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Adjudicating Security Exceptions in WTO Law: Methodical and Procedural Preliminaries

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Abstract As WTO members increasingly invoke security exceptions and the first panel report insofar was issued in *Russia – Traffic in Transit*, the methodical and procedural preliminaries of their adjudication must be reassessed. The preliminaries pertain to justiciability and to the proper interpretive approach for their vague terms that seemingly imply considerable discretion to WTO members, all the more as general exceptions are subject to expansive interpretation. Reading security exceptions expansively appears not viable as they miss the usual safeguard against abuse (i.e. the chapeau of Arts XX GATT/XIV GATS). This lack of safeguards rather suggests caution in conceptualising them expansively, as do the systemic consequences of recent attempts to re-politicise security exceptions which run the risk of nullifying the concept of multilateral trade regulation altogether. Furthermore, the appropriate standards of review and proof must be explored which have to strike a balance between control and deference in national security.

1 Introduction

About two years ago, the WTO security exceptions came to new life when WTO members started their invocation as justification for protectionist measures. Currently, more than a dozen cases are pending, dealing with the economic embargo against Qatar and the trade disputes between the US and China, the EU and others, commencing with additional tariffs for steel and aluminium imports[1] which alone caused 15 disputes. While security exceptions were debated in the GATT 1947 era, in WTO bodies[2], and in an early WTO dispute as well[3], only recently, on 26 April 2019, Article XXI b) GATT was dealt with extensively by an un-appealed WTO panel report about Russian transfer of goods restrictions.[4] The panel opined that WTO panels have a power to review, and that Article XXI b) iii) was "not totally self-judging"[5], even though WTO members like the US deem national security not justiciable, so that - as soon as a member invokes it - a panel has no authority to decide.[6] The panel developed a partially

[1] *See* Tania Voon, *Can International Trade Law Recover? Security Exception in WTO Law* 113 AJIL Unbound 45, 4647 (2019); Wolfgang Weiß, *EU Multilateral Trade Policy in a Changing, Multipolar World: The Way Forward*, in *Global Politics and EU Trade Policy*, 17, 19-21 (Wolfgang Weiß & Cornelia Furculita eds., 2020); Geraldo Vidigal, *WTO Adjudication and the Security Exception* 46 Legal Issues of Economic Integration 203, 204 et seq (2019); Tatina Lacerda Prazeres, *Trade and National Security*, 19 WTRev. 137, 142 et seq (2020).

[2] For these debates see panel, WT/DS512/R, Russia – Traffic in Transit, Appendix. For a thorough review of the genesis of the GATT security exception *see* Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security* 41 MichJIL 109 (2020); for GATT and WTO practice insofar *see also* Shin-yi Peng, *Cybersecurity Threats and the WTO National Security Exceptions* 18 JIEL 449, 459 et seq. (2015). Hence, it is untenable from a legal point of view to hold, as does Krzysztof J. Pelc, *Making and Bending International Rules* 133 (2016), that Article XXI fell in desuetude.

[3] WT/DS38 - US – The Cuban Liberty and Democratic Solidarity Act.

[4] WT/DS512/R – Russia – Traffic in Transit.

[5] *Ibid.* para. 7.102.

[6] *See* Congressional Research Service, Section 232 Investigations: Overview and Issues for Congress (Apr. 2019), R45249, 23 et seq and the US position indicated in panel, WT/DS512/R, para. 7.51 - Russia – Traffic in Transit.

objective approach, combined with plausibility requirements for Russia´s claim of security interests in case of emergency under Article XXI b) iii) GATT. In the end, Russia´s invocation of the security exception was accepted[7], which is not surprising as the conflict between Russia and Ukraine is a severe issue of national security for both sides. The occupation of the Crimea by Russia and the accompanying military conflict stopped only short of belligerency. The UN assessed the situation on the Crimea and in East Ukraine as a "threat or use of force against the territorial integrity or political independence of Ukraine" by Russia.[8] If one compares this situation to the circumstances, under which the US claims national security for its additional tariffs[9], one understands that the application of the security exception in such case raises concerns, and exacerbates the threat that the existence of security exceptions poses to the foundations of WTO law as a legal trade regime based on the rule of law and judicial dispute settlement.[10] The US invokes national interests of economic security for its industry, its workers, and the security of supply for military goods.[11]

Thus, one might deliberate whether security exceptions may cover economic security allegations, as economic security concerns gain importance. Due to globalization, domestic regulatory autonomy decreases whereas economic interdependence reaches unprecedented levels. The economic interdependence, a guarantee for growing prosperity until recently, is increasingly perceived as a source of possible threats to national security as it undermines state control, self-sufficiency and resilience.[12] Including economic security concerns into the concept of national security would result in tremendous increase of the scope of application of security exceptions.

The invocation of Article XXI GATT in such a completely different context confirms the need for revisiting the methodical and procedural issues of their judicial application, also in view of the panel´s findings in *Russia – Traffic in Transit*. Fundamental adjudicative issues come to the fore. Panels applying the security exceptions may not solely justify their jurisdiction (*see* 2), but may deliberate about appropriate interpretive approaches to the rather vague terms of Article XXI GATT and the discretion of the WTO members insofar, in particular as the itemised justifications in Article XX GATT are conceived rather broadly, which could attribute even more leeway to the WTO members (*see* 3). Finally, the pivotal issues of standard of review and standard of proof proper for the judicial application of security exceptions have to be explored (*see* 4). They are the usual adjudicative means of controlling a WTO member´s discretion in claiming exceptions, both vertically (i.e. in relation between the WTO

[7] For an analysis of the panel report WT/DS512/R *see* Geraldo Vidigal, above n. 1, 205 et seq; Daria Boklan & Amrita Bahri, *The First WTO´s Ruling on National Security Exception* 19 WTRev. 123 (2020).

[8] *See* the Resolutions of the UN General Assembly, A/Res/71/205 and A/Res/73/194.

[9] On this *see* Wolfgang Weiß above n. 1. As the US explicitly invokes Article XXI GATT, one cannot consider assessing the measures as safeguards, *see* also Tania Voon, above n. 1, 49.

[10] Daria Boklan & Amrita Bahri, above n. 7, 124 et seq. Even in traditional conflicts, the invocation of security exceptions might mean a return to 'power-oriented techniques', John Jackson, *Restructuring the GATT System* 51-52 (1990).

[11] *See* the presidential proclamation which reads in para. 2: "The rapid application of commercial breakthroughs in automobile technology is necessary for the US to retain competitive military advantage and meet new defense requirements. … The US defense industrial base depends on the American-owned automotive sector ... 3. Thus, the Secretary found that American-owned automotive R&D and manufacturing are vital to national security. Yet, increases in imports of automobiles and automobile parts, …, have over the past three decades given foreign-owned producers a competitive advantage over American-owned producers" (https://www.whitehouse.gov/presidential-actions/adjusting-imports-automobiles-automobile-parts-united-states/).

[12] J. Benton Heath, *The New National Security Challenge to the Economic Order* 129 Yale Law Journal, 1020, 1048 (2020); Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Toward a Geoeconomic Order in International Trade and Investment* JIEL 655, 659 et seq, 664 et seq (2019).

member and the adjudicative instances) and horizontally (i.e. in relation between the complainant and the defendant).

2 Jurisdiction of WTO panels over security exceptions

Whether the invocation of security exceptions is subject to judicial review at all, and if so, how far (i.e. which standard of review applies), is hotly contested. A traditional perspective refers to the non-justiciability of security exceptions ("national security exceptionalism"), as they are deemed self-judging and not subject to judicial review.[13] The textual anchor for this is Article XXI a) and b) GATT´s formulation "which it considers". This formulation, however, could be limited to refer to the measure´s necessity only.[14] The national security exceptionalism helped stabilize and accept a rules-based judicial dispute settlement mechanism.[15] The self-judging, non-justiciable nature of security exceptions may also be based on a sort of political question doctrine, under which judges, even more so trade judges, are not competent to assess political issues.[16] As the US once stated, "any examination of a [security] matter in purely trade terms would be sterile or disingenuous".[17]

The panel in *Russia –Traffic in Transit* rightly rejected such approaches. The state practice referred to as proof of an agreement by the contracting parties with such approach (in the sense of Article 31 (3) b) VCLT, according to which the context for interpretation comprises "subsequent practice in the application of the treaty which establishes the agreement of the parties"), is far from being coherent or conclusive. The panel did not find sufficient support for concluding that relevant state conduct established a common understanding of Article XXI GATT.[18] Besides, the panel offered a doctrinal basis for confirming its jurisdiction over security exceptions. It reminded to the diligence the parties invested in detailing the situations (i.e. the scope of application) in which security concerns can be raised under Article XXI GATT (which would have been unnecessary if their respect was beyond any control). The panel also referred to the lack of exclusion of security exceptions from the standard mandate in Article 7 DSU, and to the lack of any treaty language hinting to a peculiar nature of security exceptions compared to other exceptions. Finally, even if one demands a carve-out from the rule-orientation of applying WTO law, and hence from its de-politicization rationale[19] with regard to security exceptions, so that the latter should be subject to a specific treatment by the WTO judiciary, such would not contradict their at least partial jurisdiction over security exceptions. When GATT drafters introduced security exceptions, they were aware of the need for abuse control, which was to be served by reviewing their scope of application indicated in the subparagraphs of Article XXI b) GATT.

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[13] *See* in detail J Benton Heath, above n. 12, 1050 et seq.

[14] The panel WT/DS512/R, para. 7.63 et seqq carefully examined whether this clause only refers to necessity, or includes the security interest, or all elements of Article XXI b). *See* below 3.1 and 4.2.

[15] Cf. Dapo Akande & Sope Williams, *International Adjudication on National Security Issues* Va. J. Int'l L. 43, 365,373 (2002/2003).

[16] *See* the US argument reflected in panel, WT/DS512/R, para. 7.103, fn. 183; J Benton Heath, above n. 12, 1053 et seq.

[17] *See* panel, WT/DS512/R, Appendix, para. 1.30.

[18] Panel, WT/DS512/R, para. 7.80 et seqq - Russia – Traffic in Transit. *See also* Shin-yi Peng, above n. 2, 459 et seq.

[19] For rule-orientation, *see* John H Jackson, *The World Trading System* 109 et seqq (1999); for contemporary international economic law´s de-politicization impetus, *see* Nicolás M. Perrone & David Schneiderman, *International Economic Law's Wreckage: Depoliticization, Inequality, Precarity*, in *Research handbook on critical legal theory* 446, 449 et seqq (Emilios Christodoulidis, Ruth Dukes & Marco Goldoni eds., 2019).

Confirming the jurisdiction of panels over security exceptions, however is only the first step in determining the panels´ role in their application and interpretation. The more complicated questions that instantly follow are how far this jurisdiction goes und what exactly it implies. These questions refer to the issue of expansively or narrowly construing the terms used in the security exceptions, and to the applicable standard of review (i.e density of judicial control of WTO member´s assessments) and standard of proof to be employed. These standards determine how effective the judicial control over members´ discretion in determining the requirements of security exceptions finally is. The clause "which it considers" in the chapeau of Article XXI b) GATT, even though not capable of excluding justiciability, may limit its extent as it mandates some deference to WTO members´ assessments, but how far? The negotiating history demonstrates that members were supposed to have "some latitude"[20] in their determination both of security interests and of the necessity of measures for their protection, hence the decisive question is which control standards operate to scrutinize WTO members´ discretion. Before dealing with it, the scope of this discretion has to be explored.

3 The WTO Member´s discretion under Article XXI b) GATT

The security exception of Article XXI b) has several vaguely worded requirements (it rightly is called the "broadest, least constrained formal exception in the trade regime"[21]), which may impart discretion, and thereby an inherent margin of appreciation to WTO members. First, its chapeau postulates that the measures are deemed "necessary" for the protection of a WTO member´s "essential security interests". Second, the chapeau refers to the member´s assessment ("which it considers"). Third, the subparagraphs of Article XXI b) determine the type of situation or need in relation to which measures can be adopted in partly broad terms: Measures have either to be "taken in time of war or other emergency in international relations" (iii), may relate to fissionable materials (i) or to "the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment" (ii).
In view of such vague drafting, the terminology of Article XXI b) could be conceptualised in an expansive way to include diverse types of concerns, also economic ones (such as safeguarding sufficient domestic supply capacities), so that actions are deemed to be taken in an "emergency in international relations". Hence, do these formulations mandate a WTO member with a broad margin of appreciation insofar? As mentioned, with regard to the chapeau of Article XXI b) at least, a rather extensive room of manoeuver for the members´ exercise of discretion appears implied in the explicit reference to their assessment ("which it considers"), as was held regarding similar formulations.[22]

3.1 Differences between chapeau and subparagraphs

Determining the extent and scope of WTO members´ discretion under Article XXI b) GATT, however, requires considering the differences in wording between the chapeau and the subparagraphs of lit. b).[23] The differences within Article XXI b), but also other sound doctrinal reasons made the panel in *Russia – Traffic in Transit* adopt a nuanced, heterogeneous, "hybrid"[24] approach. It employed an

[20] *See* Panel, WT/DS512/R, para. 7.98.
[21] Krzysztof J. Pelc, above n. 2, 93.
[22] Article XXIII:1 GATT: "If any contracting party should consider"; insofar, the Appellate Body, WT/DS27/AB/R, para. 135 – EC - Bananas, held that this formulation grants "broad discretion".
[23] For the need to distinguish insofar *see* Dapo Akande & Sope Williams, above n. 15, 384 et seq, 399 et seq.
[24] Daria Boklan & Amrita Bahri, *above* n. 7, 126, 130.

"objective approach" for the interpretation of "emergency" in Article XXI b) iii), calling for "a situation of armed [or latent armed] conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state" or of "breakdown of law and public order".[25] Pure political or economic conflict is not sufficient.[26] The WTO member´s assessment or appreciation of facts is of no relevance for the subparagraphs, which denies a margin of appreciation insofar.[27]

The panel limited the members´ discretion in the assertion of security exceptions, rooted in "which it considers", to the chapeau of Article XXI lit. b) GATT. It applied a deferential approach to its stipulations (i.e. necessity of a measure for the protection of essential security interests). The panel gave considerable latitude to Russia´s invocation of security interests[28] which the panel determined as being "those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally", or – in short – "defence and military interest, or maintenance of law and public order interests".[29] Insofar, the panel held that it is for the WTO member to determine what it considers its security interests, bound by an obligation of good faith. Members must "articulate the essential security interests … sufficiently enough to demonstrate their veracity".[30] In tension with this, the panel did not demand from Russia a clear, explicit articulation of its security interests; it held that "[d]espite its allusiveness, Russia´s articulation of its essential security interests is minimally satisfactory in these circumstances".[31] With regard to the necessity requirement (the relation between the protective measures and the security interests), the panel merely stipulated a "minimum requirement of plausibility ... i.e. that they are not implausible as measures protective of these interests."[32] The deference to the WTO member´s consideration in the chapeau imparts broad, unconstrained discretion also insofar.[33]

In conclusion, the panel granted broad discretion to the members as regards the chapeau, i.e. the determination of their essential security interests and the assessment of necessity of a measure. In contrast, a member´s assessment does not play a role in the interpretation of the subparagraphs which define the scope of application of the security exceptions and therefore require an objective interpretive approach with only limited discretion for WTO members, if at all. The panel´s approach to the chapeau of Article XXI b) GATT takes due account of the clause "which it considers" whose introduction clearly intended ascribe discretion to members insofar. Extending the discretion also to the necessity requirement is correct. Otherwise, a panel would be obliged, when reviewing the relation between the contested measure and the security interest, to considerably interfere with WTO members´ assessments of national security interests, as can be learnt from an analysis of the WTO judiciary´s requirements for the necessity test under Article XX a) b) d) GATT which shows that the weighing and balancing approach applied by the WTO judiciary interferes with the domestic determination of the value of the regulatory objective and the level of its protection pursued.[34] The interpretation of the necessity requirements in Article XX GATT has not expanded the regulatory policy

[25] Panel, WT/DS512/R, para. 7.66, 7.71, 7.76, 7.111.
[26] Panel, WT/DS512/R, para. 7.75.
[27] Panel, WT/DS512/R, paras. 7.101, 7.135.
[28] Panel, WT/DS512/R, para. 7.98.
[29] *See* Panel, WT/DS512/R, para. 7.130, 7.135.
[30] Para. 7.131 et seq.
[31] Panel, WT/DS512/R, para. 7.136, 7.137.
[32] *Ibid*. 7.138.
[33] *See* paras. 7.108, 7.146-7.147.
[34] Wolfgang Weiß, *WTO Law and Domestic Regulation* 264 (2020).

space of WTO members.[35] It is far from evident that the new approach to interpreting the term "necessary" used in Article XX GATT/Article XIV GATS is less restrictive to WTO members' assessments than the previous least trade restrictiveness test. In weighing and balancing, the WTO judiciary may interfere even more as it delves into the domestic legislators' assessments regarding the determination of the level of protection of a societal value.[36] The necessity assessment sometimes leads to a second-guessing by the WTO judiciary of domestic reflections on the balancing between commercial and non-trade interests. The panel in *Russia – Traffic in Transit* rightly did not apply these approaches to Article XXI GATT, but extended the specific deference to the WTO members´ discretion resulting from the adjectival clause to include the necessity test. We will revert to this in 4.3.1.

3.2 More Room for Discretion: Re-politicizing Security Exceptions?

Against this nuanced approach which restrains the WTO member´s discretion to the chapeau of Article XXI b) GATT, one could suggest conceptualisations that would allow room of manoeuvre for members also with regard to the subparagraphs of Article XXI b). First, one could derive from a broad reading of security interests that WTO members may invoke Article XXI GATT for economic grounds, on the condition that there is an emergency in the "objective" sense of lit. iii). Second, one could deliberate whether a broad conceptualisation of all formulations in Article XXI GATT to be based on an interpretive approach as expansive as prevalent with regard to the itemised exceptions of Article XX GATT/Article XIV GATS. Likewise, one could make way for an expansive interpretation of Article XXI b) GATT subparagraphs, and even beyond, grant an all-encompassing discretion to WTO members with regard to all terms in Article XXI GATT.[37]

WTO judicial practice applies a rather dynamic, expansive reading of the itemised justifications in Article XX GATT/Article XIV GATS[38], not least because of the equality between trade and non-trade objectives in the WTO.[39] A well-known example is the notion of "exhaustible natural resources" in Article XX g) GATT; it was interpreted extensively in order to include fresh air or endangered species and was not limited to the issues originally thought of (stock resources of raw materials).[40] WTO judiciary went beyond a dynamic interpretation that conceives WTO terms in light of contemporary circumstances. It adopts rather expansive conceptions that give ample room for different sets of policy objectives. The notion of public morals was conceived expansively in the *US - Gambling* and the *China - Publications* reports that influenced the *EC - Seals* report, where the panel held that the non-exhaustive justifications in Article 2.2 TBT Agreement comprise a public morals exception.[41] In the *US – Gambling* case, the reports acknowledged that the public morals/order exception of Article XIV a) GATS covers the prevention of underage gambling and money laundering.[42] The panel explicitly

[35] Christiane Conrad, *Processes and Production Methods (PPMs) in WTO Law* 331-338 (2011). For a more positive view *see* Patrick Low, Gabrielle Marceau & Julia Reinard, *The Interface between Trade and Climate Change Regimes JWT* 485,512-513 (2012); Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis & Michael Hahn, *The World Trade Organization* 727 (2015); Debora Osiro, *GATT/WTO Necessity Analysis: Evolutionary Interpretation and its Impact on the Autonomy of Domestic Regulation LIEI* 123, 140 (2002).

[36] Christiane Conrad, above n. 35, 336.

[37] Cf. Daria Boklan & Amrita Bahri, above n. 7, 128 et seq.

[38] *See* Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, para 104 – *EC – Hormones*; WT/DS231/AB/R, para 272 - *EC – Trade Description of Sardines*; Wolfgang Weiß, above n. 34, 230 et seq, 240 et seq. Things were different in pre-WTO times, *see ibid*. 73-74.

[39] Asif Qureshi, *Interpreting WTO Agreements*, 175 (2015).

[40] WT/DS2/R – US - Gasoline and WT/DS58/R - US-Shrimp.

[41] Panel, WT/DS400/R, WT/DS401/R, para 7.419 - *EC – Seal Products.*

[42] Panel, WT/DS285/R, para 6.486-487; Appellate Body, WT/DS285/AB/R, para 299 – *US – Gambling*.

recognized the leeway WTO members have in determining "for themselves the concepts of 'public morals' and 'public order' …, according to their own systems and scales of values".[43] The interpretation varies according to the needs, "prevailing social, cultural, ethical and religious" concepts of members. Thus, the determination is considerably deferential to their assessments; there is no uniform interpretation to Article XIV a) GATS.[44] The interpretation goes far beyond the originally rather narrow conception of public morals in Article XX a) GATT.[45]

Another justification provision subject to expansive interpretation is Article XX d) GATT/Article XIV c) GATS, concerning measures aiming at securing compliance[46] with domestic laws or regulations, which themselves are GATT consistent. Article XX d) applies to a wide variety of ´laws and regulations` to be enforced.[47]

In line with such broad conceptualisations of general exceptions, a dynamic interpretive approach might allow ascribing current forms of security threats to the notion of "security interests" and of "emergency in international relations".

The flexible interpretation of terms in view of contemporary developments, however, does not generate space for subsuming completely different or novel meanings and concepts under their notions as would be required if one subsumed situations which might give rise to economic security interests under the notion of "emergency". For, the formulation "other emergency in international relations" is embedded within the context of "war". Compared to unprecise concepts like "public morals" or in Article XX d) GATT, the wording of Article XXI GATT is not as receptive to broadly understood concepts of national security and emergency so as to imply extensive deference to WTO members´ assessments, or include pure economic security concerns.[48] The situations described as pertinent for invoking Article XXI b) iii) GATT are set out in terminology of warfare and political conflicts ("times of war or other emergency in international relations").

Also the approach to "emergency" in Article XXI b) iii) GATT employed by the panel in *Russia – Traffic in Transit* stayed quite close to traditional understandings of international conflict[49]; it referred to military and comparable emergencies that endanger maintenance of law or public order.[50] The panel, however, acknowledged that the nature of an emergency may also be "less characteristic …, i.e. further removed from armed conflict, or … breakdown of law and public order", so that "the defence or military interests, or maintenance of law and public order interests" are less obvious, but may still meet the threshold of "essential security interest".[51] Hence, the panel accepted the possibility of emergencies being farther away from the "´hard core` of war or armed conflict"[52], and adopted some

[43] Panel, WT/DS285/R, para 6.461 – *US - Gambling*.
[44] For criticism of this approach cf. Nicholas Diebold, *The Morals and Order Exceptions in WTO Law JIEL* 43,51 (2008), for defense of the pluralist attitude *see* Robert Howse, Joanna Langille & Katie Sykes, *Pluralism in Practice* Geo. Wash. Int'l L.Rev 81,96, 144 et seq (2015).
[45] *See* Petros C. Mavroidis, *Trade in Goods* 332-3 (2012); Nicola Wenzel, in WTO - Trade in Goods, Article XX GATT, para 2, 480 (Rüdiger Wolfrum, Peter-Tobias Stoll & Holger Hestermeyer eds., 2011).
[46] This term was interpreted quite extensively, see Appellate Body, WT/DS308/AB/R, para 74 – *Mexico – Soft Drinks*.
[47] Appellate Body, WT/DS161, 169/AB/R, para 162 - *Korea - Beef*; WT/DS456/AB/R, para 5.140 et seq – *India – Solar Cells and Solar Modules*.
[48] *See* Dapo Akande & Sope Williams, above n. 15, 390, fn 102 who, however, submit that a partial economic motivation of a measure would not *a priori* exclude it from the security exception. Anyway, a partial economic motivation would trigger the need for a particularly careful examination.
[49] J Benton Heath, above n. 12, 1073-1074.
[50] Panel, WT/DS512/R, para. 7.74-7.75.
[51] Panel, WT/DS512/R, para. 7.135.
[52] Panel, WT/DS512/R, para. 7.136.

flexibility insofar, but combined it with varying standards of proof for establishing security interests.[53] Despite, the panel clearly drew limits: Mere political or economic disputes are not sufficient (in conformity with international jurisprudence on security interests); members´ previous practice clearly signals the distinction between security conflicts and economic or trade disputes.[54] Furthermore, Article XXI b) i), ii) GATT refer to fissionable material (with a view to nuclear weapons), to arms, ammunition, military equipment and establishment, which illustrates that the context is one of political security concerns. Additionally, justifying measures taken for pure economic concerns is subject of Article XIX GATT on safeguards. Security issues of regulatory public policies are subject of the policy exceptions in Articles XX GATT/XIV, all of which are subject to an, in principle, full review of the legal and factual allegations of members by the judiciary. Thus, Article XXI GATT´s scope is limited to political emergencies causing security concerns, in conformity with the requirement of "essential" security concerns, suggesting a relatively narrow conceptualization.

A look at the negotiation history confirms the need for a careful, non-expansive conception of Article XXI GATT. When the security exception was introduced into the GATT negotiations, the concern was raised that conceptualising it widely "would permit anything under the sun". The US representative continued to state "Therefore we thought it well to draft provisions which would take care of real essential security interests and, *at the same time, so far as we could, to limit the exception* so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance."[55] Also for the panel in *Russia – Traffic in Transit*, "where a Member sought to release itself from the structure of ´reciprocal and mutually advantageous arrangements` that constitutes the multilateral trading system simply by re-labelling trade interests that it had agreed to protect and promote within the system, as ´essential security interests`, falling outside the reach of that system".[56]

Besides wording, context, and history of Article XXI GATT, which speak against expanding its scope beyond war and political security conflicts, a further characteristic of Article XXI GATT clearly distinguishes it from other exception provisions: The lack of a safeguard against abuse. Whereas the itemised justifications of Article XX/XIV GATT/GATS are subject to the stipulations of a chapeau[57], which is conceived in a way to counteract their abuse for other purposes, Article XXI GATT lacks such additional qualifier. Hence, the expansion of members´ leeway by expansive conceptualisation of the justifications in Article XX GATT/XIV GATS is counterbalanced by the stipulations of their chapeau. The expansive conceptualisation of the justifications in Article XX GATT must be assessed in consideration of the chapeau´s effects, whose requirements are strictly handled by the WTO judiciary. The chapeau became the final litmus test for justifying domestic measures in breach of WTO law.[58] The WTO judiciary´s approach to the chapeaux of Article XX GATT/XIV GATS is a significant restriction on the national room for manoeuvre and the WTO members' freedom to decide how (i.e. in which ways, with which instruments) to pursue their legitimate policy objectives. Consequently, the expansive reading of itemised justifications cannot be transferred to security exceptions as the latter do not allow for a seemingly balanced approach in the conceptualisation of WTO members´ leeway in choosing their

[53] More on this below 4.3.

[54] WT/DS512/R, para. 7.75, 7.81. For international jurisprudence *see* Daria Boklan & Amrita Bahri, above n. 7, 133.

[55] Quote in panel, WT/DS512/R, para. 7.92 (original emphasis).

[56] Panel, WT/DS512/R, para. 7.133, with the original quote referring to the third recital of the WTO Agreement preamble, and to the second recital of the GATT preamble.

[57] For the TBT Agreement *see* the sixth recital of its preamble.

[58] Peter Van den Bossche & Werner Zdouc, The Law and Policy of the World Trade Organization, 593 (2017); Wolfgang Weiß, above n. 34, 236-237, 272 et seqq.

protective measures since there is no further barrier against abuse of alleged security interests for trade protectionism. Therefore, the expansive interpretive approach employed to formulations in Articles XX GATT/XIV GATS is not feasible to Article XXI b) GATT, neither with regard to its chapeau nor its subparagraphs. Instead, the need for limitations to the assertion of national security by WTO members requires a careful approach to the interpretation of the wording of Article XXI GATT and to the WTO members´ discretion in their invocation. Otherwise, there would not be any defence against its abuse for all sorts of subjective security concerns. One may recall that the formulations in the subparagraphs exactly serve this purpose: to limit the scope of application of essential security exceptions to very specifically described situations of political conflict. The safety valve against abuse of the security exception are these specifications provided in the subparagraphs that rather precisely describe and thus confine the kind of circumstances in which the exception may be invoked.[59] Considering the level of discretion granted to WTO members already in the chapeau of Article XXI GATT (*see* above 3.1), the main starting point for restraining the risk of misuse of security exceptions is the judicial verification of the existence of the circumstances required in the subparagraphs. Hence, not all types of issues discussed under the heading of new security issues[60] can be considered to be covered by the scope of application of Art XXI GATT. In conclusion, it is submitted here that the WTO members´ discretion is confined to the chapeau of GATT Article XXI b), i.e. the conditions prescribed therein (determination of security interests and of necessity).

One might, however, dispute this suggestion by contending that the lack of a safety valve in Article XXI GATT comparable to the chapeau in Article XX GATT confirms that national security exceptions are of a different quality. As a consequence thereof, one might demand more leeway for WTO members ensuing from treating security exceptions as explicitly political, and particularly exempt from the de-politicization rationale of WTO law. In other words, in such view, the political nature of security exceptions called for an unconstrained, limitless discretion for members when invoking national security. This would then include WTO members´ full discretion also with regard to the scope of application of Article XXI GATT. As consequence, the concepts used therein, also those in its subparagraphs, would be extended according to the will of the WTO member invoking them. Consequently, security exceptions would comprise all sorts of security issues alleged by a member.

Such a broad, almost unlimited understanding of security interests as a venue of political assessment attributed solely to WTO members (to the complete exclusion of any control by WTO judiciary) would run contrary to the above conclusions and deliberations based on wording, context, negotiating history, and comparison to general exceptions, all of which illustrated that there must not be uncontrolled discretion on the side of WTO members under Article XXI GATT. It would in essence again amount to denying justiciability of security exceptions completely (in effect judicial control of security exceptions would be rendered ineffective), it would contradict the drafting history and the practice of WTO members so far, and would disregard the context of the security exceptions as being an exception among others.

An expansive conceptualisation that hands the application of security exceptions fully over to the discretion of WTO members which then could use them for all sorts of subjectively perceived security issues would amount to a re-politicization of security exceptions. It would imply ascribing a

[59] *See* panel, WT/DS512/R, para. 7.98.

[60] Cf. J Benton Heath, above n. 12, 1030 et seq. For a critique regarding economic security interests *see* Wolfgang Weiß, *Interpreting Essential Security Exceptions in WTO law in view of Economic Security Interests*, in *Global Politics and EU Trade Policy* 255, 261-272 (Wolfgang Weiß & Cornelia Furculita eds., 2020).

completely novel meaning and justification rationale to Article XXI GATT. It would go far beyond a dynamic, contemporary conceptualisation of its imprecise notions. The current contestation of the de-politicization rationale of trade law implied in the overall politicization of trade disputes by frequent invocation of security interests by some WTO members cannot call into question the results of the above analyses that suggest a discretion of WTO members merely for the chapeau of Article XXI b) GATT. The novel practice by some cannot alter the recognized confines of security exceptions, which are based on the conceived understanding among the great majority of WTO members. Giving a completely novel reading to traditional rules, by way of developing new practice, requires their common acceptance. The fact that the US and other´s understanding of security exceptions as being placed fully into the hands of members´ appreciations is subject to contestation before the judiciary signals lack of support. As agreement among parties is missing, such practice cannot claim to represent a subsequent practice to be taken into account in the interpretation of Article XXI GATT according to Article 31 (3) b) VCLT.

3.3 Conclusion

In conclusion, it is submitted that in view of the confines of the security exception in Article XXI GATT resulting from wording, context, negotiation history, relevant practice, and lack of feasibility of expansive conceptualisation, the discretion of WTO members invoking Article XXI b) GATT is not unlimited. Their margin of appreciation is rather extensive in the determination of their "essential security interests" and of necessity. It is, though, severely restrained when it comes to determining whether a situation is a "war" or "emergency in international relations"; these requirements were intentionally introduced to limit the scope of application to specific situations. Recent attempts in re-politicizing security exceptions were not accepted by most WTO members; they do not establish subsequent agreement of the parties, and hence cannot call into question the above finding.

4 Controlling WTO members´ discretion: standards of proof and of review

4.1 Taming WTO members´ discretion: burden of proof, standard of proof and standard of review

While WTO members enjoy a considerable discretion in their determination of security interests and their assessment of necessity of protective measures[61], WTO members affected by measures under Article XXI GATT have an interest in control over the exercise of this discretion. Theoretically, there are different ways of restraining and controlling the exercise of discretion.

First, WTO members could adopt an authoritative interpretation (Article IX WTO Agreement), which has not yet happened. Adopting a common subsequent practice (see Article 31 (3) VCLT) would be a less formal way of prescribing the notion of formulations in Article XXI GATT, which again has not yet been established.

Second, members´ discretion in determining their security interest and necessity could be bound by requiring certain procedures to be observed before they lawfully exercise their discretion. WTO members, however, have not agreed on making the invocation of security exceptions dependent on the observance of certain procedural steps. Nor does the WTO judiciary have authority to develop

[61] This conforms greatly to panel, *Russia – Traffic in Transit*. As Tania Voon, *International Decisions* AJIL 96, 102 (2020) rightly points out, a stricter approach might have led the US to abandon the WTO.

them. On the other hand, the considerable discretion granted to WTO members may only be acceptable amidst the severe risk of abuse, if they adhere to principles of sound administration that require at least the statement of acceptable reasons, the collection and presentation of accurate information and diligent deliberation. Currently, nothing in case law nor in state practice hints to any such requirement.

Thirdly, WTO judiciary can control the exercise of WTO members´ discretion by establishing certain requirements for the standard of proof for the evidence requested from the invoking member and, even more, by adopting a demanding standard of review that effectively limits the deference to members´ assessments under the chapeau of Article XXI b) GATT. The requisite standard of proof must be established by the WTO member that bears the burden of proof, i.e. the one invoking exceptions. The burden of proof rests with the member claiming the security exception as an affirmative defence for its otherwise WTO-inconsistent measure.[62] This member bears the burden of proving the facts necessary for a panel´s confirmation of the lawfulness of the invocation of an exception.

The "standard of proof"[63] indicates the required degree of persuasion to discharge the burden of proof.[64] It hence specifies the kind of evidence necessary to establish the facts, and the quantum, extent and level of evidence, and the persuasiveness of the conclusions drawn from them that will be required in a panel's view to establish a party's presentation of its claim.[65] Hence, the standard of proof combines two requirements: the standard of production of evidence, and the standard of proof in the narrow, real sense, indicating the level of conclusiveness and persuasiveness of the factual evidence offered to a panel to establish the facts of the defence. A member has discharged this standard, if it manages to "adduce sufficient evidence to substantiate its assertion"[66] to the panel´s conviction, or "to raise a presumption" that the conditions stipulated in an exception provision have *prima facie* been met. What this prima facie test entails, however, is not very clear: "precisely how much and precisely what kind of evidence will be required to establish such a presumption, will necessarily vary from measure to measure, provision to provision, and case to case".[67] Literature postulates a standard of preponderance of evidence as default standard of

[62] Joost Pauwelyn, *Evidence, Proof, and Persuasion in WTO Dispute Settlement* JIEL 227, 238 et seq (1998). One might deliberate whether security exceptions are not a justification but a permission, so that the burden of proof rests with the complainant, which has to prove that the requirements for Article XXI GATT have not been met by the other party. But nothing in Article XXI GATT speaks in favor of treating this provision as permission, exception or carve-out from the scope of WTO law. The considerations of the Appellate Body, WT/DS246/AB/R, para. 87 et seqq, 104 et seqq on the relationship between Article I GATT and the Enabling Clause, where the Appellate Body concluded that the complainant has to allege which obligations in the Clause have been contravened and to make written submissions in support thereof, are not relevant here.

[63] Joachim Ahman, *Trade, Health, and the Burden of Proof in WTO Law*, 21 et seq (2012); Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals*, 223 et seq (2011); Matthias Oesch, *Standards of Review in WTO Dispute Resolution*, 167 et seq (2003); Joost Pauwelyn, above n. 62, 234 et seq.

[64] Michelle Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement*, 86 et seq (2009); Gene Grossman, Henrik Horn & Petros C. Mavroidis, *Legal and Economic Principles of World Trade Law: National Treatment*, 85 (2013) denote it "burden of persuasion", whereas Joost Pauwelyn, *Defenses and the Burden of Proof in International Law*, in *Exceptions in International Law* 88, 98 (Lorand Bartels & Federica Paddeu eds. 2020), calls the burden of persuasion to be the real burden of proof.

[65] *See* Appellate Body, WT/DS33/AB/R, para 42 - *US – Shirts and Blouses from India*; WT/DS231/AB/R, para 157 – *US – CVD on Certain Carbon Steel*; WT/DS231/AB/R, para 281 – *EC – Sardines.*

[66] Appellate Body, WT/DS246/AB/R, para. 105 – *EU – Preferences*.

[67] Appellate Body, WT/DS33/AB/R, p. 14 – *US – Shirts and Blouses from India*.

proof.[68] Anyway, panels have considerable discretion in the appraisal and weight they attribute to the evidence provided.[69]

The standard of review determines which intensity of control a panel employs in its subsequent examination of the factual allegations of the respondent in view of the legal requirements. This is a step in judicial control of a defence claim to be clearly distinguished from the issue of who bears the burden of proof and who has to meet the standard of proof in order to provide sufficient evidence of the relevant facts.[70] Standard of review becomes an issue for a panel when it applies the facts presented to the law. The panel then reviews whether all the stipulations of an exception provision have been established by the allegations of the defendant, and the standard of review determines the density of control insofar. The panel reviews the parties' factual claims and conclusions in light of the appropriate standard of review[71], which gives flexibility in the assessment of the parties' claims made before it.

On a theoretical level, one can distinguish different standards of review indicating differing degrees of control over WTO member´s application of WTO provisions. The most burdensome is the full review which treats members´ assessments of facts under the legal requirements as a mere issue of law and implies a judicial second-guessing of a provision´s requirements also with regard to the relevant facts. A member´s invocation of security interests and their assessment of necessity is subject to a complete, full *de nuovo* review. Such approach actually would not allow WTO members to have any margin of appreciation or assessment in the application of facts to the law. On the opposite side of the continuum of possible standards of review is a highly deferential standard, which only reviews whether the factual and legal allegations of a member are tenable so that the security exception is not obviously invoked abusively. WTO judiciary could only interfere in the members´ assessment in case of a manifest error of facts or a cross misappropriation of the law by the member invoking security interests.

The practice in WTO adjudication usually proceeds on a middle ground.[72] Article 11 DSU obliges panels to make objective assessments of the matter before them regarding the application of the law, including an objective assessment of the facts of the case, i.e. both with regard to the "ascertainment of facts and the legal characterization of such facts under the relevant agreements".[73] This obligation is source to different procedural stipulations by the Appellate Body, e.g. with regard to the statements of reasons, the consideration of previous Appellate Body reports´ interpretations, the comprehensive (or not so) use of evidence offered by the parties, and also for determining the standards of proof and review.[74] It, however, hardly gives clear guidance for determining the appropriate standards of proof and review.[75]

4.2. The panel´s nuanced approach: standard of review versus standard of proof

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[68] Joost Pauwelyn, above n. 64, 104 et seq.
[69] Peter Van den Bossche & Werner Zdouc, above n. 58, 240.
[70] Joost Pauwelyn, above n. 64, 106.
[71] Matthias Oesch, above n. 63 at 169 et seq.
[72] *See* Peter Van den Bossche & Werner Zdouc, above n. 58, 225.
[73] Appellate Body, WT/DS26, DS48/AB/R, para. 116 - *EC – Hormones*.
[74] *See* Peter Van den Bossche & Werner Zdouc, above n. 58, 222 et seq.
[75] Wolfgang Weiß, above n. 34, 382 et seq. The Appellate Body derives some guidelines for the appropriate standard of review from Article 11 DSU, in a very genuine, original way, *see* Marion Panizzon, *Good Faith in the Jurisprudence of the WTO* 335 et seq, 353-355 (2006).

The panel *Russia – Traffic in Transit* combined its nuanced approach to the member´s discretion (above 3.1) with a nuanced approach to the standard of review. It applied an objective approach, in reflection of the language of Article 11 DSU, in the form of full review to the stipulations of subparagraph iii) of "war" or "emergency", where the member´s appreciation of facts has no significance, and a completely different approach to the chapeau of Article XXI b) GATT where it operated a highly deferential standard of review.

Thus, the panel required Russia to identify explicitly the situation it considered an emergency, and scrutinized carefully whether this was the case.[76] With regard to the chapeau, the panel limited its review of the necessity criterion to a mere test for minimum plausibility of protective effect.[77] As mentioned, the member´s discretion on necessity remained unconstrained.[78] The panel only conducted a dual plausibility review with regard to the presence of security interests, and with regard to the mere suitability (in contrast to necessity) of the actions for protecting the interests, by reviewing whether the measures "are so remote from, or unrelated to, the … emergency that it is implausible that … the measures [were implemented] for the protection of its essential security interests".[79] This "implausibility" standard is a flexible one, as is the *prima facie* test (*see* above): The panel made the requisite level of articulation of security interests dependent on the type of emergency claimed by the member. The security interests have to be articulated with greater specificity, the further the emergency is removed from armed conflict or breakdown of law and public order.[80] Thus, the type of emergency steers the *standard of proof* (more exactly, the standard of production of evidence) required for the WTO member´s successful articulation of security interests. As the level of plausibility requested varies according to the security interests and the type of emergency at stake, the required level of plausibility, and hence the standard of production of proof, might be higher in other cases of an emergency, where then the level of plausibility is not reduced to a "minimum … plausibility". The level of standard of proof, i.e. the level of plausibility required for a WTO member´s articulation of essential security interests, becomes a function of the objective determination of the emergency. What the panel here determined was the standard of proof because the plausibility requirement refers to the quantum and persuasiveness of the evidence provided by the member invoking Article XXI GATT. It must be sufficient according to a mere plausibility standard, which requires furnishing appropriate proof for establishing a panel´s prima facie conviction that there are security interests concerned which are suitably protected by the measure.

The panel reasoned its choice for a mere plausibility standard for the chapeau of Article XXI b) GATT by, first, referring to the clause "which it considers", and, second, by reminding to the obligation of good faith under which the WTO members are obliged to invoke exceptions with sincere intentions and not with an intention to circumvent their obligations. The panel did so both with regard to the definition of security interests[81], and with regard to, "most importantly", their connection with the measures at issue.[82] The panel hence appears to infer from the obligation of good faith a severe restriction to its standards of review and of proof. Such connection, however, does not exist. The obligation of good faith is a corollary of substantive obligations of the parties to an international treaty.

[76] Panel, WT/DS512/R, para. 7.119-7.125.
[77] *See ibid*. 7.139.
[78] *See* above 3.1.
[79] Panel, WT/DS512/R, para. 7.139.
[80] *Ibid.* 7.135.
[81] *Ibid*. 7.132.
[82] *Ibid*. 7.138.

Every party is obliged to perform and implement it in good faith, as an obligation to the other parties. The good faith principle as a guideline for treaty interpreting is an obligation that applies on the horizontal level between the parties, securing a balance between the rights of treaty parties. In WTO law, good faith interpretation ensures that the rights and interests of exporting members in liberalised trade are balanced against the rights of regulating members to raise trade barriers in exercise of their rights flowing from exception provisions.[83] In this dimension as an interpretive principle, good faith contributes to setting out the substantive or procedural requirements a specific term entails. Hence, a good faith approach to the interpretation of a term like "security interests" may demand that a member can only claim security interests if acting with sincere intentions[84] (control of which raises the issue of appropriate standards of proof and review; good faith interpretation gives no guidance insofar). Meeting the stipulations of the term "security interest" would then require a truly security – as opposed to commercial - motivation behind domestic measures. Only then a WTO member invoking Article XXI GATT can legitimately do so in relation to other members. Setting out the substantive conditions of a term does not indicate how compliance with them is controlled by the judiciary. The judiciary has to identify the required standards of proof and of review. Thus, good faith interpretation of a legal term and the pertinent proof and control standards are two separate issues. Good faith as a requirement for implementing treaties has to be respected by adjudicators when interpreting treaty rules, which has an impact on their analysis. A tribunal has to act fairly and reasonably in its interpretation of treaty terms and its application of interpretative rules.[85] The obligation of good faith as an interpretive principle, however, does not imply any concrete guidance for the judiciary´s standard of review, all the more as the issue of the applicable standard of review relates to the vertical allocation of "jurisdictional competences" between state and international judicial institutions, i.e. between WTO member and the WTO judiciary.[86] Good faith is relevant for determining the interpretive approach to security exceptions, and for the disputing parties´ exercise of procedural rights (*see* Articles 3.7 , 3.10 and 4.3 DSU), but not for determining the standards of proof and review exercised by the judiciary. Even though panels are obliged to act in good faith in their factual review[87], this does not establish a specific standard of proof or of review.

Hence, decisive for determining a panel´s standards of proof and of review is not an interpretive principle like good faith, relevant mainly for ensuring the balance of parties´ obligations and interests horizontally among WTO members (and therefore pertinent for developing its legal interpretation), but the guidance WTO law generally gives with regard to the role of the judiciary, and specific hints in the relevant WTO provision. Article XXI b) GATT chapeau contains a pertinent clause by referring to the WTO member´s assessment ("which it considers"). This must be the starting point for determining

[83] Marion Panizzon, above n. 75, 197 et seq.
[84] *See* Dapo Akande & Sope Williams, above n. 15, 389 et seq.
[85] Eric De Brabandere & Isabelle van Damme, *Good Faith in Treaty Interpretation*, in *Good Faith and International Economic Law* 37, 38, 57 (Andrew Mitchell, M Sornarajah & Tania Voon eds., 2015).
[86] Appellate Body, WT/DS26, 48/AB/R, para 115 – *EC - Hormones*; Ross Becroft, *The Standard of Review in WTO Dispute Settlement* 66 (2012); Jan Bohanes and Nicolas Lockhart, *Standard of Review in WTO Law,* in *The Oxford Handbook of International Trade Law* 378, 383-4 (Daniel Bethlehem, Donald McRae, Rodney Neufeld & Isabelle van Damme eds., 2009); Lukasz Gruszczynski, *Standard of Review of Health and Environmental Regulations by WTO Panels,* in *Research Handbook on Environment, Health and the WTO* 731, 733 et seq (Geert van Calster & Denise Prévost eds., 2013); Michael Ioannidis, *Beyond the Standard of Review,* in *Deference in International Courts and Tribunals* 91, 92 et seq (Lukasz Gruszczynski & Wouter Werner eds., 2014).
[87] Marion Panizzon, above n. 75, 331 seq, 341 et seq.

a panel´s appropriate standards of proof and of review intended to control members´ discretion, as it was for exploring their discretions´ scope above in section 3.

4.3 Which standards of proof and of review for security exceptions?

4.3.1 The chapeau of Article XXI b) GATT

Whereas the clause "which it considers" cannot exclude judiciary´s jurisdiction, it is unique in GATT exceptions and therefore must be the pivotal focal point for determining the appropriate standards of proof and of review that a panel has to apply under Article XXI b) GATT, at least with regard to its chapeau. The central importance of this clause lies in the fact that it attributes to WTO members a power to assess whether the conditions of the chapeau are met, which must be translated into a margin of appreciation insofar as a corollary of its recognition of discretion of members (*see* above 3.1).

4.3.1.1. Standard of Review

Criteria for an appropriate determination of the standard of review are, first, explicit treaty based allocations of competence for determining and assessing the legal and factual situation, and, second, deliberations about the role of the WTO judiciary when it comes to the adjudication of competing values, as usually necessary in the adjudication of exception provisions.[88]

With regard to the first criterion, said clause expresses a clear mandate for WTO members. Consequently, a corollary to the recognition of discretion is a standard of review that allows for considerable deference. A deferential standard of review is to be preferred over an intrusive standard as it allows respect for a margin of appreciation for members invoking Article XXI b) GATT, which is necessary given the fact that security exceptions aim at protecting security interests which to define is the sole sovereign right of WTO members. Determining their security interests and the measures appropriate for their protection is based on factual assessments that lie in the hands of WTO members. It is their assessment that counts, as the specification of the relevant security goals and requirements essential for the identification and determination of national security policy is a genuine task of a state. Said clause requires the domestic factual assessments of WTO members´ authorities to be deemed decisive as the expertise for domestic security assessments clearly falls in the remit of members. An intensive review that allowed a panel to replace members´ factual assessments with its own would not respect this assignment of roles by Article XXI GATT; it would imply panel´s intrusion into members´ determination of their national security interests and their assessment of actions necessary for their protection. An intensive, full review of all facts and legal considerations would necessitate a panel having full access to the relevant deliberations, requiring WTO members to share full information about security issues with the panel, if not with the other disputing parties. Hence, not only the wording of the chapeau (i.e. the clause) severely restrains the applicable standard of review, but also functional considerations of who is the decisive trier of facts. This is confirmed by considering the democratic accountability of WTO members and the expertise of domestic institutions in collecting and assessing relevant facts[89], in particular in highly politicized matters of security. Consequently, the level of deference to WTO members´ assessments under the chapeau must be considerably high, and the standard of review accordingly very low, to the extent of a mere control of the tenability of the

[88] *See* Wolfgang Weiß, above n. 34, 389 et seq.

[89] *See* Appellate Body, WT/DS26, 48/AB/R, para 110 et seq, 117 - *EC – Hormones*; panel, WT/DS192/R, para 7.32 – *US – Cotton Yarn from Pakistan.*

WTO member´s reasoning. Hence, a panel can only intervene in case of a manifest error of facts or a cross misappropriation of the law by the WTO member invoking Article XXI GATT.

The wording of the chapeau raises the question of whether the deference and hence the highly deferential standard of review only applies to the determination of the security interests or whether it includes that of necessity. Logically, both could be distinguished. An examination of the WTO judicial practice on the necessity test in Article XX GATT demonstrates that the judiciary pretends to review only the means, and not the ends of domestic measures taken in recourse to justifications. Allegedly, the end and the level of its protection are to be determined by the WTO member invoking Article XX. A closer inspection of the review of necessity in Article XX a) b) d) GATT (in particular under the "weighing and balancing" approach) reveals that it interferes with the level of protection chosen by the regulating member, and impacts the determination of the domestic policy interest.[90] Assessing necessity in view of a chosen policy objective requires the judiciary to balance policy interests pursued against trade liberalisation obligations as the review of necessity requires the search for a less WTO inconsistent measure that still allows for the pursuance of the chosen policy at an at least comparable level of protection, and includes controlling the means-end relationship, even to the extent of a cost-benefit analysis. Consequently, a necessity review may have an impact on the determination of the end, at least of the chosen level of its protection that might come under challenge. Whereas this may appear acceptable for the regulatory policies in Article XX GATT, it is not acceptable under the national security exception. The adjectival clause in Article XXI b) GATT clearly speaks against this. Consequently, the deferential standard of review over members´ assessments not only relates to the determination of the security interest, but also to assessing necessity.

Hence, one cannot operate different standards of review with regard to necessity and the determination of security interests. The *Russia – Traffic in Transit* panel seems to have implicitly shared this conclusion, as it adopted the same control standard for both necessity (reduced to suitability[91]) and security interests. For both requirements of the chapeau of Article XXI b) GATT, the panel operated a highly deferential mere plausibility review (*see* above 4.2), in conformity with the above tenability control.

4.3.1.2. Standard of Proof

As already shown above 4.2, the plausibility control operated by the panel actually determines the standard of proof. As a highly deferential standard of review operates, limited to reviewing whether there is a manifest error of facts or a cross misappropriation of law in the WTO members´ assessments under the chapeau of Article XXI b) GATT, effective adjudicative control shifts to requiring a certain standard of proof. The level and quantum of proof requested by a panel for a member´s discharge of burden of proof remains the almost only way for effectively controlling members´ assessments. Adjusting requirements for meeting the standard of production of evidence and the standard of persuasion allows a panel to steer the level of control over the allegation of security interests and the suitability of the protective measures adopted. Accordingly, the *Russia – Traffic in Transit* panel alluded to some flexibility with regard to the required level of articulation of security interests by a member, i.e. the standard of proof, as it held out the prospect for a more intensive handling of the requirements in situations further removed from armed conflict. The applicable standard of proof for establishing security interests depends on the character of the emergency invoked by the member: The closer the emergency in the sense of subparagraph iii) comes to the traditional understanding of armed conflict,

[90] *See* section 3.1, and Wolfgang Weiß, above n. 34, 259 et seq.
[91] *See* Geraldo Vidigal, above n. 1, 215.

the less specific a member´s articulation of security interests needs to be, and vice versa.[92] Thus, in traditional international security crises, the standard of proof under the chapeau is low. In order to protect confidentiality of national security assessments, their general articulation is sufficient for discharging the burden of production of proof. Other cases might require a more demanding standard of articulation of these interests, raising the standard of production of proof and of establishing persuasion.

4.3.2 The subparagraphs of Article XXI b) GATT

As the subparagraphs do not contain deferential language, deference to members´ assessments does not extend to them.[93] The appropriate standards of review and of proof must be determined in accordance with the subparagraphs´ functions and the role of the WTO judiciary.

As mentioned, the subparagraphs determine the scope of application of the security exception and thus hinder WTO members from their abuse in other situations. This objective function requires effective judicial control advocating for a higher standard of review to hinder abuse. The *Russia – Traffic in Transit* panel opted for a full review, without deference to members´ assessment as to whether there was an emergency.[94] This approach is appropriate. The evaluation of whether a situation amounts to an armed conflict or an emergency in international relations does not depend on domestic assessment of facts, nor on information available only to a WTO member. Whereas the determination of security interests depends on a member´s subjective evaluation of the security consequences of an emergency for the domestic situation, this is not the case with the appraisal of a situation as an emergency in international relations. The categorisation of an incidence in international relations can be based on objective assessments, with full review of the facts and their legal evaluation. The assessment whether a situation constitutes such an emergency is an objective factual issue, fully in accord with the panel´s task of objective assessment.

One might contest the capacity of panels insofar as the facts to be assessed generally do not originate from the trade sphere. Rather, it is a matter of evaluating and classifying information from the fields of international relations, security and foreign policy. Panels have no specific expertise insofar. The panels, however, need not be the first to assess the facts and information, but to review the assessment by members. Although panels reviewing such assessments may act outside their traditional expertise in trade, the control of such assessments only demands general familiarity with international law and relations. Panellists are knowledgeable of international trade, Article 8.1 DSU, which implies expertise in general international relations, too. Panels can also use international sources in their review of national assessments, just as the *Russia – Traffic in Transit* panel used the UN's assessment of the conflict between Ukraine and Russia.[95] International crises typically attract considerable attention and will regularly be referred to international bodies, such as the UN. Consequently, a panel reviewing their classification as an emergency in the sense of subparagraph iii) will be able to rely on expert assessment by international organisations. Hence, the difference between an intrusive full review of the requirements of the subparagraphs in Article XXI b) GATT and the almost negligible standard of review of its chapeau can be explained by the fact that the former need not deal with a domestic perception of security interests. It refers to the assessment of an international situation available for objective determination.

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[92] Panel, WT/DS512/R, para. 7.135, criticized by J Benton Heath, above n. 12, 1075.
[93] *Ibid.* 7.101.
[94] *Ibid*. 7.98, 7.101, 7.119-7.125.
[95] *Ibid.* 7.122.

Hence, a full, objective review of the subparagraph´s requirements by the panels, and a related standard of proof, conforms to their rationale and their difference in wording compared to the chapeau, but also to the general role of the WTO judiciary to operate an objective assessment also of the facts, and to its expertise. Consequently, there is neither reason nor room for any deference to members´ appraisals insofar.

5 Conclusion

Analysing the methodical and procedural issues of WTO adjudication of security exceptions contributes to finding a balance between the interest of the invoking WTO member to protect its security and the trade interests of the other members. Security exceptions are subject to the jurisdiction of WTO adjudication, as rightly recognized by the *Russia – Traffic in Transit* panel. Even though Article XXI GATT is drafted in vague words, expansive conceptualisation is not the appropriate interpretive method. Recent attempts to re-politicize security exceptions cannot overcome the confines resulting from negotiation history, state practice, wording and context, in particular considering the lack of additional safeguards against abuse. The considerable discretion attributed to WTO members for their determination of "security interests" and their protective measures´ necessity by the adjectival clause in the chapeau of Article XXI b) GATT can only be subject to a tenability review, which is mainly effectuated by an admittedly rather low standard of proof, as applied by said panel in its plausibility standard for Russia´s articulation of security interests. Some flexibility to the standard of proof (both with regard to production of proof and burden of persuasion) must operate to adjust the review standard to the specifics of the emergency. In contrast to the chapeau, the subparagraphs of Article XXI b) indicating its scope of application are, in conformity with their function, subject to a full, objective judicial review in which the assessments of WTO members do not play a role. This difference in control standards between chapeau and subparagraphs – reflected in the nuanced approach of said panel – is necessitated by the different wording (lack of adjectival clause in the subparagraphs), by the subparagraphs´ function as the only effective barrier to their abuse, and by a consideration of the role and expertise of the WTO judiciary. Consequently, the discretion of the WTO members in invoking national security, which one might deem almost unlimited due to the vague terminology, is subject to limitations reviewable by the WTO judiciary. This allows for effective control of the invocation of security exceptions only in objectively determined situations, to the benefit of protecting trade interests, while respecting room of manoeuvre for the WTO members in determining and protecting their security interests.