

COMMERCIALIZING NATIONAL SECURITY? NATIONAL SECURITY EXCEPTIONS' OUTER PARAMETER UNDER GATT ARTICLE XXI

*Jaemin Lee**

ABSTRACT

The security exceptions under the GATT Article XXI set forth an important carve-out for WTO Members. The provision arguably contains an element of a “self-judging” nature. It also extends to other non-military and commercial sectors. Nonetheless, the provision remains subject to a WTO panel’s review. The provision also sets forth specific requirements to be fulfilled before it is properly invoked. In particular, the terms “for the purpose of supplying a military establishment” and “other emergency in international relations” establish an important outer parameter for the interpretation and application of the provision. The negotiating history and ordinary meaning interpretation of these two terms also support such conclusion. As such, irrespective of and without prejudice to the self-judging nature of the article, proper invocation of Article XXI would demand showing of the satisfaction of these two requirements of the provision.

* Professor of Law, School of Law, Seoul National University. The author can be reached at: jaemin@snu.ac.kr. This paper was presented at the conference jointly organized by the Asia WTO Research Network (AWRN) and the University of New South Wales, China International Business & Economic Law (UNSW CIBEL), held on August 17-18, 2018 in Sydney, Australia. The author would like to thank those who provided valuable comments and suggestions during the conference.

KEYWORDS: *security exceptions, national security, essential security interests, Section 232, GATT Article XXI, necessity defense, self-judging provision*