

International Trade and National Security – An Analysis of Article XXI of GATT on Security Exception

*Catherine Li**

Abstract

The exception to GATT obligations for national security reasons is set forth in Article XXI of GATT. This exception, while rarely invoked explicitly, is highly significant. Article XXI: (b) is the most important and controversial portion of this exception, because the GATT does not define critical terms such as “it considers necessary” and “essential security interests”. Consequently, the scope of the exception in Article XXI is not readily discernable. Similarly, the fact that an invoker of the security exception may take any action to protect “essential security interests” that “it considers necessary” leaves open the question of whether the use of Article XXI is subject to review by a Panel. However, the question of whether a Panel has jurisdiction over this exception has never been definitively settled. Although some scholars suggest a variety of standards to be weighed when considering the invocation of security-based sanctions, sovereignty concerns intertwined with questions of national security may cause WTO members to prefer an ambiguous Article XXI that remains outside the bodies of WTO dispute settlement. This article provides a brief overview of the nature, the implementation, and the jurisdictional question behind Article XXI. It also explores the possibility of creating standards for the use of the security exception.

Keywords: GATT, WTO, national security exception, Panel, DSU, Falkland Islands War, The Helms-Burton Act, unilateral trade sanction, cost-effectiveness approach, diplomatic pressure.

* Professor, Department of Law, Soochow University; Docteur en droit, l'Université de Paris 1 – Panthéon-Sorbonne.