

Maintaining the Multilateral Trading System: A Review of the Application of the WTO National Security Exception

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Abstract. The national security exception in the WTO originated from the 1947 General Agreement on Tariffs and Trade (GATT). As non-traditional security threats had evolved, the interpretation of "essential security interests" (ESI) within this exception had expanded significantly. Since 2017–2018, a series of WTO disputes were triggered by unilateral actions, which undermined multilateral trade stability due to the misuse of this provision. This study systematically examined the legal evolution and core controversies surrounding the exception. It revealed how certain interpretations had legitimized protectionism and highlighted how the paralysis of the Appellate Body exacerbated implementation loopholes. The paper traced the development of the national security exception, analyzed key disputes among major WTO members regarding its interpretation, and evaluated their strategic approaches to defining "essential security interests" and delineating the boundaries of self-determination rights. The study proposed solutions such as clarifying the legal boundaries of "essential security interests," introducing non-violation complaint mechanisms, upholding the "principle of high restraint," and developing diversified dispute resolution frameworks. By addressing these issues, the research aimed to provide academic support for establishing a fairer and more predictable dynamic trade framework.

Keywords: WTO, National Security Exception, GATT Article XXI

1. Introduction

The WTO's national security exception clause traces its origins to the 1947 General Agreement on Tariffs and Trade (GATT) negotiations, with its text design heavily influenced by U.S. proposals. Historical records show that American representatives emphasized this provision should be limited to "genuine security interests" rather than covering "all matters." However, post-Cold War changes in the international security landscape—particularly the rise of non-traditional security threats—have gradually expanded the scope of "essential security interests" from traditional defense and military domains to emerging areas like economic security, cybersecurity, and supply chain safety. In recent years, the resurgence of unilateralism has led to a significant increase in the invocation of this clause. Statistics indicate that since the Trump administration imposed tariffs on steel and aluminum imports under national security grounds in 2017, WTO members have initiated 18 security exception disputes. More alarmingly, major powers are increasingly abusing these

mechanisms: the U.S. equates economic security with national security through Section 232 investigations; the EU strengthens foreign investment review frameworks by incorporating key technologies into security considerations. Such overinterpretation is severely undermining the stability of the multilateral trading system and posing serious challenges to the WTO's dispute resolution mechanism.

Against this backdrop, this study aims to systematically address the following core research questions: How has the interpretation and application of the WTO national security exception evolved, and what are the primary legal controversies driving current disputes? Furthermore, what viable pathways exist for reforming its application to balance national sovereignty with collective trade governance?

In order to answer these questions, this paper reviews the historical evolution of national security exception clauses, analyzes the core disputes in contemporary practice, discusses potential reform plans, and finally summarizes the views, analyzes the implications for the future development of the multilateral trading system, and puts forward the direction of follow-up research.

2. The development process and legal basis of national security exception clause

The national security exception clause originated from the 1947 General Agreement on Tariffs and Trade (GATT), with Article 21 stipulating that member states could independently exercise this provision. At the 1948 Geneva Conference, some nations proposed separating agreements involving fissile materials, arms trade, and necessary measures to address tense international relations from traditional trade policies into independent security exceptions, distinguishing them from other clauses. The official GATT documents specifically established two categories of exceptions—general exceptions and security exceptions—differing between those concerning national security and ordinary circumstances. This formal distinction highlighted the unique status of national security within the international legal framework. As countries sought to achieve free trade mechanisms for development opportunities while avoiding threats to their security from economic gains, the security exception clause emerged as a comprehensive response to evolving trade dynamics between nations.

The concept of security exception clauses was initially interpreted exclusively as military defense. As nations expanded their national security frameworks, the scope of "security" has broadened to encompass not only military defense but also political stability, territorial integrity, and global peace. These provisions have evolved beyond international trade in goods to include services and even trade-related intellectual property rights. The application of national security exceptions has served dual purposes: maintaining delicate power balances among member states while safeguarding their absolute sovereignty over domestic and foreign affairs. This mechanism has been instrumental in shaping the global liberalized trade system.

3. The core controversy and practice of the application of national security exception clause

The GATT safeguard exception clause holds a pivotal position as a "safety valve" within the WTO's regulatory framework [1], yet has proven ineffective in practice. Over the seventy-plus years between its formal establishment and the 2019 DS512 ruling, WTO members exercised restraint in invoking this safeguard mechanism: Only 10 disputes saw members use the exception to challenge rulings, with all cases progressing to panel proceedings [2]. During these proceedings, panels adopted a hands-off approach regarding the clause's application criteria, providing no definitive

interpretations, and no member ever successfully invoked the safeguard exception to mount claims or defenses.

3.1. Article XXI of GATT

GATT article XXI recognizes the right of its members to defend their fundamental security. However, the exception in GATT depends on the term "fundamental security", which implies that security is raised to an issue of international relations.

It is generally believed that the GATT provisions concerning national security, specifically Article XXI, are most controversial in its Article XXI (b) clause. This subparagraph authorizes members to take "any action they deem necessary" to safeguard national security interests, sparking extensive debates. The core disputes center on whether this provision permits member states to unilaterally impose trade restrictions and whether the Dispute Settlement Body (DSB) has jurisdiction to review such measures. In practice, some member states have invoked this clause to implement export controls or trade sanctions, while others frequently question its legitimacy and compliance. Since the WTO's establishment, this provision has been rarely applied, with most cases failing to enter substantive review due to procedural reasons.

3.2. Current problems in the application of security exception clauses

In recent years, particularly since 2016, the resurgence of protectionist trade policies led by the United States has resulted in the repeated invocation and expanding application of security exception clauses. Although the Panel of Experts in the DS512 case has provided a relatively clear definition of the scope of review under Article 21 of the GATT, this clarification has paradoxically introduced additional uncertainties.

3.2.1. The expansion of "essential security interests"

"Essential security interests" is the core concept of the GATT/WTO security exception clauses. The disputes among parties regarding the invocation of security exceptions largely stem from differences in understanding of "essential security interests". In practice, essential security interests" have increasingly been interpreted as "interests related to national security" [3]. Due to differences in basic national conditions, there exists considerable interpretative flexibility regarding national security. Taking economic security as an example, the December 2017 National Security Strategy Report issued by the U.S. Department of Defense explicitly stated that "economic security constitutes national security." The additional steel and aluminum tariffs involved in the U.S. steel and aluminum products case were a product of the Trump administration's proposition that "economic security equals national security." In 2015, China's National Security Law proposed the "comprehensive national security perspective," clearly defining economic security as the foundation of national security. However, it remains challenging to recognize economic security as constituting ESI in WTO practices. Against the backdrop of waning multilateralism and rising trade protectionism, some countries often categorize economic and trade-related interest issues as national security interests, invoking Article 21 of the GATT to justify deviating from WTO obligations. Nevertheless, the existence of expert panels has provided certain constraints against such abuse.

Beyond economic security, security exceptions may also apply in other non-traditional security domains. Non-traditional security encompasses various fields such as information security, cybersecurity, environmental safety, and climate security. As society evolves, these security

dimensions will demonstrate increasing diversity and complexity, playing a vital role in the overall national security framework.

3.2.2. Ambiguity

The provision exhibits broad and ambiguous wording. Scholar Bhala noted that the first word "Nothing" in the exception clause explicitly states that WTO members invoking Article 21 would be exempt from GATT obligations [4]. The Nicaragua Trade Measures Case serves as evidence of this. In 1985, President Reagan of the United States imposed a trade embargo on Nicaragua under GATT Article 21(1994), citing Nicaragua's support for neighboring armed groups as a threat to U.S. national security. Nicaragua argued that the U.S. had infringed upon its legitimate rights and sought to establish an expert panel. The U.S. countered that as a trade organization, GATT lacked authority to intervene in matters concerning American national security interests.

The strategies adopted by WTO members in handling Article 21 defenses vividly demonstrate the ambiguity inherent in this provision. Peter Lindsay observes that such disputes are typically resolved through diplomatic channels rather than dispute settlement mechanisms. This stems primarily from the limited flexibility of diplomatic solutions, as adopting flexible approaches could incentivize parties to resolve disputes proactively and prevent accidental sovereignty loss, thereby curbing the abuse of Article 21 [5]. Moreover, resolving trade disputes involving national security clauses requires lengthy procedures and negotiations, which inherently confers "flexibility" to these provisions. Submitting a complaint to WTO panels necessitates prior consultations and compliance with a six-day waiting period. Once dispute resolution proceedings commence, additional deadlines further accelerate the process. Lindsay emphasizes that while these timelines and procedures facilitate trade-related settlements within tight schedules, they may also hinder optimal negotiation outcomes due to time constraints. It is evident that the national security defense clause embodies this flexibility. Given the highly politicized nature of each dispute, which often becomes entangled in complex time-sensitive requirements and conflicting national interests, Lindsay argues that the concept of national security exhibits "elasticity and high contextual specificity," serving multiple purposes. Since WTO jurisdiction over Article 21 defense rights has never been definitively established, such concerns are particularly pronounced in the Article 21 provision.

The United States does not directly comply with WTO rulings, further exacerbating the ambiguity of national security exception clauses. David Chapiro noted that Congress has taken steps to ensure WTO decisions do not threaten U.S. sovereignty [6]. Under U.S. law, WTO rulings do not take effect immediately upon issuance but must undergo review by the Office of the U.S. Trade Representative regarding national political and diplomatic interests before being implemented.

3.2.3. The self-judgment function of safety exception

Since the initiation of these WTO disputes, members have maintained divergent views regarding security-related exceptions. While some maintain that political actions fall outside the scope of WTO dispute resolution, others insist that trade measures taken for security reasons should be subject to review in WTO proceedings, just as any other trade action would be.

A defining feature of Article 21 is its "self-judgment" mechanism. John Jackson argues that Article 21 creates "a dangerous loophole in the obligations" [7]. He contends that this provision allows more powerful nations to profit from it, thereby reinforcing their global dominance. The scholar maintains that the clause encourages political abuse, with some countries potentially substituting other factors for security considerations, ultimately fueling protectionist tendencies.

Roger Alford argues that the self-judgment nature of security exceptions should be balanced with a well-functioning understanding of their application – that exceptions should be invoked sparingly, judiciously, and in good faith [8]. Alford maintains that "self-judgment" refers to member states' autonomous decision-making regarding when and whether to apply security exceptions. However, there remains ongoing debate about the precise scope of this "self-judgment" under Article 21.

Some scholars argue that the phrase "it considers necessary" in Article 21(b)(iii) should be interpreted as granting no authority to any member state, panel, or WTO adjudication body to determine whether another member's actions comply with this provision [9]. Consequently, national security is also considered in international trade law. However, Tsai-fangChen contends that the phrasing of "it considers" is misleading. While member states' discretion should be respected, the WTO must review their measures to prevent potential abuses of power within the global trading system [10]. Others advocate incorporating a good faith standard into "self-judgment" mechanisms to regulate members' exercise of national security assessments. As a fundamental principle of international law, the good faith doctrine aims to establish appropriate boundaries for treaty interpretation and implementation. Although seemingly subjective, this principle can be objectively evaluated when regulating member autonomy [11]. Alternatively, some propose dividing security exceptions into subjective and objective dimensions: while a nation's security interests remain subject to "self-judgment," other provisions are governed by objective criteria.

From the U.S. perspective, this exception is "non-judicial". Once a WTO member invokes the security exception in a dispute, the WTO panel handling the matter can only recognize such invocation without conducting further investigations [11]. The European Union maintains that Article 21 constitutes an "affirmative defense" [12], for which the defendant bears the burden of proof to demonstrate that the challenged measures fall under specified exceptions. The EU argues that the term "it considers" in Article 21(b) specifically restricts the application of "necessary" while subparagraphs (a) to (c) can be evaluated separately. The panel must also determine whether the measures were reasonably necessary and justified by the defendant based on their interpretation.

The European Union further emphasized that allowing member states to unilaterally determine whether their measures comply with Article 21 would undermine the authority and coherence of the WTO's dispute settlement mechanism. This stance could lead to member states abusing Article 21 to circumvent their obligations, thereby damaging the multilateral trading system. The EU advocates for a strict interpretation of Article 21, requiring the Dispute Settlement Body to apply the same criteria and methodologies used in reviewing other exception clauses when evaluating relevant measures. This ensures member states cannot evade responsibilities through arbitrary subjective judgments.

Regarding the jurisdictional power of national security exceptions, Jacob Gladysz proposed that further clarification could be achieved by distinguishing between two distinct forms of non-judiciality [13]. The stronger version of the non-judiciality claim by Johannes L. Schloemann and Stefan Ohlhoff asserts that states advocating such exceptions simultaneously assert exclusive interpretative authority over their scope, meaning the exception is entirely at the discretion of the state [14]. A weaker version of this argument presents similar arguments. Gladysz noted that, as demonstrated in the U.S.-Russia Transit Case, a nation's "core security interests" inherently possess subjective dimensions. During the 1947 negotiations for the General Agreement on Tariffs and Trade (GATT), concerns about the provision potentially enabling arbitrary actions led the United States to implement safeguards when drafting Article XXI. From this perspective, the ambiguity surrounding Article XXI (b) ultimately facilitates the establishment of judicial jurisdiction.

4. Reform

In the complex interplay between globalization and national security, international trade dispute resolution mechanisms are facing unprecedented challenges. The ambiguity of national security exception clauses and the abuse of unilateralism by major powers not only erode the rules-based multilateral trading system but also plunge disputes involving national security into legal limbo. The current paralysis of the WTO's Appellate Body has further complicated these issues, compelling all parties to explore alternative solutions.

4.1. Countering the abuse

The legal application of disputes involving national security is typically complex, making tariff measures a frequently discussed alternative. Regarding Section 232 tariffs under the U.S. Trade Expansion Act of 1962, nine WTO complainants have sought to use tariffs as safeguard measures [15]. They aim to permit WTO members to impose retaliatory tariffs on American imports through Article 8 of the Safeguards Agreement. This approach could also be interpreted as circumventing the security exception explicitly stipulated in Article XXI of the General Agreement on Tariffs and Trade (GATT).

Given the inherent ambiguity and uncertainty surrounding security exceptions, flexible adjustments to appeal criteria can be implemented. WTO members may file "Non-violation complaints" under Article 23(1)(b) of the GATT rather than Article 23(1)(a) [16]. This approach not only respects member states' autonomy in national security matters but also provides additional legal avenues for dispute resolution. Furthermore, most members maintain a degree of flexibility regarding the national security exception clause, serving both as a safeguard against abuse and as a buffer for potential future national security-related disputes.

4.2. Principle of high restraint

The invocation of the security exception clause should serve as a safeguard for member states to protect national security. Once the national security clause is invoked, the corresponding state's obligations will be waived. Particularly when large economies take such measures, it can cause significant fluctuations in international trade. Therefore, many WTO members have developed a customary restraint. Jiajun Li pointed out that in the U.S. case regarding steel and aluminum product measures, the United States imposed tariffs on steel products and aluminum goods on nearly all member countries worldwide. This prolonged and extensive tariff sanctioning has had a substantial impact on multilateral trading systems like the WTO [17]. However, applicant members such as China have argued that the U.S. tariff measures violated safeguard measures provisions rather than invoking Article 21's national security exception clause. Article 21 of GATT confines the security exception to "any provision of this Agreement," and WTO members cannot invoke it for violations of obligations under other agreements. Most member states prefer maintaining a certain degree of ambiguity in the national security exception clause under these circumstances, possibly to protect their self-determination rights that may involve national security issues in the future.

4.3. Explore a variety of dispute resolution mechanisms

The inherent flaws in the WTO's dispute settlement mechanism have further complicated national security-related disputes. The early success of the WTO's dispute resolution system largely owed to the Dispute Settlement Body (DSB). However, at the December 2019 WTO General Council

meeting, the revised draft of the Appellate Body failed to pass due to U.S. opposition. On December 11, the formal resignation of U.S. Judge Thomas Graham and Indian Judge Singh Bhatia left only Chinese Judge Zhao Hong remaining, plunging the Appellate Body into paralysis. When Zhao Hong's term expired on November 30, 2020, the Appellate Body became completely inactive. This crisis left panel reports under review without adjudication, severely undermining the effectiveness and authority of the WTO's dispute resolution system. The absence of the Appellate Body not only hindered the resolution of national security-related disputes but also destabilized the entire multilateral trading system.

Faced with this dilemma, exploring diversified dispute resolution methods is a viable path for future development in international trade and national security issues. The Dispute Settlement Agreement (DSU) stipulates that disputes between members may be resolved through arbitration. China, the EU, and other WTO members jointly established the Multi-Party Interim Appeal Arbitration Arrangement ("MPIA") as a temporary alternative mechanism during the suspension of the Appellate Body. Not only does MPIA provide member states with legal avenues to resolve trade disputes, but more importantly, it safeguards the rules-based multilateral trading system from complete collapse. Additionally, according to Article 25 of the DSU, arbitration provides a flexible framework for resolving specific disputes. The "Turkey Pharmaceuticals Case" (DS583) announced by the WTO in July 2022, as the first WTO appellate arbitration award, serves as a crucial reference for subsequent practices.

Another viable alternative to litigation and arbitration is negotiation. Scholars have proposed that within the WTO dispute settlement framework, establishing a permanent National Security Committee could address challenges posed by national security-driven measures to the existing trade system [17,18].

5. Conclusion

The abuse of security exception clauses could undermine the foundations of the multilateral trading system. This paper systematically examines the legal evolution, core controversies in application, and reform pathways of WTO national security exception clauses. The research aims to clarify the boundaries of security exception applications amidst rising unilateralism and protectionism, which would help balance national sovereignty with multilateral rules and maintain the global trade governance framework. Key findings reveal three critical issues: ambiguous definitions of "essential security interests," inconsistent dispute resolution mechanisms, and divergent interpretations of "self-judgment" that hinder effective resolution of security disputes. These issues indicate that the national security exception risks becoming a tool for trade protectionism, potentially harming other members' legitimate rights and undermining confidence in multilateral dispute resolution mechanisms. To address these challenges, the study proposes reforms including introducing "Non-violation Complaints" as alternative remedies, advocating "high restraint" principles when invoking provisions, and developing multilateral arbitration mechanisms as interim solutions during appellate body paralysis. However, limitations remain. Further research is needed regarding special challenges and strategies for developing economies, particularly small and medium-sized nations. Additionally, discussions on reform proposals predominantly focus on WTO framework mechanisms, while deeper exploration of regional trade agreements' rule-making approaches on security issues and their interactions with the WTO system remains essential. Future research may focus on how emerging fields challenge and redefine the concept of "essential security interests," while conducting comparative studies on specific review criteria for national security measures under different international treaty systems. Ultimately, this will help build a fairer, more predictable, and more

resilient global trade order that strikes a balance between national sovereignty and multilateral cooperation.

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