National Security, the Rule of Law, and the WTO Dispute Settlement Mechanism

Comparing the US, EU, and Chinese Approach

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Online, 3 February 2023

The EU and the National Security Exception

- 2021 EU Trade Policy Review: An Open, Sustainable and Assertive Trade Policy
    - No reference to the national securiy exceptions in WTO law, their justiciability and the conditions for their invocation
- Four panel reports dealing with the national security exception to date
    - EU = third party in DS512 (2019); DS567 (2020); DS544/DS552/DS556/DS564 (2022); DS597 (2022)
    - EU = party in DS548 but withdrawal of complaint - referral to Art. 25 DSU arbitration – suspended (January 2022) – removal of US additional duties/EU rebalancing measures & discussion on Global Arrangment on Sustainable Steel and Aluminium
- EU 'welcomed' rulings of panel in DS512 *Russia – Traffic in Transit* (2019)
    - On the justiciability/self-judging nature of Art. XXI(b)GATT
    - On the meaning of 'emergency in international relations'
    - On the requirement to interpret and apply Art. XXI(b) in good faith
    - See EU statement at DSB meeting of 26 April 2019

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- PR in DS 567 *Saudi-Arabia – IPRs* (2020)
    - Followed PR in DS512
    - Panel's rulings on justicibility/self-judging nature and conditions for invocation of Art. 73 TRIPS in line with EU position
- PR in DS544/DS552/DS556/DS564 *US – Steel and Aluminium* (2022)
    - Followed PR in DS512
    - EU on panel's rulings justicialibility/self-judging nature and conditions for invocation of Art. XXI(b) GATT ('emergency in international relations'): 'This is also what the EU has argued' (EU statement at DSB meeting on 17 January 2023)
    - EU refers to statement at DSB meeting of 26 April 2019
- PR in DS597 *US – Origin Marking Requirements* (2022)
    - Did <u>not</u> follow PR in DS512

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- On justiciability/self-judging nature of Art. XXI(b)
  - PR in para.7.28. ‘The question … is not whether Article XXI(b) provides for a unilateral determination by the invoking Member. It clearly does. The question is rather, what is covered by that determination? That – and, again, the parties agree – depends on what the phrase "which it considers" extends to.’
  - PR in para. 7.185: ‘We find that Article XXI(b) is not entirely self-judging insofar as the unilateral determination granted to the invoking Member through the phrase "which it considers" in the chapeau of that provision does not extend to the subparagraphs. Instead, the subparagraphs are subject to review by a panel.
  - PR in paras. 7.317-7.361 only examines ‘whether the situation at issue is one that constitutes an emergency in international relations
  - No examination of whether Art. XXI(b) was applied and interpreted in good faith
  - No examination of whether US had articulated its essential security interests sufficiently enough to demonstrate their veracity *and* whether the measure at issue meets a minimum requirement of plausibility

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- PR fn 70: '… whether the exercise of that discretion is disciplined by certain obligations grounded in good faith and, thus, subject to some review by a panel, as found by previous panels (…), is a separate question, which we do not discuss at this juncture of our analysis ...'
- EU explicitly refers to its statement at DSB meeting of 26 April 2019 … but does not at the DSB meeting of 17 January 2023 comment on this aspect of the PR

- Interpretation of 'emergency in international relations'
  - PR in DS512: 'a situation of … latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state' (EU: correct interpretation in DS512)
  - PR in DS597: 'breakdown or near-breakdown in the relations' (EU: incorrect interpretation by the panel?)
  - PR in DS 597: nature of the restrictive measures themselves = basis for the assessment whether an "emergency in international relations" exists (EU: circular reasoning by the panel)
  - The EU 'continues to study the report of this panel and its implications'