

PETRIFICUS TOTALUS: THE SPELL OF NATIONAL SECURITY!

R.V. Anuradha*

ABSTRACT

The “national security” exception is a preserve for sovereign power which finds a place in the 1947 General Agreement on Tariffs and Trade (hereinafter “GATT”), and practically all subsequent trade agreements, but has never been tested in a trade dispute. The reason is simple: while it has been invoked a few times, matters have never escalated sufficiently for it to be tested.

However, there are currently ten disputes (including eight against the United States) pending at the World Trade Organization (hereinafter “WTO”) where the “national security exception” has been invoked as a defence for WTO-inconsistent policies. The timing of these disputes in view of the rising protectionism by various countries in itself raises interesting questions about the intent and purpose of such an exception, i.e., whether it is a genuine exercise of the security exception, or a cover for protectionist action.

This article will make an assessment of the wording used in the security exception under the GATT, and the circumstances wherein the current spate of disputes has invoked the exception. It will also reflect on how Free Trade Agreements (FTAs) are addressing this issue, and the extent to which they are deviating from the language of the GATT and WTO Agreements.

The article will also explain that it is not correct to attribute rising national security concerns to the U.S. alone. There is a growing body of regulatory measures on grounds of national security that are emerging worldwide. Perhaps the reason for this is because the

* Partner, Clarus Law Associates, New Delhi. The author specializes in international trade and investment law, and can be reached at: anuradha.rv@claruslaw.com.

narrow structuring of the “security exception” in the post-World War II era of the GATT, is ill-equipped to consider various emerging concerns.

A more realistic assessment of the situation therefore is needed to ensure that there is some streamlining and control of the use of the security exception. In the interests of predictability and certainty, it is important that the shroud of “security” does not become a carte blanche for any form of protectionism.

KEYWORDS: *national security, security exception, GATT Article XXI, WTO, FTAs, self-judging; Review*