

## On Trade Liberalism and Legal Interpretation of Security Exception

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### Abstract

**AIS v. the United States case has drawn attention and discussion from all over the world. From the perspective of this case, this paper analyzes the application of the security exception clause in the world free trade system. Free trade and national security compete with each other and depend on each other. The reasonable application of security exception clauses can balance these two competing goals. Otherwise, it will seriously damage the development of free trade. The WTO security exception clause defines the scope of national security and limits its application reasonably. When applying the security exception clause in the field of international free trade, member countries should strictly follow the relevant provisions of WTO to maintain the long-term development of the multilateral trading system.**

### Keywords

**AIS v. The United States; WTO Security Exception Clause; National Security; Free Trade.**

### 1. Introduction

In international trade, maintaining national security and realizing trade freedom are very important goals. The meaning and purpose of the security exception clause is to safeguard national security, but how to define the scope of basic security interests in the clause and how to reasonably apply the clause are very important for free trade. Otherwise, this clause will easily become an excuse for trade protectionism. The WTO security exception clause can "break through" the general treaty rules and application of WTO, that is, when specified specific circumstances appear, member States can temporarily stop implementing the obligations stipulated in WTO rules. As an important clause and content in WTO treaty rules, The purpose is to balance the conflicts and contradictions between the free trade advocated by WTO and the interests of member countries' national sovereignty, international peace and security, etc., and to emphasize that member countries have the right to take restrictive measures against free trade in order to safeguard national security, so as to fundamentally improve the multilateral trading system and promote the development of multilateral trade. Therefore, in international trade, WTO members should and have the obligation to strictly abide by the relevant rules of this clause and take relevant measures according to the provisions of this clause.

However, judging from the content of this clause, it adopts vague expressions such as "essential security interests" and "absolutely necessary", without clearly defining the meaning of essential security interests and specifying the specific applicable conditions. Due to the loose application conditions of WTO security exception clause, it is easy to lead to the wrong application and unreasonable application of this clause. Cause international trade disputes and bring harm to international free trade and multilateral trading system. Recently, the case of AIS v.the United States, which has attracted worldwide attention and discussion, is a domestic litigation case in the United States, but it also reflects the basis, scope of national security, applicable restrictions and other issues that WTO members cite security exceptions in international free trade. The

trial results of the case will have an important impact on the future development trend of world trade. Therefore, from the perspective of *AIIS v. the United States* case, this paper analyzes the application of security exceptions in the world free trade system.

## 2. Basic Introduction of the Case

In March 2018, in the name of national security, the President of the United States decided to impose tariffs of 25% and 10% on imported steel and aluminum products, respectively, according to Article 232 of the Trade Expansion Act of 1962 and the investigation report and recommendations of the US Department of Commerce. The investigation report analyzes the importance of some steel and aluminum products to national security, and uses a relatively broad definition of "national security". It is defined as "the overall security and welfare of some industries is beyond the necessary scope to meet the national defense requirements, which is very important for the minimum operation of economy and government." The scope of the investigation is extended to the current and future requirements of national defense, as well as 16 specific important infrastructure sectors, such as power transmission, transportation system, food and agriculture, and important manufacturing industries. Including domestic mechanical and electrical equipment production. The report also reviewed domestic production capacity and utilization rate, industry requirements, current import quantity and situation, international market and global overcapacity. The Ministry of Commerce determined the national security according to the investigation of iron ore and semi-finished steel in 2001. Before 2001, the "232 investigations" usually used a narrow definition to consider the defense needs of the United States or over-reliance on foreign suppliers. The report points out that since 2001, compared with the domestic steel production capacity of the United States, the growth of steel production capacity tends to be flat, while that of other countries is very rapid, which leads to unemployment, shrinking market share and other problems. Based on this, The US Department of Commerce believes that the fact that the United States imports steel and aluminum products from many countries has endangered the national security of the United States. Once the decision was announced, it immediately aroused widespread opposition in the United States and the international community.

On June 27, 2018, American Institute for International Steel filed a lawsuit with the US International Trade Court, requesting the court to rule that the US measures to impose tariffs on imported steel products are unconstitutional and stop imposing 25% steel tariffs. As the plaintiff, American Institute for International Steel argued that the provisions of Article 232 violated the principle of separation of powers and in the American Constitution. Because Article 232 gives the president unfettered discretion, Congress has not provided any understandable principles to guide and restrict him. Therefore, the court should determine that Article 232 is unconstitutional and limit the president's unfettered discretion. Richard Chris, president of the United States world steel association, believes that Article 232 also broadly defines national security. The domestic economic security of the United States also belongs to the category of national security. The defendant replied that the plaintiff's request had been excluded by the case of *FEA v. Algonquin SNG, Inc* (1976), in which the US Supreme Court held that the standard of Section 232 was "obviously enough to meet the attack of any delegation's theory".

On March 25th, 2019, the trial of the case ended in the US International Trade Court, and the panel of judges who tried the case ruled that the plaintiff's request for the court to find Article 232 of the Trade Expansion Act of 1962 unconstitutional was rejected, that Article 232 met the "understandable principle standard" and had passed the constitutional review, saying that it had no right to evaluate the decision made by the president. They cited the case of "*FEA v. Algonquin SNG, Inc*" tried by the Supreme Court in 1976, and thought that its judgment was

binding on this case, thus safeguarding the constitutionality of the United States imposing tariffs on steel products imported by its trading partners.

### 3. Application of Safety Exception Clause

In the above cases, the United States imposed tariffs on steel products imported from other countries according to its domestic laws, which belongs to the application of American domestic laws and regulations in the world free trade system. From the point of view of purpose, the purpose of Article 232 is to protect the national security of the United States, which is beyond reproach. But judging from the results, The application of this clause will objectively harm the interests of steel exporting countries, bring greater restrictions to the free development of foreign trade and hinder the development of global trade. It can be said that the judgment of the US domestic court on this case has already had a certain impact on the multilateral trading system advocated by WTO. However, as a member of WTO, It has the responsibility and obligation to abide by the relevant provisions of WTO. Then, are the measures of the United States to increase tariffs in line with WTO regulations? Is this measure aimed at safeguarding national basic security interests or domestic economic security? And can a country freely take measures to restrict foreign trade on the grounds of maintaining domestic economic security? This paper holds that the key point is to see whether Article 232 of the United States meets the provisions of WTO security exceptions. Based on this, it is necessary to make an in-depth analysis of the specific content and application of Article 232 of the United States and the WTO security exception clause, and to make further judgment through the comparative analysis between them.

#### 3.1. Analysis of Clause 232

Article 232, that is, Article 232 of the Trade Expansion Act of 1962 of the United States, mainly includes five aspects (a), (b), (c), (d) and (e): Paragraph (a) clearly stipulates that the implementation of preferential trade measures should be stopped when they harm the national security of the United States; Paragraph (b) is a procedural provision applicable to Article 232, which clarifies the responsibilities of the US Department of Commerce and a series of steps and requirements that should be followed. Including investigating imported products, holding consultations and hearings, and reporting to the President within the specified time; Paragraph (c) stipulates that the president has the right to decide whether to take relevant measures on the products under investigation, the specific ways and time limits of the measures, and shall submit a written statement to Congress within the specified time; Paragraph (d) stipulates that the Minister of Commerce and the President should consider national defense, domestic industry, national economic welfare and other factors when judging the impact of imported products on national security. Paragraph (e) stipulates that the Ministry of Commerce shall submit and publish relevant investigation reports to Congress and the public; (f) Formulated the measures concerning petroleum and petrochemical products adopted by the President, The U.S. Congress has veto power.

First of all, from the definition of the scope of national security, paragraph (d) clearly stipulates the factors that should be considered when judging whether the imported products are related to national security, so it is not difficult to see that the national security defined in this article is not only related to national defense security, but also the whole economic development of the country may be regarded as one aspect of national security. Secondly, in terms of applicable conditions, According to section (c) of this article, it is up to the president to decide whether to agree with the investigation conclusion submitted by the Minister of Commerce, and the way and time limit for taking measures after agreeing, which shows that the president has discretionary power. At the same time, in Article 232, except that Section (f) stipulates that Congress has the power to veto the corresponding measures taken by the President on

petroleum and petrochemical products, Other parts do not specify what specific standards or suggestions the president should follow when taking measures, nor do they clearly specify the limits of taking measures and how the president can remedy after taking measures. It can be seen that the president's discretion is unconstrained and restricted.

### 3.2. Analysis of WTO Security Exception Clause

In the field of goods trade, the WTO security exception clause mainly relates to Article XXI of GATT, which is divided into three specific clauses: (a) The main content of clause is to allow member countries not to disclose information related to basic security interests; The main content of paragraph (b) is to allow member States to take necessary actions to safeguard basic security interests, and to specify the applicable situations: (i) Related to fission, fusion and related derivatives; (ii) Related to military materials such as weapons and ammunition; (iii) When in wartime or an emergency of international relations; The main content of paragraph (c) is that it is not allowed to prevent member States from performing their obligations to maintain international peace and security. Judging from the wording of this clause, both (a) and (b) use the word "basic security interests". Among them, paragraph (b) also uses the expression "what it considers necessary and urgent", but this provision does not specifically explain and explain these words, leaving a vague state. First of all, the boundary of the scope of basic security interests is not clear, and it is not specified which national security interests the basic security interests specifically point to. Moreover, the expression "it thinks" is considered to give the member countries discretion, but it is not clear whether it is a complete right of self-determination or a right of self-determination that needs certain restrictions. Because of this ambiguous meaning and the lack of objective applicable standards, the application of this clause has also caused great controversy, which tends to focus on the provisions of (i) and (ii) under (b). In this case, in order to prevent the wrong application and unreasonable application of the clause, it is necessary to make legal interpretation of the clause.

#### 3.2.1. Analysis of Legal Interpretation

According to WTO regulations, the Council of Ministers and the General Council have the power to interpret WTO rules. In the dispute settlement procedure, the WTO dispute settlement body also has the power of judicial interpretation of WTO rules. According to the representative cases involving security exceptions in the GATT/WTO period, in the "Swedish shoe import restriction case", the GATT Council considered that Sweden called shoes as military strategic products, which was an exception of abusing security. Although the safety exception clause has the function of "breaking through" other clauses, not all cases meet the applicable conditions of the safety exception clause. The case shows that the safety of its primary industry does not belong to the basic security interests; Two of its member countries are subject to GATT review when invoking this clause.

In the case of US Trade Measures Affecting Nicaragua, The expert group thinks that "it thinks" in Article 21 (b) of GATT gives the member countries the right to make their own judgments. The International Court of Justice has full jurisdiction and review power over the security involving basic security interests, but it is difficult for GATT to review. However, the expert group also expressed concern that if it does not have the right of review, it may lead to the abuse of this clause. In the "Russia-Ukraine dispute case", First of all, the panel believes that the WTO dispute settlement body has the right to examine the act of invoking Article XXI of GATT. The "it thinks" in paragraph (b) of this article can't be applied to the determination of the three situations specified in this paragraph. When the measures taken by the invoking country belong to the provisions of paragraph (b), it should further objectively assess whether the measures meet the three applicable conditions specified in paragraph (b); Secondly, The expert group interprets "other emergencies in wartime or international relations" as a state of "armed conflict, or potential armed conflict, or aggravation of tension or crisis, or general instability of

a country". Finally, the expert group believes that member States have the right to identify "essential security interests", but they should abide by the principle of good faith and handle it with caution. Although the current WTO Appellate Body is in crisis, the report may be difficult to take effect.

### 3.2.2. Analysis of Applicable Conditions

Judging from the application of Article XXI of GATT, the application of this article will be limited by many factors, including: (1) the limitation of purpose. The principle of good faith in international law and Article 26 of the Vienna Convention on the Law of Treaties require member States to follow the principle of good faith and good faith when invoking this clause, and shall not maliciously damage the rights enjoyed by other member States according to WTO rules. Shall not be applied to safeguard non-basic security interests. (2) Necessary restrictions. Article XXI of GATT contains the word "necessary", which is actually a restriction to the invoking country when taking action. Before taking measures, member States should consider whether they have taken "excessive measures", whether they can take less alternative measures to restrict trade, whether all methods such as negotiation and negotiation have been exhausted, and sufficient and reasonable evidence has been provided to prove it. (3) Examinable restrictions. This article holds that the application of this clause should be examined by the WTO dispute settlement mechanism. Although the member countries have certain right of self-determination when invoking this clause, their measures and actions should be examined. This is in line with the purpose and purpose of this article. Moreover, the relevant provisions of WTO have never excluded Article XXI of GATT from the scope of dispute settlement mechanism review.

### 3.3. Comparative Analysis of the Two

By comparing Article 232 of the United States with the national security exception clause of WTO, we can sum up the differences between them, which are mainly reflected in the following aspects: 1. Different definitions of national security scope. Compared with the WTO security exception clause, Article 232 of the United States has extended the interpretation of national security, bringing domestic economic security issues into the scope of national security. The definition of the scope of national security is broader. 2. Different applicable restrictions. The application of WTO security exception clause needs to be limited by the legislative purpose, the necessity of measures and the review of dispute settlement mechanism. However, the president's discretion under Article 232 of the United States is not bound.

Moreover, in the case of *American Iron and Steel Association v. America*, the measures taken by the United States to impose tariffs on imported steel products are also inconsistent with the provisions of WTO safety exception clauses. Judging from the investigation report of the Ministry of Commerce, which is the basis for the measures taken by the United States, the United States believes that basic security interests involve both "national defense" and "critical infrastructure needs". There is no big dispute that the national defense needs belong to the basic security interests, but there are big problems and disputes about whether the needs of key infrastructure departments are related to the basic security interests, especially as mentioned above, the division and identification of key infrastructure departments in the United States is very broad, including 16 specific departments and numerous product catalogues. However, in the investigation report, The United States has not proved how these key infrastructure sectors involve basic security interests, nor has it provided reasonable and sufficient explanations to prove that tariff measures are necessary to safeguard basic security interests. And although national defense needs belong to basic security interests, the US Secretary of Defense once pointed out that, "The US military requirements for steel and aluminum each account for only about 3% of the US output".

In addition, whether all other measures have been exhausted before the measures of imposing tariffs and whether alternative measures with less restrictions on trade can be adopted are not reflected in the investigation report. Therefore, the essence of the US tariff measures is to put domestic economic problems, That is to say, the slow growth of steel production capacity and unemployment of workers in the United States mentioned in the report of the Ministry of Commerce have risen to the issue of basic security interests in the WTO security exception clause, expanding the scope of basic security interests.

## 4. The Rational Explanation of WTO Security Exception Clause

### 4.1. Trade Freedom and National Security

Liberalism hopes that all countries can eliminate trade barriers as much as possible, so as to create a fair and open trade environment, and try their best to realize the undifferentiated trade treatment. However, in the field of international trade, it is also very necessary to safeguard national security. It is impossible for every country to continue free trade on the premise that its national interests are damaged. Both the theory of national sovereignty and the theory of national security emphasize the importance of safeguarding national security. In essence, this actually reflects the conflict between the values of freedom and security. Coordination theory, one of the legal bases of security exception clauses, advocates that we should not only recognize the right of a country to safeguard national security, but also respect the right of other countries to free trade. Make it a bridge and link between trade freedom and national security. Therefore, the reasonable setting and regulation of the security exception clause is very important. Only in this way can the coordination of freedom value and security value be realized, otherwise, the security exception clause can only become an obstacle between trade freedom and security.

After the end of the Cold War, even if trade interests are directly related to basic security interests, security objectives will not automatically exceed trade interests. The WTO system has transformed the relationship between security and trade into that between trade and security, and the scope of basic security interests in the security exception clause has actually been reduced. Under the current international development situation and within the framework of WTO system, Compared with national security, global and national development interests are more important, so trade freedom should be given more attention and protection.

Therefore, although the WTO security exception clause allows each country to determine its own basic security interests, it does not allow a broad definition of the scope of the basic security exception. However, when situations that threaten a country's basic national security and international peace appear, such as armed struggle, war and so on, national security and sovereignty are seriously challenged at this time, and national security should be given priority protection, because national security is the basis and premise of free trade. The WTO security exception clause also endows the member countries with the right to, The right to take relevant measures to safeguard the basic national security interests. However, among many alternative measures, such as consultation, negotiation and restrictive trade measures, a country can only adopt the way that has the least restrictive influence on trade freedom. And the measures taken should meet the requirements of ensuring a high degree of protection for national security, Requirements to reduce the damage to trade freedom. In this regard, the WTO security exception clause also makes corresponding requirements, which requires that the measures taken by member countries are necessary to safeguard the basic security interests and provide sufficient and reasonable evidence to prove it. The WTO dispute settlement mechanism also has the right to examine the measures taken by the invoking country, For example, the contribution to the maintenance of basic security and the influence on free trade, only in this way can the coordination between trade freedom and national security be realized.

## 4.2. Methods of Interpreting WTO Security Exception Clause

When interpreting, the WTO dispute settlement body should abide by the rules and methods of treaty interpretation stipulated in Vienna Convention on the Law of Treaties, mainly including: meaning, context, purpose and purpose, and historical interpretation methods.. First of all, from the perspective of the method of literal interpretation, this method requires that the content of a provision be interpreted according to the words and expressions used in the provision, and that the emphasis on the provision itself is also the primary method of treaty interpretation. Therefore, it is necessary to clarify the common meaning of "essential security interests". "essential" is defined in the dictionary as "absolutely necessary" and "absolutely necessary and extremely important". However, this interpretation method can't answer the question of what kind of security interests belong to essential and very important security interests, and there is still a big controversy about the boundary of basic security interests.

Secondly, according to the explanation method above and below, this method requires that specific provisions should be placed in the whole treaty, and their meanings should be understood according to the context. According to the layout of Article XXI of GATT, three applicable situations (I), (ii) and (iii) are clearly defined in subparagraph (b), and member countries only have the right to take necessary actions concerning these three situations. Therefore, These provisions indicate which security interests can be regarded as basic security interests, including nuclear security, military supplies, war, international peace and security, but they do not involve economic security issues such as a country's economic crisis and economic difficulties, unless the economic crisis has seriously endangered a country's sovereign security and national defense security. Besides, According to the overall layout of GATT articles, Article 19 is already a restriction measure concerning the import of products. If economic security interests are included in the basic security interests stipulated in Article 21, the provisions of Article 19 will lose their original effectiveness and violate the principle of validity of interpretation.

Thirdly, from the point of view of the interpretation method of object and purpose, this method requires that the interpretation of the meaning of articles should conform to the object and purpose of the treaty. Since the establishment of WTO, its purpose and purpose is to promote the progress and development of world free trade. Therefore, in order to better realize the liberalization of multilateral trade and promote the perfection of multilateral trading system, this paper holds that the understanding and scope of "basic security interests" should not be too broad, and the basic security interests should be limited to non-economic security interests. Moreover, the right of self-determination enjoyed by member countries is limited to some extent, The expression "it believes that" does not give the member countries complete right of self-determination. Although the invoking country often claims that this clause involves national security issues, it should be judged and decided by the member states themselves. However, if the member countries are allowed to invoke this clause in order to solve domestic economic problems or crises, and at the same time take measures to restrict the development of free trade, Without any review and restriction, then Article XXI of GATT will easily evolve into the "cloak" of trade protectionism. When a few member countries take protectionist measures in the name of national security, the impact may only damage multilateral free trade, but when most member countries do this, the WTO and the multilateral trading system will end up in name only.

Finally, from the perspective of historical interpretation methods, historical interpretation requires that the terms and meanings of articles be explained according to the data in the process of contracting preparation. According to the process and background of GATT Article XXI, it was originally stipulated in the general exception clause of GATT. In 1947, it was separated from the general exception clause and separately constituted the national security exception clause, which has been maintained ever since. At that time, the Cold War just kicked

off, aiming at safeguarding national sovereignty, national defense security and peace in the face of military threats. Moreover, one of the drafters of this clause once said that this clause should avoid being used to protect domestic industries. Therefore, the establishment of Article XXI of GATT is based on the main concern of war, military affairs and peace, and does not reflect the economic and industrial security.

Although the method of object and purpose interpretation and the method of historical interpretation are not the first methods to be used in treaty interpretation, according to the requirements of the Convention, the interpretation of ordinary meanings of treaty terms should conform to the object and purpose of the treaty and comply with good faith. Therefore, when the terms of the articles are ambiguous, and grammatical interpretation is still unclear and controversial, The purpose and purpose interpretation method and historical interpretation method should be used to explore the original intention of the article. In the "Russia-Ukraine dispute case", the expert group's interpretation of Article XXI of GATT followed these two methods. Through grammar interpretation, context interpretation, purpose and purpose interpretation and historical interpretation, the article XXI of GATT is legally interpreted. The scope of "basic security interests" has also been basically clarified, which does not include all security interests, but only the basic problems of the survival and security of the country and its citizens. Moreover, the WTO dispute settlement body has the right to examine the behavior measures of member States invoking this clause.

## 5. Conclusion

In the field of international economy and trade, the research on the relationship between trade freedom and national security is enduring. From the GATT era to the WTO era, how to reasonably set up the security exception clause and make it a bridge rather than an obstacle between trade freedom and national security has become a difficult problem for countless people. At present, there are some problems in WTO security exception clauses, such as vague terms and unclear applicable conditions. Moreover, in recent years, in the name of national security, the United States frequently launched "232 investigations" according to Article 232, which is the domestic security guarantee clause of the United States, constantly broadening the extension of basic security interests, and bringing challenges to the WTO security exception clause. After the end of the Cold War, with the continuous development of the international situation, national security can no longer override trade freedom. More attention and protection should be given to trade freedom. Therefore, the definition of the scope of basic security interests in the WTO security exception clause should not be too broad, at least it should be limited to non-economic security interests. Moreover, the measures taken by the countries invoking this clause should be reviewed, otherwise it will easily lead to trade protectionism and damage the multilateral free trade system. It is an urgent problem and mission for WTO to make the WTO security exception clauses effective and feasible. It should revise the contents of the clauses as soon as possible, clarify the terms and specific applicable conditions of the clauses, and make them reflect the changes of the world political economy and meet the requirements of the times.

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