

**RESPONSIBILITY IN INTERNATIONAL LAW**

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# ARE RESTRICTIVE MEASURES AND COUNTERMEASURES JUSTIFIABLE BY WTO SECURITY EXCEPTIONS: OBJECTIVE OR SUBJECTIVE APPROACH?

**INTRODUCTION.** *This paper is devoted to interpretation of so-called WTO "Security Exception Articles", namely Article XXI of the GATT, XIV bis of the GATS and 73 of the TRIPS Agreement with respect to their possible applicability to trade restrictive measures adopted against Russia, and Russian countermeasures, based on the assumption that these trade restrictive measures violate WTO disciplines.*

**MATERIALS AND METHODS.** *The materials for the article were norms of general international law and norms of WTO law, containing so-called security exception provisions and their respective*

*interpretation by international tribunals, international organizations and scholars. The methodological basis of the research consists of general scientific and special methods.*

**RESEARCH RESULTS.** *Taking into account that there is a lack of WTO jurisprudence and no common view of WTO members regarding the issue at hand, the analysis is based on the scope of Security Exception Articles and on the Panel's jurisdiction to resolve disputes arising from them. In particular, the paper addresses whether security exceptions are of a self-declaratory nature; and, as it was stated by the GATT Council in 1985 in relation to the US trade*

*embargo against Nicaragua, “the Panel cannot examine or judge the validity or motivation for the invocation of article XXI (b) (iii) by the United States” or whether it is possible to apply an objective test to Security Exception Articles.*

**DISCUSSION AND CONCLUSIONS.** *With respect to the objective test, the interpretation of the following notions should be analyzed: “essential security interests”, “emergency in international relations” and “necessary to protect”. The analysis should be based on rules of general international law and the Appellate Body’s approach according to which previously established interpretations of certain provisions of one WTO Agreement can be used to inform the content of the same ‘words’ in another WTO Agreement. With respect to*

*the subjective approach we may face a tendency to interpret “self-judging clause”, in the light of “a good faith” principle and therefore the issue at hand can be subject to the Dispute Settlement Body’s analysis.*

**KEYWORDS:** *WTO, Security exceptions, article XXI of the GATT, essential security interests, emergency in international relations, self-judging clause, objective test*

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## ОТВЕТСТВЕННОСТЬ В МЕЖДУНАРОДНОМ ПРАВЕ

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# МОГУТ ЛИ АНТИРОССИЙСКИЕ «САНКЦИИ» И РОССИЙСКИЕ ОТВЕТНЫЕ МЕРЫ БЫТЬ ОПРАВДАНЫ В РАМКАХ ВТО СООБРАЖЕНИЯМИ

# БЕЗОПАСНОСТИ: ОБЪЕКТИВНЫЙ ИЛИ СУБЪЕКТИВНЫЙ ПОДХОД?

**ВВЕДЕНИЕ.** Статья посвящена проблемам толкования так называемых Статей об исключениях по соображениям безопасности, действующих в рамках ВТО, а именно ст. XXI ГАТТ, ст. XIV-бис ГАТС и ст. 73 ТРИПС, в связи с возможностью их применения к мерам, ограничивающим торговлю, принятым против России, и российским контрамерам, исходя из презумпции, что указанные меры, ограничивающие торговлю, противоречат нормам ВТО.

**МАТЕРИАЛЫ И МЕТОДЫ.** В качестве материала для данной статьи использовались нормы общего международного права и нормы права ВТО, предусматривающие исключения по соображениям безопасности, а также практика их толкования международными судебными учреждениями, международными организациями и специалистами. Методологическую основу исследования составляют общенаучные и специальные методы.

**РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ.** Принимая во внимание недостаток практики и отсутствие общего подхода в рамках ВТО в отношении рассматриваемой проблемы, проведен анализ сферы действия Статей об исключениях по соображениям безопасности и юрисдикции третейских групп рассматривать вытекающие из них споры. В частности, в статье исследуется природа Статей об исключениях по соображениям безопасности на предмет возможности их применения третейскими группами при разрешении споров, т.е. анализируется возможность применения объективного или субъективного подхода к толкованию дан-

ных Статей.

**ОБСУЖДЕНИЕ И ВЫВОДЫ.** Касательно возможности использования объективного подхода необходимо толкование таких терминов, как «существенные интересы безопасности», «чрезвычайные обстоятельства в международных отношениях» и «необходимые для защиты». Данный анализ необходимо осуществлять на основе норм общего международного права и подхода Апелляционного органа, в соответствии с которым ранее осуществленное толкование положений одного соглашения ВТО может быть использовано для определения содержания аналогичных понятий другого соглашения ВТО. Что касается субъективного подхода, то мы можем наблюдать тенденцию ограничения его применения в контексте принципа добросовестности.

**КЛЮЧЕВЫЕ СЛОВА:** ВТО, исключения по соображениям безопасности, статья XXI ГАТТ, существенные интересы безопасности, чрезвычайные обстоятельства в международных отношениях, субъективный подход, объективный тест

**ДЛЯ ЦИТИРОВАНИЯ:** Боклан Д.С., Абсалямов В.В., Курносос Ю.С. 2018. Могут ли антироссийские «санкции» и российские ответные меры быть оправданы в рамках ВТО соображениями безопасности: объективный или субъективный подход? – *Московский журнал международного права*. № 3. С. 18-29.

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## 1. General observations

The negotiating history reveals that [GATT] participants had a wide understanding of national security in mind. They found it unreasonable, for example, to request from contracting parties to continue to do business with firms that transferred all or part of their profits from their sales

to the enemy [Mavroidis, Bermann, Wu 2013:319]. According to the Ministerial Declaration adopted 29 November 1982, paragraph 7 (iii) "...the contracting parties [to the GATT] undertake, individually and jointly: ...to abstain from taking restrictive trade measures, for reasons of non-economic character, not consistent with the General Agreement". Nevertheless, a great number of trade restrictive mea-

asures were adopted against Russia since 2014 by the United States, European Union, Canada, Australia, Ukraine and some other members of the WTO. Russia in turn, applied a number of countermeasures in response<sup>1</sup>.

As Peter Van den Bossche and Werner Zdouc note, States may wish to use trade sanctions, as an instrument of foreign policy, against other States, which either violate international law or pursue policies considered to be unacceptable or undesirable [Bossche, Zdouc 2013:596].

In case these measures will be considered WTO inconsistent the question whether they could be justified under WTO security exceptions may be raised.

Articles XXI of the GATT, XIV bis of the GATS and 73 of the TRIPS Agreement are so-called WTO "Security Exception Articles" which stipulate legal grounds for such possible justification. Therefore, Security Exception Articles may be invoked by a WTO Member only when a measure of that Member has been found to be inconsistent with another GATT, GATS or TRIPS provision.

It is worth noting that there are several provisions in other WTO agreements which contain references to the "Security Exception Articles", in particular, Article 24.7 of the Agreement on Trade Facilitation, Article 3 of the Agreement on Trade-related Investment Measures and Article 1.10 of the Agreement on Import Licensing Procedures.

According to the Decision Concerning Article XXI of the General Agreement of 1982, "the Contracting Parties may decide to make a formal interpretation of Article XXI". Moreover the Russian Federation made a special proposal at the WTO Ministerial Conference in Nairobi in 2015, according to which "...with the view to ensure clarity and predictability of implementation of Security Exceptions Provisions of the WTO Agreements Members shall develop a General Council decision on joint understanding on the interpretation of the scope of

the rights and obligations of the WTO Members under these Provisions... the negotiations shall focus on identification of circumstances when application of the measures pursuant to Security Exceptions is justified..."<sup>2</sup>. However, such interpretation never had been made. Taking into account that there is a lack of WTO jurisprudence and no common view of WTO members regarding the issue at hand further analysis will be based on the scope of Security Exception Articles and Panel's jurisdiction to resolve disputes arising from them. In particular whether security exceptions are of a self-declaratory, subjective nature and as it was stated by the GATT Council in 1985 in relation to the US trade embargo against Nicaragua, "the Panel cannot examine or judge the validity or motivation for the invocation of article XXI (b) (iii) by the United States" or whether it is possible for a panel and Appellate Body to apply an objective test to Security Exception Articles.

According to Article XXI of the GATT, Article XIV bis of the GATS and Article 73 of the TRIPS Agreement: "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*..." (emphases added).

Therefore, with respect to the objective test the interpretation of the following notions will be analyzed: "essential security interests"<sup>3</sup>, "necessary to protect" and "emergency in international relations". This analysis will be based on rules of general international law<sup>4</sup> and the Appellate Body's approach according to which previously established interpretation of certain provisions of one WTO Agreement can be used to inform the content of the same "words" in another WTO Agreement. According to the Appellate Body jurisprudence, "same" wording in different WTO Agreements may be interpreted by previously established interpretation<sup>5</sup>.

<sup>1</sup> On legal issues with respect to tariff defense of economic security of the Russian Federation see [Vorontsova 2015:93–106; Vorontsova 2017:136–143].

<sup>2</sup> Proposal on MC10 Ministerial Declaration – Part III. Para 1.5. URL: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN15/W14.pdf> (accessed date: 18.07.2018).

<sup>3</sup> See in more details about the content of the term security in international law: [Boklan, Kopylov 2014:171–179; Boklan, Korshunova 2017:299–314; Amanzholov 2007:226–244; Kemerova, Zhalkubaev 2003:479–502; Lukashuk, Boklan 2003:587–597] and Boklan D.S. 2016. Vzaimodeistvie mezhdunarodnogo ekologicheskogo i mezhdunarodnogo ekonomicheskogo prava: Avtoreferat dis. ... doktora yuridicheskikh nauk. [Interconnection of International Environmental and International Economic Law. Doctoral Thesis Abstract]. Moscow. 2016.

<sup>4</sup> About interconnection between general international law and WTO law see: [Marceau 2001:1129; Pauwelyn 2003; McRae 2000:21–47].

<sup>5</sup> See: Appellate Body Report "United States – Tax Treatment for "Foreign Sales Corporations". 2003. Para 141. URL: [http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc\\_114239.pdf](http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114239.pdf) (accessed date: 14.07.2018); Appellate Body Report "United States – Subsidies on Upland Cotton". 2002. URL: [http://trade.ec.europa.eu/doclib/docs/2004/july/tradoc\\_117893.pdf](http://trade.ec.europa.eu/doclib/docs/2004/july/tradoc_117893.pdf) (accessed date: 15.07.2018); Appellate Body Report "United States – Sunset Review of Anti-Dumping Duties on

Further, the Appellate Body reaffirmed this approach<sup>6</sup>.

## 2. The objective approach

Article XXI (b) [of the GATT] gives a member very broad discretion to take national security measures which it “considers necessary” for the protection of its essential security interests. However, it is imperative that a certain degree of “judicial review” be maintained; otherwise the provision would be prone to abuse without redress [Bossche, *Zdouc* 2013:596].

The objective approach provides for establishment of certain requirements or tests for the wording of article being interpreted. However, the direct wording of the article XXI of the GATT, Article XIV *bis* of the GATS and Article 73 of the TRIPS Agreement (hereinafter Security Exception Articles) is not clear enough to understand how such decisive notions like “essential security interests”, “emergency in international relations” and “necessary to protect” should be interpreted. Therefore, these notions will be further analyzed in turn.

All subparagraphs of paragraph (b) of the Security Exception Articles are linked to the introductory clause of paragraph (b), according to which “[n]othing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers *necessary* for the protection of its *essential security interests*” (emphases added). This means that the objective of the measures foreseen in subparagraphs of paragraph (b) is protection of essential security interests and they should be interpreted in the light of that objective; also the “necessity test” should be applied. Therefore we start from the analysis of the terms “essential security interests” and “necessity test”.

## 3. “Essential Security Interests”

Due to the absence of interpretation by the DSB or WTO Ministerial Conference of the term “essential security interests” firstly we will address interpretation existing in general international law made

by the International Law Commission (hereinafter ILC), International Court of Justice (hereinafter ICJ) and international tribunals.

According to ILC Articles on State Responsibility (Articles 20–25), there are some circumstances under which states may not be held responsible for breaching their international obligations. These circumstances which justify an otherwise wrongful act by the state include necessity (Article 25) in case it “is the only way for the State to safeguard an *essential interest* against a grave and imminent peril” (emphases added). The ILC Committee of Experts on State Responsibility through its Chairman Roberto Ago stated in 1980 that the “essential state interest” that would allow the state to breach its obligation must be a vital interest, such as “political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, the preservation of the environment of its territory or a part thereof, etc.”<sup>7</sup>.

A second limitation for invoking necessity is that the conduct in question must not seriously impair an essential interest of the other state or states concerned, or of the international community as a whole. In other terms, the interest relied on must outweigh all other considerations, “not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective” [Yannaca-Small 2007:100–101].

Thus, according to the ILC Articles on State Responsibility (Article 25) “necessity may not be invoked by the State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act... (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole”. This position also was confirmed by the ICJ in the *Gabcikovo-Nagymaros Project case*, where the ICJ was not convinced that the suspension and abandonment of the project was the only means available to Hungary to protect against its essential interest and noted that it could have “resorted to other means in order to respond to the dangers that it apprehended”<sup>8</sup>.

Corrosion-Resistant Carbon Steel Flat Products from Japan”. 1997. URL: <https://www.cambridge.org/core/journals/international-legal-materials/article/wto-appellate-body-report-united-states-measures-relating-to-zeroing-and-sunset-reviews/63DA476EED03F4CD3D1020891F1FA441> (accessed date: 15.07.2018).

<sup>6</sup> See: Appellate Body Report “European Communities – Regime for the Importation, Sale and Distribution of Bananas”. 1997. URL: [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e/27rhnd.pdf](https://www.wto.org/english/tratop_e/dispu_e/dispu_e/27rhnd.pdf) (accessed date: 15.07.2018).

<sup>7</sup> Eighth report on State responsibility by Mr. Roberto Ago, Special Rapporteur “The internationally wrongful act of the State, source of international responsibility (part 1)”. – *Yearbook of the International Law Commission*. Vol. II (1). 1980. P. 14.

<sup>8</sup> *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment. – *I.C.J. Reports*. 1997. P. 45. Para. 56.

Third criterion with respect to interpretation of “essential security interests” that exists in general international law is whether they are limited only to military actions and/or armed attacks. The ICJ in *Military and Paramilitary Activities in and against Nicaragua* case pointed out that “the concept of essential security interests certainly extends beyond the concept of an armed attack”. However, the Court did not find the perceived threat posed by Nicaragua’s aggression in Central America to meet the requirement of essential security<sup>9</sup>. In more recent ICJ jurisprudence, in the *Oil Platforms* case decided in 2003<sup>10</sup> the Court again rejected the essential security defense. Importantly, the court informed its understanding of the essential security provisions by looking to the right to self-defense of “armed attack” under international law. While the court did refer to the uninterrupted flow of maritime commerce as being a reasonable security interest of the USA, such commercial interests were considered relevant only because armed attacks were at play. The legal debate was over the interplay of use of force and justifiable self-defense in the context of necessity, not whether economic circumstances may justify the invocation of the essential security clause.

However, a different position was demonstrated by international tribunals resolving international economic disputes in *CMS v. Argentine Republic*, *LG&E v. Argentine Republic* and *Enron v. Argentine Republic*: cases where although none of the tribunals set forth its interpretation of specific, relevant terms of the essential security provision, they both concluded that major economic crises could not in principle be excluded from the scope of essential security interests<sup>11</sup>. Moreover, the tribunals pointed out that “when a State’s economic foundation is under siege, the severity of the problem can equal that of any military invasion”<sup>12</sup>. Later the *Sempra* Annulment Committee, rendered in June 2010, confirmed that “not even in the context of GATT Article XXI is the issue considered to be settled in favor of a self-

judging interpretation, and the very fact that such article has not been excluded from dispute settlement is indicative of its non-self-judging nature”<sup>13</sup>. The International Tribunal for the Law of the Sea in the *M/V Saiga No. 2* case ruled that “interest in maximizing tax revenue is essential”<sup>14</sup>.

The position of the Organization for Economic Co-operation and Development is also relevant to the issue at hand. As it is enshrined in Recommendation of the OECD Council on “Member country measures concerning National Treatment of foreign-controlled enterprises in OECD member countries and based on considerations of public order and essential security interests”, adopted at its 646<sup>th</sup> meeting on 16 July 1986, that OECD Codes of Liberalization of Capital Movements and of Current Invisibles Operations may stipulate the provisions which “shall not prevent a Member from taking action which it considers necessary for the (ii) ...protection of its essential security interests... (c) examination of the possibility of amending measures based on... essential security interests in a manner which allows the reduction or avoidance of the direct or indirect impact of this discrimination against the activities of foreign-controlled enterprises outside the area where... essential security interests concerns are prevalent”<sup>15</sup>. According to the Investment Committee’s commentaries to the Codes, this safeguard provision is “deemed to address exceptional situations. In principle, it allows members to introduce, reintroduce or maintain restrictions not covered by reservations to the Code and, at the same time, exempt these restrictions from the principle of progressive liberalization...”<sup>16</sup>.

Secondly, we may find the notion of “essential security interests” in the treaties, adopted at the regional level, in particular in the Law of the European Union.

Thus, Article 346 of the Treaty on the Functioning of the European Union (hereinafter TFEU) refers to measures which a Member State “considers neces-

<sup>9</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment. – *I.C.J. Reports*. 1986. P. 117. Para. 224.

<sup>10</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment. – *I.C.J. Reports*. 2003. P. 162.

<sup>11</sup> ICSID Case No. Arb/02/1 “*LG&E Energy Corp. v. Argentine Republic*”. 2006. URL: <https://www.italaw.com/sites/default/files/case-documents/italaw4101.pdf> (accessed date: 19.07.2018).

<sup>12</sup> *Ibidem*. Para. 227–229.

<sup>13</sup> ICSID Case No. Arb. 02/16 “*Sempra Energy Int'l v. Argentine Republic*”. Para. 384. 2010. URL: <http://scholar.smu.edu/cgi/viewcontent.cgi?article=1402&context=lbra> (accessed date: 19.07.2018).

<sup>14</sup> *MIV "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment. – *ITLOS Reports*. 1999. P. 56, Para. 133. About security issues in economic international relations in the ITLOS jurisprudence see: [Boklan 2014a:80–86].

<sup>15</sup> OECD Codes of Liberalization of Capital Movements and Current Invisible Operations: User’s Guide. 2003. URL: <http://www.oecd.org/daf/inv/investment-policy/oecdcodesofliberalisationofcapitalmovementsandcurrentinvisibleoperationsusersguide.htm> (accessed date: 16.07.2018).

<sup>16</sup> *Ibidem*.

sary for the protection of the essential interests of its security” or to “information the disclosure of which it considers contrary” to those interests.

The definition of their essential security interests is the sole responsibility of Member States<sup>17</sup>. However, according to European Court of Justice (hereinafter ECJ) case-law, Article 346 of the TFEU does not allow Member States to depart from the provisions of the Treaty by nothing more than simply referring to such interests<sup>18</sup>. The ECJ has also stated that the derogation under Article 346 TFEU is limited to exceptional and clearly defined cases, and that the measures taken must not go beyond the limits of such cases<sup>19</sup>. Like any other derogation from fundamental freedoms, it has to be interpreted strictly.

Therefore we may conclude that there is no common view in international general law with respect to the scope of meaning of “essential security interests”. On the contrary, there is a big debate whether this term includes solely military emergencies or it also may include economic ones.

The meaning of “essential security interests” is by no means unambiguous, but has been understood to be applicable only in circumstances involving national security interests. While states are to be given a margin of appreciation as to what constitutes a threat to their own national security, this discretion ought not to license states to invoke essential security interests in times of economic emergency [Moon 2012:483].

However, during last two decades we witness the evolution of the term “essential security interests”. Nowadays this term covers not only military issues but economic security as well.

#### 4. Necessity test

Security Exceptions enshrined in the above-mentioned articles of the GATT, GATS and TRIPS require the measures to be necessary for the protection of the essential security interests. This means that the WTO member invoking Security Exception Articles has to demonstrate that the measure which was applied is necessary to achieve the objective of protection of its essential security interests.

Unlike the interpretation of the term “Essential Security Interests” the term “necessary to” was interpreted by the WTO Dispute Settlement Body in several cases applying mostly Article XX of the GATT<sup>20</sup> and in some instances Article XIV (a) of the GATS; and, therefore the so called “necessity test” was established in WTO case law. According to the Appellate Body’s position in *EC-Asbestos*, the more important the social value pursued by the measure at issue and the more this measure contributes to the protection or promotion of this value, the more easily the measure at issue may be considered to be “necessary”<sup>21</sup>. Moreover, in *Korea – Various Measures on Beef* the Appellate Body noted: “[w]e believe that... the reach of the word ‘necessary’ is not limited to that which is ‘indispensable’ or inevitable... But other measures, too, may fall within the ambit of this exception... the term ‘necessary’ refers, in our view, to a range of degrees of necessity. At one end of this continuum lies ‘necessary’ understood as ‘indispensable’; at the other end, is ‘necessary’ taken to mean as ‘making a contribution to’...”<sup>22</sup>.

The interpretation and application of the “necessity” requirement has evolved considerably over the years [Bossche, Zdouc 2013:556].

<sup>17</sup> See Judgment of the ECJ First Instance (Third Chamber, extended composition) of 30 September 30, 2003 “*Fiocchi munizioni SpA v. Commission of the European Communities*” (Case T-26/01). URL: <http://curia.europa.eu/juris/celex.jsf?celex=62001TJ0026&lang1=en&type=TXT&ancre=> (accessed date: 16.07.2018).

<sup>18</sup> See Judgment of ECJ (Grand Chamber) of December 15, 2009 “*European Commission v. Republic of Finland*” (Case C-284/05). URL: <http://curia.europa.eu/juris/celex.jsf?celex=62005CJ0284&lang1=en&type=TXT&ancre=> (accessed date: 16.07.2018); Judgment of the ECJ (Grand Chamber) of December 15, 2009 “*European Commission v. Sweden*” (Case C-372/05). URL: <http://curia.europa.eu/juris/celex.jsf?celex=62005CJ0372&lang1=en&type=TXT&ancre=> (accessed date: 16.07.2018); Judgment of the ECJ (Grand Chamber) of December 15, 2009 “*European Commission v. Italian Republic*” (Case C-239/06).

<sup>19</sup> See Judgment of the Court (Sixth Chamber) of September 16, 1999 “*Commission of the European Communities v. Kingdom of Spain*” (Case C-414/97). URL: <http://curia.europa.eu/juris/celex.jsf?celex=61997CJ0414&lang1=en&type=TXT&ancre=> (accessed date: 18.07.2018); Judgment of the ECJ (Grand Chamber) of December 15, 2009 “*European Commission v. Italian Republic*” (Case C-239/06). URL: <http://curia.europa.eu/juris/celex.jsf?celex=62006CJ0239&lang1=en&type=TXT&ancre=> (accessed date: 18.07.2018).

<sup>20</sup> With respect to application of Article XX of the GATT see also: [Boklan 2014b:98–106; Pauwelyn 2013:448–506; Low, Marceau, Reinaud 2012:485–505; Trachtman 2016]; [Boklan 2014b:98–106].

<sup>21</sup> Appellate Body Report “*European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*”. 2000. Para. 172. URL: [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=1236&CurrentCatalogueIdIndex=0&FullTextHash=](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=1236&CurrentCatalogueIdIndex=0&FullTextHash=) (accessed date: 18.07.2018).

<sup>22</sup> Appellate Body Report “*Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*”. 2000. Para. 161. URL: [https://www.wto.org/english/tratop\\_e/dispu\\_e/161-169abr\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/161-169abr_e.pdf) (accessed date: 18.07.2018).

The most recent approach was applied by the WTO Appellate Body in *Brazil-Retreated Tyres*, according to which “[I]n order to determine whether a measure is ‘necessary’... a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure’s objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary; this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake. It is through this process that a panel determines whether a measure is necessary”<sup>23</sup>. The Appellate Body pointed out that to determine whether a measure is “necessary” is a “holistic operation that involves putting all the variables of the equation together and evaluate them in relation to each other after having examined them individually, in order to reach an overall judgment”<sup>24</sup>. A measure must bring about a material contribution to the achievement of its objective; and that whether a measure brings about such contribution can be demonstrated either by evidence that the measure: (1) has already resulted in a material contribution; or (2) is apt to produce a material contribution<sup>25</sup>.

Therefore, according to the WTO jurisprudence the “necessity test” involves weighing the following factors: the contribution made by the respective measure to the achievement of its objectives; the importance of the interests or values protected by the measure (the higher the importance the more necessity); the trade-restrictive effects of the measure (the more restrictive – the less necessary).

The measure also has to be compared with possible alternative measures, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.

### 5. Emergency in international relations

As for the objective test for interpretation of the term “emergency in international relations”,

some commentators underline that, the text of Article XXI (b) (iii) of the GATT, strongly suggests that “other emergency in international relations” sets a standard which the Contracting Party invoking article XXI (b) (iii) has to meet and not to define unilaterally. This understanding would be parallel to that of the other sub-sections of article XXI (b) which are all structured such that they grant (extraordinarily broad) discretion only if certain objective prerequisites are met. The term “emergency” excludes from its scope ordinary strained relations between States; it implies some sort of extreme conflict between States. Thus, a preliminary interpretation reveals that “emergency in international relations” encompasses every hostile interaction between States involving the use of force. However, “emergency in international relations” might cover additional situations not necessarily involving the use of force [Hahn 1991:589].

Although there is no interpretation of the term “emergency in international relations” made by the Panel or Appellate Body, however, with respect to the United States’ measures adopted against Nicaragua, India stated that “the scope of the term ‘other emergency in international relations’, was very wide... a contracting party having recourse to Article XXI (b) (iii) should be able to demonstrate a genuine nexus between its security interests and the trade action taken; the security exception should not be used to impose economic sanctions for non-economic purposes. India considered that such a nexus had not been established by the United States in this case, and that the action taken was, therefore, not in conformity with the General Agreement. India fully supported the Nicaraguan request that the measures be revoked”<sup>26</sup>.

Therefore we may conclude that “emergency in international relations” in the meaning of Security Exception Articles means an exceptional situation, which threatens WTO Member security. There must be a genuine link between such a threat and the actions of the threatening WTO member. That means that only threatening and threatened WTO Members could participate in such “international relations”, but not third parties.

<sup>23</sup> Appellate Body Report “Brazil – Measures Affecting Imports of Retreaded Tyres”. 2007. Para. 178. URL: [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/FE74493013FCB92664CA005619DD779D/S0020589308000560a.pdf/iii\\_appellate\\_body\\_report\\_brazilmeasures\\_affecting\\_imports\\_of\\_retreaded\\_tyres\\_adopted\\_on\\_17\\_december\\_2007.pdf](https://www.cambridge.org/core/services/aop-cambridge-core/content/view/FE74493013FCB92664CA005619DD779D/S0020589308000560a.pdf/iii_appellate_body_report_brazilmeasures_affecting_imports_of_retreaded_tyres_adopted_on_17_december_2007.pdf) (accessed date: 18.07.2018).

<sup>24</sup> Ibidem. Para. 182.

<sup>25</sup> Ibidem. Para. 151.

<sup>26</sup> Minutes of the meeting of the GATT Council. C/M/188. 1985. P. 11. URL: <https://docs.wto.org/gattdocs/q/GG/C/M185.PDF> (accessed date: 17.07.2018).

## 6. Subjective approach

Traditionally, in international relations, national security takes precedence over the benefits of trade [Bossche, Zdouc 2013:595].

The subjective test or self-judging nature of Article XXI of the GATT was established in the very first GATT panel report in *US-Export Restrictions (Czechoslovakia)*, where the Panel stated, that “every country must be the judge in the last resort on questions relating to its own security”<sup>27</sup>.

Then in 1982, the European Economic Community (EEC) and its member states, Canada, and Australia suspended imports into their territories of products of Argentina. In notifying these measures they stated that “they have taken certain measures in the light of the situation addressed in the Security Council Resolution 502 [the Falkland/Malvinas issue]; they have taken these measures on the basis of their inherent rights of which Article XXI of the General Agreement is a reflection”<sup>28</sup>. The EEC stated that “each party had to judge on its own whether to invoke this Article”<sup>29</sup>. Canada was seriously concerned that GATT not be politicized, and fully agreed with the United States that only the individual contracting party itself could judge questions involving national security; a panel could not make that judgment<sup>30</sup>. The United States pointed out that “GATT was not empowered to examine the motivation behind an action taken for national security reasons”<sup>31</sup>. Further this position was reaffirmed by the United States in *US – Nicaraguan Trade*, where they stressed that Article XXI is the provision, which “by its clear terms, left the validity of the security justification to the exclusive judgment of that contracting party taking the action”<sup>32</sup>. The Panel also noted that, “in the view of the United States... the Panel, both by the terms of Article XXI and by its mandate, was precluded from examining the validity of the United States' invocation of Article XXI... The United States' compliance with its obligations under the General Agreement was therefore not an issue before the Panel”<sup>33</sup>. More-

over, the United States suggested that it would not be advisable for the Panel to attempt a general interpretation as to when nullification or impairment existed or did not exist notwithstanding an invocation of Article XXI. And on top of that, no recommendation could be proposed to remove the embargo since to do so would imply a judgment on the validity of the national security justification which Article XXI, by its terms, left to the exclusive judgment of the contracting party taking the action. In addition, the United States noted that nothing in the Panel's terms of reference, or Article XXIII, or GATT practice would give any other contracting party reason to expect any recommendation by the Panel directed to third parties not represented in this dispute<sup>34</sup>.

Therefore, much of the debate with respect to possible applicability of the subjective test to Article XXI comes from the words in introductory clause of paragraph (b) – “to prevent any contracting party from taking *any action which it considers necessary* for the protection of its essential security interests” (emphasis added).

Commentators underline that the language of Article XXI of the GATT, which operates with the phrase “any action that it considers”, clearly gives a great weight to discretion of a state, implying an exclusively subjective standard of review [Lindsay 2003:1282].

Thus in the recent case *United Arab Emirates – Goods, Services and IP Rights*, where the Panel was already established the United Arab Emirates objected to Qatar's panel request, saying that it and eight other countries were forced to take measures in response to Qatar's funding of terrorist organizations. Article XXI of the GATT, Article XIV bis of the GATS and Article 73 of the TRIPS Agreement allows members to take action in the interests of national security. In any event, the UAE said the issues in this dispute were not trade issues, the WTO's dispute system was not equipped to hear them, and clear language existed in the agreements excluding such disputes from the WTO. Bahrain, Saudi Arabia and

<sup>27</sup> Panel Report CP.3/SR.22 “US – Export Restrictions (Czechoslovakia)”. 1949. URL: <http://www.worldtradelaw.net/document.php?id=reports/gattpanels/usexportrestrictions.pdf> (accessed date: 18.07.2018).

<sup>28</sup> Trade Restrictions Affecting Argentina Applied for Non-economic Reasons. – *GATT Doc. L/5319/Rev.1*. 1982. URL: [https://www.wto.org/gatt\\_docs/English/SULPDF/90990459.pdf](https://www.wto.org/gatt_docs/English/SULPDF/90990459.pdf) (accessed date: 17.07.2018).

<sup>29</sup> Minutes of the Meeting of the GATT Council. C/M/191.1985. P. 44. URL: <https://docs.wto.org/gattdocs/q/GG/C/M191.PDF> (accessed date: 17.07.2018).

<sup>30</sup> Ibidem. P. 45.

<sup>31</sup> Ibidem. P. 43.

<sup>32</sup> Panel Report L/6053 “US – Nicaraguan Trade”. 1986. Para. 4.6. URL: <http://www.worldtradelaw.net/document.php?id=reports/gattpanels/nicembargo.pdf> (accessed date: 17.07.2018). This report was never adopted.

<sup>33</sup> Ibidem. Para 5.2.

<sup>34</sup> Ibidem. Para 4.1.

Egypt associated themselves with the UAE statement and said they had taken necessary measures against Qatar in line with the national security exceptions provided for in the WTO agreements. Saudi Arabia also noted that nothing in the agreements requires a member to furnish information to the WTO regarding its essential security interests. The United States said that national security issues were political and not appropriate for the WTO dispute system<sup>35</sup>.

Therefore, the strongest argument of the supporters of the objective approach lies in the self-judging nature of the term “it considers”. There is still no clear position of the WTO DSB or Ministerial Conference in this regard. However, in 2008, the ICJ agreed with the Applicant, Djibouti in this case, which contended that “even in reliance on what it describes as a “self-judging clause”, the requested State must act reasonably and in good faith” and therefore such a clause may be subject to the Court’s analysis<sup>36</sup>.

## 7. Conclusion

Although Security Exception Articles give WTO members a broad discretion to take national security measures which they “consider necessary” for the protection of their essential security interests this discretion should be balanced with trade interests of other WTO members. Such balance may be executed by the review of the WTO DSB, otherwise the provision “would be prone to abuse without redress” [Bossche, Zdouc 2013:596]. The objective approach provides for establishment of certain requirements or tests for the wording of article being interpreted. However, direct wording of Security Exception Articles is not clear enough to understand how such decisive notions like “essential security interests”, “emergency in international relations” and “necessary to protect” should be interpreted.

Today we witness the evolution of the term “essential security interests”, which covers not only military issues but economic security as well.

According to the WTO jurisprudence, the “necessity test” involves weighing the following factors: the contribution made by the respective measure to the achievement of its objectives; the importance of the interests or values protected by the measure; the trade-restrictive effects of the measure.

The measure also has to be compared with “possible alternative measures”, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.

“Emergency in international relations” under Security Exception Articles means an exceptional situation, which threatens WTO Member security. There must be a genuine link between such a threat and the actions of the threatening WTO member. That means that only threatening and threatened WTO Members could participate in such “international relations”, but not third parties.

Much of the debate with respect to possible applicability of the subjective test to Security Exception Articles is based on the words “to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests”. However, we may face a tendency to interpret the “self-judging clause”, in the light of “a good faith” principle and therefore subject to the Court’s analysis.

There are several cases pending at the WTO DSB, connected with the anti-Russian “sanctions” and Russian countermeasures<sup>37</sup>. That means that the issue discussed in this paper is on top of WTO DSB agenda and likely we will see new developments in the WTO law with respect to the Security Exception Articles.

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<sup>35</sup> See United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights. URL: [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) (accessed date: 18.07.2018).

<sup>36</sup> Certain Questions of Mutual Assistance in Criminal Matters (*Djibouti v. France*) Judgment. – I.C.J. Reports. 2008. P. 53, 56. Para. 135, 145.

<sup>37</sup> See for instance: DS512: Russia – Measures Concerning Traffic in Transit; DS525: Ukraine – Measures relating to Trade in Goods and Services; DS532: Russia – Measures Concerning the Importation and Transit of Certain Ukrainian Products.

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