


# Shedding Light on WTO Jurisdiction and Preventing Abuse of The Security Exception Provision

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## Abstract

This paper critically analyzes the World Trade Organization (WTO) jurisdiction over disputes involving the use of the Security Exception (SE) under Article XXI(b) of the General Agreement on Tariffs and Trade (GATT) 1994, and explores measures the WTO could take to prevent the abuse of this provision. The study utilizes legislative, case-based, and historical approaches within a normative juridical framework to examine the complexities surrounding the invocation of the SE. First, the paper demonstrates that the WTO does indeed have jurisdiction over disputes involving the SE, countering the perception that the 'self-judging' nature of Article XXI(b) absolves the WTO of oversight. This argument is supported by the WTO panel's ruling in *Russia – Traffic in Transit* and reinforced by historical precedents, which confirm that affected countries can engage in consultations with the invoking state. Second, the paper identifies two critical instruments that could prevent the abuse of the SE provision. These instruments are rooted in the

interpretation of the SE's text, guided by the ordinary meaning of its terms, in accordance with the principle of good faith. The paper argues that more precise definitions of what constitutes an emergency situation affecting state security are essential to prevent the misuse of the SE for protectionist or politically motivated purposes. Ultimately, the research calls for a more robust framework to ensure that the Security Exception serves its intended purpose—protecting legitimate national security interests—while preventing its exploitation for unjustifiable trade barriers. The WTO must develop clearer guidelines and stronger mechanisms for transparency and accountability to maintain the integrity of the global trading system.

**KEYWORDS** *Security Exception, WTO, Self-judging, Abuse*

## Introduction

In international affairs, the invocation of national security has often served as the ultimate justification for a state's actions, even leading to the nullification of previously agreed policies. This has invoked concerns about the invocation of national security's impact on international treaties.<sup>1</sup> To understand this phenomenon in relation to international trade, we need to delve into the concept of 'security.' Security is a complex and multifaceted idea, encompassing factors like health, life, status, wealth, and freedom, making it challenging to assess.<sup>2</sup> However, it boils down to the feeling of being safe from threat or danger. National security and individual security are intertwined, with states protecting their people from both internal and external threats.<sup>3</sup> In the context of international trade, national security takes on a different role but with similar underlying principles. States must safeguard their interests, including their national security, before considering foreign nations in the trade arena.

The growth of the international trade arena through legal cooperation has led to conflicting interests among participating states. The essence of liberalization in international trade aims to remove barriers and encourage the

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<sup>1</sup> Sebastián Mantilla Blanco and Alexander Pehl, *National Security Exceptions in International Trade and Investment Agreements: Justiciability and Standards of Review*, SpringerBriefs in Law (Cham: Springer International Publishing, 2020), 1–2, <https://doi.org/10.1007/978-3-030-38125-7>.

<sup>2</sup> Barry Buzan, *People, States, and Fear: The National Security Problem in International Relations* (Brighton: Wheatsheaf Books, 1983), 18–19.

<sup>3</sup> Buzan, pp. 21–22.

exchange of goods and services to promote development. The key challenge lies in striking a balance between the objectives of international cooperation and the interests of the state parties, with flexibility being offered as a means to reach that balance. The security exception (SE) provision in the General Agreement on Tariffs and Trade (GATT) and other international treaties grants flexibility to states under certain circumstances. This provision allows states to take measures contrary to a treaty's obligations to protect their essential national security interests.<sup>4</sup> The SE covers areas like fissionable materials, arms trafficking, and actions taken during emergencies or in pursuit of international peace and security.<sup>5</sup>

However, it is important to note that the SE provision is not identically drafted across different treaties, leading to variations in scope and applicability.<sup>6</sup> Some provisions are limited to specific goods or situations,<sup>7</sup> while others are broader and require actions to be deemed 'necessary' for protection of essential security interests.<sup>8</sup> While the original intent of the SE provision was to recognize a state's primary duty to protect national security, over time, it has been used to justify restrictions on economic activities under the pretext of security interests. Examples of this abuse include Ghana restricting goods from Portugal, the United States' export control policies, and Sweden's imposition of import quotas on shoes. Overall, the SE provision grants states the authority to safeguard their national security, but its application has raised concerns about its potential abuse for economic protectionism rather than genuine security concerns.<sup>9</sup>

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<sup>4</sup> Mantilla Blanco and Pehl (n 1) 6.

<sup>5</sup> World Trade Organisation, "The General Agreement on Tariffs and Trade" (1994), art. XXI.

<sup>6</sup> Dominik Eisenhut, "Sovereignty, National Security and International Treaty Law. The Standard of Review of International Courts and Tribunals with Regard to 'Security Exceptions,'" *Archiv Des Völkerrechts*, 48. Bd., no. 4 (2010): 433.

<sup>7</sup> For example, Article XXI (b) of GATT and Article 2102 of the North American Free Trade Agreement which only can be invoked to certain goods – nuclear materials and military equipment – or in cases of international emergencies which also included the event of war. *See* *ibid* 434; GATT (n 5) art. XXI (b); "The North American Free Trade Agreement" (n.d.), art. 2102.

<sup>8</sup> Another type of the security exception provision, does not provide any subjectification nor objectification and only require such provisions only taken visibly to be 'necessary' for the protection of essential security interest *See* Eisenhut (n 8) 435; European Union, "The Treaty on the Functioning of the European Union" (n.d.), art. 36.

<sup>9</sup> World Trade Organization, "WTO Analytical Index: GATT 1994," 2023, 601, <https://www.wto-ilibrary.org/content/reports/25193368/10,.et>

The Security Exception (SE) provision under the World Trade Organization (WTO) has been used by various parties to justify quotas and restrictions on trading activities. However, the outcomes of cases involving SE have varied widely. For instance, in Czechoslovakia's lawsuit against the United States, the complaint was rejected by most countries, citing the Security Exception as a valid reason for the U.S. provisions. Similarly, Sweden used the SE to impose global quotas on shoe imports, leading to doubts and complaints from multiple countries. After consultations, Sweden eventually removed the quota in 1977.<sup>10</sup> Another case involved EEC Countries, Canada, and Australia, where Argentina's demands against the quota imposed by them were denied in a 'Decision regarding Article XXI in the GATT.'<sup>11</sup> Despite these disputes, the invocation of SE has been primarily resolved through alternative means rather than the formal WTO Dispute Settlement Body (DSB). The lack of clear rules concerning the SE article has contributed to its potential misuse for protectionist purposes, leading to unnecessary trade barriers and hampering the flow of goods between and among state parties.<sup>12</sup>

Furthermore, the 'self-judging' characteristic of Article XXI, which grants states the right to judge their own actions based on national security interests, has gained support from various countries. This perception has been evident in case like Russia's argument in the Russia – Traffic in Transit case and the U.S.'s argument in the US – Steel and Aluminum case, where both countries claimed that the WTO lacked jurisdiction due to Article XXI's self-judging and non-

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<sup>10</sup> World Trade Organization, "Sweden - Import Restriction On Certain Footwear," Notification on GATT Council, November 17, 1975, [https://www.wto.org/gatt\\_docs/English/SULPDF/90920073.pdf](https://www.wto.org/gatt_docs/English/SULPDF/90920073.pdf); World Trade Organization, "Summary Record on Twenty-Second Meeting," Summary (Annex: GATT Council, June 8, 1949), 9, <https://docs.wto.org/gattdocs/q/GG/GATTCP3/SR22.PDF>; World Trade Organization, "Council of Representatives - Report on Work Since Thirtieth Session," Summary (GATT Council, November 25, 1975), <https://docs.wto.org/gattdocs/q/GG/L4399/4254.PDF>; World Trade Organization, "Addendum to Sweden - Import Restriction On Certain Footwear," Notification on GATT Council, March 17, 1977, 2, <https://docs.wto.org/gattdocs/q/GG/L4399/4250A1.PDF>.

<sup>11</sup> "Decision Concerning Article XXI of the General Agreement" (World Trade Organization, 1982), [https://www.wto.org/gatt\\_docs/english/SULPDF/91000212.pdf](https://www.wto.org/gatt_docs/english/SULPDF/91000212.pdf).

<sup>12</sup> Chao Wang, "Invocation of National Security Exceptions under GATT Article XXI: Jurisdiction to Review and Standard of Review," *Chinese Journal of International Law* 18, no. 3 (September 1, 2019): 697, <https://doi.org/10.1093/chinesejil/jmz029>.

justiciable nature.<sup>13</sup> The absence of a formal adjudication system for SE cases and the support for self-judging characteristics have resulted in the erosion of the WTO's jurisdiction in resolving disputes related to Article XXI. The resolution of SE-related problems through informal means without official recommendations has limited the legal force of interpretation and hindered the establishment of precedent for future cases involving security exceptions. As such, the issues surrounding the use of the SE continue to pose challenges for the WTO's dispute resolution mechanism, leading to uncertainty and potential abuse of this provision.

The absence of precedent governing this issue creates an opportunity for further interpretation by WTO member countries regarding jurisdiction when a country uses Article XXI to justify trade quotas in the future. The case of Russia – Traffic in Transit has shed new light on resolving disputes and provided the WTO's DSB with a new standard for addressing such cases, including DSB jurisdiction and defining National Security for invoking Article XXI(b). In regards to the discussion above, this article research objectives are focusing on the legal issues surrounding WTO's use of the SE article, examining interpretations that intersect with the SE's use. It specifically addresses DSB jurisdiction in SE disputes and the concept of 'Emergency in International Relations' embedded in the language of the SE article. The research aims to clarify the WTO's jurisdiction on issues involving the SE as a basis for disregarding GATT regulations. Clarity on the use of the SE article is crucial for WTO member countries, especially developing nations, to protect their national security interests properly while abiding by WTO regulations.

This research is normative juridical research that uses legislative, case, and historical approaches. This descriptive research examines the phenomenon and provides a comprehensive explanation for and solution to this phenomenon. In addition, this research is not intended to confirm or debunk a theory but uses theory as a basis to explain phenomena. Data collection in this study was obtained from secondary sources including books, journals, articles in books, magazines, newspapers, government documents or published papers, the internet, archives and reports, previous survey results, and other references related to the research topic. The author uses qualitative analysis techniques. These techniques emphasize the author's interpretation of the sources of data

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<sup>13</sup> World Trade Organisation, "Russia - Measures Concerning Traffic In Transit (WT/DS512/R)," Report of the Panel (World Trade Organization, April 5, 2019), para. 7.26 [Russia - Traffic]; World Trade Organization, "United States – Certain Measures On Steel And Aluminium Products: Report Of The Panel," Report of the Panel (World Trade Organization, December 9, 2022), para. 7.105.

obtained. The types of data that are analyzed in this study can be in the form of international law and cases related to the activity of international trade, especially on the invocation of security exception article in the GATT.

## **Legal Principle and Case Studies on the Jurisdiction of WTO towards The Security Exception Provision**

### **A. The jurisdiction of the WTO DSB over the use of Article XXI of the GATT**

The WTO's dispute settlement system faces two key problems concerning the use of the SE provisions. Firstly, the brevity of the SE article's terminology creates ambiguity, allowing member countries to impose restrictions or quotas on economic activities justified by varying interpretations.<sup>14</sup> Secondly, defining national security is challenging, as each member state can determine its own vital security interests. The self-judging nature of Article XXI gives countries broad discretion,<sup>15</sup> leading to a presumption that the WTO cannot intervene in disputes regarding its use.<sup>16</sup>

As a result, countries have increasingly used the SE clause to impose trade quotas under the pretext of security interests.<sup>17</sup> Examples of this include Japan restricting chemical exports to South Korea,<sup>18</sup> India withdrawing trade preferences from Pakistan,<sup>19</sup> and Qatar challenging neighboring countries over

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<sup>14</sup> Wang (n 12) 698.

<sup>15</sup> Viktoriia Lapa, "The WTO Panel Report in Russia – Traffic in Transit: Cutting the Gordian Knot of the GATT Security Exception?," *Question of International Law, Zoom In* 69 (2020): 5.

<sup>16</sup> US – Aluminum (n 13); Russia – Traffic in Transit (n 13); Sandeep Ravikumar, "The GATT Security Exception: Systemic Safeguards Against Its Misuse," *NUJS Law Review* 9, no. 3–4 (2016): 329.

<sup>17</sup> Mona Pinchis-Paulsen, "Trade Multilateralism And U.S. National Security: The Making Of The Gatt Security Exceptions," *Michigan Journal of International Law* 41, no. 1 (Spring 2020): 112; Alan Wm. Wolff and Warren Maruyama, "Saving the WTO from the National Security Exception," *SSRN Electronic Journal*, 2023, 7, <https://doi.org/10.2139/ssrn.4453718>. [Paulsen]

<sup>18</sup> Yordan Gunawan, M Fabian Akbar, and Eva Ferrer Corral, "WTO Trade War Resolution for Japan's Chemical Export Restrictions to South Korea," *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 9, no. 3 (2022): 419, <https://doi.org/10.22304/pjih.v9n3.a6>.

<sup>19</sup> Zahida Rashid and A. Z. Hilali, "Geo-Politics of Most Favoured Nation (MFN) Status under the WTO and Future of Trade between India-Pakistan," *Liberal Arts and Social Sciences International Journal (LASSIJ)* 4, no. 1 (September 18, 2020): 63, <https://doi.org/10.47264/idea.lassij/4.1.6>.

alleged trade violations amid security concerns.<sup>20</sup> Furthermore, tensions over Huawei's 5G technology<sup>21</sup> and the imposition of tariffs by the U.S. on steel and aluminum imports, have added to the arbitrary use of the SE provisions.<sup>22</sup> In summary, the SE article's ambiguous language and self-judging nature<sup>23</sup> have given countries significant leeway to impose trade measures, raising concerns about its potential abuse for protectionist purposes under the guise of national security.

The trend of major countries claiming that the WTO disputes settlement system lacks jurisdiction when member countries invoke the SE article need clarification through provisions regarding WTO dispute settlement regulations (DSU). DSU regulations show that the DSB indeed has jurisdiction to resolve problems arising from the use of provisions under the WTO,<sup>24</sup> including the SE article, without requiring special procedures.<sup>25</sup> In the Russia – Traffic in Transit case, the respondent argued that the SE article provided immunity from DSB adjudication, claiming it as 'self-judging'<sup>26</sup> or 'non-justiciable.'<sup>27</sup> However, international regulations require interpretations to be done in 'good faith'<sup>28</sup> and aligned with the original provisions' purpose.<sup>29</sup>

<sup>20</sup> World Trade Organization, "WTO | Dispute Settlement - DS526: United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights," accessed March 5, 2023, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds526\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds526_e.htm).

<sup>21</sup> Verensia Vista Monzalsha, Arie Kusuma Paksi, and Muhammad Dafa Hanggariksa, "Australia-China Trade Tensions During the Covid-19 Pandemic: Australia's Reaction to China Trade Sanctions," *International Journal of Multicultural and Multireligious Understanding* 10, no. 2 (February 2023): 159, <http://dx.doi.org/10.18415/ijmmu.v10i2.4293>.

<sup>22</sup> Paulsen (n 17) 113.

<sup>23</sup> Tatiana Lacerda Prazeres, "Trade and National Security: Rising Risks for the WTO," *World Trade Review* 19, no. 1 (January 2020): 139, <https://doi.org/10.1017/S1474745619000417>.

<sup>24</sup> World Trade Organization, "Understanding on Rules And Procedures Governing The Settlement of Disputes" (1986), [https://www.wto.org/english/docs\\_e/legal\\_e/28-dsu.pdf](https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf).

<sup>25</sup> *Ibid* art. 1.2. and Appendices 2.

<sup>26</sup> Russia – Traffic (n 13) para. 7.57

<sup>27</sup> US – Aluminum (n 13).

<sup>28</sup> Kartikey Vipul Misra, "Analysing the 'Self Judging' Nature of Article XXI of the GATT," *International Journal of Legal Science and Innovation* 4, no. 1 (2022): 597, <https://doi.org/10.10000/IJLSI.111358>.

<sup>29</sup> "Vienna Convention on The Law of Treaties 1969" (1969), art. 31 (1). [VCLT]

The general objective of WTO agreements is to promote safety, predictability, and the reduction of trade barriers.<sup>30</sup> While the GATT 1994 and WTO agreements allow exceptions for non-trade objectives, applying article XXI ‘self-judgingly’ frustrates the multilateral trading system’s purposes.<sup>31</sup> The panel to this case opines that DSB has full jurisdiction over all cases involving WTO rules, including the use of article XXI(b)(iii),<sup>32</sup> despite claims of immunity.<sup>33</sup> The interpretations of article XXI(b)(iii) should be limited to its provisions, especially regarding the definition of an ‘emergency in international relations.’<sup>34</sup>

Through this interpretation, the panel confirmed that the dispute settlement system of the WTO has jurisdiction over the exercise of the SE article through the DSU regulations which explains that all consultations on problems that arise as a result of implementing obligations under WTO regulations are within the scope of this dispute settlement system.<sup>35</sup> The emphasis on the jurisdiction of the DSB on the problems arising from the use of this article has also succeeded in counteracting and disproving the paradigm that such article allows ‘self-judgment’ which has so far been considered embedded in every use by the parties.

## B. Clarity to Prevent Abuse of the GATT Security Exception Articles

The International Court of Justice has rejected the ‘political question’ argument,<sup>36</sup> affirming that the settlement system has jurisdiction to resolve legal

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<sup>30</sup> Kentaro Ikeda, “A Proposed Interpretation of GATT Article XXI(B) (II) In Light of Its Implications For Export Control,” *Cornell International Law Journal* 54 (February 1, 2021): 15, <https://ssrn.com/abstract=3815334>.

<sup>31</sup> Russia – Traffic (n 13) para 7.79.

<sup>32</sup> *Ibid.* para. 7.104.; VCLT (n 29).

<sup>33</sup> In the US – Aluminum case, US also argued that the invocation of SE article is ‘non-justiciable.’ See US – Aluminum (n15) para 6.15.

<sup>34</sup> *Ibid* para 7.128.; Russia – Traffic (n 13) para 7.101.; VCLT (n 29).

<sup>35</sup> Gabriela Feret, “Invocation of the GATT Security Exception after the Russia – Traffic in Transit Case,” *Acta Iuridica Resoviensia* 35, no. 4 (2021): 38, <https://doi.org/10.15584/actaires.2021.4.3>.

<sup>36</sup> The political question doctrine states that courts cannot adjudicate certain claims due to their political nature, and therefore courts must dismiss such claims for lack of jurisdiction without reaching the merits. the arguments made by the United States show a desire to put the ‘political question’ doctrine into international trade law. see Iryna Bogdanova,



issues raised in cases or advisory opinions, regardless of political aspects.<sup>37</sup> However, in reality, political interests are closely tied to national security concerns. Some countries argue that matters related to ‘essential security’ fall under their discretion argue against intervention by the WTO or its members.<sup>38</sup> Such an interpretation would seemingly grant immunity to countries invoking the SE article from WTO obligations and dispute settlement mechanisms.<sup>39</sup> Applying the doctrine of the ‘political question’ in international law contradicts basic principles since international law lacks a separation of powers like national legal systems. Thus, it remains uncertain whether this doctrine can become a reality in international law,<sup>40</sup> especially concerning WTO regulations.

The proposal to include the SE article in WTO regulations dates back to the ITO (the predecessor organization to the WTO) charter’s draft. The U.S. proposed this article to protect national interests from ITO review when in conflict with charter obligations.<sup>41</sup> The proposal sparked differing opinions among ITO members, with some supporting and others opposing it due to potential use.<sup>42</sup> Ultimately, the article won a majority vote, limited to matters of national security only.<sup>43</sup> Consultations were held on the proposal to include the SE article in the ITO charter. Australia and other nations raised concerns about effectively granting immunity from consultations to countries when invoking this article with affected nations.<sup>44</sup> The U.S. responded that the SE’s

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“Adjudication of the GATT Security Clause: To Be or Not to Be, This Is the Question,” *SSRN Electronic Journal*, 2019, 13, <https://doi.org/10.2139/ssrn.3359187>. [Bogdanova]

<sup>37</sup> “Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter),” Advisory Opinion (International Court of Justice, July 20, 1962), 155–56.

<sup>38</sup> Bogdanova (n 36).

<sup>39</sup> Peter Van den Bossche and Sarah Akpofure, “The Use and Abuse of the National Security Exception under Article XXI(b)(Iii) of the GATT 1994,” in *WTI Working Paper No. 03/2020* (Beijing Conference on the New Global Economic Order, Beijing: Universitat Bern, n.d.), 5 para. 3. [Bossche and Akpofure]

<sup>40</sup> Bogdanova (n 36) 14.

<sup>41</sup> Russia – Traffic (n 13) para. 7.85 and 7.87.

<sup>42</sup> *Ibid* para. 7.89.

<sup>43</sup> After the vote was taken, this article finally won a majority of votes from member countries, provided that this article is a separate article from the General Exception article and the use of this article is only limited to matters of national security and nothing more. *See ibid* para. 7.92

<sup>44</sup> Jay Manoj Sanklecha, “The Limitations on the Invocation of Self-Judging Clauses in the Context of WTO Dispute Settlement,” *Indian Journal of International Law* 59, no. 1–4 (February 2021): 7, <https://doi.org/10.1007/s40901-019-00108-6>.

use does not invalidate other countries' right to hold consultations if their economic interests are harmed.<sup>45</sup>

Despite the proposal's original intent, to concern national security matters only without preventing consultations, recent events have shown that countries view the SE as shielding them from intervention and consultation, even when using the 'emergency in international relations' clause to justify disregarding GATT provisions.<sup>46</sup> This opportunistic behavior frustrates the article's intended purpose and defiles its purity. In the Russia – Traffic in Transit case, the panel aimed to prevent abuse of Article XXI(b) – the core of the SE article.<sup>47</sup> The Panel considered that the *chapeau* of this article does not grant broad discretion but is limited to three specific sub-paragraphs: (1) fission materials; (2) trade in weapons and military goods; and (3) emergencies in international relations.<sup>48</sup> Each sub-paragraph requires good faith interpretation in line with the original terminology and the role of provisions, as stated in the Vienna Convention on the Law of Treaties (VCLT).<sup>49</sup>

To ensure proper exercise of the SE article, specificity in its invocation is essential. The panel in the Russia – Traffic in Transit case outlined specific conditions for an 'emergency in international relations.'<sup>50</sup> Russia produced scenarios such as riots at its border, loss of neighboring countries' border control, refugee migration, and unilateral (or at least unauthorized by the UN) sanctions imposed by neighboring countries, similar to those from Ukraine.<sup>51</sup> Regarding the review of Ukraine's trade policy in 2016, Russia argued it identified an emergency situation affecting its security. However, Ukraine

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<sup>45</sup> *Ibid* para. 7.94.; Jacob Gladysz, 'The National Security Exception in WTO Law: Emerging Jurisprudence and Future Direction' (2021) 52 Geo J Int'l L 835, 844

<sup>46</sup> Bogdanova (n 36) 2-3.; Gladysz (n 45) 841.

<sup>47</sup> Gladysz (n 45) 839.

<sup>48</sup> Russia – Traffic (n 13) para. 7.101.; GATT (n 7) art. XXI (b).

<sup>49</sup> Ramadhan Bismono, Joko Priyono, and Nanik Trihastuti, "The Problems of Interpreting GATT Article XXI(b)(iii) in *Russia – Traffic in Transit*," *Journal of International Trade Law and Policy* 21, no. 1 (February 14, 2022): 70–71, <https://doi.org/10.1108/JITLP-10-2021-0054>; Yen-Chiang Chang, "Letter to the *Journal* Dual-Use Products in the Course of Considering National Security Exceptions under GATT Article XXI," *Chinese Journal of International Law* 21, no. 2 (September 23, 2022): 383, <https://doi.org/10.1093/chinesejil/jmac021>.

<sup>50</sup> Russia – Traffic (n 13) para. 7.135.

<sup>51</sup> *Ibid* para 7.114.

objected, and Russia clarified the review, serving as a condition for identifying the emergency, not as the basis of their argument.<sup>52</sup>

The panel defined ‘emergencies’ as armed conflicts, latent conflicts, tensions, escalating crises among member countries, or general instability.<sup>53</sup> Considering the evidence presented, the panel validated Russia’s invocation of the SE article due to the poor relations and UN-recognized armed conflict between Ukraine and Russia, along with sanctions imposed on Russia since 2014.<sup>54</sup> In other cases, similar to Russia – Traffic in Transit, such as U.S. – Certain Steel and Aluminum Products, the panel used the same standard to define ‘emergency in international relations,’<sup>55</sup> then the U.S. argued that excess capacity in steel and aluminum production constituted an emergency, justifying additional import duties.<sup>56</sup> However, the panel rejected this argument, stating it didn’t meet the gravity and severity required for invoking the ‘emergency’

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<sup>52</sup> *Ibid* para 7.115.

<sup>53</sup> Tao Du and Ziwen Ye, “Trade Control and Wto Law: Examining the Adequacy of the Gatt Exception,” in *A Chinese Perspective on WTO Reform*, ed. Lei Zhang and Xiaowen Tan (Singapore: Springer Nature Singapore, 2023), 589, <https://doi.org/10.1007/978-981-19-8230-9>; Tania Voon, “Russia—Measures Concerning Traffic in Transit,” *American Journal of International Law* 114, no. 1 (January 2020): 99, <https://doi.org/10.1017/ajil.2019.72>; Joel Slawotsky, “The Fusion of Ideology, Technology and Economic Power: Implications of the Emerging New United States National Security Conceptualization,” *Chinese Journal of International Law* 20, no. 1 (July 26, 2021): 6, <https://doi.org/10.1093/chinesejil/jmab007>. [Voon]; Russia – Traffic (n 13) para. 7.76.

<sup>54</sup> Voon (n 53) 96; Russia – Traffic (n 13) para. 7.126.

<sup>55</sup> Giorgio Sacerdoti, “The Wto and Its Dispute Settlement System in 2022: From the First Appellate Arbitrations to the Unsuccessful Invocation of the Security Exception,” *SSRN Electronic Journal*, 2023, 12, <https://doi.org/10.2139/ssrn.4369702>.

<sup>56</sup> The US used Article XXI (b) (iii) of the GATT to justify imposing import duties, claiming an emergency in international relations. They argued that the broad meaning of ‘which is considered’ in the article grants wide discretion and non-justiciability, providing immunity from WTO jurisdiction. The US also defined this emergency as sudden, dangerous political and economic situation between nations requiring urgent attention. See Yong-Shik Lee, “Three Wrongs Do Not Make a Right: The Conundrum of the US Steel and Aluminum Tariffs,” *World Trade Review* 18, no. 3 (July 2019): 490, <https://doi.org/10.1017/S147474561900020X>. Mihai Ioachimescu-Voinea, ‘National Security Exceptions in the WTO - A Carte Blanche for Protectionism? Part II - US - Steel and Aluminum Products Disputes, Improvements of the Security Test, Conclusion’ (2020) 10 Law Rev 3, 5. [Voinea]; US – Aluminum (n 13) para 2.31, 7.102., 7.106., 7.132., and 7.144.,

clause.<sup>57</sup> Another dispute under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) arose between Saudi Arabia and Qatar. Saudi Arabia refused an IP Right to beIN TV, citing protection of its security interests under TRIPS Article 73(b) (iii).<sup>58</sup> Saudi Arabia argued that Qatar's support for extremist groups violated the Riyadh Agreement,<sup>59</sup> leading to severed relations.<sup>60</sup> The panel concluded this matter with the Russia – Traffic in Transit standard,<sup>61</sup> finding Saudi Arabia's actions justified as invoked during an emergency in international relations.<sup>62</sup>

Both parties agreed to use a good faith and objective interpretation of the SE article. The panel's definition of 'Emergency in International Relation' resembled that in Russia – Traffic in Transit, involving armed conflict, latent conflict, crisis, tension, or surrounding instability.<sup>63</sup> Decisions including severing diplomatic relations are considered a last resort under the United

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<sup>57</sup> The panel responded by stating that Article XXI (b) doesn't grant wide discretion. In response, invoking members must adhere conditions in section (I) to (iii), separately. The panel also clarified the meaning of 'emergency in international relation' as dangerous situation requiring urgent attention. This term refers to severe situations comparable to those impacting international relations as war would Aditi Warriar, "The Essential Security Interest Conundrum for India," *New York University Journal of International Law & Politics* 53, no. 3 (Spring 2021): 1037; Takemasa Sekine, "Security Exception Clauses under Free Trade Agreements," *SSRN Electronic Journal*, 2023, 4, <https://doi.org/10.2139/ssrn.4370053>; ; US – Aluminum (n 13) para. 7.128 and 7.139.

<sup>58</sup> "Saudi Arabia – Measures Concerning The Protection of Intellectual Property Rights," Report of the Panel (World Trade Organization, June 16, 2020), para. 3.3. [Arab – IPR]

<sup>59</sup> Olufunlola Rotimi, "The Qatari Blockade: Was an International Legal Resolution Possible?," *SSRN Electronic Journal*, 2021, 12, <https://doi.org/10.2139/ssrn.4056619>.

<sup>60</sup> Relating to the intellectual property rights, Saudi Arabia asserted that these terrorist and extremist groups have used Qatar-based and Qatar-sponsored media platform in expanding their messages. See Amna Saif Al-Naemi et al., "The Blockade Imposed Against Qatar: An Analytical Study of WTO Principles," *International Review of Law* 2018, no. 1 (January 2018): 21, <https://doi.org/10.29117/irl.2019.0008>. Arab – IPR (n 58) para. 2.25 and 2.29.

<sup>61</sup> Weihuan Zhou, Huiqin Jiang, and Zhe Chen, "Trade vs. Security: Recent Developments of Global Trade Rules and China's Policy and Regulatory Responses from Defensive to Proactive," *World Trade Review* 22, no. 2 (May 2023): 198, <https://doi.org/10.1017/S147474562200026X>.

<sup>62</sup> The panel has assessed these explanations by the standard of assessment in which conducted in Russia – Traffic in Transit cases, noted that the passage within TRIPS agreement article 73 (b) section (iii) is in fact identical to the passage which is written in GATT agreement article XXI (b) section (iii). See Arab – IPR (n 58) para. 7.41.

<sup>63</sup> *Ibid* para 7.284 and 7.426.

Nations charter.<sup>64</sup> The panel concluded that the actions of Saudi Arabia against beIN were indeed taken during an emergency in international relations, based on the evidence presented.<sup>65</sup> The invocation of this article begs questions from various parties because member states use it based on national security interests, leading to concerns about its ‘self-judging’ nature. However, cases such as Russia – Traffic in Transit, US – Certain Steel and Aluminum product, and Saudi Arabia – Intellectual Property Rights, indicate that a clear that interpretation and specificity are crucial to prevent abuse. Accordingly, a good faith interpretation ensures legitimate use, and specifies the underlying problems to help avoid trade prohibitions under the guise of national security interests.<sup>66</sup>

## Policy Implications for WTO States Member

### A. WTO Jurisprudence: Means to Resolve the Maze of Security Exceptions

The WTO’s Jurisprudence, a result of the GATT legacy, is crucial to international trade relations. It fills the void left by the International Trade Organization and is closely tied to the DSU system, considered the crown jewel of the WTO, handling over 500 cases.<sup>67</sup> The DSU’s panel reports are pivotal in settling disputes, which become adopted rulings and form jurisprudence, guiding future cases.<sup>68</sup> In the Russia – Traffic in Transit case, the panel clarified

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<sup>64</sup> Actions which mentioned in the article of United Nation was similar to the measure which taken by several other nations. *See* United Nations, “United Nations Charter” (n.d.), art. 41.; Arab – IPR (n 58) para 7.260 and 7.262.

<sup>65</sup> Arab – IPR (n 58) para. 7.270.

<sup>66</sup> Chang, “Letter to the *Journal* Dual-Use Products in the Course of Considering National Security Exceptions under GATT Article XXI.”

<sup>67</sup> Autar Krishen Koul, *Guide to the WTO and GATT: Economics, Law and Politics* (Singapore: Springer Singapore, 2018), viii, 56, and 80, <https://doi.org/10.1007/978-981-13-2089-7>.

<sup>68</sup> Repetition of DSB on the use of ruling in other international court such as The International Court of Justice, interprets the relations between WTO DSB and public international law, in terms of source of international law, which make them as a part of the same group of norms. *See* Jae Sundaram, *WTO Law and Policy: A Political Economy Approach*, 1st ed. (London: Routledge, 2022), 97–98, <https://doi.org/10.4324/9780367028183>; Roberto Soprano, *WTO Trade Remedies in International Law: Their Role and Place in a Fragmented International Legal System*, 1st ed. (Abingdon, Oxon [UK]; New York, NY: Routledge, 2018. |: Routledge, 2018), 32, <https://doi.org/10.4324/9781315189963>; DSU (n 24) art. 12.7.

the jurisdiction of the DSB over SE article cases, nullified the ‘self-judging’ argument, emphasized a good faith interpretation, and required specificity in invoking the article during emergencies.<sup>69</sup> The DSB adopted this report as the foundation for resolving future disputes involving the SE article, ensuring a fair and transparent approach.<sup>70</sup>

The ruling implicitly outlines a mechanism to prevent abuse of the SE article. The mechanism to resolve such disputes are: (1) From a technical view, related disputes must follow the series of dispute settlement systems, since the dispute, as emphasized by the panel decision, is included within the jurisdiction of DSB;<sup>71</sup> (2) Any response which contains a ‘self-judging’ argument would be nullified since the ruling invalidated such arguments;<sup>72</sup> and (3) The invoking state bears the burden of proof to provide any information regarding national necessities to precede its national security before its economic relation with another parties to the related treaty, featured such information was interpreted within the good faith principle and ordinary meaning of the SE article.<sup>73</sup>

However, this ruling contradicts certain aspects of the article itself.<sup>74</sup> The ruling’s mechanism applies to disputes arising from paragraph (b)(iii) in the SE article of GATT. Though it’s a first step in resolving SE article disputes, more improvements and amendments are needed to address the article’s problematic nature. To make significant adjustments, the SE article could be amended, particularly the problematic parts and the *chapeau* of Article XXI. The WTO could establish a specific standard for procedural legislation within the DSB to handle disputes related to the SE article, expanding the mechanism’s scope based on adopted rulings. Additionally, a separate agreement could be created

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<sup>69</sup> Russia – Traffic (n 13) para 7.101; 7.122; and 7.26.

<sup>70</sup> “Russia - Measures Concerning Traffic in Transit (Action by the Dispute Settlement Body),” Panel Report (World Trade Organization, April 26, 2019), 1. [Action by DSB]

<sup>71</sup> DSU (n 24) art. 1.2.

<sup>72</sup> Russia – Traffic (n 13) para 7.104; US – Aluminum (n 13) para 6.15; DSU (n 24).

<sup>73</sup> Voon (n 53) 96; Voinea (n 56) 7; Warrier (n 57) 1037; Gladysz (n 45) 845; Russia – Traffic (n 13) para. 7.126; US – Aluminum (n 13) para. 7.139 and 7.148.; Arab – IPR (n 58) para.7.260, 7.262, 7.270, 7.284, and 7.41.

<sup>74</sup> Though the ruling has implicitly explained the mechanism to prevent the abuse, existing SE article might be contradicted to it, especially in the sub-mechanism where the invoking state responsible to explain its national security necessities before the panel. Such sub-mechanism is overlapping another paragraph within the SE article, whereas explained that state parties are not obligated to furnish any information related to its essential security matters. *See* GATT (n 7) art XXI (a)

to define the requirements for invoking the SE article, following the approach in the first suggestion.

## B. The Use of Security Exception Article by Developing Countries

As discussed above, there are many challenges advanced the state in their way in invoking the provision, from the adherence of a situation which stipulated a national security interest to a puzzling means to use such provision to protect one state security interest. In the History of the WTO, the invocation of SE articles by member countries has yielded diverse outcomes. However, the ruling from the panel's decision in the Russia – Traffic in Transit case offers clear guidance to countries seeking to invoke this article for national security purposes. The decision highlighted four essential points: (1) The WTO's Dispute Settlement Mechanism (DSB) has jurisdiction over cases involving article XXI;<sup>75</sup> (2) Interpretation should be made in good faith;<sup>76</sup> (3) Sub-paragraphs of article XXI(b) are not limited by the *chapeau* and the applications are alternatively different for each sub-paragraph;<sup>77</sup> and (4) Emergency situations in International Relations pertain to armed conflicts, latent conflicts, high tensions or crises between nations, or unstable public order near warring countries.<sup>78</sup>

Initially, the notes were not used as recommendations for the DSB after the case's conclusion,<sup>79</sup> but they were later adopted, creating a new precedent in the WTO dispute settlement system.<sup>80</sup> This new precedent established a valid procedure for using the SE article, providing a framework for member countries, especially developing countries, to formulate trade policies based on their national security interests.<sup>81</sup> Those countries could utilize this precedent

<sup>75</sup> US – Aluminum (n 13) para 7.103

<sup>76</sup> *Ibid* para. 7.59

<sup>77</sup> 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, no. 1 (January 2020): 135, <https://doi.org/10.1017/S1474745619000430>; US – Aluminum (n 13) para. 7.82

<sup>78</sup> *Ibid* para. 7.135

<sup>79</sup> *Ibid* para. 8.3.

<sup>80</sup> "Russia - Measures Concerning Traffic In Transit (Action by the Dispute Settlement Body)."; Russia – Traffic (n 13) para. 7.26.

<sup>81</sup> In the history of the use of this article, countries that are considered to be still developing are still very rarely invoking it. There is a possibility that the reason behind the infrequency of developing countries to use this article is because they do not want pressure from

to safeguard crucial industries linked to national security, such as industries for modernizing their defense systems.<sup>82</sup>

In Southeast Asia, Singapore has implemented security-based policies to control contraband materials that could lead to manufacture of weapons of mass destruction,<sup>83</sup> while developed countries, like the U.S., have policies like ITAR to restrict crucial technology dissemination.<sup>84</sup> By using the SE provision, developing countries can formulate import policies for military technology without hindrance from foreign policy,<sup>85</sup> ensuring the sustainable modernization of their defense systems. For example, As explained by the Minister of Defense of Indonesia, Prabowo, the Indonesian military is currently trying to modernize its weapons systems. In addition to modernizing the Indonesian National Armed Forces' Main Weapon System Tool (Alutsista), there are several plans regarding the creation of an Indonesian defense satellite that will function as a tool to integrate Indonesia's state defense communications.<sup>86</sup> Indonesia as a developing country, could use this ruling as a precedent for strengthening their national security apparatus. However, it must learn and follow the proper procedure for using the SE article, interpreting relevant sub-paragraphs, and adapting policies to the ongoing development of its military forces, ensuring legitimacy and strong arguments in any consultations by WTO member countries before the panel or DSB.

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developed countries as happened in the previous problems. See Aris Rahmat Juliannoor and Sefriani Sefriani, "Itar And The Security Exception: Lessons For Developing Indonesian Defensive Satellites," *Prophetic Law Review* 5, no. 1 (June 1, 2023): 16–17, <https://doi.org/10.20885/PLR.vol5.iss1.art1>. [Aris and Sefriani]

<sup>82</sup> *Ibid*, p.18.

<sup>83</sup> Sefriani Sefriani and Nur Gemilang Mahardhika, "Implementation of the United Nations Security Council Resolution under the Indonesian Legal System," *Journal of East Asia and International Law* 14, no. 2 (November 30, 2021): 348, <https://doi.org/10.14330/jeail.2021.14.2.06>.

<sup>84</sup> John R Liebman and Kevin J Lombardo, "Digital Commons at Loyola Marymount A Guide to Export Controls for the Non-Specialist," *Loyola of Los Angeles International and Comparative Law Review* 28, no. 3 (2006): 501.

<sup>85</sup> Whitney Q. Lohmeyer et al., "The Global Impact of ITAR on the For-Profit and Non-Profit Space Communities," vol. 25th (25th Symposium on Space Policy, Regulations and Economics, Naples, Italy: International Astronautical Federation, 2012), para. 4.2, <http://www.iafastro.net/iac/paper/id/14466/summary/>.

<sup>86</sup> Yudi Sutrasna, "Strategi Pertahanan Indonesia Dalam Menghadapi Ancaman Militer Dan Non Militer Melalui Prespektif Ekonomi Pertahanan," *Syntax Literate; Jurnal Ilmiah Indonesia* 8, no. 7 (July 6, 2023): 4819, <https://doi.org/10.36418/syntax-literate.v8i7.12871>.



## Conclusion

Three conclusions with suggestions were derived from the above analysis. *First*, the WTO does have jurisdiction over the use of the SE provision, the self-judging character is merely a political perception of certain countries, and the Russia – Traffic in Transit case emphasized that the use of this article does not exempt the invoking state from WTO consultations or dispute settlement processes. The SE article should be interpreted in good faith, and consultations from affected countries are permitted.

*Second*, the new mechanism proposed to resolve SE article disputes and prevent misuse states that: (1) Disputes must follow the WTO's dispute settlement system, as emphasized by the panel's decision; (2) Arguments of a 'self-judging' nature are invalid; and (3) The invoking state must provide proof of national security necessity before affecting economic relations with other parties, with good faith interpretation. More radical changes could be achieved through an amendment to the SE article, and the DSB of GATT should establish a specific standard for procedural law to handle disputes related to the SE. A distinct agreement could also be created by the WTO to define the standard for applying the SE article.

The last conclusion and suggestion emphasized that the adopted ruling in the Russia – Traffic in Transit case marks a significant improvement in the WTO's dispute settlement system. While more complex disputes are expected in the future, the mechanism can evolve to address them. By clarifying the valid grounds for invoking the SE article, the WTO aims to foster international economic collaboration and prevent political interests disguised as national security concerns.

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*All the great things are simple, and  
many can be expressed in a single word:  
freedom, justice, honour, duty, mercy,  
hope.*

**Winston Churchill**

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