

Original Paper

“Essential Security Interest”: How Did WTO Interpret?

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Abstract

The world is facing a new security crisis—with the development of technology, national interest has been expanded from military to oceans, polar regions, outer space, and networks, as well as to new fields such as artificial intelligence and big data. And there will be a great possibility for states to invoke the “Security Exception” clause to exempt themselves from WTO obligations. Following the interpretation approach of the WTO Panel, there is no technical barrier to giving an expansive interpretation of the ESI. However, the Panel should cautiously examine it in case of abuse.

Keywords

essential security interest, WTO law, jurisprudence of WTO, treaty interpretation

1. Introduction

Till now, the Russo-Ukrainian War lasted for more than two years. Meanwhile, global security risks and challenges have also increased, and the whole world is facing a new security crisis—interactions and even competitive actions among countries have expanded from traditional land borders to new borders such as oceans, polar regions, outer space, and networks, as well as to new fields such as artificial intelligence and big data. In this regard, there is a great possibility that states will invoke the “Security Exception” clause to exempt themselves from WTO obligations. Thus, there is a desperate need to clarify the scope of the “Essential Security Interest” (ESI), especially under the WTO regime.

2. From Tradition to Expansion

2.1 The Traditional Range of ESI

The “Security Exception” of Article 21 of GATT 1947, originated from a U.S. proposal during the ITO preparatory process. The U.S. proposed to add a provision to Chapter 4 of the ITO Charter, entitled “Commercial Policy”, to make it clear that nothing in that chapter shall be construed as preventing a member from adopting or enforcing trade-restrictive measures for a particular purpose, such as the

protection of essential security interests. Judging from the negotiating history, the proposal raised concerns among other negotiating parties that the security exception, if abused to serve economic purposes, would become a huge loophole in the multilateral trading system.

During the 1947 ITO Preparatory Commission meeting in Geneva, the Netherlands questioned the ambiguity of “ESI” and its possible abuse. The U.S. delegation responded “We thought it well to draft provisions which would take care of really essential security interests and, at the same time, so far as we could, to limit the exceptions and to adopt that protection for maintaining industries under every conceivable circumstance”. The U.S. did not specify what constituted an “ESI”, however, the U.S. indicated that it envisioned the situation in 1941, prior to the entry of the US into World War II. At that time, the war in Europe lasted two years, the U.S. entry into the war was imminent, and the U.S. needed to protect its interests by taking measures prohibited by the ITO Charter, which tightly controlled imports and exports. Thus, when the U.S. proposed to incorporate the security exception, it was clear that its intentional meaning of “ESI” is national defense and military security interests. In subsequent negotiations, the U.S. pressured other negotiating parties to accept the security exception as a precondition for ratifying the ITO Charter, resulting in the emergence of a broad and vague “ESI”.

Understanding “ESI” as traditional defense and military security is also consistent with the state practice in the WTO system, as evidenced by the reasons why States invoke security exceptions in WTO disputes. For instance, in 1949, the U.S. imposed stringent export controls on Eastern European countries, including Czechoslovakia, because of the negative impact on its security of the continuous expansion of the Soviet Union after World War II; in 1982, the European Community embargoed Argentina because of the armed occupation of the Falkland Islands; in 1996, the U.S. passed the Cuban Liberty and Democratic Solidarity Act, which provided that United States citizens who were dispossessed of their property during the Cuban Revolution may seek compensation from individuals and companies that had commercial relations with that property; in 2000, Nicaragua imposed a trade embargo against Honduras and Colombia, on the grounds that the agreement reached by Honduras and Colombia on the delimitation of their territorial waters in the Caribbean Sea impaired the sovereignty of those countries. The reasons for invoking security exceptions by the above-mentioned members are simply that there is a real threat to the sovereignty of a State, its territory, its regime, its population and other elements that make up a sovereign State. Thus, “ESI” has traditionally been understood primarily in terms of military interest, i.e., the acquisition, deployment and use of military force to achieve national objectives.

2.2 The Expansion of ESI

With the end of the Cold War, large-scale war was no longer the main security threat the States faced. On the whole, however, another series of security problems, such as cyberattacks, technological theft, and epidemics of infectious diseases, have become more prominent. To meet the real needs of maintaining national security, states had to adjust their security strategies. For instance, in order to understand national security more comprehensively, Japan has proposed the concept of

“comprehensive security”, which integrates various elements of national security. So far, the concept of “comprehensive security” has been generally accepted by countries all over the world, although there are subtle differences in the terminology used by each country. In the National Security Strategy issued by the White House, the U.S. has included climate and energy security, pandemics and biodefense, food insecurity, terrorism, and so on into its national security policy. China, on the other hand, has put forward the concept of “A Holistic View of National Security” and advocates the construction of a national security system that integrates political, homeland, military, economic, cultural, social, scientific and technological, network, ecological, resource, nuclear, overseas interests, biological, space, polar, and deep-sea security. To conclude, in the national security strategy of many countries, the scope of national security interest has been greatly deepened and expanded.

3. Analysis of Jurisprudence of WTO

3.1 *The First Case on ESI-DS512*

The Russia–Measures Concerning Traffic in Transit (DS512) is the first case where the WTO has confirmed the justiciability of the security exception clause.

The panel did not give a definition of what is ESI, however, the panel compared it with “security interest”. In the view of the panel, ESI is narrower than “security interest” and relates to the basic functions of a State, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally. The panel holds that such specific interests, directly related to the protection of a State against external or internal threats, will depend on the specific circumstances and perceptions of the State concerned and will evolve as circumstances change. For these reasons, it is generally for each Member State to determine what it considers to be its essential security interests. However, this does not mean that a State is free to consider any issue as an ESI. A State’s discretion with regard to ESI is limited by the principle of good faith (in good faith).

The obligation of good faith requires that members do not use the exceptions in Article 21 as a means of circumventing their obligations under GATT. A clear example of this is the attempt by a member to depart from the “mutually beneficial arrangements” that make up the multilateral trading system by simply relabeling the trade interests that are part of the structure as ESI that are separate from the structure. It is therefore incumbent upon the invoking member, in order to prove its authenticity, to fully articulate sufficiently the essential security interests arising from the exigencies of international relations. What is “sufficiently” depends on the emergency in international relations at issue. In the view of the panel, the less distinctive the character of the “emergency in international relations” invoked by a member, i.e., the further removed it is from a situation of armed conflict or breakdown of law and public order (whether in the invoking member’s own country or in its immediate vicinity), the less distinct is the interest in national defense or military advantage or the interest in the preservation of law and public order that can generally be expected to arise. In such cases, Member States need to articulate their essential security interests with greater specificity than is required when an emergency

in international relations is involved. In addition to the fact that a State should make a good faith determination of its ESI, the principle of good faith is also embodied in the minimum requirement of reasonableness that the measures in question be related to the ESI asserted, i.e., that they are not implausible as a means of protecting the ESI.

After DS512, there are more cases involving the security exception. The cases including DS512 and the summary of their panel reports are listed in Table 1.

Table 1. WTO Cases Involving Security Exception

Year	Cases	Conclusion of Panel Reports
2019	Russia—Measures Concerning Traffic in Transit (DS512)	The Panel’s first positive response to the security exception, finding that it has jurisdiction over the security exception case and ruling that Russia’s invocation of the security exception is consistent with WTO rules.
2020	Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights (DS567)	Invoking country loses the case, the Panel rules Saudi measures not necessary.
2022	United States—Steel and Aluminum Products (DS544)	The Panel rejects the United States plea that the measures were taken in time of war or other emergency in international relation, and the case is currently on appeal.
2022	United States—Origin Marking Requirement (DS597)	The Panel upholds Hong Kongs claim that United States’ measures violate WTO rules, and United States files appeal.

In conclusion, all of the cases followed the approach of the DS512, confirming that States have the right to define the scope of ESI, however, the WTO panel has the jurisdiction to evaluate whether the action at issue “was taken under the circumstances described in the subparagraphs of Article XXI(b)(iii) of the GATT 1994”.

3.2 The Room for Expansive Interpretation

Since the WTO still hasn’t given a definition of the ESI, if a WTO member intends to preserve its security objective by invoking the security exception clause, it must resort to the method of evolutionary interpretation under the Vienna Convention on the Law of Treaties. This method has been adopted by the WTO panels several times. A well-known example is the notion of “exhaustible natural resources” in Article 20(g) GATT; it was interpreted extensively to include fresh air or endangered species, which were not originally the issues thought of. Similarly, in China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment

Products (DS363), the panel holds that the terms—“sound recording” and “distribution” used in China’s GATS Schedule are sufficiently generic that what they apply to may change over time. Thus, whether ESI can be interpreted as time changes, we shall give an analysis following the approach of VCLT.

First, from the perspective of textual interpretation, the term “essential security interests” can be split into the modifier “essential” and the central term “security interests” in accordance with the function of the term. As mentioned earlier, the meaning of “essential” has been interpreted by the WTO panel as very important in that it relates to “the basic functions of a State”. Under the qualification of “essential”, whatever the extent to which the scope of “security interests” will be expanded by the inclusion of non-traditional security, ESI can be categorized as the basic security interests in the real sense. Thus, the word “essential” artificially sets the threshold for the definition of ESI. Sovereignty, territory, power, and population are the basic conditions for the existence and development of a sovereign State. Therefore, any factor that promotes, maintains, or safeguards a State’s sovereignty, territory, power and population can be considered an ESI. According to this understanding, both traditional military security and non-traditional security are ESI, and there is no direct relationship between the definition of “security interests” and the content of national security. Taken together, the above explanations of “essential” and “security interests” show that ESI refers to factors that play a crucial role in the preservation of a member’s territory and sovereignty, and in guaranteeing peace and stability. Thus, the concept is highly abstract and can be given different content at different times.

Secondly, in terms of systemic interpretation, the contexts most closely associated with ESI include the term “it considers” and three types of illustrative situations. On the one hand, the formulation of the provision shows that ESI is logically limited by the state’s own consideration. This suggests that the security exception has explicitly left the determination of ESI to the discretion of the members. The main reason for this legislative arrangement is to take into account the fact that ESI may vary from one member to another depending on their actual situation and that the specificity of such ESI is often familiar to the members themselves and can be easily proved by them. On the basis of the above understanding, under the qualification of “it considers”, the understanding of ESI is highly subjective and needs to be analyzed on a case-by-case basis. On the other hand, ESI is followed by three specific situations that may affect the security of a member. The words “or” in the third specific case indicate that the subparagraph uses the term “other”. The word “other” in the third specific case indicates that the subparagraph adopts the legislative model of “enumeration” and “caveat”, and caveat clauses are generally designed by the drafters in order to deal with situations that may arise in the future that threaten essential security interests. This formulation effectively leaves room for members to address non-traditional security threats.

Thirdly, in terms of objective and purposive interpretation, the security exception, as a rule that departs from trade obligations in order to safeguard national security, is intended to cater to national security in the true sense of the word, rather than to create conditions for members to implement trade protection

in disguise, which is the basis on which the rule is maintained in operation. Therefore, the understanding of ESI should be in a good balance. From the current point of view, limiting ESI to military security would make it impossible for a member to respond to the threat of other members jeopardizing its security interests through non-traditional means. Cyberattacks, for example, cannot be ruled out as having potentially catastrophic consequences for a member, given the wide range of hostile actions carried out through information networks, from malicious hacking and website destruction to large-scale damage to military or civilian infrastructure based on those networks. At the same time, one should also be wary of taking the definition of ESI to the other extreme and categorizing non-traditional security matters that clearly do not cause significant harm as ESI. For example, when designing the security exception, the drafters explicitly excluded industrial security and created other WTO remedies for domestic industrial difficulties. Similarly, non-traditional security matters such as resource security, ecological security and biosecurity are generally considered to be subject to the general exception. Of course, this division is not absolute. Under certain circumstances, these non-traditional security threats may also cause great harm to a country. Therefore, the understanding of ESI should not be confined to the question of the form of traditional military security versus non-traditional security, but rather to the question of whether or not the non-traditional security threats in question have a significant negative impact on the existence and development of a State.

Finally, in terms of historical interpretation, the meaning of ESI has not been clarified in the drafting and application of the security exception. However, the question of ‘who’ should clarify ESI and “how” is generally considered to be a matter for States to determine in good faith. Thus, it is not entirely impossible to consider non-traditional security as an ESI. For example, the security exception provided for in Article 13.2 of the Regional Comprehensive Economic Partnership Agreement includes “actions taken to protect critical public infrastructure, including communications, power and water infrastructure”. This shows that cybersecurity has been included in the category of ESI by the subsequent design of security exceptions, which also confirms the legitimacy of the evolutionary interpretation of ESI in the context of non-traditional security threats. In the context of evolutionary interpretation, the definition of ESI should meet the requirements of generality and specificity. In terms of generality, military security is the core security among the ESI, which has been generally recognized by the WTO panel, its appellate body and member states; in terms of specificity, whether non-traditional security, such as cybersecurity, scientific and technological security and biosecurity, belongs to the ESI under the security exception should be determined on a case-by-case basis.

Moreover, outside the WTO system, there have been many arguments in favor of non-traditional security interest as an ESI, particularly in ICSID arbitral tribunals. For example, the tribunal in *LG&E v. Argentina* stated that “economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external situation, are also considered essential interests”; and the tribunal in *CMS v. Argentina* similarly held that ‘economic, financial or other relevant interests in the general situation of the State of Bohu are also essential interests’. The

tribunal in *CMS v. Argentina* similarly held that “The need to prevent a major breakdown, with all its social and political implications, might have entailed an essential interest of the State in which case the operation of the state of necessity might have been triggered”.

4. Conclusion

In conclusion, there is no technical barrier to giving an expansive interpretation of ESI. However, in case states abuse ESI, there still be a clarification about the scope of ESI. With regard to traditional national security, such as homeland security, military security, and nuclear security, there is no dispute that these are the ESI that form the basis for invoking the security exceptions. As for new types of national such as ecological and environmental security, information network security, etc., they should be judged according to the gravity of the facts, and when the destruction of these security interests threatens the fundamentals on which a country relies its survival and development, then the above security interests can be judged as the ESI of a country, and thus the security exception clause can be invoked to defend the protective acts. When the destruction of these security interests threatens the very essence of a country’s survival and development, these security interests can be recognized as a country’s ESI, thus invoking the security exceptions to defend its protective acts. As for economic security and political security, which are easier to be abused by trade protectionism and are only used to protect the domestic industry of a member State or to achieve its specific political objectives, the WTO panels should cautiously examine and deny the validity of the invocation of the security exception clause.

References

- Akaha, T. (1991). Japan’s Comprehensive Security Policy: A New East Asian Environment. *Asian Survey*, 31(4), 324-340. <https://doi.org/10.2307/2645387>
- Amelia, P. et al. (1995). *Guide to GATT Law and Practice: Analytical Index* (World Trade Organization, 6th ed.).
- China’s State Council Information Office. (2020). *A Holistic View of National Security*. Retrieved from http://english.scio.gov.cn/featured/chinakeywords/2020-01/22/content_75639567.htm
- GATT. (1947). *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, E/PC/T/A/PV/33, 24 July 1947*.
- Geraldo, V., & Hidden M. (2021). Evolutionary Interpretation between Norm Application and Progressive Development. *Journal of International Economic Law*, 24(1), 208-210. <https://doi.org/10.1093/jiel/jgaa035>
- ICSID. (2005). *CMS Gas Transmission Co. v. Argentina, Case No. ARB/01/8, Award, May 12, 2005*.
- ICSID. (2006). *LG&E Energy Corp. v. The Argentine Republic, Case No. Arb/02/1, Decision on Liability, Oct.3, 2006*.

- Michael, J. H. (1991). Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception. *Michigan Journal of International Law*, 558(12), 568.
- Sebastián, M. B., & Alexander, P. (2020). National Security Exceptions in International Trade and Investment Agreements: Justiciability and Standards of Review. *SpringerBriefs in Law*, 10-12.
- Stephen, K. et al. (2023). The Conundrum of the Essential Security Exception: Can the WTO Resolve the GATT Article XXI Crisis and Save the Dispute Settlement Mechanism? *Working Paper of Geneva Graduate Institute*.
- The White House. (2022). *National Security Strategy*. Retrieved from <https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf>
- WTO. (1996). *United States-Standards for Reformulated and Conventional Gasoline, Panel Report, WT/DS2/R*, 29 Jan 1996.
- WTO. (2009). *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, Appellate Body Report, WT/DS363/AB/R*, 21 Dec 2009.
- WTO. (2019). *Russia-Measures Concerning Traffic in Transit, Panel Report, WT/DS512/R*, 5 April 2019.