When Sovereigns Clash and International Rules Fail
Dealing with National Security at the WTO

Remarks of

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The national security provision of the WTO is seriously flawed and needs to be revised. At one extreme, as interpreted, it gives an aggressor a claim of legitimacy for its imposing trade sanctions on its victim and at the other extreme, it calls for an intrusiveness by dispute settlement panels in the most sensitive assessments a government can make, without restraining protectionist behavior. In a world of increasing turmoil, geopolitical and economic, the exception is likely to be invoked in ways and for purposes never intended. Maintaining that WTO dispute settlement panels have the competence to review a government's determination of what is in its "essential interests" will likely prevent the restoration of binding dispute settlement at the WTO.

The post-World War II planners in constructing a world trading system understood that there had to be an escape from the rules in dire circumstances. What they drafted was the following:

> *Art. XXI. Security exceptions.*
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> *Nothing in this Agreement shall be construed. …*
>
> *… (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests,*
>
> *… (iii) taken in time of war or other emergency in international relations; ….*

The essential security (alternatively referred to as "national security) exception to the WTO's rulebook functioned well enough during most of the first 75 years of the multilateral trading system's existence, during the GATT and then the WTO years because (1) it was not invoked to protect domestic industry as a substitute for other trade measures; and (2) its use was rarely adjudicated. In the abstract it made good sense. It was a reasonable approach for those building a global trading system to adopt after much debate and thought.

The circumstances of its use have changed dramatically due to the United States citing the national security exception as its justification to protect its steel and aluminum industries and due to WTO dispute settlement panels increasingly being called upon to opine on whether the invocation of this exception was justified.

Avoiding litigating that which is not susceptible to judicial disposition

Litigation of what constituted an essential security interest was for decades scant. There were instances in which national security was a central issue, but were not resolved through litigation. A Swedish footwear case did not need to be litigated due to its removal in the face of universal international criticism. During the Falklands War, majority sentiment in the General Council viewed the EU applying sanctions to Argentina's trade as being within its rights. When the Sandinistas were in power in Nicaragua, the US placed sanctions on Nicaraguan trade but it dodged a panel review of its justification by using its clout to make sure that the panel's terms of reference precluded a review of the validity of its invoking the national security exception. When the US imposed sanctions against Cuba, the question of the legitimacy of these Helms-Burton sanctions being applied to EU companies doing business in Cuba was also finessed. The world's two largest trading entities at the time, the US and the EC, chose to work out their differences rather than litigate them. The EU withdrew the case.

The period of trade expert panels being kept away from determining whether a member was pursuing its "essential security interests" ended with the Russia-Ukraine Goods in Transit case. A panel determined that Russia's actions were within the scope of the exception. That decision opened a pandora's box of judicial involvement in what are essentially political questions. The US restrictions on steel and aluminum for national security reasons was successfully challenged and found wanting, as was the US labeling goods from Hong Kong as being "made in China". In the queue for potential decision at present is China's challenge to US export restrictions on semiconductors (the matter is currently in consultations).

As the US considers invocation of Art. XXI as nonjusticiable, the clear precedent that WTO dispute settlement panels can review national determinations of their essential security interests will be a principal roadblock to resolving the impasse over restoring binding dispute settlement at the WTO, an essential element of the organization's original reason for being.

What is a country's essential security interest?

In the case of *Russia transit*, the panel found that since Russia invaded Ukraine, there was a war, clear evidence of the applicability of the exception. In the cloistered domain of judicial consideration, this outcome made eminently good sense. In a more practical world, this is nonsense. An aggressor is given WTO cover, license, to impose trade sanctions against the trade of its victim along with pressing forward with military action. I doubt is any of the drafters of Art. XXI thought that they were providing a means for making aggression economic as well as military.

Adjudication of essential security interests is the judicial equivalent of wandering into a field of landmines of fraught political questions. First, there is the panel's assuming it can reasonably review whether an action is actually in the "essential security interests" of the government making this determination. Second, the panel chooses to review the necessity (proportionality) of the measure. And third, it determines if there is really a war or international emergency justifying the measure. No government can tolerate that amount of second guessing. And, even if the government prevails, there is the remaining question of whether the world has been well-served by the panel decision.

The advisability of maintaining dispute settlement of Article XXI panel decisions as they have been determined in recent cases can be considered best with the use of hypothetical sets of facts.

Assume that Russia thinks Moldova will join the EU and shortly thereafter NATO. Would it then be justified under the essential security exception to end imports of fruits and vegetables from Moldova to press Moldova to desist from that course, or does it first have to send troops into its neighbor's territory to qualify its trade measure under the essential security exception? Would it be sufficient if it has invaded another neighbor? Is what is on its face another war or international emergency relevant to bring a hypothetical anti-Moldovan measure within the national security exception? What if, instead of invading Moldova, it surreptitiously sponsors part of Moldova (Transnistria) declaring its independence and aligning itself with Moscow? Does that qualify as a relevant war or international emergency for purposes of Art. XXI?

How can a panel assess the validity of Russia's essential security interests? Historians still argue whether Stalin was correct in believing that the USSR required a line of buffer states between it and Western Europe, and whether the Cold War was in fact caused by a perceived threat from the West and not Stalin's unfounded paranoia. What set of facts constitutes an essential security interest is a highly subjective

judgment. Whether there is a war or an international emergency before troops cross borders is also not clear. The Russian measures in these circumstances should neither be justifiable nor justified under global trading rules. Nor should their validity be adjudicated by a WTO panel under the exception contained Article XXI. These are not justiciable matters.

Of course, a principal means of avoiding a review of whether the national security exception applies is not to invoke it. Assume that China reacts negatively to another WTO member allowing a Taiwan office within its territory. Do China's essential security interests legitimately permit a trade response under Article XXI, arguing that allowing a Taiwan office to open could upset a very delicate diplomatic balance, destabilizing the current world order, and thus creating an international emergency? Again, identifying a nation's essential security interests is a highly subjective judgment. In what way would the global trading system be served to have three experts make a judgement on that question under WTO dispute settlement procedures.\

This is true independent of the merits of the case. One cannot find a trade expert outside of the Trump Administration who would support the use of the national security exception to justify import restrictions on steel and aluminum. It does not help to consider that the invocation of Art. XXI in this particular instance was perhaps something of a fluke. The US Secretary of Commerce had owned a large part of the American steel industry for a brief period a few years earlier and only left the board of the world's second largest steel company to take his position in government. He knew the steel industry. One of the Commerce Department's chief trade tools, rarely utilized, was the authority to impose national security import restrictions. His president liked to impose tariffs. The domestic conditions were ripe for imposing restrictions on steel imports.

Steel trade and the WTO has some history. In 2002, the US invoked the WTO safeguard mechanism with respect to steel imports. At that time, 35 US steel companies were in bankruptcy, and one was in dissolution. A WTO panel and the Appellate Body found the measure to be WTO inconsistent. The industry had chosen not to file a national security case. In that bygone era, no one dreamt that national security meant other than preserving steel for limited defense purposes such as having steel plate available for constructing battleships. And, in terms of the quantities involved, this was a very minor use of steel. Blanket restrictions were not seen at that time as justifiable to serve this limited purpose.

In 2018, the Trump Administration argued that it had taken its national security action to maintain capacity utilization in the steel industry at 80%. It did not choose to invoke the judicially-damaged safeguards provisions of the WTO but opted to claim a national security rationale. The WTO panel did not seek to impose its own view of the level of capacity utilization necessary to preserve the health of the US steel industry. It did not engage in an intellectual exercise to choose, with global excess capacity driving

down the profitability of US mills, its own number of what would be needed to maintain a healthy steel industry, whether 70%, 60%, or 30% was the right number for US capacity utilization to safeguard America's essential security interests. It did not address the question of whether a 21st century military power needed steel or aluminum industries, or whether it could better dsrely on imports from its current allies. These are not readily judiciable calculations. Instead, the panel decided that it could not find a relevant war or international emergency justifying the invocation of the national security exception.

The Biden Administration modified but did not remove the steel and aluminum restrictions. It did not renounce the national security claim as a basis for the measures' WTO legitimacy. Instead, it argued that the existence of essential security interests is nonjusticiable. It cut short the adjudication by filing in January 2023 an appeal to an Appellate Body that does not exist and is unlikely to ever be reconstituted given US opposition to appointing anyone to the Body. Thus, it blocked a final determination at the WTO of whether the US measure was justified under the rules. Was the trading system well-served by a panel condemning the US measure and having the a series of countries retaliating in a manner not specifically contemplated by the WTO rules?

These fact patterns suggest that essential security interests in most instances should be nonjusticiable. Clearly while it would perhaps be better to rely upon alternatives instead of litigation, for example, consultations, reviews in relevant WTO committees at the WTO and perhaps drawing upon the "good offices" of the Director-General from time to time where this might be productive to settle differences, bringing a dispute settlement case is a fundamental WTO right.

While there are undoubtedly alternative approaches, it is still necessary to end the attractiveness of resort to the national security exception. A reasonable answer is to convert Article XXI into, in effect, Article XXVIII – renegotiation. A country would be permitted for essential security reasons to modify its tariff schedules, perhaps on short notice in an emergency, which judgment would be nonreviewable in WTO dispute settlement, but to restore the pre-existing balance of concession, the country would automatically owe compensation or face potential retaliation. As a practical matter, this is in fact what took place with respect to steel and aluminum -- the EU, Canada, India, China, Russia, UK and Turkey imposed retaliatory tariffs on US exports, thereby seeking to restore the pre-existing balance of concessions. But they did so without the express sanction of the WTO rules. Amending Art. XXI would be a better approach.

Sovereigns should be constrained by agreed international rules. Nevertheless, the member's own judgment of its essential security interests should not generally be subject to review by independent trade experts. To attempt to do so is at worst folly and at best ineffective. If a member's judgment is widely seen as a sham, as in the case of Swedish footwear or American steel and aluminum, a panel's condemnation would only lead to an authorized rebalancing of concessions. One can short-circuit the judicial process by starting with a right of retaliation rather than ending there.

It is argued that having an Article XXVIII (rebalancing of concessions) approach will not solve the problem for small countries who are not in a position to retaliate with much effect against large countries. That cannot be resolved outside of collective security where all nations weigh in to protect a small nation's rights. This is not a feature of the WTO and not likely to become one in the foreseeable future. International opprobrium, by itself is at present ineffective (one ambassador's reactions: "they have no shame!"). The cure must lie ultimately in members seeing it as being in their best interests to live up to the obligations they accepted. That world needs to be restored. Having panels reviewing national decisions on essential security is not a part of any viable solution. Imposing costs for choosing to apply import restrictions is the traditional and necessary response.