Art. XX, XXI GATT

Safeguards for national sovereignty or *cartes blanches* for protectionist trade policies?

A comparative analysis based on case studies

Master Thesis

Markets and Competition

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A. Introduction

World trade is booming. Especially in the Western world we benefit from this network and consume goods from the other end of the globe.

Rules are needed to ensure the functioning of world trade. The framework for the assessment of these rules under international law is provided by world trade law, now institutionalised by the WTO, which plays an important role in regulating and shaping trade. The treaties listed in the Annex to the WTO Agreement form an integral part of this. The GATT[1], which is integrated into the WTO, is decisive for customs duties on goods.

Nevertheless, the concept of multilateral agreements to ensure fair world trade is increasingly being questioned. International trade policy is more and more influenced by national interests and national security thinking. The WTO is confronted with growing protectionism and a rejection of the institution as such. This rejection carries the danger that Member States test the stability of the WTO and its norms and try to push their own political agenda by taking advantage of WTO law.

Therefore, this work will focus on two specific norms: the general exception of Art. XX GATT and the security exception of Art. XXI GATT.

These two exceptions are intended to illustrate the tension between national and international interests in which the WTO judiciary has to make decisions.

[1] The term "GATT" is used hereinafter to refer to GATT 1947 and GATT 1994.

It will be examined whether these two exceptions are *cartes blanches*[2], which endanger the effectiveness of world trade law and allow abuse, or whether they are safeguards for national sovereignty, which act as a "safety valve" for the interests of the Member States and prevent abuse.

In the first part of the thesis, the interpretation and application practice of the security clause of Art. XXI GATT is explained using the example of the additional tariffs on aluminum and steel levied under President Trump.[3]

The second part is dedicated to *J. Benton Heath's* criticism of the Panel's decision in the case *Russia - Measures Concerning Traffic in Transit*[4]. He describes the historical transformation of national security and the reforms required to meet the „new national security challenge". The author's views are critically examined.

In the third part, the interpretation and application practice of the general exceptions of Art. XX GATT is explained. Reference is made to the current decision in the case *US - Tariff Measures on Certain Goods from China*[5].

In the fourth part, the findings from the second and third parts will be used to compare GATT Art. XX and XXI. The differences and similarities between

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[2] M. Hahn, Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception, Mich J Int'L 12 (1991), 558, 559.

[3] e.g. *United States - Certain Measures on Steel and Aluminum Products* (EU) WT/ DS544.

[4] *Russia - Measures Concerning Traffic in Transit* WT/ DS512/R.

[5] *United States - Tariff Measures on Certain Goods from China* WT/DS543/R.

the two exceptions and their relationship to each other will be examined.

In the conclusion, based on the knowledge gained from this work, the susceptibility of GATT Art. XX and XXI to abuse will be assessed using the example of measures recently taken by the USA.

B. The security exception of Art. XXI GATT

Art. XXI GATT is a provision which is intended to ensure a certain flexibility for the Member States and above all their national sovereignty.[6] On the one hand, this flexibility creates a certain degree of uncertainty and instability; on the other hand, its general acceptance is a clear sign of its necessity and reflects the fact that international treaties must offer a limited number of possibilities to avoid treaty obligations. Without such options, international treaties run the risk of being flouted even more frequently.[7]

The need for such escape clauses is therefore largely undisputed.

However, it is problematic how far they should go:

"We cannot make it [i.e. the national security exception] too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose".[8]

This statement by one of the drafters of Art. XXI GATT outlines the dilemma: in its most extensive interpretation, Art. XXI GATT, has the potential to

[6] A. Funke, Souveränität, Völkerrecht – Lexikon zentraler Begriffe und Themen, p. 393; M. Hahn, Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception, Mich J Int'L 12 (1991), 558, 561.

[7] M. Hahn, Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception, Mich J Int'L 12 (1991), 558, 562.

[8] GATT Analytical Index, Art. XXI, p. 600.

justify protectionist measures as a *carte blanche* under the guise of security interests, thus endangering the fragile system of GATT rules. In its most restrictive interpretation, it limits national sovereignty to a high degree.

Art. XXI GATT is thus in a permanent tension between the pursuit of legitimate national security interests as an expression of sovereignty on the one hand, and abuse for economic purposes, which would undermine the legitimacy of the WTO agreement as a regulatory force on the other hand.

The relevance of this dilemma is demonstrated by the long history of the application of Art. XXI GATT. Already in 1949, the different views of the parties to the dispute regarding the scope of Art. XXI GATT became apparent in the case *United States - Export Restrictions (Czechoslovakia)*[9]. This uncertainty also accompanies the application of Art. XXI GATT.

How far-reaching Art. XXI GATT can be applied was demonstrated by the US embargo against Cuba. Cuba, not the US, informed the contracting parties of the embargo imposed on Cuba by the Kennedy administration in February 1962.[10] Only after that did the USA invoke Art. XXI GATT as justification.[11] Therefore, the different approaches to the interpretation of Art. XXI GATT - in particular

[9] Panel Report, II BISD 28 11/28 (8 June 1949).

[10] R. Bhala, National Security and International Trade Law: What the GATT Says, and what the United States Does, U Pa JIEL 19 (1998), 263, 269.

[11] R. Bhala, National Security and International Trade Law: What the GATT Says, and what the United States Does, U Pa JIEL 19 (1998), 263, 269.

Art. XXI lit. b (iii) GATT - will be discussed below. It is examined to what extent Art. XXI GATT can be described as a "self-judging" clause.[12]

The decision on *Russia - Measures Concerning Traffic in Transit*[13] will be compared with the previous interpretation and their effects on the future application of Art. XXI GATT. This will be examined using the example of the *US - Certain Measures On Steel And Aluminum Products*[14] case.

I. *US - Certain Measures on Steel and Aluminum Products*

The problematic nature of Art. XXI GATT can be illustrated using the current invocation of the security exception by the US and the associated imposition of defensive and punitive tariffs on aluminum and steel products.[15]

The relevance of this topic is not only due to its problematic legal nature, but especially to the implications for political and economic decisions which can determine the demise of entire economic sectors.[16][17]

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[12] M. Herdegen, Internationales Wirtschaftsrecht, p. 190, recital 75.

[13] Panel Report, WT/DS512/R.

[14] e.g. *United States - Certain Measures on Steel and Aluminum Products* (EU) WT/ DS544

[15] Ibid.

[16] BBC, 16.01.2020, available at https://www.bbc.com/news/business-45899310, last accessed on 18.11.2020.

[17] At an earlier stage, for example, tariffs on automobiles were also on the agenda, which would have led to enormous economic pressure, especially for the German car industry, which would also have affected political decision-makers, cf. P. Heijmans/ H. Amin,U.S. May Not Need to Put Tariffs on European Cars, Ross Says, available at https://www.bloomberg.com/news/Art./2019-11-03/u-s-may-not-need-to-put-tariffs-on-european-cars-ross-says, last accessed on 18.11.2020.

1. Facts

The import tariffs imposed under US President Trump are not entirely unprecedented. Already in 2002, the US imposed import tariffs on certain steel products with the aim of giving the US industry time to restructure in order to regain competitiveness.[18]

The national legal basis for these measures is provided by Section 232 which allows the US President to impose additional duties on imports that are likely to threaten US national security.[19][20]

The Trump administration establishes defensive and punitive tariffs on aluminum and steel products in order to protect domestic production, which is supposed to guarantee a supply of militarily important raw materials for armored vehicles, combat aircraft and critical infrastructure.[21]

It should be noted that the imposition of import tariffs is in principle permissible under WTO law.

Art. XI:1 GATT provides for the "tariffs-only" principle, which states that imports may only be

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[18] K. Ho, Trading Rights and Wrongs: The 2002 Bush Steel Tariffs, BJIL 21 (2003), 825, 829.

[19] 19 U. S. C. § 1862 lit. c. (1) (A) (ii) Safeguarding National Security of the Trade Expansion Act 1962, as amended.

[20] Section 232 is controversial in the US and is part of a legal process in which the US President's powers over tariff provisions are considered too far-reaching, cf. G. Thrush, Trump's Use of National Security to Impose Tariffs Faces Court Test, available at https://www.nytimes.com/2018/12/19/us/politics/trump-national-security-tariffs.html, last accessed on 18.11.2020.

[21] U.S. Department of Commerce, Bureau of Industry and Security, The Effect of Imports of **Aluminum** on the National Security, An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as amended, January 17, 2018;
U.S. Department of Commerce, Bureau of Industry and Security, The Effect of Imports of **Steel** on the National Security, An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as amended, January 11, 2018.

subject to tariff barriers.[22] Thus, under WTO law, tariffs are a legitimate instrument for guiding trade flows.[23] However, Art. II:1 GATT stipulates that these tariffs may not exceed the bound tariffs in the schedules binding on Members under Art. II:7 GATT. The additional tariffs imposed by the US are in breach of this obligation. However, Art. XXI GATT is an exception to this obligation.

The US has imposed additional tariffs on steel and Aluminum products against China, India, EU, Canada, Mexico, Norway, Russia, Switzerland, Turkey and others.[24]

So far only Canada and Mexico have reached a mutually agreed solution with the US.[25]

With regard to the other countries, a Panel was composed by the Director-General on 25 January 2019.[26] The report of the Panel was expected in autumn 2020 and will only be made available to the public once it was circulated to the Members in all three official languages.

The Panel has the difficult task of verifying whether the US measures are in conformity with Art. XXI GATT. This is problematic because the US and

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[22] C. Herrmann/ C. Glöckle, Der drohende transatlantische „Handelskrieg“ um Stahlerzeugnisse und das handelspolitische „Waffenarsenal“ der EU, EuZW (2018), 477, 479.

[23] C. Herrmann/ C. Glöckle, Der drohende transatlantische „Handelskrieg“ um Stahlerzeugnisse und das handelspolitische „Waffenarsenal“ der EU, EuZW (2018), 477, 480.

[24] cf. in this order DS544, DS547, DS548, DS550, DS551, DS552, DS554, DS556, DS564.

[25] Notifications of a mutually agreed solutions, WT/DS550/13 and WT/DS551/13.

[26] For all above mentioned cases one Panel was established, cf. *United States - Certain Measures on Steel and Aluminum Products* (EU) WT/ DS544/9.

some other voices are already questioning whether the measures are even justiciable.[27]

2. Political background

Looking at this trade dispute from a purely legal perspective, it is impossible to understand it. It is at least as important to recognise the economic and especially the political background that shapes the legal perspective.[28]

As noted above, the US justifies the tariffs on the grounds of national security.

At least, this is the official argumentation.[29]

The tariffs could also serve to put pressure on trading partners. The US wants to use its position of economic power to renegotiate trade relations bilaterally in its favour, thus securing jobs at risk in the US and reducing the US trade deficit.[30]

This is illustrated by the cases of Mexico and Canada, which were able to obtain a removal of the tariffs following concessions to the US.[31] However, on 6 August 2020, the US administration imposed new tariffs on aluminum imports from Canada.[32]

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[27] *United States - Certain Measures on Steel and Aluminum Products* (EU) WT/ DS544, First Written Submission of the United States of America, June 12, 2019, p. 5.

[28] M. Hahn, Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception, Mich J Int'L 12 (1991), 558, 580.

[29] J. Chait, Trump Confesses Illegal Motive, Blows Up Legal Basis for His Trade War, available at https://nymag.com/intelligencer/2018/06/trump-confesses-motive-blows-up-legal-basis-for-trade-war.html, last accessed on 16.11.2020.

[30] BDI, „America First" - U.S. Trade Policy under President Donald Trump, available at https://english.bdi.eu/article/news/america-first-u-s-trade-policy-under-president-donald-trump/, last accessed on: 14.11.2020.

[31] Notifications of a mutually agreed solutions, WT/DS550/13 and WT/DS551/13.

[32] T. Schürpf, Weltweiter Handelsstreit, available at https://www.nzz.ch/wirtschaft/handelsstreit-fakten-und-ereignisse-im-ueberblick-ld.1392086, last accessed on: 13.11.2020.

The US considers Art. XXI GATT to be a self-judging norm and denies a judicial review by a Panel, in order to avoid a more detailed examination of their motivation for the imposition of protective tariffs.[33]

II. Previous practice of interpretation and application

Art. XXI GATT is divided into (a), (b) and (c), whereby (b) is subdivided into (i), (ii) and (iii).

Art. XXI (c) GATT brings about conformity with Art. 103 UN Charter and clarifies the legality of trade measures based on a UN decision.

Art. XXI (a) GATT provides for a right to refuse to provide information for the protection of essential security interests, which, however, has little practical relevance.

Art. XXI (b) GATT is divided into three sub-case groups, of which the first two (concerning fissionable materials (i) and arms, ammunition and implements of war (ii)) also have little practical relevance, whereas Art. XXI b (iii) GATT is highly controversial and extremely relevant.

1. „*which it considers necessary*“

According to Art. XXI (b) GATT a state may take measures "*which it considers necessary*" if the conditions of (i), (ii) and (iii) are met. Thus, in the case *United States - Trade Measures Affecting Nicaragua*, the USA argued that invoking Art. XXI

[33] *United States - Certain Measures on Steel and Aluminum Products* (EU) WT/ DS544, First Written Submission of the United States of America, June 12, 2019, p. 5.

GATT would in itself prevent the Panel from being able to assess the measures taken by the US.[34] This is also shown by the confidential statement of the representative of Ghana, who in 1961 expressed his views on the boycott of Portuguese goods by Ghana:

"... under this Art. each contracting party was the sole judge of what was necessary in its essential security interest"[35]

In particular, the wording of the norm raises the question of the extent to which the measures taken are reviewable by the WTO judiciary and Art. XXI GATT can therefore be described as a "self-judging" clause.

There is no uniform definition of the term. In essence, self-judging clauses have the function of enabling a State to enter into multilateral cooperation on the basis of binding international obligations, while reserving the power to derogate from such obligations in certain circumstances, most often when the state finds that its sovereignty, security, public order or its essential interests are affected.[36] The question arises to which extent the parties have discretion in applying the security clause and are subject to review by the WTO judiciary. There can only be a margin of discretion

[34] *United States - Trade Measures Affecting Nicaragua*, Panel Report (unadopted), GATT Doc. L/6053.

[35] GATT Analytical Index, Art. XXI, p. 600.

[36] S. Schill/R. Briese, „If the State Considers“: Self-judging Clauses in International Dispute Settlement, MPUNYK 13 (2009), 61, 67.

in the absence of - or limited - reviewability by the WTO judiciary.[37]

It follows from the application of Art. 31, 32 VCLT[38] that the provision must be interpreted in particular with regard to its wording, systematics, object and purpose and a possible subsequent agreement. Since Art. XXI GATT is an exception which allows a derogation from all GATT obligations, it must be interpreted strictly.[39]

a. Wording

The difference in the wording is highlighted in particular in comparison with Art. XXI of the 1956 FCN-Treaty between the US and Nicaragua. It states that the parties to the Treaty may take measures which are "*necessary to protect [...] essential security interests*"[40]. The ICJ draws the following conclusions from this:

"That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear a contrario from the fact that the text of Art. XXI of the [FCN] Treaty does not employ the wording which was already to be found in Art. XXI [GATT]".[41]

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[37] J. Lee, Commercializing National Security: National Security Exceptions' Outer Parameter under Gatt Article XXI, ASIAN J. WTO & INT'L HEALTH L & POL'Y 13 (2018), 277, 290.

[38] Vienna Convention on the Law of Treaties

[39] Berrisch, WTO-Handbuch, p. 157, recital 293.

[40] Treaty of Friendship, Commerce, and Navigation (with Protocol), available at https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280139d26, last accessed on: 11.11.2020.

[41] IGH, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), ICJ Reports 1986, 14 recital 222.

The *argumentum e contrario* put forward by the ICJ, which seeks to show that the absence of the word "*consider*" in Art. XXI of the FCN-Treaty results in full justiciability of the provision by the ICJ, can also be used as an argument to justify justiciability by the WTO judiciary in the case of Art. XXI GATT.

b. Systematics

Against the view that Art. XXI GATT is not subject to review by the WTO judiciary, it could be argued that similar exceptions like Art. XIX and XX GATT are reviewable.[42] Art. XXI GATT would constitute a stand-alone exception in the system of exceptions, which would be highly questionable on a systematical basis. However, the outstanding importance of the national security as a protected interest must be taken into account. Therefore, the systematical comparability of the exceptions is missing.

c. Object and purpose

Art. XXI GATT serves to safeguard national security interests and is thus an expression of a central element of state sovereignty.[43] Art. XXI GATT is an expression of the assumption that the interest in free world trade must in principle be subordinated to the security concerns of the Member States.[44]

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[42] Berrisch, WTO-Handbuch, p. 139, recital 231.

[43] W. Cann, Creating Standards and Accountability for the Use of the WTO Security Exception, YJIL, 26 (2001), 413, 421.

[44] M. Kau, Die EU-Wirtschaftssanktionen gegen Russland im Licht der WTO- Regeln, EuZW (2017) , 293, 295.

This was also recognised by the drafters of the norm, who wanted to leave it to the contracting parties to determine when their national security was threatened.[45] However, the drafters of Art. XXI GATT also saw its susceptibility to abuse.[46] Therefore, the reference to Art. XXI GATT should strike a balance between their own national security interests and the general interest in trade liberalisation, following the principle of *bona fide*.[47] However, without reviewability, the general belief could arise that the WTO agreements do not have binding force, thus calling into question the WTO system as a whole.[48]

The object and purpose of Art. XXI GATT must be seen in the light of the GATT as a whole. The preamble of the GATT states that its objective is

"to increase economic prosperity and international trade by substantially reducing customs duties and other barriers to trade".

All measures under Art. XXI GATT, such as trade embargoes or import restrictions, have a negative impact on the economic prosperity of the States concerned and, because of the lack of exports or the increased cost of imports, also on the state imposing the sanction.[49] However, it must also be taken into

[45] GATT Analytical Index, Art. XXI, p. 600.
[46] A. Lowenfeld, International Economic Law, p. 34.
[47] GATT Analytical Index, Art. XXI, p. 600.
[48] H. Hestermeyer, WTO-Trade in GoodsArticle XXI, MPCWTL Vol. 5 (2011), 3, para. 20.
[49] D. Feldges, Die Strafzölle der USA auf Stahl sorgen weltweit für Verlierer, available at https://www.nzz.ch/wirtschaft/die-strafzoelle-der-usa-auf-stahl- sorgen-weltweit-fuer-verlierer-ld.1390757, last accessed on 12.11.2020.

account the high value placed on the protection of state sovereignty. Clear "escape routes" provide the necessary "breathing space" for the exercise of state sovereignty and thus prevent the adoption of measures not regulated by GATT,[50] which would have even more serious consequences for the economic prosperity of the countries concerned, since they would be enforced under the law of the strongest. Ultimately, therefore, norms such as Art. XXI GATT guarantee that the objective of the Treaty is achieved.

d. Subsequent Agreement Art. 31(3) (a) VCLT

According to Art. 31(3) (a) VCLT, *"any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions"* must be taken into account in the same way as the systematic interpretation.

Such an agreement could be seen in the 1982 "*Decision Concerning Art. XXI of the General Agreement*"[51]. The background to this decision was the occupation of the Falkland Islands and the resulting sanctions against Argentina.[52]

In particular, Argentina criticised the fact that the sanctioning parties did not announce the measures, whereas the sanctioning parties claimed that Art. XXI GATT does not require such notification.[53]

[50] M. Hahn, Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception, Mich J Int'L 12 (1991), 558, 562.

[51] GATT Analytical Index, Art. XXI, p. 605 et seq.

[52] *Trade Restrictions Affecting Argentina*, GATT Doc. L/5319/ Rev.1.

[53] GATT Analytical Index, Art. XXI, p. 605.

Canada went even further by arguing that WTO judiciaries do not have jurisdictional competence:

"Canada was convinced that the situation which has necessitated the measure had to be satisfactorily resolved by action elsewhere, as the GATT had neither the competence nor the responsibility to deal with the political issue which had been raised."[54]

Therefore, the refusal of the sanctioning States to explain to what extent the measures are covered by Art. XXI GATT was called into question by others.[55]

The results of this discussion on the reviewability of measures based on Art. XXI GATT does not, however, contain any specific rules on this very issue. There is no specific reference in the decision to an interpretation of Art. XXI GATT which is necessary for an interpretation under Art. 31(3) (a) VCLT.[56] On the contrary: the decision once again emphasises the outstanding importance of Art. XXI GATT for safeguarding the rights of contracting parties (*"important element for safeguarding the rights of contracting parties"*).

Furthermore, the contracting parties stated in the decision that it did not contain any interpretation of Art. XXI GATT which means that it cannot be a

[54] GATT Analytical Index, p. 554.
[55] cl. GATT Doc. C/M/157, 5.
[56] O. Dörr, Vienna Convention on the Law of Treaties, Article 31, recital 72.

"*subsequent agreement*" within the meaning of Art. 31(3) (a) VCLT.[57]

Nevertheless, the decision reveals the rejection of the assumption made, that the invoking Member can determine at its own discretion and without any possibility of verification whether it wishes to derogate from GATT by invoking the security clause.[58] However, it remained unclear how far this verifiability should go.

2. „essential security interests“

The essential security interests are mainly the defence and the existence of the state.[59] Purely economic interests are not covered by Art. XXI GATT, in particular because the drafters of the norm regarded it as a prototypical counterexample of an economic safeguard clause.[60]

Furthermore, the comparison with Art. XXI (b) (i), (ii) GATT, both of which have a military connection, shows that the primary purpose is to protect the external security of States.[61]

A "*commercialisation of national security interests*“[62] must be avoided.

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[57] It was merely a provisional solution pending the official interpretation of Art. XXI GATT, containing procedural guidelines for the application of Art. XXI GATT which in particular include obligations of consideration in the form of information duties.

[58] M. Hahn, Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie, p. 334.

[59] R. Alford, The Self-Judging WTO Security Exception, UTAH L. REV. 3 (2011), 697, 757 f.

[60] M. Hahn, Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie, p. 296. ; UN Doc. EPCT/A/PV/33, 20 f.

[61] M. Hahn, Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie, p. 295.

[62] J. Lee, Commercializing National Security: National Security Exceptions' Outer Parameter under Gatt Article XXI, ASIAN J. WTO & INT'L HEALTH L & POL'Y 13 (2018), 277, 301.

However, it should be kept in mind that a level of openness is necessary, as the concept of national security is subject to constant change.[63] For example, the national security interests of the US have shifted since the attacks of 11 September 2001, and have been devoted to the fight against terrorism in the "war on terror".[64] Other States are also redefining their security interests and are addressing issues such as climate change, pandemic diseases and cyber security.[65]

The growing importance of economic security in national security policies is problematic.[66] It is questionable to what extent economic interests intended to serve higher-ranking military interests are covered by Art. XXI GATT. The current case *United States - Certain Measures on Steel and Aluminum Products*[67] shows how difficult this distinction is.

The problematic mix-up of national security - in the nature of military security - and economic security is reflected in the banal statement of the US Secretary of Commerce, Wilbur Ross:

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[63] J. Yoo/D. Ahn, Security Exceptions in the WTO System, JIEL 19 (2016), 417, 444.

[64] S. Kitharidis, The Unknown Territories of the National Security Exception: The Importance and Interpretation of Art. XXI of the GATT, AUSTL. INT'L L.J. 21 (2014), 79, 90.

[65] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1034.

[66] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1029.

[67] WT/DS548.

„Economic security is military security. And without economic security you can't have military security."[68]

The link between economic and national security has also been the subject of disputes in the past. In the case of *Sweden - Import Restrictions in Certain Footwear*[69], Sweden imposed an import quota on footwear on the grounds that the supply of the military by domestic producers had to be guaranteed for emergencies. This case shows that it is possible to reconcile any economic concerns with national security interests. This leads to a risk of abuse.

An invocation of Art. XXI GATT to safeguard domestic industries should therefore only constitute action to protect "essential security interests" if the measure does not constitute circumvention of other GATT exceptions.[70] Essentiality thus also has a restrictive effect, as it requires a serious threat to national security interests.[71]

3. Alternative elements of Art. XXI(b) (iii) GATT

The mere threat to essential security interests is not sufficient to implement a measure based on Art. XXI (b) (iii) GATT, but the existence of the alternative elements "*in time of wa*r" or "*other emergency in international relations*" is also

[68] J. Kernen, CNBC, 24.05.2018,available at https:// www.cnbc.com/video/ 2018/05/24/wilbur-ross-trade-tariffs-trump-national-security.html last accessed on 17.11.2020.

[69] GATT DOC. L/4250, p. 9.

[70] M. Hahn, Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie, p. 301.

[71] J. Fahner, Qatar under Siege: Chances for an Article XXI Case?, EJIL:Talk!, available at https://www.ejiltalk.org/qatar-under-siege-chances-for-an-article- xxi-case/, last accessed on 06.11.2020.

required. In comparison to the two other elements of Art. XXI (b) GATT, the alternative elements of Art. XXI (b) (iii) GATT are formulated much more broadly and offer a relatively unclear possibility of restriction.[72]

a. *„in time of war“*

"*In time of war*" requires the existence of an international armed conflict.[73] The party invoking Art. XXI GATT does not have to be involved in this conflict.[74] This is justified by the fact that on the one hand it concerns the national security of each state whether and to what extent it supports a belligerent party and on the other hand this kind of taking sides represents the core of the state's freedom of action, which according to the object and purpose of the norm should be protected by the latter.[75]

b. *„other emergency in international relations“*

The very fact that it is linked ("*other*") to the term "*war*" makes clear that the applicability of GATT Art. XXI(b) (iii) "*other emergency in international relations*" should be limited to extraordinary crises.[76]

Although the definition of the crisis is narrow, the contracting parties must be allowed a certain margin of discretion as to whether or not such a crisis

[72] M. Hahn, Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie, p. 309.
[73] Berrisch, WTO-Handbuch, p. 157, recital 292.
[74] M. Kau, Die EU-Wirtschaftssanktionen gegen Russland im Licht der WTO- Regeln, EuZW (2017) , 293, 295.
[75] M. Hahn, Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie, p. 346.
[76] M. Hahn, Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie, p. 349

exists.[77] However, the contracting party is not entitled to exercise sole discretion in the interpretation of this term.[78]

4. Dispute Settlement Understanding

The provisions of the DSU do not contain an explicit exception to the reviewability of GATT Art. XXI by the WTO judiciary. Especially in view of the fact that the DSU was only adopted in the course of the GATT 1994 and that the problem of the justiciability of GATT Art. XXI was sufficiently well known due to numerous cases, this cannot be considered as an oversight of the drafting. Art. 7.2 DSU describes the scope of the tasks of a Panel. It states that the Panels "*shall address*" the relevant provisions. In the *Mexico - Taxes on Soft Drinks* case, it was noted that the term "*shall address*" implies that the appointed Panel is obliged to address the relevant provisions in all relevant agreements cited by the parties to the dispute.[79] Furthermore, Art. 3.2 DSU recognises that the dispute settlement procedure is a "*central element in providing security and predictability to the multilateral trading system*".

5. Interim result

a. Practice of interpretation

All in all, it can be stated that Art. XXI GATT is only partially a "self-judging" clause, due to the requirement of additional, objectively determinable

[77] Berrisch, WTO-Handbuch, p. 158, recital 294.
[78] Berrisch, WTO-Handbuch, p. 157, recital 293.
[79] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, WT/DS308/13

elements. The fact that so farno decision has been made by a Panel in which Art. XXI GATT has been interpreted in detail is not a sufficient justification for the conclusion of Art. XXI GATT as "self-judging",[80] since the contracting parties were able to influence the procedure before the Panel under the old GATT in such a way as to prevent a full review and decision by the Panel.[81]

Art. XXI GATT is thus not intended to guarantee complete freedom from GATT obligations according to previous practice of interpretation, but merely to provide a legally enforceable exception to the GATT.[82]

b. Practice of application

With regard to Art. XXI GATT, there is a clear divergence between the previous practice of interpretation and application.

Due to a lack of decisions by Panels, the existing interpretation practice has not been reflected in the application practice. The application practice by the Member States made the norm *de facto* self-judging, as they unilaterally determined its application and in case of conflict concluded bilateral agreements in the consultation phase.

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[80] Until the decision in *Russia - Measures Concerning Traffic in Transit* WT/ DS512/R.

[81] R. Browne, Revisiting National Security in an Interdependent World: The GATT Article XXI Defense after Helms-Burton, GEO. L.J. 86 (1997), 405, 421.

[82] M. Hahn, Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie, p. 287.

III. Changes in the practice of interpretation and application

The case of *Russia - Measures Concerning Traffic in Transit* may have caused a change in interpretation and application practice.[83] No Panel has yet reached a decision on Art. XXI GATT.[84] Panel decisions have been prevented by Member States in order to defend their understanding of sovereignty.

1. Facts

On 14 September 2016, Ukraine submitted a request for consultations to the WTO. In that request Ukraine complained about the violation of Art. V and X GATT by the restrictions on traffic in transit through Russia. The traffic in transit through Russian territory allowed Ukraine to transit Ukrainian goods to countries of the former Soviet Union with which Ukraine has no other land connection. Russia justified the transit restrictions on the grounds of the tensions between the two countries, which have persisted since 2014, and the resulting threat to national security interests. Russia referred to Art. XXI (b) (iii) GATT and argued that it is a "totally self-judging clause" and the Panel therefore lacks jurisdiction to make a binding decision in this dispute.[85]

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[83] Panel Report, WT/DS512/R.

[84] For an overview of the consultation procedures to date, see P. Mavroidis, The Regulation of International Trade, Vol. 1, p. 481 et seq.

[85] Panel Report, WT/DS512/R, p. 30.

2. Report of the Panel

The Panel finds that it has the jurisdiction contested by Russia to give a final and binding decision in the contested dispute.[86] Furthermore, contrary to the view of the US, Art. XXI(b) (iii) GATT is also justiciable and can therefore be partially reviewed by the Panel.[87]

Art. XXI(b) (iii) GATT is therefore not a "totally self-judging" clause.[88]

On the basis of the examination of Russia's motives, it concludes that the conditions for invoking GATT Art. XXI(b) (iii) concerning restrictions on traffic in transit are met.[89]

The wording "*which it considers*" gives the Member State a margin of discretion to determine the national security interests, to choose the measure and to determine whether it is necessary.[90]

The Panel defines national security interests as

„specific interests that are considered directly relevant to the protection of a state from such external or internal threats“.[91]

However, this margin of discretion is limited by the Member State's obligation to comply with Art. XXI GATT in good faith in accordance with Art. 31(1)

[86] Panel Report (adopted), *Russia - Measures Concerning Traffic in Transit*, WT/ DS512/R, p. 50, 7.103.
[87] Panel Report (adopted), *Russia - Measures Concerning Traffic in Transit*, WT/ DS512/R, p. 50, 7.103.
[88] Panel Report (adopted), *Russia - Measures Concerning Traffic in Transit*, WT/ DS512/R, p. 50, 7.102.
[89] Panel Report (adopted), *Russia - Measures Concerning Traffic in Transit*, WT/ DS512/R, p. 59, 7.149.
[90] Panel Report (adopted), *Russia - Measures Concerning Traffic in Transit*, WT/ DS512/R, p. 56, 7.131 et seq.
[91] Panel Report (adopted), *Russia - Measures Concerning Traffic in Transit*, WT/ DS512/R, p. 56, 7.131.

(a) and 26 VCLT.[92] This results in the obligation to ensure that the rules set out in Art. XXI(b) (iii) GATT are subject to a minimum degree of plausibility, which can be reviewed by the Panel.[93]
The alternative elements of Art. XXI(b) (iii) GATT are subject to objective criteria and can therefore be fully reviewed by the Panel.[94]

The Panel states that the alternative elements are closely linked. The more unspecific "*emergency in international relations*" must therefore have a connection to the first alternative and a military connection.[95]
Due to the tensions that have existed between Ukraine and Russia since 2014, the Panel assumes an "*emergency in international relations*" and states that the conflict is on the verge of war or armed conflict.[96] As this would affect in particular the border region of Russia with Ukraine, the claimed measures for the protection of security interests could not be characterised as unclear and thus meet the requirements of plausibility review.[97]
The Dispute Settlement Body adopted the Panel report on 26 April 2019.[98] Ukraine indicated that,

[92] Panel Report (adopted), *Russia - Measures Concerning Traffic in Transit*, WT/ DS512/R, p. 56, 7.132.
[93] Panel Report (adopted), *Russia - Measures Concerning Traffic in Transit*, WT/ DS512/R, p. 56, 7.138 et seq.
[94] Panel Report (adopted), *Russia - Measures Concerning Traffic in Transit*, WT/ DS512/R, p. 50, 7.101.
[95] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1034; Panel Report (adopted), *Russia - Measures Concerning Traffic in Transit*, WT/ DS512/R, p. 56, 7.135.
[96] Panel Report (adopted), *Russia - Measures Concerning Traffic in Transit*, WT/ DS512/R, p. 57, 7.136.
[97] Panel Report (adopted), *Russia - Measures Concerning Traffic in Transit*, WT/ DS512/R, p. 58, 7.145 et seq.
[98] *Russia – Measures Concerning Traffic in Transit*, WT/ DS512/7.

although disappointed with the outcome, the decision would have more positive than negative implications for the WTO dispute settlement procedure and that it would therefore refrain from appealing before the Appellate Body.[99]

IV. Impact of *Russia - Measures Concerning Traffic In Transit*

1. General impact

Until now, the transfer of such a politically important issue to the WTO judiciary seemed to be so dissuasive for many Member States, that a Panel decision was prevented at an early stage by an agreement in the consultation phase.[100] Art. XXI GATT has been subject to changing interpretation by Member States over the last 70 years. The decision is therefore a break in the interpretative sovereignty of individual Member States. The decision contradicts the historically grown position of the US - and many other countries - that Art. XXI GATT as a "self-judging" clause is not subject to the justiciability of the WTO judiciary. This means that the Member States must accept a partial review of their motives by the WTO judiciary.

Even if the previous interpretation practice already indicated that Art. XXI GATT is subject to some restrictions in its application, this has not been taken into account in the application practice.

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[99] cf. WTO news item 26.04.2019, available at https://www.wto.org/english/ news_e/news19_e/dsb_26apr19_e.htm, last accessed on 21.11.2020.

[100] For an overview of the consultation procedures to date, see P. Mavroidis, The Regulation of International Trade, Vol. 1, p. 481 et seq.

The decision *Russia - Measures Concerning Traffic in Transit* now makes the previous interpretation practice the future application practice.

What is special about the decision is not its content, but the decision itself. The decision therefore has a clarifying function because of its binding nature. In terms of content, the main finding is that the alternative elements of Art. XXI(b) (iii) GATT can be objectively determined and are therefore fully reviewable, which goes further than previous interpretation practice.

All in all, the prevention of an abuse of Art. XXI GATT is no longer only dependent on the "spirit"[101] of the parties to the dispute, but is subject to restrictions. The "right of the strongest“[102] is thus limited.

It remains to be seen how this decision will affect the future application of Art. XXI GATT.

2. Impact on *US - Certain Measures On Steel And Aluminum Products*

In its written submissions, the US has repeatedly argued that Art. XXI GATT is self-judging and that the Panel may therefore only determine that the US

[101] The Norwegian chairman of the Preparatory Committee's working group assumed that the "spirit" of the Member States was the only protection against abuse, GATT Analytical Index, p. 600.

[102] „*The security exception is an inherently discriminatory remedy. It is available only to those nations that have the power to successfully coerce, to successfully punish, and to successfully intimidate*“ cf. W. Cann, Creating Standards and Accountability for the Use of the WTO Security Exception, YJIL, 26 (2001), 413, 426.

is invoking Art. XXI, but may not subject this to any substantive review.[103][104]

The Panel's decision in the *Russia - Measures Concerning Traffic in Transit* case contradicts this approach.

This emerges in particular from the restrained criticism of the decision by the US, which, although interpreting the decision as incorrect, did not reach a further assessment with reference to its own outstanding decisions on Art. XXI GATT.[105] The US must therefore expect that the punitive tariffs on Aluminum and steel will also be reviewed. If the Panel follows this practice, it does give the US a margin of discretion in that it is free to choose the measure to protect its national security interests. However, this margin of discretion is limited by good faith application. The measures are therefore subject to a minimum degree of plausibility, which can be reviewed by the Panel.[106]

In this respect, it is questionable whether the USA can uphold its argument that punitive tariffs serve to secure the supply of military equipment and critical infrastructure, or whether these are merely (hidden) economic or political interests.

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[103] *United States - Certain Measures on Steel and Aluminum Products* (EU) WT/ DS544, First Written Submission of the United States of America, June 12, 2019, p. 5.

[104] For the USA the self-judging character of the norm seems to be so crucial, that it did not support the allied Ukraine in its argumentation, but *de facto* shared the argumentation with Russia, cf. *Russia – Measures Concerning Traffic in Transit*, Third Party Oral Statement of the United States of America.

[105] cf. WTO news item 26.04.2019, available at https:// www.wto.org/english/ news_e/news19_e/dsb_26apr19_e.htm, last accessed on 21.11.2020.

[106] Panel Report (adopted), *Russia - Measures Concerning Traffic in Transit*, WT/ DS512/R, p. 56, 7.138 ff.

C. Overcoming the „new national security challenge“[107]

The previous analysis has shown how difficult it is to enforce Art. XXI GATT and that even when a decision is taken by a Panel, there is resistance to its application. At the same time, the risk posed by Art. XXI GATT has also become apparent. Art. XXI GATT has the potential to seriously disrupt world trade and to render the GATT *ad absurdum*.[108]

The crisis is much more far-reaching and cannot be limited to GATT Art. XXI. As the US interests described above and the behaviour regarding the appointment of judges to the Appellate Body show, the WTO is facing a crucial test which it does not seem able to resolve with the tools it currently has at its disposal. It is therefore necessary to reflect on new approaches to the problem.

J. Benton Heath criticises the Panel's approach in the case *Russia - Measures Concerning Traffic in Transit*, which sought to draw a clear line between economic interests and national security interests. He claims that there is an inseparable link between economic activity and national security concerns, which cannot be separated politically or legally.[109]

[107] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020.

[108] C. Daase/ O. Kessler, From Insecurity to Uncertainty: Risk and the Paradox of Security Politics, Alternatives 33, (2008), 211, 232.

[109] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1024.

I. Historical background

According to *J. Benton Heath*, the reason for this is the change in the political landscape. Art. XXI GATT had its origins in the Cold War period, when there were clear political opponents. During this period, the boundary between economic activity and national security interests was maintained by political pressure and mutual restraint.[110] This political division between economic activity and national security concerns was also the basis for the legal approach of international treaties to separate the economic sphere and the security sphere.[111] With the collapse of the Soviet Union and the end of the Cold War, this concept became obsolete. Now, there were no longer two major opponents who were holding each other back. In the meantime, with the United States, China, Russia and the EU, but also emerging nations such as Brazil and India, there are many players on the stage of international power politics who want to push their interests politically and economically. A further blurring between economic activity and national security interests is caused by the fact that all these rivals are part of the same multilateral trading system.[112] Thus, political conflicts are also carried out in this trading system.

[110] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1026.
[111] Ibid.
[112] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1024.

II. Transformation of national security

The author criticises that previous attempts to reform ignore these historical aspects and only try to „legally anchor“ a reform, but that it is more important that the economic order within the national security state is reintegrated.[113] This reintegration has to take place both legally and politically.

The reintegration of the economic order within the national security state also requires an adjustment of the concept of national security. This concept has been transformed since the end of the Cold War: The economic order is no longer separated from the security order, but has transformed into

„a multifaceted concept intertwined with law enforcement, human rights policy, environmental protection, public health, and economic globalization“.[114]

National security now comprises many more facets: new security threats such as climate change, pandemic diseases and terrorism have been added. These threats are characterised by the fact that they do not originate from a single state, but are „actorless“ risks, individual or network-centered risks.[115] In addition, States are also more vulnerable. Globalisation and worldwide digital interconnection also increase the need to protect critical

[113] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1020.

[114] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1034.

[115] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1040.

technologies and critical infrastructure from the outside world.[116]

On this basis, *J. Benton Heath* criticizes that the current judicial review approach would not leave enough room for States to develop and evolve their own security policies. National security has changed historically, but its interpretation in Art. XXI GATT has not evolved with the spirit of the times.[117]

III. *Good-faith but novel* security claims[118]

This outdated concept of security poses the danger that in the future, States will be driven into illegality with their actions to protect against these new threats to national security, since Art. XXI GATT does not cover these security concerns.

Thus, the current focus on protectionist claims hiding behind national security is much too dominant in the discourse on Art. XXI GATT.[119] Instead, the discussion should be about how to deal with *good-faith but novel* national security claims, that poses a more significant and permanent threat to the system.[120] The more the multifaceted nature of national security increases, the more it threatens the existing system if changes are not made soon.

Therefore, it is important to separate these two claims.

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[116] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1042

[117] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1074.

[118] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1070.

[119] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1065.

[120] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1020.

International courts must therefore give the Member States the freedom to develop their national security policies by controlling national security claims. The Panel in the case *Russia - Measures Concerning Traffic in Transit* chose good faith. The aim was to give Member States the necessary discretion to define their national security measures. *J. Benton Heath* criticises this approach as a "*trojan horse to introduce the more intrusive styles of review*"[121], arguing that although the measures may be determined by the Member State itself, they are subject to a plausibility review by the Panel based on the good faith principle.[122] The alternatives of Art. XXI (b) (iii) GATT are also subject to objective criteria and can therefore be reviewed by the Panel.[123]

This approach does not take into account an evolving national security concept, as it would impose limits on States in their development of security policies and thus lead to "*gatekeeping judgments*".[124] Therefore, a greater focus on the process itself is needed.[125] The principle of good faith could be used to ensure that the state is not controlled by the judiciary but by the public (e.g. public participation, reason-giving, transparency in the decision-making process).[126] In this way, state

[121] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1070.
[122] Panel Report (adopted), *Russia - Measures Concerning Traffic in Transit*, WT/ DS512/R, p. 56, 7.138 ff.
[123] Panel Report (adopted), *Russia - Measures Concerning Traffic in Transit*, WT/ DS512/R, p. 50, 7.101.
[124] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1072.
[125] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1074.
[126] Ibid.

control could also be achieved without having the interests as such reviewed by the judiciary.[127]

IV. Reform proposal

Broadly speaking, the reforms should include both political and legal elements.[128]

The reforms are based on four building blocks.

Firstly, national administrations are to be more closely involved in control. This is to be achieved on the basis of binding agreements or softer standards, which will act as a bridge between national and international mechanisms.[129]

Secondly, policy flexibility is to be achieved by a return to the realm of politics.[130] This is to be accomplished, for example, by not letting the WTO judiciary decide on the substance of the matter, but by delegating the matter back to the state concerned and accompanying and monitoring the state in finding a solution.[131] This leaves a wide margin of discretion to the States, but the WTO judiciary can still influence the decision through their control.[132]

Thirdly, the costs of security measures are to be internalised.[133] This will motivate countries to reconsider their security measures, as this could lead to high costs. This can prevent abuses, because otherwise the costs could lead to economic damage.

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[127] Ibid.

[128] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1026.

[129] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1082.

[130] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1084.

[131] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1089.

[132] Ibid.

[133] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1090.

Fourthly, States and tribunals should exchange information on the scope of national security policies and learn from each other.[134] This is intended to achieve harmonisation with regard to the scope of national security policies and at the same time reduce the potential for conflict between States and tribunals. This is to create a "mediated interaction" between law and politics and States and tribunals.[135]

V. Criticism

The reform ideas that *J. Benton Heath* presents are comprehensible and, with their historical reference, create an understanding of the mistakes he believes have been made. At the same time, they show how reforms can reintegrate the economic order into the national security order.

The underlying approach, that reintegration can only succeed if the concept of security is defined more broadly, is not tenable.

On the one hand, the Panel report in the case *Russia - Measures Concerning Traffic in Transit* makes it clear that a narrowing of the concept is not intended. The Panel defines national security interests as

"*specific interests that are considered directly relevant to the protection of a state from such external or internal threats*".[136]

[134] J. Benton Heath, The New National Security Challenge to the Economic Order, YJIL, 129 (2019), 1020, 1093.
[135] Ibid.
[136] Panel Report (adopted), *Russia - Measures Concerning Traffic in Transit*, WT/ DS512/R, p. 56, 7.131.

Accordingly, terrorism and climate change would already be covered.

In addition to creating a margin of discretion for the Member States concerned, the Panel also has a legitimate interest in establishing a legal framework around the concept of national security interests in order to create legal certainty.

Therefore, the concept of security cannot be so broadly defined as to include national security interests that lie in the future and are not yet known to us. However, in their interpretation, the WTO judiciary is also committed to interpret the rules in the light of current circumstances on the basis of the GATT and thus to make adjustments. So the current definition is not cast in stone.

It is also questionable whether concerns such as climate change necessarily have to be subsumed under the security exception of Art. XXI GATT. Instead, repressive measures with a comparable level of protection for the environment and climate protection can be subsumed under GATT Art. XX(b) and (g).[137] Moreover, the conflicts that are taking place, in regard to climate change, have less to do with Art. XXI GATT than with the general question of the extent to which this can be effectively combated at all through multilateral *trade* agreements such as GATT.[138]

The interpretation thus prevents the abuse that would be caused by an unlimited Art. XXI GATT.

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[137] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 5; Appellate Body Report, *US – Gasoline*, pp. 30-31.

[138] A. Bree, Article XX GATT - QUO VADIS? The Environmental Exception After The Shrimp/Turtle Appellate Body Report, Dick J Int'l L (1998), 99, 102.

J. Benton Heath does not manage to avert the increased susceptibility to abuse of Art. XXI GATT in an argumentative manner. It seems to make more sense to limit legal uncertainty and the law of the strongest, rather than allowing the Member States unlimited freedom of action. In particular, in a historical review, which the author rightly makes, it should not be forgotten that the scenario described by *J. Benton Heath* of the free determination of security interests by the Member States existed *de facto* until the Panel's decision. No Member State has ever been constrained by a Panel to limit or repeal a measure which the Member State has based on Art. XXI GATT. It is not understandable that this should be solely due to mutual control as a result of the power politics of the Cold War, in particular because the Cold War has been over since the 1990s.

It is generally preferable to have „rebels“ within a stricter legal system than a boundless legal system which is no longer able to control these „rebels“ and cannot perform any function of control.

With regard to the first reform proposal, it is difficult to understand what interest the Member States would have in signing such an agreement, which would bind their own administrations to review it in terms of security policy. In particular, States which claim the "self-judging" character of Art. XXI GATT will refuse to have their own administrations review them on the basis of international agreements. At the same time, this approach, if implemented, offers a wide scope for abuse.

Who controls the American administrative system? Who understands the Chinese administrative structure and its decision-making process? Self-regulation resulting from this approach does not create legal certainty, nor does it limit the risk of abuse. It is therefore better that a Panel makes objective and comprehensible decisions on national security measures.

The second and fourth reform proposals could be useful within narrow borders. It would weaken the "enemy image WTO" and the member States concerned would have to justify their measures more strongly. The problem arises if the WTO judiciary and the affected Member State cannot reach a consensus. Exchanges on an equal level and the return of decision-making power will undermine the authority of the WTO judiciary and thus raise even more profound doubts on the legitimacy of decisions.

The third reform proposal is an interesting approach. However, it could lead to a situation where member States must be „able to afford“ their national security measures. This would lead to financially weaker Member States having to refrain from legitimate national security measures, while financially stronger Member States could enforce illegitimate national security measures because they could afford the compensation costs.

All in all, it is therefore questionable whether the implementation of these reform proposals would not create more dangers than it could eliminate. Moreover, the current inability of the WTO to act means that reforms are a long way off.

D. The general exception of Art. XX GATT

This chapter is intended to shed light on the interpretation and application practice of GATT Art. XX and to place it in the context of *United States - Tariff Measures On Certain Goods From China*[139]. Special attention will be paid to Art. XX(a) *necessary to protect public morals*, because it is of particular importance for the case mentioned above.

Art. XX GATT is not as controversial and contested as Art. XXI GATT, but nevertheless looks back on a long history of application and interpretation with contradictions and changes. The general exception consists of a *chapeau* and the alternatives (a) - (j). The scope of application covers only the exhaustive list of paragraphs (a) - (j) and extends only to unilaterally prescribed measures which are in contradiction to GATT.[140][141] It is designed to allow Member States to adopt measures that protect their social and cultural values - even if they contravene other provisions of the GATT.[142][143]

Such a norm is particularly necessary because the ideas of public morality differ in all parts of the world, but come into contact with each other as a result of globalisation and the exchange of goods.

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[139] WT/DS543/R.

[140] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 4; Appellate Body Report, *US – Shrimp*, para. 121.

[141] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 8; Appellate Body Reports, *EC – Seal Products*, para. 5.185.

[142] Article XX GATT, like Article XXI GATT, is intended to be an all-embracing exception, which is implied by the wording „*nothing*".

[143] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 4; Appellate Body Report, *US – Gasoline*, p. 24.

The tensions are between defending social and cultural values of the Member State and the interests of the other Member States in multilateral trade liberalisation, market access and non-discriminatory treatment.[144]

Art. XX GATT therefore serves as a safety valve to create a balance between these conflicting interests and to increase the acceptance of the GATT by Member States.[145]

I. Practice of interpretation and application

Unlike Art. XXI GATT, Art. XX GATT has a long history of interpretation and application by a Panel. The sometimes contradictory decisions of the Panel have led to a stimulating discussion on the correct interpretation of GATT Art. XX and that it has been constantly developed and further refined. This interpretation and application practice will be described in the following.

1. *Chapeau*

The *chapeau* of Art. XX GATT is divided into three introductory clauses.[146] The wording makes it clear that the *chapeau* is a general rule for all paragraphs of Art. XX GATT.[147]

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[144] Q. Guanglin, The Balance between „Public Morals“ and Trade Liberalization: Analysis of the Application of Article XX(A) of the GATT, Frontiers L. China 14 (2019), 86, 114.

[145] T. Nachmani, To each his own: The case for Unilateral Determination of Public Morality under Article XX(A) of the GATT, UT Fac L Rev 71, no. 1 (2013), 31, 37.

[146] „*arbitrary discrimination, unjustifiable discrimination, disguised restriction on international trade“*

[147] C. Feddersen, Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation, Minn J Intl L 7, no. 1 (1998), 75, 91.

The phrase in the *chapeau* "*nothing in this Agreement*" indicates that paragraphs (a) - (j) are an exception to all GATT obligations.[148]
However, the exceptions in paragraphs (a) - (j) are not unrestricted, but

"limited and conditional exception...the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau.“[149]

The *chapeau* thus serves to prevent abuse of the exceptions under Art. XX GATT.[150] It should assist in resolving the tension between *rights* and *duties* in interpretation and application.[151] This balance between rights and obligations under the *chapeau* is linked to the principle of good faith.[152]
This means that Member States must respect the principle of good faith when exercising their rights under Art. XX GATT - in particular *abus de droit*, which prohibits abusive exercise of rights.[153]

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[148] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 4; Appellate Body Report, *US – Gasoline*, p. 24.
[149] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 65; Appellate Body Report, *US – Shrimp*, para. 157.
[150] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 64; Appellate Body Report, *US – Gasoline*, p. 22.
[151] "*[A] balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members.*“, cf. WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 4; Appellate Body Report, *US – Shrimp*, paras. 156 and 159.
[152] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 5; Appellate Body Report, *US – Shrimp*, paras. 158-159.
[153] Ibid.

This *juridification* of interpretation by introducing the principle of good faith is intended to ensure legal certainty.

The burden of proof is another aspect which is supposed to prevent abuse. A distinction is made between the burden of proof under the paragraphs (a) - (j) and the burden of proof under the *chapeau*.[154] The burden of proof that the measure does not constitute an abuse under the *chapeau* rests with the Member State invoking it.[155]

2. Two-tier test

The two-tier test defines the relationship between the *chapeau* and the individual paragraphs and follows the "*fundamental structure and logic of Art. XX*".[156][157]

The test is performed in two steps: First, it is examined whether the Member State's measure falls under one of the exceptions from a) to j). Only then, in a second step, the compatibility of the measure with the *chapeau* of Art. XX GATT is examined.[158]

This order is important because it ensures that the specificity of each paragraph can be taken into account when assessing the compatibility of the

[154] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p.65; Appellate Body Report, *US – Gasoline*, p. 22.

[155] Ibid.

[156] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 66; Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.96.

[157] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 6; Appellate Body Report, *US – Shrimp*, paras. 119-120.

[158] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 5; Appellate Body Report, *US – Gasoline*, p. 22.

measure with the *chapeau*.[159] Only in this way can the purpose of the chapeau unfold and prevent abuse of the provision. The Appellate Body emphasised the importance of adhering to the order in *US Shrimp*, after the Panel had begun examining the *chapeau* in the case.[160][161]

3. Art. XX(a) GATT: *public morals*

The *public morals* exception is the first of ten exceptions in Art. XX, which also reflects its importance.[162]

Public morals represent a core interest of every state and contain standards of *right* and *wrong*, which are

[159] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 66; Appellate Body Report, I*ndonesia – Import Licensing Regimes*, para. 5.96.

[160] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 6; Appellate Body Report, *US – Shrimp*, paras. 119-120.

[161] In part, this order is criticised because it is only a pretended argument that the individual case can be better considered. In the foreground of the order is actually the judicial economy, cf. S. Charnovitz, The Moral Exception in Trade Policy, Va. J. Int'l L 38 (1998), 689, 709.

[162] "*We do not consider it simply accident that the exception relating to 'public morals' is the first exception identified in the ten sub-paragraphs of Art. XX.*", cf. WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 15; Panel Report, *China – Publications and Audiovisual Products*, para. 7.187.

shaped by social, cultural, ethical and religious values.[163][164]

The drafters of Art. XX(a) had no interest in creating a narrow definition of public morals in order to not endanger the *constructive ambiguity* of the concept.[165] Because of the different social, cultural, ethical and religious circumstances in the different Member States, the ideas about public morals differ from country to country.[166] For this reason, the Member States must also be given a margin of discretion to translate their ideas of public morals into public policies.[167] It follows from this that the Panel does not have to examine the exact content of the moral concepts of the state concerned in the respective case.[168] There has been much criticism and some have called for the Panel to

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[163] *"'[T]he term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation' ... 'the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values' ... Members, in applying this and other similar societal concepts, 'should be given some scope to define and apply for themselves the concepts of 'public morals' ... in their respective territories, according to their own systems and scales of values'.*" cf. WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 22; Panel Report, *China – Publications and Audiovisual Products*, para. 7.759.

[164] *Right* or *wrong* must not be understood in the sense of a claim to truth, but only "*about the claim of particular communities to have, or to choose, their own standards, rather than about the validity of those standards in any deeper metaphysical sense*." cf. O. Suttle, What Sorts of Things are Public Morals? A Liberal Cosmopolitan Approach to Article XX GATT, Mod L Rev. 80, no. 4 (2017), 569, 592.

[165] T. Smith, Much needed Reform in the Realm of Public Morals: a Proposed Addition to the GATT Article XX(a) „Public Morals" Framework, Resulting from China-Audiovisual, Cardozo J. Int'l & Comp. L. 19, no. 3 (2011), 734, 747.

[166] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 22; Panel Report, China – Publications and Audiovisual Products, para. 7.763.

[167] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 22; Appellate Body Reports, *EC – Seal Products*, para. 5.199.

[168] Ibid.

include the States internal legislation and executive efforts on public morals in its decision to review consistency,[169] or "*to internationalize Art. XX(a)*", for example to create a more objective form of public morals based on international human rights.[170] This criticism has not been successful in interpretation and application practice.

The examination of the public morals exception takes place in two steps, which are described below. Then comes the examination of the compatibility of the measure with the *chapeau*.

a. Measure designed to protect public morals

In a first step, the relationship between the measure taken and public morals is examined. The measure must be designed to protect public morals.[171] It may be "*not incapable of protecting public morals*".[172] If it is already determined in this first step that the measure is not designed to protect public morals, a further examination is not necessary.[173]

[169] T. Smith, Much needed Reform in the Realm of Public Morals: a Proposed Addition to the GATT Article XX(a) „Public Morals" Framework, Resulting from China-Audiovisual, Cardozo J. Int'l & Comp. L. 19, no. 3 (2011), 734, 773.

[170] S. Charnovitz, The Moral Exception in Trade Policy, Va. J. Int'l L 38 (1998), 689, 716.

[171] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 9; Appellate Body Reports, *Colombia – Textiles*, paras. 5.67-5.70.

[172] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 10; Appellate Body Report, *Colombia – Textiles*, para. 5.77.

[173] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 9; Appellate Body Reports, *Colombia – Textiles*, paras. 5.67-5.70.

b. Measure necessary to protect public morals

In a second step, it must be examined whether the measure is necessary to protect public morals. At this point, a difference is also revealed with regard to the other exceptions in Art. XX GATT,[174] which have a different nexus between the interest to be protected and the *chapeau*.[175] The burden of proof to show that a measure is necessary to protect public morality lies with the party invoking Art. XX(a) GATT.[176]

aa. *„Weighing and balancing“*

The core of the Panel's examination is the "*weighing and balancing*"[177] of different factors, to what extent the measure is necessary to protect public morals. The cumulative factors are weighed individually against each provision that the measure violates.[178][179]

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[174] eg *„relating to“*, *„essential to“*; except paragraphs (b) and (d) which have the same wording as (a)

[175] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 6; Appellate Body Report, *US – Gasoline*, pp. 17.

[176] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 8; Appellate Body Reports, *EC – Seal Products*, para. 5.169.

[177] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 11; Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 239 and 242.

[178] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 12; Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 243-245.

[179] Critical voices doubt that a real weighing in the sense of a proportionality test takes place, but that only the individual factors are examined, which however would not guarantee objectivity and would lead to absurd results. It would also be inconsistent that the measure would be subject to the balancing test on the one hand and that the Member State could choose the level of protection on the other.
cf. F. Fontanelli, Necessity Killed the GATT: Art. XX GATT and the Misleadling Rhetoric about „Weighing and Balancing“, Eur J Legal Stud 5, no. 2 (2012), 39, 65; D. Regan, The Meaning of „Necessary“ in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing, World T Rev. 6, no. 3(2007), 347, 348.

(1) Factor 1: contribution of the measure to the objective

The first factor to be taken into account is the extent to which the contested measure contributes to the achievement of the objectives pursued.[180] The objective pursued by Art. XX(a) GATT is the protection of public morals by the challenged measure. "*A genuine relationship of ends and means between the objective pursued and the measure at issue*"[181] is required. Based on the contribution of the measure to the objective pursued, the likelihood of the measure being characterised as "*necessary*" is determined.[182]

(2) Factor 2: trade-restrictiveness

The second factor deals with the trade-restrictiveness of the measure.[183] The purpose is to assess the impact of the measure on international trade. Merely stating that the measure leads to trade restrictions is not sufficient.[184]

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[180] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 12; Appellate Body Report, China – Publications and Audiovisual Products, paras. 243-245.

[181] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 29; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

[182] This can be determined on the basis of scientific evidence, although the Panel is not restricted to this. cf. WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 16.

[183] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 28; Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 243-245.

[184] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 18; Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 300-311.

(3) Factor 3: importance of the objective pursued

The third factor determines the importance of the objective pursued.[185] The more important the objectives pursued by the measure are, the higher the chance that the measure will be recognised as „*necessary*".[186]

bb. comparison between measure and available alternatives

After weighing the measure against the 3 factors, it has to be examined whether there are alternative measures which could achieve the pursued objective of the Member State, while being less trade restrictive.[187] This alternative measure must achieve the same level of protection as the contested measure.[188] Furthermore, this alternative measure must be "*reasonably available*"[189], i.e. it must not only exist in theory but must be available to the Member State without significant additional effort.[190] The burden of proving the existence of

[185] G. Ayres/ A. Mitchell, General and Security Exceptions under the GATT and the GATS, International Trade Law and WTO, p. 17.

[186] The protection of public morals has a very high priority: *„as vital and important in the highest degree in a similar way to the characterization of the protection of human life and health against a life-threatening health risk by the Appellate Body in EC – Asbestos.*" cf. WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 14; Panel Report, *US – Gambling*, paras. 6.489-6.492.

[187] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 13; Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 246 and 249.

[188] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 12; Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 239 and 242.

[189] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 12; Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 246 and 249.

[190] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 14; Appellate Body Report, *Colombia – Textiles*, paras. 5.71-5.74.

such an alternative measure lies with the complaining party.[191]

II. *US - Tariff Measures On Certain Goods From China*

1. Facts

The two largest economies are in an ongoing trade dispute. A major source of conflict has been the US accusation against China of stealing or otherwise improperly acquiring intellectual property, trade secrets, technology, and confidential business information from U.S. companies.[192]

The case *US - Tariff Measures On Certain Goods From China* is a good example of this. In June and September 2018, the US imposed additional tariffs on Chinese imports suspected of profiting from the theft of intellectual property.[193] This was in response to the conclusions of the *2018 Special 301 report*, which criticised China for its unfair trade practices.[194] China has imposed retaliatory tariffs and reportedly taken other retaliatory actions against U.S. companies.[195] The national legal basis for the measure is provided by *Section 301 of the U.S. Trade Act of 1974*. This allows the US President or

[191] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 8; Appellate Body Reports, *EC – Seal Products*, para. 5.169.

[192] Office of the United States Trade Representative (USTR), 2018 Special 301 Report, p. 38 et seq.

[193] Panel Report (*Addendum*), *United States - Tariff Measures on Certain Goods from China* WT/DS543/R/ Add.1, p.12.

[194] Office of the United States Trade Representative (USTR), 2018 Special 301 Report, p. 44.

[195] Y. Li, China will retaliate with tariffs on $75 billion more of US goods and resume auto tariffs, CNBC, available at https://www.cnbc.com/2019/08/23/china-to-retaliate-with-new-tariffs-on-another-75-billion-worth-of-us-goods.html, last accessed on 22.11.2020.

the USTR[196] to impose tariffs on imports that are likely to manifest unfair trade practices.

As an international legal basis, the US invokes the public moral exception of Art. XX(a) GATT.

China denies the accusation of unfair trade practices and requests the establishment of a Panel after prior consultations.[197] China argues that the measure violates Art. I:1 and II:1(a) and (b) GATT and is not justified under Art. XX(a) GATT.[198]

2. Political background

As already explained in relation to *US - Certain Measures On Steel And Aluminum Products*, it is important to know the political background to understand the trade dispute between the US and China. This case highlights in particular a *battlefield* of the so-called *trade war*: the „tech battle"[199] between the US and China over IP rights, high-tech chips, new innovations and social networking technologies. Tech supremacy has commercial, military and national security advantages.[200]

China is attempting to attack the previous supremacy of the US in the field of new technologies with its state-owned tech giant Huawei

196 Office of the United States Trade Representative.

197 *United States - Tariff Measures on Certain Goods from China* WT/DS543/7.

198 Panel Report (*Addendum*), *United States - Tariff Measures on Certain Goods from China* WT/DS543/R/ Add.1, p.13 et seq.

199 D. Wu/H. Hoenig/ H. Dormido, Who's Winning the Tech Cold War? A China vs. U.S. Scoreboard, available at https://www.bloomberg.com/graphics/2019-us-china-who-is-winning-the-tech-war/, last accessed on 22.11.2020.

200 Ibid.

and others.[201] The US accuses China of using unfair trade practices to enforce this.[202] So the conflict revolves around the supremacy in new technologies between the two largest economies in the world.

3. Report of the Panel

The Panel ruled that the tariffs imposed by the US against China are inconsistent with Art. I:1, II:1(a) and II:1(b) GATT.[203] The Panel also recommends that the US brings its measures into conformity with its obligations under the GATT.[204] The Panel gives four reasons for inconsistency:

a. Mutually agreed solution

First, the parties to the dispute had not found a mutually satisfactory solution under Art. 12.7 DSU.[205] The US has argued that there was a settlement of the matter between the US and China in accordance with Art. 12. 7 DSU and the Panel therefore had to dispense with legal findings in its

[201] A. Fitch/ L. Santiago, Why Fewer Chips Say „Made in the U.S.A.“, available at https://www.wsj.com/articles/why-fewer-chips-say-made-in-the-u-s-a-11604411810, last accessed on 23.11.2020;
L. Wei, China Stresses Reliance on Its Own Technologies in Five-Year Plan, available at https://www.wsj.com/articles/china-leadership-says-economy-will-reachmid-level-within-15-years-11603969958, last accessed on 18.11.2020;
A. MacDonald, U.S. Steps Up Efforts to Counter China's Dominance of Minerals Key to Electric Cars, Phones, available at https://www.wsj.com/articles/u-s-steps-up-efforts-to-counter-chinas-dominance-of-minerals-key-to-electric-cars-phones-11601884801, last accessed on 18.11.2020.

[202] *United States - Tariff Measures on Certain Goods from China* WT/DS543 First Written Submission of the United States of America, paras. 18-21.

[203] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p.65, 8.2.

[204] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p.65, 8.4, cf. Art. 19.1 of the DSU.

[205] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p.65, 8.1.a.

report and was only allowed to present the case and determine that a solution had been found.[206] China contradicts this and argues that the *Phase One Agreement* has no legal significance for the current dispute and would merely constitute a process of bilateral negotiations.[207] The Panel notes that a *mutually* agreed solution requires that it reflects "*shared views on the substantive matter*".[208] This is not the case with regard to the *Phase One Agreement* due to the dissent between the US and China.

b. Terms of reference

Secondly, the Panel confirmed that the measures were fully covered by the Panel's terms of references and that the Panel could therefore make findings and recommendations.[209]

c. Inconsistency with Art. I:1, II:1(a) and II:1(b) GATT

Third, the measures at issue are inconsistent with Art. I:1 and II:1(a) and (b) GATT.[210]

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[206] The US is referring to the *Phase One Agreement* between China and the US, signed on 15 January 2020, entered into force on 14 February 2020; Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p.16, 7.4; *United States - Tariff Measures on Certain Goods from China* WT/DS543 Second Written Submission of the United States of America, para. 1.

[207] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p.17, 7.6; *United States - Tariff Measures on Certain Goods from China* WT/DS543 Second Written Submission of China, para. 11.

[208] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 19, 7.13.

[209] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 28, 7.62.

[210] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 65, 8.1.c.

The measures at issue are inconsistent with Art. I:1 GATT, because they only apply to products from China, whereas like products from other WTO Member States are not affected by the additional tariffs and thus violate the most-favoured-nation treatment.[211]

Furthermore, the measures at issue are also inconsistent with Art. II:1 (b) GATT, because the US has applied customs duties in excess of those provided for in its schedule. Consequently, these customs duties manifest a less favourable treatment which is inconsistent with GATT Art. II:1 (a).

d. Art. XX(a) GATT

Fourthly, the inconsistency of the measures with Art. I:1 and II:1(a) and (b) GATT is not justified by the claim of the US that it should protect public morals under Art. XX(a) GATT.

In its assessment of the public morals exception, the Panel follows the previous practice of interpreting GATT Art. XX(a).

First of all, the Panel notes that in order to invoke Art. XX(a) GATT, it is not necessary that the legal instruments implementing the measure explicitly refer to public morals. It is sufficient if such a link can be established by interpretation.[212] China hadsargued that the absence of the reference to public morals in the US tariffs shows that it has no public morals objective.[213]

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[211] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 32, 7.86.

[212] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 38, 7.125.

[213] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 38, 7.120.

Furthermore, China argues that the public morals objectives of the US include economic policy concerns, but that the scope of Art. XX(a) GATT is limited to non-economic concerns.[214] The USA has justified the measures at issue by stating that

"*state-sanctioned theft and misappropriation of U.S. technology, intellectual property, and commercial secrets*"[215]

by China would violate public morals in the US. The Panel argues that the Member States have a margin of discretion in the assessment of public morals, in particular to set their own public morals objectives.[216] The Member State in question is not limited to non-economic concerns. One of the reasons given by the Panel for this was that the other paragraphs of Art. XX GATT are linked to economic dimensions.[217] In addition, Panels have already allowed exceptions under Art. XX (a) GATT for measures related to public morals where economic concerns were paramount in the past.[218]

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[214] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 41, 7.133; *United States - Tariff Measures on Certain Goods from China* WT/DS543 Second Written Submission of China, para. 31.

[215] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 34, 7.100; *United States - Tariff Measures on Certain Goods from China* WT/DS543 Second Written Submission of the United States of America, para. 22.

[216] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 40, 7.131.

[217] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 41, 7.136.

[218] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 41, 7.137.

aa. Reviewing factor 3: importance of the objective pursued

The Panel reviews the importance of the pursued policy objective. The US points out that

„the measures pursue the vitally important objective of upholding US norms against theft and coercion; such values are of tremendous importance to U.S. society and the functioning of the U.S. economy".[219]

The Panel, taking into account the margin of discretion of the invoking party, states that the presented policy objectives of the USA serve a high societal interest and are therefore important.[220]

bb. Reviewing factor 2: trade-restrictiveness

The Panel finds that the measures have a restrictive impact on international trade, even if the additional tariffs at issue have a less restrictive effect on trade, as for instance an import ban.[221]

cc. Reviewing factor 1: contribution of the measure to the objective

As the next point of examination, the Panel reviews the contribution of each of the two challenged measures to the pursued public morals objective.

The US argues that the list 1 products would be intrinsically linked to the unfair practices described

[219] *United States - Tariff Measures on Certain Goods from China* WT/DS543 Second Written Submission of the United States of America, para. 52.

[220] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 48, 7.169.

[221] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 49, 7.171.

in the *Section 301 Report*.[222] The list 1 products are not limited to morally offensive products, but cover products "*that embody morally offensive conduct*".[223] This would be justified, as China is profiting extensively from its unfair trade practices.[224] The aim of the measure would be to both reduce China's incentive to unfair trade practices and deter US actors from unfair trade practices in the US market by increasing costs.[225]
China criticises that the measures

"*are not applied based on the morally offensive content of the products themselves*".[226]

This means that there is no genuine relationship of ends and means.
According to the USA, the additional duties on list 2 products are a reaction to the increased duties on U.S. exports to China.[227] The US describes the list 2 measures as *derivative* to the list 1 measures.[228] This

[222] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 52, 7.182; *United States - Tariff Measures on Certain Goods from China* WT/DS543 Second Written Submission of the United States of America, para. 34.
[223] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 52, 7.182; *United States - Tariff Measures on Certain Goods from China* WT/DS543 Second Written Submission of the United States of America, para. 62.
[224] Ibid.
[225] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 49, 7.172; *United States - Tariff Measures on Certain Goods from China* WT/DS543 Second Written Submission of the United States of America, para. 53.
[226] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 52, 7.183; *United States - Tariff Measures on Certain Goods from China* WT/DS543 Second Written Submission of China, para. 56.
[227] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 60, 7.218.
[228] Ibid.

would mean that the same public morals provisions would apply to the list 2 measures as to the list 1 measures.[229]

China doubts the derivative character of list 2 products and assumes that they have a purely punitive character.[230]

The Panel finds that the requirement of a *genuine relationship* is missing for both list 1 products and list 2 products.[231] The US could not provide the necessary evidence that the list 1 products benefited from China's industrial policies.[232] Rather, the list 1 products appear to be related to the risk of disruption to the US economy and the value of the products concerned.[233] This is also the case for the list 2 measures due to their legal dependence on the list 1 measures.

The Panel concludes that there is no contribution of each of the two challenged measures to the pursued public morals objective. Accordingly, there is no justification for the measures under Art. XX(a) GATT.

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[229] Ibid.

[230] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 60, 7.219; *United States - Tariff Measures on Certain Goods from China* WT/DS543 Second Written Submission of China, para. 51.

[231] „*…the United States has not provided an explanation that demonstrates how the measures contribute to the public morals objective as invoked by the United States. More specifically, the United States has not demonstrated that there is a genuine relationship of ends and means between the measures at issue and the public morals objective pursued by the United States.*“ cf. Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 62, 7.231.

[232] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 59, 7.215.

[233] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 57, 7.200.

4. Impact

The USTR criticised the Panel and found its view confirmed that the WTO is "*completely inadequate to stop China's harmful technology practices*".[234]

Although the US could appeal against the decision, it has blocked the appointment of judges to the Appellate Body, making it *de facto* incapable of acting. Apart from the already existing retaliatory tariffs, no further action by China is expected before the US elections. Should President Donald Trump be re-elected, the conflict could escalate again.

Should Joe Biden move into the White House, trade policy towards China could change. However, this does not mean that the conflict would end.[235]

The conflict will continue, even with a new president. However, under a potential president Biden, the ways and means by which this conflict will be fought out will probably be less "sensational and antagonistic".[236]

In practical terms, the decision will therefore have little impact.

However, the decision will have a positive influence on interpretation practice. The Panel masters the

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[234] USTR, WTO Report on US Action Against China Shows Necessity for Reform, 15.09.2020, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/september/wto-report-us-action-against-china-shows-necessity-reform last accessed on 11.11.2020.

[235] Some experts even expect the conflict to intensify, cf. G. White, Why a Biden presidency could inflame America's trade war with China available at https://www.telegraph.co.uk/business/2020/10/30/biden-presidency-could-inflame-americas-trade-war-china/ last accessed on 17.11.2020.

[236] E. Alden, China and Europe Won't Get Any Relief on Trade From Biden, available at https://foreignpolicy.com/2020/11/06/biden-china-europe-trade-war-tariffs-protectionism/ last accessed on 17.11.2020.

balance between rights and obligations of the Member States:

On the one hand, it concedes to the US that it is not necessary for the legal instruments implementing the measure to refer explicitly to public morals in order to invoke Art. XX(a) GATT. Furthermore, the Panel argues that the US has a margin of discretion in the assessment of public morals, in particular to set its own public morality objectives, and that the US is not limited to non-economic concern.[237]

On the other hand, the Panel demands a

"*genuine relationship of ends and means between the measures at issue and the public morals pursued by the United States*"[238]

and thus prevents abuse of Art. XX (a) GATT.

If one followed the US argumentation, the consequence would be that a Member State could express legitimate public moral concerns to another state, but the measures chosen need not be in any internal relation to the public morals objectives. It is true that the US has tried to demonstrate an internal link between tariffs and public moral objectives before the Panel.[239] However, looking at the ongoing so called trade war between the US and China, as well as the disregard of the US towards

[237] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 40, 7.131.

[238] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 62, 7.231; the requirement of a *genuine relationship* has long been a practice of interpretation; cf. Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

[239] *United States - Tariff Measures on Certain Goods from China* WT/DS543 Second Written Submission of the United States of America, para. 66.

the WTO,[240] the abuse of Art. XX (a) GATT cannot be dismissed.[241]

E. Art. XX and XXI GATT in comparison

In the previous chapters, the interpretation and application practice of Art. XX and XXI GATT was explained on the basis of two relevant cases. Based on the differences and similarities in the interpretation and application of the two exceptions, the relationship between them will be examined.

I. Legal character of general and security exceptions

Before starting the analysis, a brief look at a new approach to the interpretation of the exceptions, which will facilitate the comparison of Art. XX and XXI GATT, will be taken.[242]

It focuses more on the legal character of general and security exceptions. Defining the legal character of exceptions helps the interpretation. This does not contradict the previous interpretation in the previous chapters, but complements it.

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[240] USTR, WTO Report on US Action Against China Shows Necessity for Reform, 15.09.2020, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/september/wto-report-us-action-against-china-shows-necessity-reform last accessed on 11.11.2020; President Trump on Twitter: „…trade wars are good, and easy to win.“, available athttps://twitter.com/realDonaldTrump/9828222737/f&%world-453, last accessed on 22.11.2020.

[241] This accusation also appears in the Panel Report. Although the Panel does not accuse the USA of intentional abuse, it does indicate that the list 1 and list 2 products have no connection with the public morality arguments put forward, cf. Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 57, 7.200.

[242] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557.

Caroline Henckels makes a distinction between permissions and defences.[243] General and security exceptions such as Art. XX and XXI GATT consist of a command and the derogation from that command.[244] A permission will share the same underlying principle with the command.[245]

The permission has the function to limit the scope of the command by nullifying the imperative norm.[246]

A defence is an underlying principle that differs from the command.[247] In contrast to the permission, the imperative norm is not nullified. The Member State invoking the exception admits that it has not fulfilled its obligations and is therefore in breach of the obligations.[248]

Since the exceptions are not clearly defined by the text of the agreement as either defence or permission, the analytical character of the general and security exceptions must be determined by interpretation.[249]

However, the wording cannot indicate whether the exceptions should be treated as permissions or

[243] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 558.

[244] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 559.

[245] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 565.

[246] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 561.

[247] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 565.

[248] Ibid.

[249] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 563.

defences.[250] But the same use of language for general and security exceptions indicates that they should be interpreted in the same way concerning their analytical character.[251]

When interpreting according to object and purpose, the author first points out that different levels must be taken into account in the interpretation.[252]

Furthermore, a distinction must be made between object and purpose.

The objective of the Agreement is to ensure that trade between Member States remains open to competitive opportunities.[253] The purpose of the Treaty is to achieve sustainable development and greater prosperity.[254] In the light of this purpose, the exceptions are intended to leave welfare-enhancing objectives[255] to the Member States which serve the same purpose of achieving greater prosperity and sustainable development.[256] The command and the derogation from the command thereto share the

[250] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 560-565.

[251] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 565.

[252] The provision itself, the part of the agreement in which it appears, the agreement itself, the regime as a whole and the preamble, cf. C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 565.

[253] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 566.

[254] Ibid.

[255] E.g. national security, public morality, health and environment.

[256] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 566.

same underlying principle, which suggests that the exceptions are permissions.[257]

Until now, Panels and the Appellate Body have regarded general and security exceptions as defences.[258] This assumption was based on an inconsistent and incoherent interpretation as a theoretical basis was missing.[259] In *Russia - Measures Concerning Traffic In Transit,* the security exception of GATT Art. XXI was interpreted for the first time as a permission.[260] Due to the similarities between security exceptions and general exceptions, the author argues that general exceptions should also be evaluated as permissions, as this would correspond to the analytical character of these exceptions, as explained above.[261]

But why is this distinction important and what is the point of defining general and security exceptions as permissions?

The author explains that the characterisation of the exception as a permission has the advantage that due to the connecting relationship between exception and rule, the interpretation is not limited

[257] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 567.

[258] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 573.

[259] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 567.

[260] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 570.

[261] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 558.

to the exception itself but the rule to the exception can be part of the interpretation as well.[262]

This broadening of the scope of the interpretation means, that the regulatory purpose of the substantive obligations can also be included in the interpretation, which leads to increased legal certainty.[263]

II. Requirement of „timelessness“

The need for escape clauses such as Art. XX and XXI GATT is undisputed. They are preserving flexibility, securing parties acceptance and serve as a safety valve and insurance mechanism.[264]

In a globalised world that is changing faster than ever before, exit clauses must always find new answers to new challenges.

But where does this dynamic come from, which the concepts of national security and public morals are evolving with?

If one thinks of the liberal *Western world*, it is defined by the core value of individual freedom.[265]

Both national security and public morals can be linked with this core value, as they both act as core values themselves and limit freedom.

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[262] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 579.

[263] Ibid.

[264] C. Henckels, Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law, Int'l & Comp. L.Q. 69, 3 (2020), 557, 558.

[265] In the 19th century, the concept of the liberal *constitutional state* was coined by German constitutional law, first by Robert von Mohl. In contrast to the *power state* of absolutism, state authority in a constitutional state is subject to a self-imposed obligation due to the legality of the administration, procedural guarantees and possibilities of effective legal protection; cf. T Nipperdey, Deutsche Geschichte, 1866-1918, Bad II: Machtstaat vor der Demokratie, 1993. p. 182 et seq.

For example, if one thinks of the USA, the need for security has grown since the terrorist attacks of 11 September 2001, which conflicts with the freedom of the individual. Freedom has been restricted in favour of national security.[266] Thinking of alcohol consumption, prostitution, sexuality and gambling, freedom has been restricted in favour of public morality.

Understanding both national security and public morals as core values or fundamental concepts of a state and its society, this explains why they are subject to constant change and are not static. They are closely linked to the development of society. If the public's need for security changes, national security policy changes as well. If the ideas of *good* and *evil* and *right* and *wrong* in a society change, the concept of public morality also changes.

The driving forces behind this rapid change are numerous: climate change, terrorism and other security challenges require constant adaptation of the concept of security and demand that Art. XXI GATT provides reliable legal responses for these challenges so that the security exception can continue to function as a safety valve.

A similar conclusion can be drawn with regard to public morals: Societies are changing more rapidly than ever before, and with them public morals: What was considered *good* and *right* 50 years ago

[266] Section 215of the USA PATRIOT Act of 2001, partly replaced by USA Freedom Act; B. McKeon/ G. Schaerr, The Patriot Act Goes Too Far, available at https://www.wsj.com/articles/the-patriot-act-goes-too-far-11572209177, last accessed on: 19.11.2020.

can no longer withstand the consensus of public morals in some cases.[267]

These societal changes differ in the Member States and with them the concepts of public morality and national security. This can lead to inter-state conflicts which do not stop at world trade.

If these conflicts have an impact on world trade, the WTO judiciary will have to find legal responses to the conflicts of *today and tomorrow* on the basis of exceptions that are consistent with the wording and spirit of *yesterday's* rules.

This required flexibility and *timelessness* of the rules can only be achieved by an open wording of the exceptions. However, they must not be formulated too broadly in order to prevent abuse and to ensure legal certainty.

It is difficult to maintain this balance.

Ultimately, this balancing act of the WTO judiciary is the same as the balancing act societies have to go through when balancing between security and freedom, public morals and freedom.

The flexibility of Art. XX, XXI GATT is thus not a sign of fragility but an expression of the timeless conflicts about the scope of the concepts of national security and public morality.

III.Balancing act

This balancing act described above, which the WTO judiciary has to take into account in its interpretation, is an important common element of Art. XX and XXI GATT.

[267] e.g. women's rights and rights of minorities.

On the one hand, the objective of the WTO is to create an open, non-discriminatory, rules-based and equitable multilateral trading system.

In contrast to this, the regulatory autonomy of the Member States to define concepts such as national security and public morality within limits is opposed to this.

If one understands this tension as opposites that collide and exclude each other, this holds a great potential for conflict between the Member States, but especially between the Member States and the WTO.

If one understands Art. XX and XXI GATT as *permissions*, this can relax the tension. Accordingly, Art. XX and XXI GATT share the same underlying principles as the command.

This means that a tension exists only *within* the GATT. The interests of the States in regulatory autonomy also serve sustainable development and prosperity and are thus not only protected by Art. XX and XXI GATT, but also correspond to the purpose of the GATT.

This relaxation of tensions shows that all these conflicts are not about Member States opposing each other or the WTO to enforce their own interests, but that both parties to the conflict pursue the same purpose and thus have much in common. The existing conflict can thus be explained as a

constructive ambiguity[268] which helps to achieve the common purpose through discourse.

This shows the advantage of interpreting exceptions as permissions. As a result, the decisions of the Panel and the Appellate Body are no longer a tightrope walk, since no decision is made to the detriment of regulatory autonomy, but a decision is always made in favour of sustainable development and prosperity.

To achieve this, the Panels and the Appellate Body themselves must first of all give more thought to this approach and incorporate it into their decisions. This is a long process, which the disintegration of the WTO could pre-empt.

If this approach is accepted, it is questionable whether it will also create more acceptance for the objectives of the WTO in practice. However, it is an attempt, in the current tense situation in which the WTO finds itself, to highlight the common goals and shared interests of Member States and the WTO and not to fuel existing conflicts further by drawing a clear line between the interests of the WTO and the interests of its Member States.

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[268] *Constructive ambiguity* promotes a discourse of different opinions, which allows the best results to be obtained. The concept is used in economics but it can be transferred to the concept of public moral.
cf. T. Smith, Much needed Reform in the Realm of Public Morals: a Proposed Addition to the GATT Article XX(a) „Public Morals“ Framework, Resulting from China-Audiovisual, Cardozo J Int'l & Comp L 19, no. 3 (2011), 734, 746.

IV. Practice of interpretation and application in comparison

GATT Art. XX and XXI show some differences and similarities in their interpretation and application.

Art. XX GATT, in contrast to Art. XXI GATT, has a (longer) history of interpretation by Panels and the Appellate Body, which has led to more legal certainty through the constant development of Art. XX GATT.

A weighing of interests as clearly regulated by application practice as in Art. XX GATT ("*weighing and balancing*") does not exist in Art. XXI GATT.

It was not until *Russia - Measures Concerning Traffic in Transit* that it was made clear that Art. XXI GATT is not completely self-judging, but that it does leave the Member States a margin of discretion. Although, the Panel or Appellate Body retains a certain degree of control over the application by the Member State through the requirement of *good faith*. The possibility of control is more extensive in the case of Art. XX GATT than in the case of Art. XX GATT.[269][270]

The wider scope for reviewing measures under Art. XX GATT can be attributed in particular to the *chapeau*, which internalises the good faith principle.[271]

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[269] It remains to be seen, however, whether future decisions will not further develop the possibilities of review by the Panel under Art. XXI GATT.

[270] G. Ayres/ A. Mitchell, General and Security Exceptions under the GATT and the GATS, International Trade Law and WTO, p. 37.

[271] WTO Analytical Index, GATT 1994 - Article XX (Jurisprudence), p. 65; Appellate Body Report, *US – Shrimp*, paras. 158-159.

Art. XXI GATT is not covered by the general justifications of Art. XX GATT, but in a separate paragraph, which is why the application of Art. XXI GATT is not subject to the requirements of the *chapeau* of Art. XX GATT.[272] This is also in line with the purpose of Art. XXI GATT, as a far-reaching control possibility would violate the sovereignty of the invoking Member State. For this reason, the possibility of reviewing measures under Art. XXI GATT must not be as extensive as the possibility of reviewing measures under Art. XX GATT.

Another difference in wording underlines the limited review of Art. XXI GATT: Art. XXI GATT speaks of measures "*which it [the Member State] considers necessary*" whereas Art. XX (a) GATT speaks of measures "*necessary to*". Accordingly, Member States need only to "*consider*" that their essential security interests are engaged. In Art. XX (a) GATT, on the other hand, the wording is more objective and therefore does not exclude reviewability.

Both are formulated as "*all-embracing exceptions*"[273], which is why the invoking Member State does not have to comply with any obligation of the GATT.

The differences in wording and purpose clearly indicate that the drafters of the GATT, by creating an own justification under Art. XXI GATT, wanted to clarify the difference between the general

[272] Berrisch, WTO-Handbuch, p. 150, recital 269.

[273] R. Bhala, National Security and International Trade Law: What the GATT Says, and what the United States Does, U Pa JIEL 19 (1998), 263, 268.

exceptions under Art. XX GATT and the security exceptions under Art. XXI GATT. Therefore, the control exercised by the WTO judiciary over measures under Art. XXI GATT must be much more limited than under Art. XX GATT. Although this entails the risk of abuse, Art. XXI GATT would otherwise fail to achieve its regulatory purpose.

In *Russia - Measures Concerning Traffic In Transit*, the Panel established a limited possibility of review, which is still within the scope of the regulatory purpose. However, future decisions on Art. XXI GATT must not under any circumstances be based on the interpretation and application of Art. XX GATT, despite the many legal commonalities.

V. Interim result

In summary, it can be said that both the concept of national security from Art. XXI GATT and the concept of public morality from Art. XX GATT are notions that are subject to constant change and therefore have a certain *timelessness*[274] in their interpretation and must allow for flexibility. It also helps to define the general and security exceptions as permissions, thus broadening the interpretation and easing the tension in which GATT Art. XX and XXI find themselves. Despite these many legal similarities, the different regulatory purposes must not be ignored.

[274] If a new danger arises, society adapts to this danger by changing and, thus, changes its perception. Public morals and national security can therefore be described as *timeless* concepts. This *timelessness* must be captured by the escape clauses. cf. above.

F. Conclusion

The examination of the susceptibility to abuse does not come out of the blue. The rise of protectionism and rejection to the WTO make it seem possible for Member States to test the stability of the WTO by trying to enforce their own policy objectives by using WTO law.

Both Art. XX GATT and Art. XXI GATT give the impression that they are open to abuse due to their wide margin of discretion.

This can be illustrated using the example of the US. It is not necessary to accuse the US of abuse of the rules, but it is sufficient to note that Art. XX and XXI GATT seem to be very attractive tools in the so-called trade war with China.

Under President Trump, the US has made no secret of its opposition to the WTO and its protectionist trade policy.[275]

It is astonishing that even during the ongoing Panel proceedings, the President of the United States publicly says (and tweets) the opposite of what the

[275] USTR, The President's 2018 Trade Policy Agenda, p. 22-24; President Trump on Twitter: „…The WTO is BROKEN…", available at https://twitter.com/realdonaldtrump/status/1154821023197474817?lang=de, last accessed on 23.11.2020; The Guardian, Trump attacks WTO after it says US tariffs on China Broke global trade rules, available at https://www.theguardian.com/world/2020/sep/16/trump-attacks-wto-after-it-says-us-tariffs-on-china-broke-global-trade-rules, last accessed on: 21.11.2020; G. Felbermayr/M. Steininger/ E. Yalcin, Quantifying Trump: The Costs of a Protectionist US, CESifo Forum 4, vol. 18 (2017), 28, 28.

written submissions of the USA in the proceedings say.[276] According to China, the US

"*seeks to stretch the narrow parameters of Art. XX(a) to encompass blatantly coercive economic objectives*".[277]

It does not seem unreasonable to take up China's accusation and not only limit it to Art. XX (a) GATT, but also to include Art. XXI GATT.[278]
If one follows the theory of realism in international relations, the behaviour of the USA is not surprising. Traditional realists like *Hans J. Morgenthau* assume an anarchic system characterised by uncertainty, in which States try to act wisely (and not morally "good") in order to maintain and improve their position of power.[279]
President Trump's policy is based on the fundamental idea that power and dominance are the

[276] National security is not mentioned in connection with the Steel and aluminum tariffs: Trump on Twitter, available at https://twitter.com/realdonaldtrump/status/972585290857672704, last accessed on 22.11.2020; J. Chait, Trump Confesses Illegal Motive, Blows Up Legal Basis for his Trade War, available at https://nymag.com/intelligencer/2018/06/trump-confesses-motive-blows-up-legal-basis-for-trade-war.html, last accessed on: 21.11.2020.
[277] Panel Report, *United States - Tariff Measures on Certain Goods from China* WT/DS543/R, p. 34, 7.101; *United States - Tariff Measures on Certain Goods from China* WT/DS543 Second Written Submission of China, para. 77.
[278] *„Economic security is military security. And without economic security you can't have military security"* cf. fn. 68; For the USA the self-judging character and thus the freedom to determine the scope of Art. XXI GATT seems to be so crucial, that it did not support the allied Ukraine in its argumentation, but *de facto* shared the argumentation with Russia, cf. fn. 104.
[279] R. Jackson/ G. Sorensen, Introduction to International Relations, p. 19 et seq.

means by which he can achieve his goal of *America First* both domestically and abroad.[280]

To this end, its administration also uses world trade law to justify measures that pursue foreign policy objectives.[281] For a long time, Art. XXI GATT was the "safety valve" for States that wanted to enforce economic or political interests, due to its lack of interpretation and application practice.[282]

Until the decision in *Russia - Measures Concerning Traffic in Transit*, Art. XXI GATT was applied by the Member States like a *gentlemen's agreement* where the proper invocation depended only on mutual trust and diplomatic success of the Member States.

The Panel's decision puts a stop to this and the invoking Member States must now undergo a plausibility review. Therefore, the US must be aware that in *US - Certain Measures on Steel and Aluminum Products,* its margin of discretion is limited by the obligation to apply Art. XXI GATT in good faith, which can be reviewed by the Panel.[283] In addition, the Panel can fully review the alternative elements, as these fall under objective criteria.[284]

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[280] USTR, The President's 2018 Trade Policy Agenda, p. 1-4; R. Haass, America and the Great Abdication, available at https://www.theatlantic.com/international/archive/2017/12/america-abidcation-trump-foreign-policy/549296/, last accessed on 23.11.2020.

[281] USTR, The President's 2018 Trade Policy Agenda, p. 1-4; President Trump on Twitter: „…trade wars are good, and easy to win.", available athttps://twitter.com/realDonaldTrump/9828222737/f&%world-453, last accessed on 22.11.2020.

[282] The most absurd and obvious case is *Sweden - Import Restrictions in Certain Footwear* GATT DOC. L/4250.

[283] Panel Report (adopted), Russia - Measures Concerning Traffic in Transit, WT/ DS512/R, p. 56, 7.132.

[284] Panel Report (adopted), Russia - Measures Concerning Traffic in Transit, WT/ DS512/R, p. 50, 7.101.

The removal of Art. XXI GATT as a full self-judging norm may have led the US to seek other norms to pursue its interests. At first sight, Art. XX (a) GATT appears to be as broad a concept of public morality as that of national security. However, Art. XX(a) GATT offers the Member State a margin of discretion, but within the context of a *weighing and balancing* process by the Panel and it requires a *genuine relationship* between the chosen measure and public morality. This requirement has been a major obstacle for the US in *China - Tariff Measures on Certain Goods from China*.

The advantage of this clear application practice by the Panel is that in the present case it does not even have to accuse the US of abuse. The provision in itself defends against abuse through the inherent requirements.

In summary, both GATT Art. XX and GATT Art. XXI give the impression that they could be susceptible to abuse because of their margin of discretion. However, the previous analysis shows, that this appearance is deceptive and that both exceptions master the balancing act between regulatory autonomy and the risk of abuse through a wide margin of discretion for the Member States on the one hand but a clear legal framework on the other.

It can therefore be concluded that neither Art. XX GATT nor Art. XXI GATT constitute a *carte blanche* for abuse.

However, if one looks at *Russia - Measures Concerning Traffic in Transit*, the decision has opened up another problem area:

The effort to discuss and even legally assess the reasons and circumstances for invoking Art. XXI GATT could become problematic in future proceedings. The legal assessment - in this specific case the conflict in connection with the Crimea and the current situation in eastern Ukraine - could have been part of the decision and could have provided political dynamite. A legally neutral assessment, while avoiding assessments at the political level, will not be possible for the WTO judiciary in all proceedings. Such decisions could be politically abused and used against the political opponent - or against the WTO with the accusation of being biased.

Thus, although the susceptibility to abuse of Art. XXI GATT has been limited by the decision in the case of *Russia - Measures Concerning Traffic in Transit*, the abuse of the decisions has added a danger of political sentiment, which could further fuel the disintegration of the WTO.

Against the backdrop of the Appellate Body's inability to act, it is questionable to what extent the exceptions are still capable of protecting the principles of international trade law. It remains to be seen how a possible President Biden will behave and whether he will take a more moderate and less confrontational path to assert American interests.

President Trump's term of office has shown why the previous approach to Art. XXI GATT was abandoned and a precedent was set with the decision in *Russia - Measures Concerning Traffic in Transit.* This change is based on the realisation that Art. XXI GATT could become the crucial tool in a

trade war for those who - under the guise of national security interests - use protectionist measures to safeguard their own industries. This also explains the continuation of the interpretation practice in the case of *US - Tariff Measures on Certain Goods from China*.

The Member States lose a part of their sovereignty through the limitations of GATT Art. XX and XXI, but in return they receive a neutral construct beyond the national state that guarantees them reliability in world trade. The current threat posed by the isolationist policies of some countries shows the value of reliability in a constantly changing world.

word count: 13516 excluding quotation

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