary of the decisions available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds556sum_e.pdf. Five more cases were initiated in relation to the steel and aluminum tariffs, but either terminated, lapsed or ended with mutual agreement. Several States participated as third parties in these cases, including Bahrain, Brazil; Canada; China; Colombia; Egypt; European Union; Guatemala; Hong Kong, China; Iceland; India; Indonesia; Japan; Kazakhstan; Malaysia; Mexico; New Zealand; Qatar; Russian Federation; Saudi Arabia, Kingdom of; Singapore; South Africa; Switzerland; Chinese Taipei; Thailand; Turkey; Ukraine; United Arab Emirates; Venezuela.

[19] Article 73(b)(iii) and its chapeau.

[20] The panel report in *Russia – Traffic in Transit* (DS512), which is the only one that has formally been adopted by the Dispute Settlement Body (DSB); the panel report on *Saudi Arabia – IPRs* (DS567) that has not been adopted as the two disputing parties agreed to terminate the dispute following Saudi Arabia's appeal; panel reports on *US – Steel and Aluminium Products* (DS544, etc.) and *US – Origin Marking (Hong Kong, China)* (DS597) that have yet to be adopted as they are currently subject to appeal (by the United States).

[21] Klint W. Alexander, supra n. 16.

first time into a comprehensive analysis of article XXI, reviewing the negotiation history of the article, and confirming that article XXI(b)(iii) is not 'self-judging',' [22] and that WTO Panels have inherent jurisdiction to adjudicate the article's invocation.[23] Also, the Panel in US – Steel and Aluminium Products (Turkey), after a detailed textual/grammatical analysis of the text, rejected the United States' argument on the self-judging nature or non-justiciability of Article XXI(b).[24]

The panel in Russia-Traffic set three-tiered test for reliance on Article XXI(b) including (i) the measure must have been taken 'in time of ... an emergency in international relations'; (ii) the invoking State must articulate the specific essential security interest it seeks to protect; and (iii) the invoking State must demonstrate that the measure is plausibly taken to protect its asserted interest.[25] In regard to the circumstances enumerated under GATT Article XXI(b)(iii), the panel in Russia – Traffic in Transit rejected the view these are "self-judging" or "non-justiciable" and concluded that the requirements are of an objective nature, and that the phrase "which it considers" does not qualify the determination of the circumstances described in that subparagraph.[26]

The panel was of the opinion that "it is … incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity. What qualifies as a sufficient level of articulation will depend on the emergency in international relations at issue. In particular, the Panel considers that the less characteristic is the 'emergency in international relations' invoked by the Member, i.e. the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise. 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."[27] Furthermore, the panel considered that the existence of an emergency in international relations requires circumstances more serious than political or economic differences between relevant Members.[28]

In the cases on steel- aluminum, the Panel considered that an “emergency in international relations” under Article XXI(b)(iii) refers to situations of a certain gravity or severity and international tensions that are of a critical or serious nature in terms of their impact on the conduct of international relations. [29] The Panel disagreed with the United States' arguments that global excess capacity in steel and aluminium pointed to an emergency in international relations.[30] In doing so, the panel attempted to set boundaries on the reading of situations that could fall under Article XXI(b)(iii).

Consequently, the Panel did not find that the US measures were “taken in time of war or other emergency in international relations”, and concluded that the inconsistencies of the measures

[22] Panel Report, Russia - Traffic, WTO Doc WT/DS512/R, para. 7.102-7.103.
[23] Panel Report, Russia - Traffic, WTO Doc WT/DS512/R, para. 7.53.
[24] Panel Report, US – Steel and Aluminium Products (Turkey), paras. 7.121-7.137.
[25] WTO analytical index on Article XXI GATT, available at: https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art21_jur.pdf. See also: Daniel Kang Wei-En, Adapting Gatt Article XXI(B)(III) to Climate Change Threats: An Overdue Rethinking of Security Blues for an Urgent Green Way Forward?, 27 AUSTL. INT'l L.J. 103 (2020).
[26] Panel Report, Russia – Traffic in Transit, para. 7.82. Similarly, the Panel in US – Origin Marking (Hong Kong, China) concluded that the phrase "which it considers" in the chapeau of Article XXI(b) does not extend to its subparagraphs. This position was also supported by third parties that commented on Article XXI(b) in this case. See Panel Report, US – Origin Marking (Hong Kong, China), paras. 7.29-7.31
[27] Panel Report, Russia – Traffic in Transit, para. 7.134-7.135
[28] Panel Report, Russia – Traffic in Transit, paras. 7.75-7.76.
[29] Panel Report, US – Steel and Aluminium Products (Turkey), para. 7.154.
[30] Panel Report, US – Steel and Aluminium Products (Turkey), paras. 7.162-7.163, and para. 7.164.

at issue with certain provisions of the GATT were not justified under Art. XXI(b)(iii).[31] The Panels found that the duties on steel and aluminium were inconsistent with Article II:1 GATT as they exceeded the bound tariff rates in the United States' WTO Schedule of Concessions, that exemptions from the duties granted to steel and aluminium products from certain countries were inconsistent with the requirement of most-favoured-nation treatment under Article I:1 GATT, and that quotas on steel and aluminium products from certain countries were inconsistent with the requirement to eliminate quantitative restrictions under Article XI:1 GATT.[32]

The decisions of the Panels are on appeal, while the function of the Appellate Body (AB) is halted due to the US position blocking the appointment of AB adjudicators. The position of the US, as reflected in its notice of appeal, argues that "issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement. Every Member of the WTO retains the authority to determine for itself those measures that it considers necessary to the protection of its essential security interests…". The US adds that "bringing issues of national security into the WTO is not only incompatible with the purpose of the WTO, a trade organization, but will not advance WTO Members' shared interests in the WTO as a forum for discussion and negotiation".[33]

The dangers of weakening the boundaries of the security exception

Article XXI GATT was designed in a period significantly different from today's context. The nature of security issues that States may face today does not necessarily link to wars, arms and related material as reflected under Article XXI(b). It has been argued for example that the climate crisis requires that States incorporate new dimensions of security threatening conditions under Article XXI.[34] Testing some approaches to complement Article XXI approach is emerging in bilateral and regional trade agreements (these includes under the US FTA model as well as bilateral trade agreements between other countries).[35] Approaches adopted in bilateral and regional agreements are often defined by the specific interests and conditions of the parties to the agreement and do not necessarily provide an effective model for the multilateral trading rules.

[31] See summary of the panel's findings: https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds556sum_e.pdf
[32] See reports in dispute cases DS552; DS556; DS564.
[33] US notification of appeal in US- Certain Measures on Steel and Aluminum Products, WT/DS544/14, 30 January 2023, available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/544-14.pdf&Open=True . For more details, see: https://www.wto.org/english/news_e/news23_e/ds544_552_556_564apl_30jan23_e.htm
[34] Sophia Fossali, The Perfect Climate for Environmental Trade Coordination: An Analysis of the EU Carbon Border Adjustment Mechanism through GATT Articles XX and XXI, 54 GEO. J. INT'l L. 639 (2023)
[35] For example: Article 17.13: Security Exceptions in RCEP that refers to measures "taken so as to protect critical public infrastructures including communications, power, and water infrastructures". See also https://ielp.worldtradelaw.net/2025/08/new-security-exception-language.html, referring to UK-India trade agreement Chapter 28, Article 28.2, which adds language pertaining to measures "…necessary for the protection of its essential security interests, including in time of national emergency or relating to the protection of critical public infrastructure, whether publicly or privately owned, including communications, power and water infrastructure, subject to the requirement that such action is not taken in a manner which would constitute a disguised restriction on trade". See also: US FTAs that provide "Nothing in this Agreement shall be construed: . . . to preclude a Party from applying measures that it considers necessary . . . for the protection of its own essential security interests", examples: USFTAs with Australia, Bahrain, CAFTA, Chile, NAFTA, Morocco, Oman, Singapore, USMCA. Some include an additional clarificatory footnote: "'For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies". Examples: USFTAs with Colombia, Republic of Korea, Panama, Peru

Discussions on the relevance and application of the security exception require close attention to the political and economic power asymmetries, which are blatantly exercised today. WTO Member States might find value in collectively discussing and assessing the relevance of WTO rules in today's context, and potentially negotiating ways of making the rules more relevant for today's trading context. However, such exercise significantly differs from attempts to carve-out Article XXI GATT from reviewability by independent adjudicators. The latter will have major systemic implications and will potentially make this provision a major weak point in rules that is prone for abuse. A non-justiciable security exception is more likely to be abused by certain States with political and economic might that do not face a plausible threat of retaliation. It could eventually morph into a major loophole that allows only certain 'powerful' States a space to opt out of the rules without accountability, thus undermining the rights of the rest of the WTO Membership.

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Annex

Article XXI GATT provides that:

"Nothing in this Agreement shall be construed

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

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."