

# The Determination of “Basic Security Interests” in the WTO Security Exception Clause

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## Abstract

The WTO security exception clause is the product of balancing national security interests and economic and trade development. Because the terms of “basic security interests” are vague, there are some problems in the actual determination. By analyzing the problems in application, this paper concludes that the methodological path for determining basic security interests is subject to objective conditions and the principle of good faith, while taking into account the development of non-traditional security interests, under the prerequisite of safeguarding the right of members to self-determination. In today's ever-changing political and economic situation, the game between development and security will be the background for a long time. How to promote members to reach a consensus on basic security interests within the WTO system is a new topic and challenge.

**Keywords:** security exception, basic security interests, national security

## 1. Preface

Development and security are emerging issues in international economic law. Governments and international organisations are faced with the challenge of coordinating the two concepts and managing their interdependence, in particular with the World Trade Organisation (WTO). Sovereign states and international organisations have to manage this relationship in order to ensure sustainable and secure growth. It is essential to recognise that: Security is a prerequisite for development, while development is a guarantee of security. Safeguarding the security interests of sovereign states whilst promoting the orderly development of international economic trade poses new challenges in the current era. The GATT/WTO security exception clause focuses on

the balance between security and development, and with the development of non-traditional security issues, it is essential to explore and pay attention to the specific content of the basic meaning of security interests. This paper aims to explore the security exception clause<sup>1</sup> by analysing relevant issues and case studies to identify the basis of basic security interests. It discusses the challenges involved in determining these interests.

## 2. Question Raising

The transfer of economic sovereignty to the WTO implies that the WTO's legal mechanism will interfere with the domestic laws, regulations and policies of its members, and that

<sup>1</sup> Unless otherwise specified, the security exception clause in this paper refers to Article 21 of GATT.

they will lose some economic autonomy. States are willing to cede economic sovereignty because it provides a legal basis for certain domestic policies in WTO multilateral trade agreements and allows domestic interest groups to influence international decision-making. However, in the security field, states are often less willing to cede economic sovereignty in exchange for far-reaching benefits. It is widely accepted that the benefits typically associated with free trade and comparative advantage should be subordinated to a nation's need to maintain its sovereignty and security<sup>1</sup>. This is due to the increased attention and concern of countries over security issues, resulting in the important and complicated implementation of the security exception clause within the WTO system.

### *2.1 Importance of "Basic Security Interests" in the Application of the Security Exception Clause*

Article 21 of the GATT is titled "Security Exception." The provision refers to the "basic security interests" of a member as its specific embodiment of security. The substantive meaning of "basic security interests" is crucial to applying the security exception. It is therefore essential to establish the meaning and extent of "basic security interests" when applying the security exception.

At the 1947 Geneva Conference, the Dutch delegation enquired with the American delegation about the definition of basic security interests, expressing concerns over the vagueness of the concept and its scope. They believed that the current provisions allowed the invoking party to make favorable claims and conclusions effortlessly, leading to an undermining of the stability of the global trade system. Certain academics have suggested that GATT Article 21's language is excessively broad, subjective, and vague, thereby enabling misuse. Furthermore, the interpretation of Article 21 largely depends on the party invoking it. While the security exception provisions considered the expansive scope of "essential security interests," they ultimately favoured a comprehensive explanation. On the one hand, the security exceptions require a broad interpretation of "basic security interests", which cannot be adequately defined through a list. On the other

hand, the security exception clause serves to enable members to take action concerning security interests. On the other hand, the security exception clause serves to enable members to take action concerning security interests. On the other hand, the essential purpose of the security exception clause is to allow members to take measures in the consideration of security interests, which is a guarantee for the development of international trade, rather than a restriction.

### *2.2 Limitations of the Security Exception Clause Itself*

During the process of negotiating the security exception clause, the involved parties carefully analyzed the formulation of the exception and achieved a balance between its existence and its scope limitations. The resulting provisions are in agreement with Article 21 of GATT.

Among the three paragraphs comprising the article, the first one deals exclusively with a restricted range of conduct, relating to the refusal of disclosing information, and is generally less contentious in practical application. As per the United Nations Charter provisions, the third paragraph requires a clear restriction on the usage, which should be based on United Nations Security Council's actions. This ensures a non-controversial approach towards the paragraph. Contrastingly, the second paragraph is the most complex and disputable section of this article. The disagreement pertaining to this paragraph can be broadly categorised into two key areas. The first area revolves around the definition of "any action which it considers necessary to protect its basic security interests". This phrasing is vague and uncertain on several fronts. Firstly, what qualifies as a country's "basic security interests"? Secondly, does "its view" give states autonomy in determining "basic security interests" for themselves? Do countries have the authority to determine the precise definition of "basic security interests" based on their own requirements and national circumstances as well as changes in global conditions? If the principle of self-determination is applied, does this imply that the dispute settlement system of the WTO cannot handle legal conflicts that pertain to security exceptions, particularly those that involve "basic security interests"?

### *2.3 Problems Arising in the Practice of Applying the Security Exception Clause*

<sup>1</sup> Huang Zhixiong. (2014). "Challenges Facing the Security Exception of the WTO and China's Strategies", *Journal of International Economic Law*, 4, p. 143.

The analysis presented is well-supported. The clause's inherent uncertainty has resulted in application issues, thus causing apprehension about future security exception clause application.

The security exception clause is often misused because the definition of "basic security interests" is difficult, leading to ambiguity between "protecting basic security interests" and "implementing a specific policy". In practice, "basic security interests" are broadly interpreted and increasingly employed as a pretext for non-economic rationales for unilateral trade restrictions. These measures lack identifiable standards and effective remedies, making it challenging to ensure security and predictability in the multilateral trading system. Additionally, the invoking party's insistence on self-determination of "basic security interests" and opposition to the multilateral trading system's effective intervention has hindered the formation of effective norms and supervision of security exceptions in the multilateral trading system. Most supporters of the security exception argue that it should be left to individual states to decide and that the WTO has no authority to intervene in matters of national security. This has led to the politicalization of the WTO, which is considered unacceptable by its members. Consequently, the identification of "essential security interests" remains unregulated regarding security exceptions. Often, the party making the invocation can interpret the relevant meaning and circumstances, demonstrating compliance with security exceptions. As a result, the dispute settlement body is not authorised to oversee this process. Developed countries frequently implement security exception measures against developing countries, leading to doubts among the latter that these measures have become a tool for exporting the economic concepts of more advanced economies.

This inclination towards instrumentalisation has violated the world trade order and could erode the trust of developing nations in the WTO. It is an established fact of the international community that national power is used in economic and trade matters, and it is challenging to completely eliminate the effects of political power on economics and trade. Nonetheless, the significance of the multilateral trading system is particularly pronounced in this context. If the multilateral trading system is

incapable of objectively reviewing and monitoring security exceptions, it may be open to abuse in practice, thereby undermining the predictability of WTO rules and values. Therefore, it is crucial to resolve the pressing issue of applying the security exception clause judiciously to enable it to fulfil its role effectively in the WTO system.

### **3. Path to the Determination of "Basic Security Interests"**

#### *3.1 Prerequisite — Self-Determination of the Invoking Party*

In Article 21 of the GATT, the term "essential security interests" is qualified by "in its opinion". The dispute between the applicant and the complainant revolves around whether "essential security interests" or the "objective link between the measure and essential security interests" is the crucial factor. The issue of whether "in its opinion" acts as a modifier for "essential security interests" or "objective link between the measure and essential security interests" presents a challenging aspect of the review and constitutes the crux of the differing opinions between the invoking party and the complainant. In the DS512 case about Measures for the transit passage of Russia, the Panel determined that "essential security interests" refer to the fundamental responsibilities of a State, such as safeguarding its citizens and territory from threats and defending its domestic laws and national security. The Panel emphasized clarity in understanding the term. The Panel determined that "essential security interests" encompass safeguarding a nation's territory and population against threats and maintaining internal law and public order. Members may exercise free judgement in assessing the gravity of potential internal or external threats<sup>1</sup>. As such, the party invoking the clause reserves the right to interpret "essential security interests" for themselves. The position of the Panel aligns with the intended purpose of security exemptions whilst upholding the national sovereignty of its members, alongside practical reasoning. It is challenging for a non-State entity to determine the components that make up a State's "interests relating to the most basic functions of the State". Such a determination necessitates the State to evaluate its internal, external, diplomatic, economic,

<sup>1</sup> Russia-Measures Concerning Traffic in Transit, Report of the Panel, para.7.130-7.131.

political, and social affairs comprehensively, including horizontal and vertical comparisons. Therefore, the party making the claim should be given the right to self-determination on the meaning of the term.

Although it is a challenge to enumerate the specific content of “essential security interests”, it is not entirely vague. Drawing on the consultation materials and negotiation history of the GATT security exception, it is evident that the notion of “security interests” can be delineated into political and economic interests, with distinct treatment for both. Political security interests are considered part of the fundamental security interests, while economic security interests may not be universally included. If an invocation of economic security interests as fundamental security interests is sought, it will be subject to a stricter burden of proof, which requires evidence. To successfully invoke the security exception when invoking economic security interests as essential security interests, it will be necessary to meet a higher standard of proof. Specifically, it will be necessary to prove that the economic and trade measures are of “grave urgency”, as emphasised by the “necessity” rule in Article 25 of the Draft<sup>1</sup>.

The right to self-determination is limited; therefore, States cannot place any national interest under the category of “essential security interests”. In terms of the exceptions related to security, members are given flexibility to activate the provisions to safeguard non-economic interests. This is intended to increase the adoption of the multilateral trading system by members, aimed to promote the growth of international economic trading. Hence, though members are permitted to waive select obligations while citing security exceptions, it is inaccurate to assume that they can entirely dictate their “essential security interests”. This strays from the principles of transparency and security aimed by the multilateral trading system. In the DS512 case, the Panel recognised a limited degree of self-determination for the invoking party. The Panel’s decision curtailed States’ complete autonomy to decide on security exceptions, ultimately constraining the invoking party’s right to self-determination.

### 3.2 Limitation — Objective Criteria and the

#### *Principle of Good Faith Interpretation*

To begin with, it should be made clear that the categorisation of “essential security interests”, despite the qualifying phrase “which it deems necessary”, should be based on objective limits and not depend solely on national self-determination. If the determination of “essential security interests” were solely dependent on the invoking member, this exception would be applied without restriction. Other members’ legitimate interests would not be safeguarded, and hence there should be certain objective limitations on the determination of “essential security interests.” Therefore, the determination of “essential security interests” needs to be subject to certain objective limitations. The dispute settlement body should perform a judicial review to uphold objective limitations. While the panels and appellate bodies do not have the authority to define “essential security interest”, they should be able to scrutinize whether the invocation was reasonable. This way, they can assess if the security exceptions were abused. The reasonableness review arises from the understanding that the security exception is not the singular exception, as there are other exceptions that may be invoked primarily for safeguarding the economic security of the State. Moreover, the security exception can be used only for limited essential security interests. Compared to the general exceptions, the determination of basic security interests appears to be more adaptable and individualised. The WTO dispute settlement body struggles to establish basic security interests to a greater extent than it does with general exceptions. Consequently, the condition of objective limitations entails that the dispute settlement body is solely granted judicial oversight rather than the power to ascertain what pertains to “basic security interests”. This will not encroach upon the sovereignty of States. Therefore, the need for objective limitations only permits the dispute resolution body to exercise judicial review, without the authority to ascertain the definition of an “essential security interest”, while respecting the sovereignty of States.

Secondly, it is imperative to adhere to the principle of good faith interpretation. In the DS512 case, the Panel applied this principle and incorporated precise criteria for evaluating “essential security interests”. It should be noted that this case involves the “232” investigation

<sup>1</sup> Zhao Haile. (2021). “The Function of General International Law in the Application of Security Exception Clause”, *Journal of International Economic Law*, (2), p. 110.



brought to the United States by China, Canada, and other countries through the WTO. Therefore, the use of security exceptions as a standard for judgment in this case will impact the legitimacy of US trade measures. If the WTO Dispute Settlement Body relinquishes its authority to conduct judicial review of “basic security interests”, disagreements in the economic and trade sectors will become more ambiguous, posing a potential threat to the global peace and stability. Against this backdrop, the Panel utilised the provisions of the Vienna Convention on the Law of Treaties regarding the sincere interpretation of treaties to assert that the security exception clause necessitates members to refrain from using it as a means to evade their obligations. To justify invoking the clause instead of evading obligations, the Group demands that the invoking party provides evidence of the specific “basic security interest” at risk in the “exigencies of international relations”<sup>1</sup>. The further removed the link to armed conflict, the greater the burden of proof on the invoking party. Furthermore, the Group has enforced that the party making the claim provide evidence of “a connection between the measure in question and a fundamental security interest,” adhering to the principle of interpreting in good faith<sup>2</sup>.

The DS512 case illustrates that complying with the principle of good faith in defining “basic security interests” goes beyond formalities. Instead, specific factors can be drawn from the principle to concretise these interests. This exemplifies the application of the principle of good faith to security. This exemplifies the application of the principle of good faith to security. This adequately captures the requirement to consider the connection between the security interests of individuals at risk and the impact of measures taken on the shared interests of the multilateral trading system when applying security exceptions, with proportionality as the minimum standard. “Essential security interests” need to be assessed to a higher level than regular security interests<sup>3</sup>.

### 3.3 Development — Addressing Principles and

<sup>1</sup> Russia-Measures Concerning Traffic in Transit, Report of the Panel, para. 7.131-7.134.

<sup>2</sup> Russia-Measures Concerning Traffic in Transit, Report of the Panel, para. 7.138.

<sup>3</sup> Chen Weidong. (2002). *Interpretation of WTO Exception Clause*, University of International Business and Economics Press, p. 379.

### Non-Traditional Security Matters

The primary challenge in identifying “essential security interests” arises from the ambiguity or generality of the language used in Article 21 of the GATT. Therefore, identifying “essential security interests” requires understanding fundamental principles and harmonising the relationship between free trade and security exceptions to avoid impeding the legitimate application of exceptions. Therefore, when identifying “essential security interests”, it is crucial to comprehend fundamental principles and establish a favourable equilibrium amidst free trade and security exceptions. This will guarantee that exceptional circumstances do not deviate from the legal pathway.

The view regarding the integration of non-traditional security concerns under the ambit of “essential security interests” is positive. However, the WTO needs to define the means of their assimilation and ensure prevention of any misuse or exploitation of the “essential security interests,” which should be clarified through policy documents or legal interpretations. The inclusion of non-traditional security concerns within the concept of “basic security interests” reflects the evolution of security exceptions. Consequently, redefining “basic security interests” is essential in light of changing circumstances, but this should be done with an objective and cautious approach. The identification of “essential security interests” must adapt to current circumstances while maintaining an objective and careful approach. It is not appropriate to include all non-traditional security matters within the scope of “essential security interests” at present, nor should exclusively non-traditional security matters concerning particular countries be incorporated. It is crucial to make a holistic assessment of non-traditional security matters in the international community, followed by a systematic analysis, and then provide requisite explanations through policy documents or judicial interpretations. Policy documents or judicial interpretations should be used to provide essential explanations.

## 4. Challenges in Defining “Fundamental Security Interests”

### 4.1 The Persistence of the Development-Security Game

In retrospect, it is clear that the social basis for the emergence and development of the

exception clause is the global community's preoccupation with the objectives of a specific national public policy set by the government. The evolution of the multilateral trading system has demonstrated that striving for free trade, despite its theoretical feasibility, can only be a long-term objective<sup>1</sup>. To achieve greater trade freedom, it is necessary to address how national interests, particularly security, relate to overall trade freedoms. This can be achieved through the implementation of security exceptions, which will contribute to the creation of a stable economic and trade order. Hence, the interaction between development and security is an enduring issue, and the fundamental concern is to effectively manage this correlation.

On the WTO scale, trade freedom is typically favored, but when it comes to security, trade freedom appears to have taken a back seat to security concerns. The security interests of a country are the core and primary concerns of a sovereign state, which members prioritise over trade freedom. Thus, the freedom of trade promoted by the multilateral trading system cannot override a state's security interests. Additionally, the existence of security exceptions is a crucial factor in the advancement of the multilateral trading system. The security exception permits a member party to vary their obligations in emergency situations, in line with the principle of change of circumstances. The law should favour exemption from obligations in special circumstances. This is crucial for the ongoing development of the multilateral trading system. Otherwise, when special circumstances arise, countries may be forced to abandon the treaty in order to protect their own security. Such a scenario would increase the risk of the entire multilateral trading system being abandoned. The security exception clause establishes equilibrium between safeguarding national interests and promoting the multilateral trading system. Countries may avail themselves of the clause to preserve their security interests only in unique situations. The security exception clause's presence limits countries from resorting to it arbitrarily, thereby upholding the multilateral trading system.

Due to the aforementioned reasons, the interaction between development and security within the multilateral trading system will

inevitably be a protracted undertaking. As the international political and economic situation evolves, the correlation between the two will be regularly revisited. The complexities of this relationship make it arduous to distinctly define "basic security interests" from the articles alone, and this ambiguity could prove to be an unfeasible obstacle to overcome. The meaning of "basic security interests" can be adapted in response to changes in the global situation.

#### *4.2 Persistent Disagreement over the Criteria for Interpreting Words*

In DS512, three interpretations were proposed for determining whether the three essential elements involved in the security exception exist or not. These key elements are the essential security interest, the necessity of the measure, and the specific circumstances listed in Article 21b. Advocates of the first interpretation, called the subjective standard, argue that WTO members should have considerable discretion to make subjective judgments. This approach is also endorsed by both Russia and the United States, thus indicating that all three elements employ a subjective standard. The second perspective takes an objective approach in which Members contend that the Panel should thoroughly consider the specific circumstances outlined in Article 21(b), but that essential security interests should be left at the discretion of Members. It suggests that a higher standard than that of general interests is necessary to aid the Panel in determining whether the interests claimed by Members are "reasonable" or "prima facie reasonable"<sup>2</sup>. It suggests that a higher standard than that of general interests is necessary to aid the Panel in determining whether the interests claimed by Members are "reasonable" or "prima facie reasonable". It suggests that a higher standard than that of general interests is necessary to aid the Panel in determining whether the interests claimed by Members are "reasonable" or "prima facie reasonable". The third perspective acts as the restrictive factor, and proponents believe that the three specified circumstances outlined in paragraph b should be assessed using an objective criterion, while determining the essential security interests and necessity of the measure involves a subjective criterion<sup>3</sup>.

<sup>1</sup> Chen Weidong. (2002). *Interpretation of the WTO Exception Clauses*, University of International Business and Economics Press, 2002 edition, p. 401.

<sup>2</sup> Russia-Measures Concerning Traffic in Transit, Report of the Panel, para.7.37.

<sup>3</sup> Russia-Measures Concerning Traffic in Transit, Report of the Panel, para.7.37.

Different perspectives in this instance show variations in the degree to which security interests can be transferred, which is evident in differing interpretations of “basic security interests” across countries. For the United States, Russia, and other nations, security interests are a central component of national interests and must be determined independently. The core discourse of security interests cannot be delegated to the WTO Dispute Settlement Body. The provisions of the CPTPP also support complete self-determination, a view held by many countries. Regarding the EU, security interests do not depend entirely on complete and absolute self-determination. By establishing criteria for determining fundamental security interests, the EU can maintain a balance between protecting its own interests and supporting economic and trade development, thus achieving mutual benefits. It is challenging for the attitudes of diverse nations to undergo significant changes within a short period. It is expected that variations in the interpretation of terms will persist for some time. However, the WTO should function as an international organization to facilitate nations with differing perspectives within the system to achieve a shared understanding. Activating the security exception clause within the WTO system will enhance the safeguarding of the security interests of all countries and promote the economic and trade development further.

#### *4.3 The Role of the WTO Dispute Settlement Body*

Because of the ambiguity surrounding the concept of “basic security interests”, the initial role of the WTO Dispute Settlement Body (DSB) should be that of a reviewer, assessing the reasonableness of the invocation of essential security interests — a right granted to the DSB in the WTO system. The DSU mandates that its procedures encompass disputes emerging from the implementation of all framework agreements, specifically the Marrakesh Agreement and the DSU, along with the Trade Review Mechanism (TRM). The scope of the DSU also covers disputes arising from security carve-outs, eliminating any exclusions. Despite objections from certain Members who maintain that the WTO is not the right setting for addressing national security concerns, an examination of the contextual reading of the WTO agreements, along with their historical interpretation and subsequent implementation, implies that conflicts related to security

exemptions are susceptible to resolution through dispute settlement mechanisms. As outlined in the previous analysis, a reliable means of identifying “essential security interests” involves granting the dispute settlement body the authority to assess the legitimacy of invoking the security exception in a reasonable manner.

Could the DSB perform other functions? Would it be possible for the DSB to establish the standard of “essential security interests”? The DSB’s role is limited to that of a reviewer rather than a creator. Therefore, the establishment of an objective standard for “essential security interests” depends on the consensus reached by Members rather than on the DSB’s decision in the case. Nevertheless, the influence of previous WTO decisions on subsequent decisions should not be ignored. In DS512, the Panel established security exceptions for the first time, which prescribed limitations on the right of WTO members to self-assessment and the extent of its implementation, thereby shaping the outcome of the Saudi Arabia Intellectual Property Rights Protection case (DS567). Scholars have widely interpreted both the decision made in DS512 and the Panel’s interpretation of it. It is unclear whether DS512 provides an example for the WTO dispute settlement body to decide on security exceptions. Nevertheless, the Panel has furnished thoughts on the implementation of security exceptions, whilst also denying the right of states to full self-determination. Additionally, the Panel has recognised that “essential security interests” are subjective assessments, and that they are to be weighed against objective criteria. However, it is essential to emphasize that “essential security interests” are not arbitrary judgements.

#### **5. Conclusion**

During a time of fast-paced changes and developments in the global community, the matter of national security has always been a focal point for sovereign countries. The need to enhance multilateral trade progression while ensuring the protection of national interests and revitalising the WTO system is a pressing issue that requires immediate resolution.

In the DS512 case, the expert group provided a comprehensive guideline on the nature of the right to self-determination, its applicable circumstances, and the procedure for implementing the security exception clause. This

methodological approach to interpreting the security exception is a positive step forward. As members' requirements for safeguarding fundamental security interests increase, it appears essential that non-traditional security domains are incorporated within the ambit of fundamental security interests. Nevertheless, under these circumstances, the Panel's decisions are limited in their capacity. Furthermore, ensuring a balance between development and security will continue to be a prevalent issue in contemporary times. The differences in countries' interpretations of security exceptions are rooted in the prioritisation of national interests. To facilitate the WTO's effectiveness, efforts should be made to foster agreement in the field of security exceptions, enabling oversight and regulation of their implementation.

China needs to understand the link between safeguarding its fundamental security interests and promoting multilateral trade. By seeking solutions to the challenges posed by security exceptions, China can more effectively protect its national interests and contribute to global peace and development.

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