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Preserving World Trade Organization's Role Amid the Proliferation of Essential Security Interest Exception

Nivianivia@mail.ugm.ac.id
Universitas Gadjah Mada**How to cite:**

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p-ISSN: 2721-8392**e-ISSN:** 2655-8297**Abstract**

International economic regime has been interrupted by recent disputes involving national security exception under article XXI GATT. Along with the spirit behind the establishment of WTO, the Panel conclude that it has jurisdiction on the matter as well as the matter is justiciable. Nonetheless, this decision is opposed by two big economies, Russia and United States. Against this background, this research aim to consider whether this approach is justified from trade liberalization perspective using normative research method. Furthermore, it proceeds to analyze a proposal to build National Security Committee as solution to contemporary ineffectiveness of the implementation of WTO litigation process. This research shows that WTO's Panel approach to exercise its jurisdiction regarding the invocation of article XXI is indeed the best approach to protect a stable and predictable trading system. However, the establishment of National Security Committee will not resolve the enforcement problem of WTO's decision towards this matter.

Keywords: Essential Security Exception; World Trade Organization; Dispute Settlement Mechanism.

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Introduction

The creation of the World Trade Organization (WTO) marked a new era of a rule-based trading system enforced through advanced dispute settlement mechanisms. As one of the global economic architectures, alongside Bretton Wood Institutions, WTO is saddled with crucial tasks to create and maintain an open, stable, and predictable trade.¹ Although created to serve economic functions, in this interdependent world, trade matters may correlate with other aspects, such as human rights,² environment, and even, security matters. State sometimes resorts

¹ Marc Auboin, *Fulfilling the Marrakesh Mandate on Coherence: Ten Years of Cooperation between the WTO, IMF and World Bank* (WTO Secretariat 2007).[1].

² Joost Pauwelyn, 'The Role of Public International Law in The WTO: How Far Can We Go?' (2001) 95 *The American Journal of International Law*. [539].

to trade policy to pursue non-trade objectives,³ including protecting its essential security interest. Trade policies related to important materials for the military such as semiconductors, steel, aluminum, and fissionable materials are often used as a weapon within geopolitical conflict.⁴ When faced with trade vis-à-vis national security, States tend to choose security protection rather than trade liberalization. As stated by Adam Smith in 1779, defence is of much more than opulence.⁵ Thus, for a multilateral trading system to be both politically and economically sustainable, it requires an exceptional clause. This clause is embroidered into Article XXI of General Agreement on Tariffs and Trade (GATT) 1994, Article XIV bis of General Agreement on Trade in Services (GATS), and Article 73 of Trade-Related Aspects of Intellectual Property Rights (TRIPS). However, this research will be focused on Article XXI GATT 1994 for two reasons. First, GATT is a predecessor agreement that has longer history compared to the others. Second, similar provisions prescribed in GATS and TRIPS both are duplications of GATT's.

Article XXI GATT 1994 consists of three paragraphs. Paragraph (a) gives Members a right of refusal to furnish any information which is not in line with its security interest. Paragraph (b) contains a degree of flexibility for Members to take measures which it deems necessary for the protection of its essential security interest even if such measures are contrary to its GATT obligations. This part is followed by three subsequent subparagraphs. Two of them provide specific materials that can be the subject of the measures, while the other comprises contextual elements in which the measure can be conducted, i.e. in war or other emergency in international relations. Paragraph (c) constitutes a consistency between WTO and other international institutions, specifically United Nations, by allowing Members to deviate from their obligations to fulfill their role under UN Charter.

³ *ibid.*

⁴ Mona Pinchis Paulsen, 'Let's Agree to Disagree: A Strategy for Trade-Security' (2022) 25 *Journal of International Economic Law*. [532]

⁵ Peter Van den Bossche and Sarah Akpokfure, *The Use and Abuse of the National Security Exception under Article XXI(b)(Iii) of the GATT 1994* (Universitat Bern 2019). [1].

The overall purpose of GATT is the reduction of tariffs and barriers to trade as well as elimination of discriminatory treatment in international trade.⁶ To achieve these goals, GATT provides security exception to ensure greater participation in rule-based multilateral trading system, underlining that the exception can't be arbitrarily used to circumvent obligations under GATT.⁷ That being said, the exception reflects the need for balance between trade liberalization interest and Member's security interest. However, recent practice by Russia in *Russia – Measures Concerning Traffic in Transit* presents a threat to this objective.

On 5 April 2019, WTO revealed its first ruling on the matters after its establishment in 1994. This ruling is awarded as a landmark decision in which the Panel formally interprets Article XXI, especially XXI(b), GATT 1994. Unlike in *United States – Trade Measures Affecting Nicaragua* where the Panel restrained itself from judging the validity of essential security interest exception,⁸ in this decision, the Panel concluded that not only it has jurisdiction over the matter, but also the matter itself is justiciable according to Article 31 (1) VCLT.⁹ However, as explained by Russia and United States, the involvement of Panel in such case will result in the judgment of State's security interest and, in turn, constitutes a manifest violation of State's sovereignty.¹⁰ On the other hand, the proponents of the Panel's jurisdiction are challenged by the States' reluctance to follow its decision because it is deemed as an intervention to internal security of States. Hence, there is an urgency to determine the appropriate forum as an alternative to solve dispute relating to Article XXI of GATT 1994. This research's objectives are: First, to analyze whether the Panel's decision to insert its jurisdiction over the invocation of Article XXI of GATT 1994 is consistent with the general purpose of GATT to balance trade liberalization and members'

⁶ Preamble of General Agreement on Tariffs and Trade.

⁷ Para 7.137 Dispute Settlement: *Russia-Measures Concerning Traffic in Transit*.

⁸ William J. Gardner Jr, 'Divergent Strategies: A Legal History of the WTO's National Security Exception in the Context of a Globalized Economy, 1983-2019' (2020), 28 *University of Miami International and Comparative Law Review*. [195].

⁹ Para.7.53 to 7.104 Dispute Settlement: *Russia-Measures Concerning Traffic in Transit*.

¹⁰ Para. 7.50 Dispute Settlement: *Russia-Measures Concerning Traffic in Transit*.

security interest. Second, to determine the alternative forum to manage security exception outside the Panel.

Research Method

This research is a normative legal research which conducted by analyzing literature or secondary data.¹¹ Normative legal research describes the law as an object in coherence between legal norm and legal principle, legal rules and legal norm, as well as individual behavior and legal norm.¹² This paper seeks to describe States behavior in implementing WTO's legal norm, i.e. essential security exception norm. Thus, it used WTO's General Agreement as primary legal data along with related publications and jurisprudences of WTO's Panel as secondary legal data. The approach of this research involves the statutory approach and conceptual approach. The statutory approach is done by identifying and studying all relevant statutes and regulations including GATT 1994, Dispute Settlement Understanding (DSU), and Vienna Convention on the Law of Treaties (VCLT). The conceptual approach departs from opinions and doctrines which evolve in legal field. This approach is conducted by analyzing public international law concept through expert opinions within several journals cited. The data is collected through series of literature research. The primary, secondary, and tertiary source is being collected through the Law Library of Universitas Gadjah Mada, Universitas Gadjah Mada Central Library, as well as online library of Universitas Gadjah Mada.

World Trade Organization and Essential Security Interest Exception

WTO's ruling relating to Article XXI(b) GATT is subjected to further debate.¹³ This matter has polarized WTO Members into two chambers, pros and cons. However, before moving to the interpretations, it must be emphasized that

¹¹ Soejono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif* (Rajawali Press 2006)[13].

¹² Peter Mahmud Marzuki, *Penelitian Hukum* (Kencana 2005)[119].

¹³ Chao Wang, 'Invocation of National Security Exceptions under GATT Article XXI: Jurisdiction to Review and Standard of Review', (2019), 18 Chinese Journal of International Law. [698-699].

every international adjudicative tribunal has inherent jurisdiction to determine all matters relating to its substantive jurisdiction.¹⁴ Therefore, WTO's Panel can entertain this dispute.

To determine the consistency between Panel's decision to establish jurisdiction on the matters with GATT purpose, the interpretation must be made according to Vienna Convention on the Law of Treaties 1969 (VCLT). Article 3.2 of Dispute Settlement Understanding (DSU), a set of rules and procedures governing trade disputes under WTO, directed WTO'S dispute settlement system to interpret General Agreement in accordance with customary rules of interpretation. In this regard, it refers to Article 31 VCLT. Article 31 (1) VCLT established that treaty shall be interpreted in good faith according to its ordinary meaning and in light of its object and purpose.

First, ordinary meaning. Even though ordinary meaning is an objective criterion, both the Member States (in the case is United States) and the Panel have different perspective on the matter. This part will be divided into two discussions each analyze the "it considers necessary" in the chapeau of Article XXI (b) and "war or other emergency in international relation" phrase in subparagraph (iii) of Article XXI (b).

- a. The interpretation of "it considers necessary". In *Russia – Measures Concerning Traffic in Transit* and *United States – Origin Marking Requirement*, United States insists that the term "It considers" in Article XXI (b) of GATT 1994 encompasses all subparagraphs below the chapeau.¹⁵ To the contrary, Panel argued that the term "it considers" extends to only the chapeau and has no effect on subparagraphs.¹⁶ The Panel draws this conclusion by first analyzing whether subparagraphs (i), (ii), and (iii) can be subjected to Panel's objective determination. The phrase "relating to" in subparagraphs (i) and (ii) indicates

¹⁴ Para. 7.53 Dispute Settlement: *Russia-Measures Concerning Traffic in Transit*.

¹⁵ Para. 7.51 Dispute Settlement: *Russia-Measures Concerning Traffic in Transit* and Para. 7.44 Dispute Settlement: *United States – Origin Marking Requirement*.

¹⁶ Para. 7.101 Dispute Settlement: *Russia-Measures Concerning Traffic in Transit*.

there shall be plausible relation between the measures and its security objectives.¹⁷ Accordingly, it requires invoking State to prove this relation as well as giving the Panel power to determine whether the measures are implausible to protect security interests.

- b. The interpretation of “war or other emergency in international relation”. Subparagraph (iii) which obliges the measures conducted against “war or other emergency in international relation” background also comprises certain situations that are subjected to objective determination by ruling out political or economic differences as reasons for invoking Article XXI(b) of GATT 1994.¹⁸ In *United States – Origin Marking Requirement*, war is described as “...hostile contention by means of armed forces, carried on between nations, states or rulers, or between parties in the same nation or state; the employment of armed forces against a foreign power, or against a opposing party in the state.” Further, the Panel imposed a gravity test to ascertain whether the situation has raised into an “emergency in international relation”. According to the Panel, an emergency in international relation means that the situation is closer to a “breakdown in international relations between two or more States”. Interestingly, Panel also explicitly recognized that the deterioration of relations shall not involve the invoking country.¹⁹ Conflict arising between other States, or even internal conflict in one State, may be sufficient to invoke Article XXI(b) as long as it can be proved that such conflict has led the economic or international relation of invoking State with the complaining State into a breakdown. With these objectives’ nature, it is unreasonable to think the term “it considers” encompasses the subparagraphs so make it entirely self-judging. If it is the case, then the subparagraphs will have no effect.

Second, the teleological perspective regarding the object and purpose of treaty. By characterizing Article XXI(b) of GATT 1994 as fully self-judging,

¹⁷ Para.7.69 Dispute Settlement: *Russia-Measures Concerning Traffic in Transit*.

¹⁸ Para. 7.75 Dispute Settlement: *Russia-Measures Concerning Traffic in Transit*.

¹⁹ Para. 7.297 Dispute Settlement: *United States – Origin Marking Requirement*.

Panel will risk the balance between trade liberalization and States' interest as States can arbitrarily justify the invocation of the Article based on subjective judgment of their security interest. Even more, WTO can do nothing to prevent further destruction caused by such arbitrary use. Thus, in balancing the rights between Members and their obligation, Panel must have the power to judge the validity of Article XXI(b) GATT 1994 invocation.²⁰ Only by this option, we can arrive at a stable and predictable trading system.

Third, the obligation of good faith. The third part of treaty interpretation according to Article 31 (1) VCLT is the obligation of good faith. As the concept of good faith has no exact meaning in GATT 1994, this article will turn to general conception of it in public international law. As stated by Appellate Body in United States – Standard for Reformulated and Conventional Gasoline that General Agreement is not to be read in clinical isolation from public international law.²¹ In international law, there's a presumption of validity in which the rules of its treaties must therefore in harmony with international law's principle.²² One of the foundational international law principle is good faith. There are several assessment forms to determine whether this principle has been met, those are²³ (a) purely administrative review, (b) further requiring objective elements such as reasonability or proportionality of the measure, or (c) it can be a method of controlling the abuse by rights holder. Regarding Article XXI(b), the Panel used a reasonability or proportionality test. Accordingly, even though the Panel admits that the determination of what constitutes an essential security interest and what actions necessary to tackle it are within the States autonomy,²⁴ it doesn't mean this right is without limit. The limitation of such power is the principle of good faith.

²⁰ *ibid.*

²¹ Page 17 United States – Standard for Reformulated and Conventional Gasoline.

²² Peter Mahmud Marzuki. *Op.Cit.*[970].

²³ Andreas Ziegler and Jorun Baumgartner, *Good Faith as a General Principle of International Law* (Oxford University Press 2015).[9].

²⁴ Para. 7.101 Dispute Settlement: Russia – Measures Concerning Traffic in Transit.

On the opposite chamber, the oppositions argue that Article XXI of GATT 1994 is completely self-judging. For some groups of this chamber, it's impossible for WTO to review the invocation of this Article since WTO is an economic institutional framework whose function is related to trade.²⁵ Security matter fall outside WTO's purpose and objective. Thus, the Panel lacks competence as well as jurisdiction to entertain the dispute relating to it. On the other side, other groups from the same chamber argue that WTO, in fact, has jurisdiction in such cases according to Article 7.1 DSU and supporting with the fact that there is no additional provision that excludes the applicability of dispute settlement mechanism against Article XXI(b). However, since security interest is national affairs and may vary depending on each state, WTO Panel will lack legal criteria to review it.²⁶ Both arguments arrive at the same conclusion that the Article can't be reviewed by WTO. Moreover, citing Russia's response relating to invoking Member's burden of proof,²⁷ Article XXI(a) of GATT 1994 gives invoking Member's right to refuse the disclosure of every information contrary to its security interest. Therefore, invoking party may evade its transparency obligation by exercising this right. It puts so much difficulty for the Panel to acquire adequate information regarding the situation. In fact, these impediments have not been met because recent disputes were conducted within a "publicly known international emergency"²⁸ background. However, it doesn't prevent parties in any subsequent cases, particularly internal conflict of one State which satisfied the Panel's threshold as an emergency in international relation, to withhold their information. Besides, the Panel can't draw an adverse inference from such refusal because the concerned parties are exercising their right according to Article XXI(a) of GATT 1994.

²⁵ Brandon J Murrill. *Loc. Cit.*

²⁶ Para. 7.52 Dispute Settlement: Russia – Measures Concerning Traffic in Transit.

²⁷ Para. 7.129 Dispute Settlement: Russia – Measures Concerning Traffic in Transit.

²⁸ To illustrate, Russia invasion and annexation of Crimea. It's worth to note in this dispute, Russia used hypothetical fact and public information regarding the conflict, instead of transparently gave all domestic information or reports pertinent to the situation.

However, this research submitted that by choosing such interpretation, the Panel has put the Members, instead of itself, as the sole determinant of case's result. Eventually, it will drag the rule-based multilateral trading system into an abyss. Therefore, the only possible way to preserve delicate balance between trade liberalization and State's security interest is to establish a jurisdiction of the Panel on the matter.

The Panel's decision to entertain the dispute is also congruous with functional change within its system from pre-WTO regime to WTO regime. In United States-Trade Measures Affecting Nicaragua (before WTO regime), the term of reference of Panel in settling dispute is very restrictive and depends on political consensus between the parties. Thus, the dispute settlement mechanism mirrored the political power of States involved. The narrow term of reference is the reason why Panel restrained themselves from further adjudicating and defining Article XXI of GATT.²⁹ However, after the establishment of WTO, dispute settlement is no longer solely based on a diplomatic approach which usually led to negotiated solutions with the reflection of States' relative power.³⁰ This improvement encourages the Panel to insert its jurisdiction in sensitive issue such as security exception in Article XXI (b) of GATT 1994.

The Politically Unfavorable Result of WTO's Panel Jurisdiction Over Article XXI (b) of GATT 1994

Although the decision to establish jurisdiction to judge the validation of Article XXI (b) of GATT 1994 emerges as the only possible way to protect trade liberalization, such decision may give some adverse consequences specifically to dispute settlement viability and generally to WTO integrity.

WTO's jurisdiction toward the invocation of Article XXI(b) of GATT 1994 is highly unfavorable for two big economies, i.e. United States and Russia. Reiterating its refusal to comply with the Panel's decision on security interest matters, United

²⁹ *Vide* United State – Trade Measures Affecting Nicaragua, Para 5.2.

³⁰ Lamy.*Op.Cit.*[972].

States further stated that proceeding with such matter would pose risk to WTO as an organization³¹. Indeed, the result of every case citing Article XXI(b) of GATT 1994 as justification may vary since WTO has no binding force of precedent concept. However, the previous case may stand as a reference to recent dispute. This has been proved by several cases following the Russia-Measures Concerning Traffic in Transit which have similar reasoning and consistent approach to Article XXI of GATT 1994. Because of the vitality of essential security interests, there are possibilities that State will refuse to implement the decision, citing its right to “self-defense” as primary right under international law. In addition to the lack of enforcement, the decision on Article XXI(b) of GATT 1994 will encourage United States to continue paralyzing WTO’s Appellate Body and even withdraw from WTO.³² If the world’s big economies are doing this, it’s possible for other developing or less-developed countries to follow such steps.

The Establishment of National Security Committee to Resolve Disputes Concerning Article XXI

As previously explained, WTO’s litigation process may not be effective in resolving trade disputes when the party invoked Article XXI. States may disobey the decision because it affects the national integrity of States to protect their territory and population. In regard to this problem, some scholars propose the establishment of a National Security Committee.³³

Alongside its main bodies such as Ministerial Conference and General Council, WTO is built with technical committees which carry out important supportive functions.³⁴ These functions include observation and monitoring of general

³¹ Roger P. Alford, ‘The Self-Judging WTO Security Exception’ (2011), 697 Utah Law Review. [720].

³² Daria Boklan and Amrita Bahri, ‘The First WTO’s Ruling on National Security Exception: Balancing Interests or Opening Pandora’s Box?’ (2020), 19 World Trade Review 123.[18].

³³ Lester and Manak, *Op. Cit.*[273].

³⁴ Simon Lester and Inu Manak, ‘A Proposal For A Committee on National Security at the WTO’ (2020), 30 Duke Journal of Comparative & International Law 267.[268].

agreement implementation,³⁵ developing guidelines including best practices, giving recommendations to implement WTO's agreement, and facilitating Members with a forum to resolve disagreements between Members.³⁶ Because of the cross-sectoral nature of national security, the Committee is designed to report directly to General Council. National Security Committee functions include:³⁷

- a. To provide Members an opportunity to consult matters relating to trade and national security in annual meetings;
- b. To establish system of notification, counternotification, and the review of trade policy concerning the protection of national security interest;
- c. To give recommendations on how the notification should be made. It consists of the period of notification, materials that should be included in the notification, and the expiring date of such measures;
- d. To build an ad hoc consultation body to settle disagreements between Members relating to national security exceptions.

With its ability to provide a forum to notify all national security restrictions that impact international trade, the Committee will open a deliberation within WTO members. It creates communication phase for each States to negotiate the extent of restrictive measures conducted by the others under security interest exception. Hence, it prevents a sudden disruption of international trade and immeasurable discretion to fashion the scope of security exception while also enable States to protect its territorial integrity. Furthermore, it holds back the probability of adjudicative measures which will create a polarization between Member States and threaten certain States' supports for WTO. The latter concern is particularly important to preserve the efficiency of the Organization amid hostile behavior against it.³⁸

Aside from its comprehensiveness, this solution must be criticized, particularly, on its applicability. The blanket of secrecy wrapping national security information will discourage States to engage in any forum of discussion. Such transparency necessities have been created far from the establishment of WTO.

³⁵ World Trade Organization, 'Understanding the WTO: Developing Countries' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev2_e.htm> accessed 3 June 2023.

³⁶ Lester and Manak, *Op.Cit.*[270].

³⁷ Lester and Manak, *Op.Cit.*[274].

³⁸ Giuseppe Zaccaria, 'You're Fired! International Courts, Re-contracting, and the WTO Appellate Body during the Trump Presidency' (2020), 13 *Global Policy*. [323].

On 30 November 1982, the Contracting Parties of GATT has adopted Decision Concerning Article XXI of the General Agreement which clearly established other Contracting Parties' right to be informed of trade measures taken under Article XXI.³⁹ There are scattered practices that violate these decisions. It reflects State's attitude toward such proposal. Even if several States are naïve enough to concur in this solution, their voices are not sufficient. Committee's setup process under WTO must be carried out through General Council decision which requires the entire membership to agree on the committee's terms of reference.⁴⁰ Regardless of such shortcomings, the option is worth considering with little adjustment to the system.

Conclusion

After returning to Article 31 VCLT as compulsory method under Article 3.2 DSU and inquiring the impacts of self-judging approach endorsed by United States and Russia, this analysis shows that the Panel's decision to impose jurisdiction over States that invoking security interest exception is conform with the purpose of GATT, namely, to preserve delicate balance between trade liberalization and its member's security interest. Such approach prevents any abuses by States to escape its obligation under GATT. However, the decision to entertain such politically sensitive case may attracts negative sentiments towards WTO as has been showed by United States. Shielding upon the fundamental nature of security, States may refuse to follow the decision thus undermine the integrity of WTO's system. There's urgency to propose alternative mechanism to prevent all cases relating to security exception to be brought before litigation body. In this research, the Writer endorse the creation of National Security Committee that is proposed by Lester and

³⁹ The Decision explicitly stated:

“...The Contracting Parties decide that:

Subject to the exception in Article XXI:*a*, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI.

When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement.

The Council may be requested to give further consideration to this matter in due course.”

⁴⁰ Paulsen.*Op. Cit.*[533].

Manak. Nevertheless, considering the sensitive character of security information there is some reluctance from States to discuss their security matters within the Committee. Even so, this proposal is worth considering with further research needed to answer how States' transparency on its security matters can be obtain through the Committee.

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