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Economic Sanctions and their Challenge in the WTO through the  
Lens of the National Security Exceptions under Art. XXI:(b)(iii)  
of the GATT: a Dead End?

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# **Economic Sanctions and their Challenge in the WTO through the Lens of the National Security Exceptions under Art. XXI:(b)(iii) of the GATT: a Dead End?**

**Abstract:** The essay seeks to contribute to the understanding of how international economic law is intertwined with sovereignty of states and their right to regulate. To unveil the complicated interaction, the author explores an extreme possible case being a challenging of economic sanctions in the WTO. The success of a challenge hinges on whether a state may circumvent the national security exceptions enshrined in Article XXI:(b)(iii) of the GATT. This provision is often regarded as a large stumbling block in a fruitful legal resolution of possible disputes. Those far reaching exceptions do not, however, prevent the matter from being adjudicated by the DSB of the WTO. As further argued by the essay, states measures taken in contradiction with the good faith principle would not enjoy protection of Article XXI:(b)(iii). Nor does that provision automatically extend to state's commitments under Accession Protocols to the WTO on trade in goods.

## **1. Introduction – Sanctions Everywhere**

Recently, the European Union acting in a line with other states prolonged sanctions against Russia.<sup>1</sup> In its turn, already long before that the Russian Minister of Economic Development reassured that Russia will not lift food embargo until the European Union's restrictive measures do not lapse.<sup>2</sup> This ping pong game does not seem to be extraordinary in the state practice. On the contrary, being unilateral '[m]easures taken by a state to coerce another to conform to an international agreement or norms of conduct, typically in the form of restrictions on trade...' <sup>3</sup> sanctions are a beloved tool in the foreign policy of states. The thorough study on sanctions in the international relations reveals that countries as well as international organizations impose them more frequently and thickly, as it might seem on the first gaze.<sup>4</sup> To illustrate this point, one may refer to the example of the United States of America (USA) in 2006 when it had the operating sanctions imposed upon 90 states. Among

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<sup>1</sup> 'Russia: EU extends economic sanctions by six month', *Official site of the European Council and the Council of Europe of the European Union*, 22 June 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/06/22-russia-sanctions/>.

<sup>2</sup> Ulyukayev, A., 'Russia's Food Import Ban to Stay Until End of European Sanctions', Sputnik International, 13 October 2014, <http://sputniknews.com/russia/20141013/194030851/Russias-Food-Import-Ban-to-Stay-Until-End-of-European-Sanctions.html>.

<sup>3</sup> 'Sanction', Oxford Dictionaries, <http://www.oxforddictionaries.com/definition/english/sanction>.

<sup>4</sup> McGee (2007), p. 2; Bossuyt (2000), Annex I.

those states there were not only the rivals of the USA such as North Korea, Cuba, China, Russia, but also Canada, Mexico and Cyprus that are rather perceived to be its partners.<sup>5</sup>

It is doubtful that all imposed sanctions comply with international law. International judicial and quasi-judicial bodies are deemed to be the most appropriate fora for solution of possible disputes regarding legality of sanctions. To this end, this essay raises a question whether the World Trade Organization (WTO) can match expectations of those states seeking to find a legal way of lifting unilateral economic sanctions in trade of goods against them.

At the outset the essay will clarify if the WTO Dispute Settlement Body (DSB) has jurisdiction to consider disputes concerning economic sanctions. Then, the focus of the present research will shift towards the analysis of separate national security exceptions (Article XXI:(b)(iii) of the General Agreement on Tariff and Trade (GATT)). These exceptions allow states to unilaterally adopt measures to protect their national security interests and, thus, are the most pertinent justification grounds for alleged violations of WTO Law. After a thorough examination the author will make two key contributions. Being the first one, the essay will attempt to outline a legal test, which could be applied by the DSB to examine whether state measures fall under the national security exceptions in the WTO. Despite the ‘impregnability’ of state's positions backed by Article XXIII:(b)(iii), the author will try further to determine disputes allegedly not covered by these far reaching security exceptions.

## **2. The WTO Dispute Settlement and Unilateral Economic Sanctions**

Economic sanctions often restrict import from and export to a country concerned and block a financial assistance to that state be it loans, free flow of capital or other comparable limitations.<sup>6</sup> Aside from this factual prospective, states often violate thereby their obligations under WTO law, unlike by means of sanctions imposed under the WTO Dispute Settlement Understanding (DSU), not being considered here. For instances, a discrimination in treatment of goods caused by sanctions will not comply with the most-favoured-nation principle emanating from Article I:1 of the GATT, since it requires that goods from different WTO members must enjoy a similar legal regime.<sup>7</sup> Besides, economic sanctions may be contrary to other obligations stemming from the GATT: tariff bindings on imported goods; the national

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<sup>5</sup> McGee (2007), p. 2.

<sup>6</sup> Bossuyt (2000), paras. 11-13.

<sup>7</sup> Stoll (2012), p. 121, para. 10.

regime and prohibition of non-tariff barriers to trade.<sup>8</sup> Given all the possible range of violations, it does not seem to be extremely difficult to find a violation of WTO law. In light of this, the essay does not address in details an issue as to whether sanctions violate inherently WTO members' commitments under the WTO legal regime. Instead, it appears to be more compelling to find out if an alleged violation caused by a sanction may still be justified pursuant to special exceptions.

For this purpose the GATT offers a few options by allowing WTO members to invoke general exceptions and those being relevant for national security.<sup>9</sup> The latter are *lex specialies* with respect to the general exceptions articulated in Article XX of the GATT, as it first of all follows from the comparison of both articles titles (general – security).<sup>10</sup> The national security exceptions are also more pertinent, when it comes to sanctions,<sup>11</sup> therefore this essay intends to primarily examine them.

The GATT contains the national security exceptions applicable in cases of unilateral economic sanctions in Article XXI, whose relevant part determines them as follows:

Nothing in this Agreement shall be construed: ... (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests ... (iii) taken in time of war or other emergency in international relations...<sup>12</sup>

Admittedly, this article does not reveal the whole its meaning at first glance. And yet it had become an important precondition for many states to join the GATT-1947.<sup>13</sup> By having this clause, members acquired an effective leverage to influence other countries to protect their national interests. At the same time, this article provides states with a great latitude being equal to a green light to abuses, what has been the main concern in the interpretations of Article XXI:(b)(iii) of the GATT.<sup>14</sup>

As a result of this, Article XXI:(b)(iii) of the GATT is perceived to be self-judging. As will be shown below, this approach to the understanding of this clause may lead to the complete exemption of disputes from the jurisdiction of the DSB, whenever a party invokes

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<sup>8</sup> General Agreement on Tariffs and Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 (1994), Articles II:1(a), III, XI; see Malloy (2003), p. 379.

<sup>9</sup> *Ibid.*, Articles XX, XXI.

<sup>10</sup> The Appellate Body labelled the following exceptions as special: the national security exceptions along with those related to the formation of customs unions and free trade zones (see Appellate Body Report, *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, adopted 18 June 2014, fn. 1067 ('*EC–Seal Products*'). About *lex specialis* as a means of interpretation see Koskeniemi (2006), paras. 56-57; Vranes (2005), p. 393.

<sup>11</sup> Guan (2014), pp. 229-230.

<sup>12</sup> GATT, *supra* note 8, Article XXI:(b)(iii).

<sup>13</sup> Mavroidis (2013), p. 368.

<sup>14</sup> Alford (2011), pp. 698-699.

the national security exceptions. In a case of a negative answer to that, the next issue to address would be whether an invocation of Article XXI of the GATT makes it almost impossible for the DSB to find a challenged economic sanction unjustified and, thus, to be in violation of state's commitments under the WTO legal framework.

### **3. Is Article XXI:(b)(iii) of the GATT Indeed that Self-judging?**

As noted above, Article XXI(b)(iii) of the GATT is frequently regarded as a self-judging clause given the basic rules of interpretation enunciated in Articles 31-32 of the Vienna Convention on the Law of Treaties.<sup>15</sup> In the meantime the complete understanding of its content is far from being clear, especially bearing in mind the absence of a single attempt to apply this article and, thus, scrutinize it in full in either the GATT-1947, or in the DSB. Intending to fill this gap, this section proceeds towards the interpretation of the 'self-judging' term to explain, how Article XXI:(b)(iii) of the GATT intersects with jurisdiction of the DSB.

Article XXI of the GATT calls for seeking of a balance between free trade and opposite sovereign interests.<sup>16</sup> An extreme opinion suggests that it is entirely up to a state to determine, how to strike the balance:

... the bottom line is that despite numerous security crises that have come before the GATT/WTO-the Marshall Plan, the Falkland War, the Reagan Doctrine, the War in Yugoslavia, the secondary boycott against Cuba, the Arab League Boycott against Israel-there has never been a case actually adjudicating the security exception. The reason is that Member State[s] recognize that national security questions are self-judging.<sup>17</sup>

This approach implicitly insinuates that Article XXI:(b)(iii) of the GATT is a virtually self-judging norm that 'grant[s] a state discretion to unilaterally opt out ... from an international obligations'.<sup>18</sup> Whether this provision indeed empowers states with an unfettered latitude has been a subject to hot debates since 1947. There are compelling arguments for both sides.<sup>19</sup> The practical implications of those debates are primarily twofold, they help to understand if the DSB's jurisdiction encompasses disputes concerning the national security

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<sup>15</sup> Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969), Article 31. As to the exhaustive interpretation of Article XXI:(b)(iii) in light of Articles 31-32 of the Vienna Convention see Peng (2015), pp. 462-466. The author argues there that the provisions concerned are 'self-judging', but, apparently, not to the full extent, which is also the main message of this essay.

<sup>16</sup> Panel Report, *China-Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R, WT/DS431/R/Add.1, WT/DS432/R, WT/DS432/R/Add.1, WT/DS433/R, WT/DS433/R/Add.1, adopted 2 September 2014, para. 7.137 ('*China-Rare Earths*').

<sup>17</sup> Alford (2013).

<sup>18</sup> Schill and Briese (2009), p. 67.

<sup>19</sup> See Hestermeyer (2011), pp. 579-583.

exceptions. Should this be plausible, the next issue to shed light on is what test applies to examine whether a state's measure is adopted in conformity with Article XXI:(b)(iii) of the GATT.

### *3.1. Exploring a Notion of 'Self-judging' in its Application to Article XXI:(b)(iii)*

Absent a phrasing contrary to that, the ordinary meaning of 'it considers' conveys nothing but a message that only a state decides, whether the circumstances for invocation of Article XXI:(b)(iii) are met.<sup>20</sup> This broad interpretation could potentially lead to the complete exclusion of this article from the jurisdiction of the DSB, which is also a subject to political concerns.<sup>21</sup> Yet, the first instance, where a state invoked the article concerned, albeit without a thorough examination and subsequent application, does subscribe to the contrary opinion.

This first attempt to discuss the exceptions under consideration occurred shortly after the GATT-1947 was established. Being convinced that a state is independent in the determination, if taken measures comply with Article XXI of the GATT, Czechoslovakia nevertheless filed a complaint to the Council of the GATT-1947 touching upon the exceptions concerned.<sup>22</sup> The CONTRACTING PARTIES dismissed the Czechoslovakia's claim on 8th June 1949 by voting in favour of the United States' position in that dispute.<sup>23</sup> In spite of the negative outcome this case exemplifies, how states delicately deal with the national security exceptions. On the one hand, they are inclined to the idea that an exogenous adjudicator should be foreclosed from examination of the security issues to the fullest extent. On the other hand, this dispute illustrates a tacit approval that the issues under consideration might be discussed in the beginning in the GATT-1947 and later in the DSB.

And yet the national security still remains to be a very sensitive sphere for states to willingly file complaints regarding disputes on such issues to any international judicial and quasi-judicial body.<sup>24</sup> For instance, for almost the half-century history of the GATT-1947 there had been only one dispute concerning application of Article XXI of the GATT that was considered by a panel. Unsurprisingly, given a peculiarity of decision-making in that organization, the panel was not empowered by its terms of reference to explore Article XXI:(b)(iii) in details and the report produced by the panel has never been adopted (US–

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<sup>20</sup> Briese and Schill (2009), p. 308.

<sup>21</sup> Piczak (1999), p. 318.

<sup>22</sup> WTO Secretariat (2012), p. 600.

<sup>23</sup> CONTRACTING PARTIES, Summary Record of the Twenty-Second Meeting, CP.3/SR22 – II/28, 8 June 1949, p. 5.

<sup>24</sup> Singh, p. 10.

*Nicaraguan Trade*).<sup>25</sup> In its turn, the jurisprudence of the WTO did not take a chance to become more successful in this regard: according to the data from the official web-site, only in one dispute was there an attempt to bring Article XXI of the GATT up to the discussion (*India–Import Restrictions*).<sup>26</sup> Beside that, the academic literature knows other examples (*US–The Cuban Liberty and Democratic Solidarity Act*, where the European Union challenged an American embargo of Cuba’s goods and other bans indirectly related to it).<sup>27</sup> None of them has resulted in the penal proceedings with producing a report.

Being essential in light of the principle of single undertaking in the WTO,<sup>28</sup> the systematic interpretation of this article also advocates that a state’s position backed by the security exceptions is not that ‘impregnable’. To this end, an interpretation of the DSU might clarify some details about Article XXI:(b)(iii) of the GATT. However, absent direct regulations of this matter the DSU is of a little help here. The plain text of both the DSU and Article XXIII of the GATT establishing types of complaints does not limit the jurisdiction of the DSB regarding the ‘self-judging’ clause concerned. The same approach was taken in *obiter dicta* by the tribunal of the International Centre for Settlement of Investment Disputes in *Sempra v. Argentina*. In this case, the tribunal should define, whether Article XI of the Bilateral Investment Treaty between the US and Argentina is a ‘totally’ self-judging clause. In doing so it referred to Article XXI of the GATT.<sup>29</sup> In tribunal’s opinion, measures taken to pursue national security interests would have been excluded from its jurisdiction, if the drafters of that clause would have explicitly expressed their intention to endow it with this effect.<sup>30</sup>

Consequently, while being a ‘self judging’ in its nature, Article XXI:(b)(iii) has its own limits in providing states with a wide discretion. Aside from clarifying that the DSB, apparently, might exercise its jurisdiction over this matter, the sources from within the GATT-1947/WTO do not, however, assist well enough in understanding where boundaries of that discretion are.

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<sup>25</sup> GATT, Panel Report, *US–Nicaraguan Trade*, L/6053, 13 October 1986, unadopted, para. 5.3.

<sup>26</sup> WTO Web site, disputes on agreements, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A9](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A9).

<sup>27</sup> Mavroidis (2005), pp. 223-225; Clark and Wang (2007), pp. 16-19.

<sup>28</sup> Panel Report, *Turkey–Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, para. 9.187; Rolland (2010), p. 65.

<sup>29</sup> ICSID, *Sempra Energy International v. Argentine Republic*, Decision on the Argentine Republic's Application for Annulment of the Award, ICSID Case No. ARB/02/16, 29 June 2010, paras. 183, 384.

<sup>30</sup> *Ibid.*, para. 384.

### 3.2. *Is the case law of the ICJ key to the problem?*

Absent relevant decisions of the DSB scrutinizing Article XXI:(b)(iii) of the GATT,<sup>31</sup> one may refer to the practice of other international bodies to dispel the concerns of how a self-judging clauses function. By considering the *Certain Questions of Mutual Assistance in Criminal Matters* case and solving this dispute in 2008 the International Court of Justice (ICJ) became the first international court to examine a self-judging provision in details.<sup>32</sup> The cases concerned an issue as to whether France complied with its obligations arising out of the Convention on Mutual Assistance in Criminal Matters between Djibouti and France.<sup>33</sup> To decide the case the ICJ interpreted Article 2(c) of the Convention, which is akin to the text of Article XXI:(b)(iii) of the GATT:

Assistance may be refused: ... (c) if the requested State considers that execution of the request is likely to prejudice its sovereignty, its security, its ordre public or others of its essential interests.<sup>34</sup>

Similar to Article XXI:(b)(iii) of the GATT, the wording of this provision ('if ... State considers') reflects its self-judging character.<sup>35</sup> Should the extreme approach to such articles have been correct, this might have signified the complete exclusion of Article 2(c) of the Convention from the jurisdiction of the Court, that is the ICJ should have refused to entertain the Djibouti's claims. This did not occur.

Instead, beside acknowledging of a great state's discretion in this issue the ICJ noted that the satisfaction of the requirements set out in this article does not entirely hinge only on the state's margin of appreciation.<sup>36</sup> Many authors conclude the same with regard to Article XXI:(b)(iii) of the GATT.<sup>37</sup> Despite this seeming consensus, opinions differ as to what benchmark should apply to test such norms, as evidenced by the Declaration of Judge Keith who did not agree with his colleagues on the majority test.<sup>38</sup> However it is possible to derive the general approach towards self-judging clauses from the first judicial decision and scholars' papers about the security exceptions in the WTO.

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<sup>31</sup> Lobsinger (2006), pp. 106-107.

<sup>32</sup> Briese and Schill (2009), p. 321.

<sup>33</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Application instituting proceedings, 4. Januar 2006, <http://www.icj-cij.org/docket/files/136/13104.pdf>, para. 2.

<sup>34</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. Declaration of Judge Keith, 2008 I.C.J. Reports 278, para. 3.

<sup>35</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. Judgment, 2008 I.C.J. Reports 177, para. 135.

<sup>36</sup> *Ibid.*, para. 145.

<sup>37</sup> Schill and Briese (2009), pp. 106-107; Reyes (2009), pp. 534, 566; Rose-Ackerman and Billa (2008), p. 490; Akande and Williams (2003), p. 389; Schloemann and Ohlhoff (1999), pp. 441, 445-446.

<sup>38</sup> Declaration of Judge Keith, *supra* note 34.

A starting point for analysis is the fundamental for international law principle of good faith<sup>39</sup> that in treaty law stems first of all from the Vienna Convention<sup>40</sup> and applies to the members' commitments within the legal framework of the WTO.<sup>41</sup> The ICJ opines that a state must respect this principle, even if it invokes a self-judging clause.<sup>42</sup> To render the invocation lawful, a state should merely designate grounds for its decision, albeit they need just to match those that are laid down in a norm concerned, without additional explanation.<sup>43</sup>

These, rather, minor requirements are in reality equated with recognition of almost unfettered latitude of states, when it comes to adoption of such measures. To evade this dangerous understanding of how self-judging provisions function, in its Declaration to the said case, Judge Keith differently interpreted Article 2(c) of the Convention between Djibouti and France in two aspects. Firstly, acting in accordance with good faith states should refrain from abusing their sovereign rights.<sup>44</sup> Secondly, while assessing measures one needs to pay great attention to the whole Convention.<sup>45</sup> These considerations have important implications in their applications to the WTO realm.

The WTO jurisprudence shares the similar understanding of the good faith principle in its both reflections as a general principle of law<sup>46</sup> and as a standing alone notion in Article 3.10 of the DSU.<sup>47</sup> As a corollary, international judicial and quasi-judicial bodies may review, whether a state genuinely believes that taken measures are crucial for its security.<sup>48</sup> Apparently, Article XXI of the GATT has been only once dubiously invoked by far, when a state did not significantly substantiate its decision to do so.<sup>49</sup> In 1975 Sweden introduced an import quota system for certain footwear because of its production decrease.<sup>50</sup> In its opinion, this 'decrease in domestic production had become a threat to the planning of Sweden's

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<sup>39</sup> Oppenheim's International Law (1992), p. 38.

<sup>40</sup> Vienna Convention on the Law of Treaties, supra note 15, Article 26.

<sup>41</sup> Panel Report, *United States–Continued Suspension of Obligations in the EC–Hormones Dispute*, WT/DS320/R, adopted 14 November 2008, para. 7.357.

<sup>42</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. Judgment, 2008 I.C.J. Reports 177, para. 145.

<sup>43</sup> *Ibid.*, para. 148.

<sup>44</sup> Declaration of Judge Keith, supra note 34, para. 5.

<sup>45</sup> *Ibid.*, para. 6.

<sup>46</sup> Appellate Body Report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, para. 224; Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 158.

<sup>47</sup> This article obliges WTO members to comply with the principle of good faith while being parties to disputes in the WTO. Panel Report, *Peru–Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/R and Add.1, 27 November 2014, paras. 7.94-7.95; Stoll (2006), pp. 294, 312.

<sup>48</sup> Akande and Williams (2003), p. 396.

<sup>49</sup> Hestermeyer (2011), pp. 574-575, para. 5.

<sup>50</sup> WTO Secretariat (2012), p. 603.

economic defence in situations of emergency as an integral part of its security policy'.<sup>51</sup> Unlike in many other situations of bans on similar grounds, representatives of many countries doubted, whether Sweden may rely on the security exceptions under the GATT in given circumstances.<sup>52</sup> Finally, in practice all this would purport a prohibition of measures that despite an attempt to justify them by relying on Article XXI:(b)(iii) are nevertheless aimed to promote manifest protectionism.<sup>53</sup>

To sum up, a scrutiny of Article XXI:(b)(iii) as a self-judging clause results in the understanding, how far the DSB may come in review of measures backed by that article. Whereas no single case has addressed this issue in details so far, the existent practice of the GATT-1947 along with systematic interpretation of WTO law as well as the jurisprudence of the ICJ help to shed light on the security exceptions and their place in the WTO dispute settlement system. The analysis of those sources suggests that Article XXI:(b)(iii) is not excluded from the jurisdiction of the DSB. Yet, its supervision powers are utterly limited.

To define the scope of review, the legal findings of the ICJ in the *Certain Questions of Mutual Assistance in Criminal Matters* case can become a beacon. Their possible application in the DSB must be, however, viewed through a three-layered lens. Firstly, it is pertinent only insofar no guiding source is available in the legal framework of the WTO. Secondly, peculiarities of a treaty being at stake of interpretation (the Convention on legal assistance, the GATT) are to be taken into account: ordinary meaning, object and purpose, context, etc. Thirdly, the same holds true for distinctive features of a forum, where a dispute is being adjudicated, rendering inadmissible those conclusions that contradict with its internal rules and functions. Given all possible limitations deriving from those considerations, the author is nonetheless of an opinion that like in the *Certain Questions of Mutual Assistance in Criminal Matters* case, the DSB can test whether state's measures are indeed justified by the security exceptions enshrined in Article XXI:(b)(iii). The result is, apparently, contingent on state's compliance with the principle of good faith and paying regard to the object and purpose of the GATT in the WTO legal framework. Moreover, the different legal reasoning purely relying on basics of public international law permeating the whole system of states' obligations also confirms the applicability of the good faith principle to the national security exceptions.<sup>54</sup> The unadopted report in *US–Nicaraguan Trade* similarly supports this view that basic principles

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<sup>51</sup> General Agreement on Tariffs and Trade, Minutes of Meeting, Council, C/M/109, 10 November 1975, p. 8.

<sup>52</sup> Multilateral Trade Negotiations, The Uruguay Round, Negotiating Group on GATT Articles, MTN.GNG/NG7/W/16, 18 August 1987, p. 7. As to examples see pp. 5-7.

<sup>53</sup> Schloemann and Ohlhoff (1999), p. 444.

<sup>54</sup> Peng (2015), pp. 466-468.

of international law apply to interpretation of Article XXI:(b)(iii).<sup>55</sup> Ultimately, the details of such review are vague, but sanctions aimed to reach the purpose of manifest protectionism seem to fail the suggested test, as it was, admittedly, in the case of Sweden quota for footwear in 1975.

By means of Article XXI:(b)(iii) states obtained an almost unfettered right to promote their interest in the sphere of national security, even if their measures are in effect beyond that. Despite that the said article virtually equals to a trump card, the recent decisions with respect to China's commitments arising out of its Accession Protocol to the WTO alarmingly signalize that states are not always entitled to use it.

#### **4. Is a State Always Entitled to Invoke Article XXI:(b)(iii) of the GATT?**

At first glance, Article XXI is in its main message as straightforward as possible. Indeed, the wording 'nothing in this Agreement' and 'to prevent from taking any action which [a contracting party] considers' suggests nothing but the great state discretion in these matters. Still, the application of them to the WTO members' obligations under Accession Protocols even directly related to the trade of goods is rather contentious. To unfold this allegation, the analysis of the recent DSB cases with participation of China regarding its Accession Protocol to the WTO is relevant.

The relevance bases chiefly on the fact that the DSB's findings concerning the interplay between Accession Protocols and the rest WTO documents may be applicable to the significant part of WTO members. To date more than 30 states have acceded the WTO through Accession Protocols. However, the proper legal status of those documents in the legal framework of the WTO is yet to be clarified.<sup>56</sup> What is nonetheless clear, many Accession Protocols supposedly 'contain more stringent commitments compared with the WTO Agreement'.<sup>57</sup> For this reason their implementation likewise becomes a matter of other states' concern.

Apart from a general interest of those states, a proper interpretation of Accession Protocols yields practical implications too. Disputes regarding commitments under Accession Protocols usually involve claims related to the rest WTO agreements. Therefore one may allege the intrinsically connection between the GATT and those provisions of Protocols

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<sup>55</sup> *US–Nicaraguan Trade*, supra note 25, para. 5.2.

<sup>56</sup> Liu (2014), p. 752.

<sup>57</sup> Yamaoka (2013), p. 105.

regulating trade in goods.<sup>58</sup> The *China–Audiovisual*, *China–Raw Materials* and *China–Rare Earths* cases enlighten the legal interaction between the Protocols and the GATT focusing on applicability of its Article XX of the GATT to specific commitments. In panel's and the Appellate Body's opinion, states are not always entitled to evade responsibility by having a recourse to general exceptions under Article XX to justify violations of their commitments under Accession Protocols to the WTO.

The main obstacle for WTO members willing to invoke that article is a phrase 'in this Agreement'. By means of this wording the general exceptions, apparently, may not automatically apply to justify violation of other agreements unless there is a way to understand the provision otherwise.<sup>59</sup> The DSB sought to find out whether this indeed holds true and, if yes, under what circumstances Article XX applies to the provisions of the Accession Protocols dealing with trade in goods. The section will conclude with reasoning on why the DSB's findings on that may extend to Article XXI.

#### *4.1. A Limited State's Right to Regulate according to the Chinese Practice in the WTO Dispute Settlement System*

Having encountered this complex issue for the first time, the Panel in *China - Audiovisual* deliberately eludes the difficult task on interpreting the China's Accession Protocol.<sup>60</sup> Instead, it examined *arguendo* the justification argument, which the Panel ultimately dismissed rendering unnecessary the finding on whether the general exceptions are applicable to the Accession Protocol whatsoever.<sup>61</sup>

Yet the core question of the general exceptions applicability has been raised again in the same case later. This time, to dispel uncertainty concerning Chinese commitments, the Appellate Body has carefully scrutinized Paragraph 5.1 of the China's Accession Protocol. This provision contains an introduction sentence, which reads:

Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement...<sup>62</sup>

Although the final outcome of the proceedings on the violation stage in respect of China's measures compatibility with this paragraph still was not in its favor, the Appellate

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<sup>58</sup> Kennedy (2013), p. 52.

<sup>59</sup> Qin (2011), pp. 294-295.

<sup>60</sup> Panel Report, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, adopted 19 January 2010, paras. 7.743, 7.745 ('*China–Audiovisual*').

<sup>61</sup> *Ibid.*, para. 7.915.

<sup>62</sup> Appellate Body Report, *China–Audiovisual*, WT/DS363/AB/R, adopted 19 January 2010, paras. 215-216.

Body has shed light on the issue concerned. Not only has it acknowledged the applicability of Article XX to the abovementioned provision, but also exemplified the general test of examining if a clause implementation might be protected by reference to the general exceptions under the GATT.<sup>63</sup> A state may have recourse to Article XX as long as the provision contains, in words of the Appellate Body, ‘a clearly discernable, objective link to ... regulation of trade’ meaning an unequivocal connection to the GATT at large.<sup>64</sup>

The next question is what kind of threshold a clause should meet to qualify as including such a ‘discernable, objective link’. So far the DSB case law has come up only with two examples. Being the first one, the foresaid *China–Audiovisual* case signifies that the general exceptions under the Article XX of the GATT apply to Paragraph 5.1 of the Chinese Accession Protocol due to the introduction: ‘Without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement’.<sup>65</sup> Whereas it might be rather uncontroversial here to reach the same conclusion, Paragraph 11.3 of the China’s Accession Protocol analyzed in *China–Raw Materials* and *China–Rare Earths* has fueled hot debates:

China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.<sup>66</sup>

Unlike the previous clause, this provision contains only a phrase referring to a single article of the GATT. In Panel’s opinion in *China–Raw Materials*, this reference is not enough to conclude that Paragraph 11.3 is inherently connected with the whole GATT and namely with Article XX. To sum up, the Panel based this finding on the following premises: Paragraph 11.3 lacks an expressed reference either to Article XX of the GATT, or to the GATT at large. Besides, this provision does not have an introduction similar to that of Paragraph 5.1. Similarly, both the reference to Article VIII of the GATT and to Annex 6 of the Protocol do not purport the opposite decision. Nor does the interpretation of the context.<sup>67</sup> The Appellate Body has upheld inapplicability of general exceptions enshrined in Article XX of the GATT to the obligations arising out of the paragraph concerned.<sup>68</sup>

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<sup>63</sup> Appellate Body Report, *China–Audiovisual*, WT/DS363/AB/R, adopted 19 January 2010, para. 415.

<sup>64</sup> *Ibid.*, para. 233.

<sup>65</sup> *Ibid.*, para. 415.

<sup>66</sup> Panel Reports, *China–Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R and Corr.1, adopted 22 February 2012, para. 7.65.

<sup>67</sup> *Ibid.*, paras. 7.124, 7.126, 7.148, 7.160.

<sup>68</sup> Appellate Body Reports, *China–Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, adopted 22 February 2012, para. 307.

As a result of this decision, China has been deprived of its core right as a sovereign state to regulate trade to the same extent as other WTO members may enjoy it.<sup>69</sup> In the meantime this decision additionally indicates the absence of a coherent set of jurisprudence on the general exceptions application.<sup>70</sup>

Notably, facing later with the similar problem, the panel had been split when in 2 years after *China–Raw Materials* it was adopting the next decision examining China’s obligations pursuant to the same Paragraph 11.3 of the Accession Protocol. One member of the panel has differently interpreted the uncontested idea that Accession Protocols constitute an integral part of the WTO agreement.<sup>71</sup> Unlike what the majority decided, the separate opinion supposes that this concept already constitutes the necessary link to the GATT.<sup>72</sup> Moreover, had there been an intention to exclude Article XX from the scope of application, China should have explicitly given up the right to invoke that article.<sup>73</sup> Having never done this, China may seek to justify its actions applying Article XX of the GATT. The similar concerns have been declared by Argentina, Brazil and Russia being the third parties intervening the proceedings concerned with participation of China.<sup>74</sup>

Despite the same approach of panels and the Appellate Body, it is difficult to characterize the finding on applicability of Article XX of the GATT as a solid decision.<sup>75</sup> The critics concerns, *inter alia*, the flaws in interpretation ‘relying solely on the text and context of the provisions’ instead of taking also into account the object and purpose of the clause and the WTO agreement.<sup>76</sup> Nevertheless, the WTO law stays thus far on a position that unless there is a strong link to the right to regulate, no justification of a measure otherwise incompatible with obligations under Accession Protocol is possible basing on general exceptions.

#### 4.2. *Have the Chinese Established a Dangerous Precedent?*

What the panels and the Appellate Body have not addressed and which is a subject of the present research is whether the panels’ and the Appellate Body’s stance in the Chinese cases has significant implications upon application of other exceptions available in accordance with the GATT. Applying the same logic from abovementioned cases one may

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<sup>69</sup> Lim and Senduk (2014), p. 382.

<sup>70</sup> Guan (2014), p. 221.

<sup>71</sup> Panel Reports, *China–Measures Affecting Imports of Automobile Parts*, WT/DS339/R, WT/DS340/R, WT/DS342/R and Add.1 and Add.2, adopted 12 January 2009, para. 7.740.

<sup>72</sup> Panel Report, *China–Rare Earths*, para. 7.138.

<sup>73</sup> *Ibid.*, para. 7.138.

<sup>74</sup> *Ibid.*, para. 7.137.

<sup>75</sup> Смбатян and Тымма (2015), p. 117.

<sup>76</sup> Esra (2012), p. 1414; Смбатян and Тымма (2015), pp. 114-115.

state that similarly to Article XX, in the absence of ‘discernable, objective link’ in the provisions concerned, a state may not invoke the national security exceptions to justify its actions contrary to the state’s obligations under Accession Protocol to the WTO. This conclusion could be reached by a way of analogy, which is a recognized by both the doctrine,<sup>77</sup> and the jurisprudence<sup>78</sup> means of interpretation of international obligations granted special circumstance for that are met.<sup>79</sup> Analogous arguments have been raised many times in disputes within the WTO ambit before.<sup>80</sup> Hence, this thesis is supposed to be correct, if Article XXI is not significantly distinct from Article XX in its wording and general interests behind both provisions.<sup>81</sup>

Both articles are analogous in essence, since their partly identical chapeau stipulates ‘nothing in this Agreement shall be construed’ to prevent a WTO member from application of measures aiming to reach certain goal.<sup>82</sup> The same legal function of them was also noted by the panel in *EC–Tariff Preferences*.<sup>83</sup> Only the specific set of permissible goals differs taking into consideration the plain text, as well as the additional limitations of state’s rights reflected in the chapeau of Article XX of the GATT. This suggests that by analogy the same logic would potentially apply to extend the DSB’s finding to Article XXI.<sup>84</sup>

On the other hand, the opponents of this assertion might argue that while the text is comparable in both instances, the nature of articles is substantially different. Indeed, the security exceptions incorporated in Article XXI of the GATT purport the core state right as a sovereign to protect national security. This holds true especially in light of apparent self-judging character of the clause to great extent. As to the general exceptions, while they are

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<sup>77</sup> Bleckmann (1977), p. 113.

<sup>78</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, 1998 I.C.J. Reports 275, paras. 30, 33; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, 1984 I.C.J. Reports 392, para. 63.

<sup>79</sup> Apart from determination of similarities between regulated and unregulated situations by comparing and analyzing rationals behind norms concerned, the circumstances allowing to make an analogous argument are: 1) an absence of exclusive rules governing the situation; 2) the legal order should not exclude the principle that equals should be treated equally; 3) an absence of a precise legal norm that regulates the issue (see Vöneky, paras. 3-5). For the sake of argument the author assumes that these criteria are fulfilled, should Articles XX and XXI of the GATT be compared.

<sup>80</sup> Panel Report, *United States–Measures Affecting the Cross Border Supply of Gambling and Betting Services–Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285/RW, adopted 22 May 2007, para. 3.256 (‘US–Gambling’); Panel Report, *Canada–Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, para. 6.149.

<sup>81</sup> Panel Report, *US–Gambling*, WT/DS285/R, adopted 20 April 2005, para. 6.448; Bleckmann (1993), pp. 365-366.

<sup>82</sup> GATT, supra note 8, Articles XX, XXI.

<sup>83</sup> Panel Report, *European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, para. 7.36 (‘EC–Tariff Preferences’).

<sup>84</sup> Kennedy (2013), p. 70.

admittedly also tied with the inherent state's right to regulate,<sup>85</sup> Article XX is not usually considered as a state's last ditch in disputes on trade in goods.

In spite of this alleged difference, Russia expressed strong concerns in its third party submission to the proceedings in *China–Rare Earths* that 'the Panel's finding would apply to all other defences, including the security exceptions in Article XXI of the GATT 1994'.<sup>86</sup> Furthermore, the earliest US draft of the International Trade Organization Charter, that had been a moderate guide for the GATT/WTO, incorporated both general and security exceptions into a single article turning out to be Article 37 in the London and New York drafts for the same documents.<sup>87</sup> This fact connotes that states do not always distinguish those exceptions. Notably, the DSB has multiply times put both articles on a par, pointing out to similar legal nature without any particular distinction.<sup>88</sup>

As seen, there are equally compelling arguments for both sides on whether Articles XX and XXI of the GATT can be considered analogous. Ultimately, should a dispute involving this issue be brought to the DSB, it would be a panel and the Appellate Body, who will put the matter to rest. Nevertheless, already now it is clear that the *China–Audiovisual*, *China–Raw Materials* and *China–Rare Earths* cases set a dangerous precedent that is capable of undermining the settled system of international trade governed by WTO law.

In fact, should the outlined analogy be accurate, states would be deprived from their key sovereign right to protect their national security interests stipulated by Article XXI of the GATT. This deprivation concerns those commitments that stem from Accession Protocols to the WTO dealing with trade in good issues, as long as provisions containing them are not intrinsically connected with those of the GATT.

## 5. Conclusion

Article XXI:(b)(iii) is a last citadel in the context of the WTO legal framework for states imposing economic sanctions to protect their national security. This understanding of its content emanates from a self-judging character of the article purporting an almost unfettered state's latitude to pursue its interests on the basis of the security exceptions. Contrary to the conventional concern regarding Article XXI:(b)(iii), this discretion is,

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<sup>85</sup> Panel Report, *United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/RW, 14 April 2015, para. 12, 14; Appellate Body Report, *EC–Seal Products*, para. 5.125.

<sup>86</sup> Panel Report, *China–Rare Earths*, para. 2.240.

<sup>87</sup> Guan (2014), p. 230.

<sup>88</sup> Appellate Body Report, *EC–Tariff Preferences*, WT/DS246/AB/R, adopted 20 April 2004, para. 81; Panel Report, *EC–Tariff Preferences*, paras. 7.36-7.37.

however, limited, especially given the established above DSB's jurisdiction encompassing disputes concerning this article. And yet, it is highly doubtful that the WTO may become a favourable forum to solve disputes concerning economic sanctions due to the far reaching options for a state to justify alleged breaches of WTO law. Despite this, the detailed analysis has shed light on a few interesting issues beyond disputes on sanctions as such.

Being a card up state's sleeve, Article XXI:(b)(iii) nonetheless can under certain circumstances fail expectations of those relying on it. This can be the case whenever WTO members are boldly trying to hide manifest protectionist measures under a veil of national security issues. For instance, a protection of internal producers of footwear is unlikely to override international obligations to address challenges to national security. This has been vividly illustrated by how representatives of other states assessed the Sweden's intention to introduce a quota for footwear by invoking the national security exceptions. Exactly for this kind of instances a last and paramount limitation of how states behave, can and should be the principle of good faith, as the ICJ's decision in the *Certain Questions of Mutual Assistance in Criminal Matters* case suggests. Irrespective of what country's interests are at stake, a state should always follow international law in its means of their protection, and must not abuse its rights. Otherwise states will be no longer willing to trust each other, which will, in its turn, shatter the underpinning of international law being a consent to have common rules to abide. Should this occur, it will be difficult to stabilize the system back.

Besides, states that joined the WTO through Accession Protocol should be cautious while carrying out commitments contained therein. By analogy with *China–Audiovisual*, *China–Raw Materials* and *China–Rare Earth* the national security exceptions similarly to the general ones, apparently, do not automatically apply to the commitments concerned. Drawing a distinction between those two groups of exceptions is pivotal for the functioning of the WTO. This organization was initially conceived to regulate economic activities, policy did not play there a role as important as it does in other international bodies, for example, in the United Nations. In this vein, the suggested interpretation of legal findings in the Chinese cases can be welcomed, since by recognizing of inapplicability of exceptions this understanding expands the scope of potential economic disputes that can be peacefully and promptly resolved with a help of international law.

And yet it is questionable that states will be eager to embrace this limitation of their sovereign rights. It should not be neglected that a corner stone of international law is a consent of states to comply with set rules. Article XXI:(b)(iii) is, thus, to be regarded as some sort of embrasure in the castle WTO. The view from it does not let you forget about important

foundations of relations between states based on respect of sovereignty and national security issues.

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