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# A Blind Side of Security Exceptions?: New Legal Complexities of the "Refusal to Furnish Information" Clause

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## Abstract

*National security exceptions clauses in treaties have been receiving heightened attention recently as states are increasingly referring to these provisions to deviate from existing treaty obligations. As disputes increase, jurisprudence on national security exceptions is also being developed and accumulated. States are looking at national security exceptions with keen interest and from a new perspective. This phenomenon is being observed in a variety of treaties. There is a particular provision in national security exceptions clauses that has been sidelined mostly and neglected sometimes in these discussions. This provision is what is called the "refusal to furnish information" clause. It uses broad language without much qualifications or conditions. The level of discretion and leeway accorded to an invoking state is arguably much higher than that granted by other provisions in national security exceptions. As such, this provision can permit a state to refuse to provide any information to any entity in any proceeding. This means this provision could effectively nullify other obligations in the already controversial national security exceptions clauses as well as other ordinary provisions of a treaty. Notably, its invocation could even derail dispute settlement proceedings at international courts. A review of the drafting history of this provision indicates that careful thought has not necessarily been given to its introduction and wording. Nor has there been sufficient debate to date to clarify and tame this provision. The robust attention given to national security exceptions these days indicates that the "refusal to furnish information" provision will be invoked more actively, considering its usefulness in blocking any discussion relating to a treaty. Existing and future treaties need to revisit this provision to ensure it does not become a source of conflict or a* carte blanche *for a treaty violation.*

KEYWORDS: National Security Exceptions, Essential Security Interest, Refusal to Furnish Information, Self-Judgment, International Court of Justice, World Trade Organization

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## I. Introduction: Rediscovering the Security Exceptions

In recent times, security exceptions clauses have been receiving fresh attention because they are being actively utilized in trade and investment agreements. This trend started with the US import control measures. The US government initiated import restrictions on foreign steel products in June 2018, based on the security exceptions clauses under Article XXI of the 1994 General Agreement on Tariffs and Trade (GATT). This extraordinary measure immediately led to a World Trade Organization (WTO) dispute. Nonetheless, the US government is considering similar import restrictions on imported cars.

A dispute between Japan and South Korea over Japan's export restrictions that began in July 2019 is also based on the security exceptions clauses of Article XXI of GATT. Japan claims that the restriction was a legitimate export control measure based on its national security concerns, arguing that it is justified under Article XXI of GATT even if there is a problem. As a countermeasure, South Korea sued Japan at the WTO in September 2019. Since then, the two countries have concluded two bilateral consultations.[1] As of March 2020, the WTO dispute settlement procedure has been temporarily suspended as part of an effort to bring about a diplomatic resolution between the two countries.

Meanwhile, Article XXI of GATT is also emerging as the key issue in other major ongoing disputes at the WTO, including the one between Russia and Ukraine set in Russia's annexation of Crimea[2] and another between Qatar and the United Arab Emirates (UAE) triggered by the collective sanctions of the neighboring countries of Qatar against its Iranian policy.[3]

The increasing attention to security exceptions is also found in other

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1) *See* Request for consultations by the Republic of Korea, *Japan—Measures Related to the Exportation of Products and Technology to Korea*, WTO Doc. G/L/1325; G/TFA/D3/1; G/TRIMS/D/45; IP/D/42; S/L/431; WT/DS590/1 (Sept. 16, 2019).

2) Report of the Panel, *Russia—Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (Apr. 5, 2019) [hereinafter Russia-Traffic in Transit].

3) *See Qatar—Certain measures concerning goods from the United Arab Emirates*, WTO Doc. DS576, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds576_e.htm.

treaties. A case over the Ukrainian-Russian conflict concerning Russia's military support to a pro-Russia insurgent group in eastern Ukraine began in January 2017 and is currently pending before the International Court of Justice (ICJ).[4] Russia has cited national security exceptions in this case.[5] Two disputes between the US and Iran, which began in May 2018 after the US broke the Iran nuclear deal,[6] are also currently pending before the ICJ. The security exceptions clauses stipulated by the 1955 Treaty of Amity between the US and Iran lie at the center of these cases.[7] Furthermore, the ICJ dispute between Qatar and the UAE,[8] triggered by heightened diplomatic conflicts due to the hegemonic struggle in the Middle East, which led to the mutual expulsion and refusal to entry into the country of each other's citizens, and the conflict between Saudi Arabia, Bahrain, Egypt, and Qatar[9] all revolve around security exceptions in the relevant treaties as the main issue.[10]

As such, the issue of national security has been receiving renewed attention recently, and by extension, studies on security exceptions clauses are being actively carried out. However, these studies have mainly focused on the part that allows the governments of the contracting parties to "take

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4) *See* Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russia)

5) *See id*. Provisional Measures (Apr. 19, 2017), Preliminary Objections, ¶¶ 36, 93 (Nov. 8, 2019).

6) *See Certain Iranian Assets (Iran v. U.S.), Application instituting Proceedings, (June 14, 2016)*; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U. S.), Application instituting Proceedings (July 16, 2018)*.

7) *See Certain Iranian Assets, Preliminary Objections, Judgment, 2019 I.C.J. Reports 7 (Feb. 13, 2019)*, pp. 46-47, paras. 39-44, 46-47; *See Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights, Provisional Measures, 2018 I.C.J. Reports 623,* p. 635, para. 41 (Oct. 3, 2018).

8) *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Provisional Measures, 2018 I.C.J. Reports 406 (July 23, 2018)*; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Provisional Measures of the United Arab Emirates,* 2019 I.C.J. Reports 361, pp. 369-371, paras. 25-30, 23 (June 14, 2019).

9) *See* Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention of the International Civil Aviation (Bahrain, Egypt, Saudi Arabia and U.A.E. v. Qatar), Joint Application Instituting Proceedings (July 4, 2018).

10) *See id*. Annex 2 at 8, 26-30; Annex 3 at 34-39.

necessary action that is in conflict with the obligations under the agreement," mainly for national security reasons, or the part allowing them to "take any action that is in conflict with the agreement if it is necessary to fulfill the obligations under the UN Charter." Nevertheless, what is also included in the security exceptions clauses is the state's right to "refuse to furnish any information." Under this provision, contracting parties may not provide any information on the grounds of national security interests. Unfortunately, there has been a lack of both domestic and foreign research examining this provision. Although some studies have mentioned the issue from time to time, they have only briefly touched upon it.[11] Also, even if some studies dealt with security exceptions clauses as a whole, it was rather rare to see them focusing on refusal to furnish information.[12] As pointed out above, the focus was mainly on the state's right to take actions that may breach the obligations under the agreement.[13]

Presumably, there appear to be three reasons why the provision for refusal to furnish information has not attracted much attention. First, security exceptions clauses themselves have not received much attention, so the provision for refusal to furnish information contained therein has not gained attention as well. Second, it is thought that the core aspect of the security exceptions clauses is the provision that allows a certain action to be taken even if it is in conflict with other parts of the agreement. Refusal to furnish information is considered something non-essential. Third, since it was more common to omit the refusal to furnish information provision

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11) *See* M. J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 Mich. J. I. L. 558, 582-584 (1991).

12) *See*, *e.g.*, D. Akande & S. Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 Va. J. I. L. 365, 368 n.7 (2003) (The United States-Nicaragua Treaty of Friendship, Commerce and Navigation of 1956 and the United States-Iran Treaty of Amity have provisions similar to Article XXI of GATT, but there is no provision for refusal to furnish information in these treaties). Books introducing the GATT agreement also often omit the provision for refusal to furnish information while explaining the national security exceptions in Article XXI. *See* W. Benedek, *General Agreement on Tariffs and Trade (1947 and 1994)*, *in* International Economic Law: The Max Planck Encyclopedia of Public International Law 307 ¶ 29 (2015); J. Jackson, World Trade and the Law of Gatt 748-752 (1969); J. H. Jackson, W. J. Davey & A. O. Sykes, Jr., Legal Problems of International Economic Relations: Cases, Materials and Text 983-988 (3rd ed. 1995).

13) *See* Akande & Williams, *id.* at 385 ("focus[ing] on paragraph (b), which is the most contentious aspect of Article XXI…").

from security exceptions clauses compared to other provisions, there were relatively fewer opportunities for it to receive attention. The purpose of this study is to explain the significance of the provision for refusal to furnish information in contrast to the general view thus far. To this end, the study will examine the process of introduction of Article XXI of GATT, the first treaty that included the refusal to furnish information clause, and also review other treaties with security exceptions clauses including refusal to furnish information. During this process, WTO and ICJ precedents that dealt with refusal to furnish information will also be revisited.

The frequent invocation of security exceptions clauses nowadays signals that the number of state-to-state disputes over this issue will increase in the future.[14] What can play an important part in such disputes is the provision for refusal to furnish information. Such a possibility has been raised recently. However, the present language in the provision is likely to lead to abuses of the provision and unnecessary disputes. If so, it is necessary to adopt a new perspective in terms of how to introduce the provision for refusal to furnish information when adopting and implementing security exceptions in various treaties in the future.

With this in mind, this study is organized as follows. First, Chapter II will examine national security exceptions as a whole. Chapter III will investigate the legal meaning and the origin of the provision for refusal to furnish information. Chapter IV will review precedents of the application of this provision. Then, based on these results, Chapter V will discuss the reform of security exceptions. The conclusion will be included in Chapter VI.

## II. Security Exceptions in Treaties

This chapter will examine the type of treaties that generally include national security exceptions and how they are defined. It was found that this clause is included only in a small number of treaties, and the provision for refusal to furnish information in particular, the specific topic of this

14) *See* J.H. Jackson, The Jurisprudence of Gatt & the WTO: Insights on Treaty Law and Economic Relations 85 (2000).

study, appears only in some security exceptions clauses.

### *1. "Selectivity" of Security Exceptions*

National security exceptions are not commonly included in treaties. One can find them only in some treaties. For example, among 515 treaties that were signed by South Korea and which entered into force between January 1, 2011, and March 1, 2020 (335 general treaties and 180 treaties effected by a notice), only 125 treaties (124 general treaties and 1 treaty effected by a notice) included security exceptions clauses,[15] accounting for about 24.3% of the total number of treaties. These 125 treaties are broadly divided into the following categories:

- Diplomat and Official Passport Visa Exemption Agreements;
- Agreements Regarding the Working Holiday Program (including the World Friends Korea project);
- Mutual Administrative Assistance in Tax Matters;
- Double Taxation Agreements, Tax Information Exchange Agreements;
- Extradition Treaties, Mutual Legal Assistance Treaties in Criminal Matters (MLATs), International Prisoner Transfer Treaties, Mutual Legal Assistance Treaties in Civil Matters;
- Trade Agreements, Investment Agreements;
- Others: Consular Agreement (China), Agreement on Maritime Transport (Iran), Agreement on the Mutual Recognition and Exchange of Driving Licenses (Lithuania).[16]

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15) *See* the Ministry of Foreign Affairs of the Republic of Korea, Treaty Information, http://www.mofa.go.kr/www/wpge/m_3834/contents.do. Based on the data on the current status of treaty signing by the Ministry of Foreign Affairs, the author confirmed that this is the sum of cases in which the term "security exceptions" is officially adopted in the article itself, and of cases in which the article does not adopt such a name but actually contains security exceptions.

16) Of the 125 treaties, 11 are trade agreements, 7 are investment agreements, and the remaining 107 are treaties in other areas. The only treaty implemented by a notice is "Agreement on the Mutual Recognition and Exchange of Driving Licenses between the Government of the Republic of Korea and the Government of the Republic of Lithuania" (Notification No. 852), which entered into force on January 22, 2015. *See id*.

By category, national security exceptions appear in certain areas. Of course, considering that the above-mentioned information is based on South Korean statistical data for the past 10 years, there will be limits to generalizing the situation across other countries. However, since a treaty is a by-product of working with other parties and the treaties that countries focus on in each era seem to show some similarities, it may indicate the overall state of affairs of the international community.

In fact, the situation is not very different when one looks at two international documents that are frequently mentioned in many international disputes. The Vienna Convention on the Law of Treaties (1969) does not include national security exceptions. Nor are there security exceptions clauses in the 2001 Draft Articles on Responsibilities of State for International Wrongful Acts, which, though not a treaty, are frequently invoked as evidence of customary international law. Article 25 of the Draft Articles stipulates necessity, and the "essential interest" mentioned therein may include matters related to national security, but numerous conditions are attached[17] for invoking the provision, which is different when compared to the national security exceptions clauses in a treaty that allows considerable room to invoke the provision on the grounds of national security.

Other major international agreements also reveal the "selectivity" or "exceptionality" of national security exceptions clauses. For example, neither the Vienna Convention on Diplomatic Relations of 1961,[18] nor the Vienna Convention on Consular Relations of 1963[19] includes security exceptions clauses. An international instrument against terrorism, which is closely related to national security in terms of content, is not very different.

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17) For example, in Art. 25 (Necessity) of the 2001 Draft Articles on Responsibility of States, specific requirements such as "the only way" that "does not seriously impair an essential interest of [another] State" and "has [not] contributed to the situation" are additionally imposed. *See* Int'l Law Comm'n, Rep. on the Work of the Fifty-Third Session, U.N. Doc. A/56/10, at 80 (2001).

18) Vienna Convention on Diplomatic Relations (1961), https://treaties.un.org/doc/Treaties/1964/06/19640624%2002-10%20AM/Ch_III_3p.pdf.

19) Vienna Convention on Consular relations (1963), https://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf.

The 1999 Convention for the Suppression of the Financing of Terrorism,[20] the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague Convention), the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), and the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (Beijing Convention) do not have security exceptions clauses either.

Sometimes, treaties in a specific area tend to include national security exceptions clauses, but in some cases, it is difficult to find a logical motive for their inclusion. For example, a significant number of extradition treaties do not contain clauses for security exceptions,[21] but the majority of MLATs include them[22] even though they are both international instruments on criminal matters. Also, the trend seems to change with time. For example, recently concluded extradition treaties include national security exceptions clauses selectively unlike in the past. South Korea's extradition treaties with Iran (entered into force on March 8, 2018), UAE (entered into force on May 17, 2017), Malaysia (entered into force on April 15, 2015), South Africa (entered into force on June 20, 2014), and Kazakhstan (entered into force on September 10, 2012) are some examples. In any case, the fact that national security exceptions clauses are included in such treaties "selectively" suggests that these clauses hold an important place therein.[23]

In terms of time, security exceptions clauses are generally a phenomenon that appeared after World War II. GATT introduced this

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20) International Convention for the Suppression of the Financing of Terrorism (1999), https://treaties.un.org/doc/db/Terrorism/english-18-11.pdf.

21) Ministry of Foreign Affairs, Republic of Korea, Treaty on Extradition between the Republic of Korea and Canada (1994), http://www.mofa.go.kr/www/wpge/m_3834/contents.do.; Extradition Treaty between the Government of the Republic of Korea and the Government of the United States of America, http://www.mofa.go.kr/www/wpge/m_3834/contents.do.

22) Ministry of Foreign Affairs, Republic of Korea, Art. 3 of Treaty between the Republic of Korea and the United States of America on Mutual Legal Assistance in Criminal Matters (1993), http://www.mofa.go.kr/www/wpge/m_3834/contents.do.; Ministry of Foreign Affairs, Republic of Korea, Art. 3 of Treaty Between the Republic of Korea and Canada on Mutual Assistance in Criminal Matters (1994), http://www.mofa.go.kr/www/wpge/m_3834/contents.do.

23) *See* C. Wilcox, A Charter for World Trade 183 (1949).

clause, as discussed below, in 1947.[24] This is also the case with the US' practice of signing a Treaty of Friendship, Commerce and Navigation (FCN Treaty).[25] Originally, the US FCN treaty had no national security exceptions.[26] However, ever since the FCN treaty with Taiwan included the clause for the first time in 1946 after WW2, this practice has continued.[27]

Moreover, there are some clauses that do not use the title "security exceptions" but serve the same purpose essentially. For example, MLAT between Korea and the United States contains a clause dubbed "Limitation on Assistance," which stipulates that a request for assistance under the treaty can be denied on the grounds of national security.[28] Furthermore, the clause is sometimes manifested in multilateral agreements in the form of reservations by a contracting party.[29] Moreover, there are cases in which a similar concept is introduced separately and security exceptions are stipulated, such as in the 1966 International Covenant on Civil and Political Rights.[30]

Nevertheless, the articles that mention security interests, but simply presents them as a condition and does not treat them as a "general" exception to the agreement, it is difficult to consider them as security exceptions clauses. The clauses on freedom of movement and travel as

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24) Please refer to section "C. Inclusion of Refusal to Furnish Information".

25) The Treaty of Friendship, Commerce and Navigation signed by the United States is available on the U.S. Department of Commerce's "Enforcement and Compliance" website. *See* https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/index.asp.

26) *See id*. The U.S. Treaties of Friendship, Commerce and Navigation signed from the late 1840s to the mid-1940s did not contain any national security exceptions clauses.

27) Since the conclusion of the Friendship, Commerce and Navigation Treaty with Taiwan in 1946, the U.S. has continued to include national security exceptions clauses in such treaties. *See id*.

28) *See* MLAT, S. Kor.-U.S. Art. 3, Nov, 23, 1993, Treaty Doc. No. 104-1 (1995); MLAT, S. Kor.-Can. Art. 3, 1994, [1995] C. T. S. 3.

29) Panama joined the Chicago Convention in 1944 (1945) and made a reservation containing possible violations of the agreement for national security reasons. *See* Convention on International Civil Aviation, Dec. 7, 1944, 15 U.N.T.S. 295, https://www.icao.int/publications/Documents/7300_orig.pdf.

30) *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, 99 U.N.T.S. 171, https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf. Art. 4 of this Covenant introduces the concept of "public emergency," and in this case allows a general deviation from the obligations under Covenant B.

stipulated in the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963 are some examples.[31] Other examples include the Freedom of Association clause in the 1966 International Covenant on Economic, Social and Cultural Rights,[32] the Freedom of Assembly clause in the International Covenant on Civil and Political Rights,[33] and the Right to Innocent Passage clause in the 1982 United Nations Convention on the Law of the Sea.[34]

As such, national security exceptions clauses appear in different forms in each treaty, but they all share overall commonalities in that actions in violation of an agreement can "in general" be taken on the grounds of national security interests, and by extension, actions in violation of the agreement can be taken if they are necessary to fulfill duties and obligations under the Charter of the United Nations. The part that deviates from this common denominator of security exceptions clauses is the provision for "refusal to furnish information," which is the subject of this study. It can be seen that security exceptions clauses are largely divided into two types, one that excludes a provision for refusal to furnish information in terms of structure and content and another that includes it. Both types are examined below.

### *2. Exclusion of Refusal to Furnish Information*

The introduction of security exceptions clauses in a specific treaty does not necessarily mean that it also includes a provision for refusal to furnish information. For example, MLAT between Korea and the US includes (substantial) security exceptions clauses, but does not have the provision for refusal to furnish information.[35] The 1955 US-Iran Consular Friendship

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31) *See* Vienna Convention on Diplomatic Relations, Art. 26, Apr. 18, 1961, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, Art. 34.

32) *See* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf.

33) *See* Art. 21 of this Covenant.

34) *See* United Nations Convention on the Law of the Sea, Art. 25, ¶ 3, Dec. 10, 1982, 1883 U.N.T.S. 397, https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

35) *See* Treaty on Mutual Legal Assistance in Criminal Matters, S. Kor.-U.S., Art. 3, Nov.

Treaty[36] and the 1956 US-ROK FCN Treaty[37] are also the same in that regard. They stipulate the possibility of taking actions that violate the agreements, but do not include a provision for refusal to furnish information.

As discussed previously, 125 out of the 515 treaties that were signed by South Korea and which entered into force between January 1, 2011, and March 1, 2020, contain national security exceptions clauses. Of these 125 cases, only 44 include provisions for refusal to furnish information, accounting for approximately 35.2% of the treaties with security exceptions clauses and only 8.5% of the total number of treaties. Therefore, even when security exceptions clauses are introduced, only about one-third can be said to include a provision for refusal to furnish information. Moreover, provisions for refusal to furnish information are mostly included in double taxation agreements, tax information exchange agreements, trade agreements, and investment agreements.[38] It can be perceived as a model with limited adoption, whether by number or area. Again, there are inherent limitations in deriving general conclusions from South Korea's statistics of the last decade, but an approximate estimation of the state of affairs in the international arena can be made here. In summary, it is relatively rare to see treaties that include security exceptions clauses and even if they do have one, it is even rarer to find those that have provisions for refusal to furnish information.

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23, 1993, T.I.A.S. 97-523; Treaty on Mutual Assistance in Criminal Matters, S. Kor.-Can., Art. 3, Apr. 15, 1994, 1995 Can. T.S. No. 3.

36) *See* Treaty of Amity, Economic Relations, and Consular Rights, Art. 20, Aug. 15, 1955, U.S.-Iran, 284 U.N.T.S. 93, https://treaties.un.org/doc/Publication/UNTS/Volume%20284/v284.pdf.

37) *See* Treaty of Friendship, Commerce and Navigation, S. Kor.-U.S., Art. XXI, Nov. 28, 1956, 8 U.S.T. 2217.

38) Among 515 treaties that were signed by South Korea and which entered into force from January 1, 2011 to March 1, 2020, 44 treaties contain the refusal to furnish information clause; these include 26 double taxation agreements and tax information exchange agreements, 11 trade agreements, and 7 investment agreements. *See supra* note 15 on "Treaty Information," Ministry of Foreign Affairs, Republic of Korea, confirmed by the author of the study based on the data on the current status of treaty signing by the Ministry of Foreign Affairs.

### *3. Inclusion of Refusal to Furnish Information*

As such, refusal to furnish information is not a common aspect of security exceptions clauses. However, some treaties specifically include the provision. Such an "inclusion" can be found in Article XXI of GATT. The provision for refusal to furnish information seems to have its origin in Article XXI of GATT. The author of this study has verified that provisions for refusal to furnish information are found only after the signing of GATT in 1947. It seems that the provision has been gradually incorporated into other treaties after GATT. With this in mind, this study will examine Article XXI of GATT as a representative case for inclusion of the security interest clause. This text of this article is as follows:

> Article XXI
> Security Exceptions
>
> Nothing in this Agreement shall be construed
>
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> > (i) relating to fissionable materials or the materials from which they are derived;
> > (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
> > (iii) taken in time of war or other emergency in international relations; or
>
> (c) to prevent any contracting party from taking any action in

> pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

The above-mentioned provisions present three main situations in which national security exceptions are invoked, and these are stipulated in paragraphs (a), (b), and (c) respectively. Among these, paragraphs (b) and (c) have received heightened attention recently. Of these two, paragraph (b) specifically lists (i) measures related to nuclear materials, (ii) measures to secure military supplies, and (iii) measures adopted in war and state emergencies, which provide justifications for violations of GATT. Whether an argument falls under one of these three categories has been discussed in recent national security disputes. In particular, subparagraphs (ii) and (iii), which have relatively wide applicability compared to subparagraph (i), which has a relatively clear scope as it is about measures "relating to fissionable materials or the materials from which they are derived," are at the center of controversy.[39] Meanwhile, paragraph (c) discusses the fulfillment of obligations under the UN Charter. Specifically, this refers to the implementation of the UN Security Council's resolutions on economic sanctions. Although relatively infrequent, paragraph (c) has been an issue for some time.[40]

Unlike paragraphs (b) and (c), paragraph (a) has rarely been the subject of discussion. Paragraph (a) is related to providing "information." This provision stipulates that if the "disclosure" of certain information threatens "essential security interests" of a contracting party, that party can refuse to provide the information based on its own judgment. Information in this context encompasses "any information." It does not specify whether the information is related to a procedure or content. This provision clearly affirms that a wide range of information will not be available. The General

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39) *See* J. Lee, *Commercializing National Security: National Security Exceptions' Outer Parameter in GATT Article XXI*, 13 Asian J. WTO & Int'l. Health L. & Pol'y 277, 292-303 (2018).

40) *See* Communication from the Commission of the European Communities, Australia and Canada, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, GATT Doc. L/5319/Rev.1 (May 18, 1982), ¶ 1(b). Please see the countries in opposition to this position, GATT Council, *Minutes of Meeting held on May 7, 1982*, GATT Doc. C/M/157 (May 7, 1982), at 4-9.

Agreement on Trade in Services (GATS)[41] and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[42] which form another axis of the WTO agreement system, contain the same language in security exceptions each. Oddly, among the subsidiary treaties, the Agreement on Technical Barriers to Trade includes this provision.[43]

Most trade agreements adopt this form of security exceptions clauses. The agreements that were recently concluded and believed to be proposing new trade norms, such as the new Comprehensive and Progressive Agreement for Trans-Pacific Partnership[44] and the recently signed Agreement between the United States of America, the United Mexican States, and Canada,[45] are some examples. The security exceptions clauses in these recent agreements differ slightly from Article XXI of GATT, but they are essentially the same. All of these include provisions for refusal to furnish information. The same is true for investment treaties. The Bilateral Investment Treaties (BITs) recently concluded by South Korea also contain essentially the same security exceptions clauses, with most including provisions for refusal to furnish information.[46] In fact, of a total of 106 BITs concluded by South Korea since 1972, only nine recently concluded

41) *See* General Agreement on Trade in Services, Art. XIV *bis* 1(a), Apr. 15, 1994, 1869 U.N.T.S. 183.

42) *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 73(a), Apr. 15, 1994, 1869 U.N.T.S. 299.

43) *See* Agreement on Technical Barriers to Trade, Art. 10, Apr. 15, 1994, 1868 U.N.T.S. 120.

44) *See* Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Art. 29.2., Mar. 8, 2018, https://www.iilj.org/wp-content/uploads/2018/03/CPTPP-consolidated.pdf.

45) *See* Agreement between the United States of America, the United Mexican States, and Canada, Art. 32.2., Nov. 30, 2018, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/32_Exceptions_and_General_Provisions.pdf.

46) The BITs and the Investment Chapters included in the Free Trade Agreements (FTAs) combine to form International Investment Agreements (IIAs) in a broad sense. Among them, the FTA Investment Chapter does not contain security exceptions. This is because there are separate national security exceptions that apply to the entire FTA, and these clauses also apply to the investment chapter. While the FTA's "General Exceptions" are applied "selectively" (for example, general exceptions do not apply to investment chapters), national security exceptions apply without exception to all chapters and territories of the agreement. As a true "general" exception, it can be said to show the importance and implications of the national security exceptions.

agreements have security exceptions clauses. In other words, BITs originally did not have security exceptions clauses, but that trend has changed in recent times. This situation is the same in other countries. Seven of these nine BITs contain provisions for refusal to furnish information. Only the BIT signed with Japan in 2002 and the deal with China and Japan signed in 2012 (a three-party investment agreement) do not include provisions for refusal to furnish information.

Meanwhile, similar provisions for refusal to furnish information can be found in other treaties. The treaty establishing the European Union (EU) is a prime example.[47] This treaty has security exceptions including refusal to furnish information which is similar to Article XXI of GATT. The 1996 Comprehensive Nuclear Test Ban Treaty also contains security exceptions clauses that include a provision for refusal to furnish information.[48] The 1980 Convention on the Physical Protection of Nuclear Material[49] and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism[50] also adopted security exceptions clauses that included provisions for refusal to furnish information.

Sometimes, there are no national security exceptions, but a provision for refusal to furnish information is included, as seen in tax information exchange agreements. Since the primary purpose of this type of treaty is to exchange information, it can be understood that general exceptions to treaty obligations are defined with the focus only on refusal to furnish information. However, the justification is unclear in some cases. The 1982 United Nations Convention on the Law of the Sea is such an example. The convention has a provision for refusal to furnish information without the general security exceptions clauses.[51]

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47) *See* Consolidated version of the Treaty on the Functioning of the European Union, Art. 346, Oct. 26, 2012, 2012 O.J. (C326) 194.

48) *See* Comprehensive Nuclear Test Ban Treaty, Art. 57, Sept. 10, 1996, https://www.ctbto.org/fileadmin/user_upload/legal/CTBT_English_withCover.pdf.

49) Convention on the Physical Protection of Nuclear Material, Art. 6, Mar. 3, 1980, 1456 U.N.T.S. 101.

50) International Convention for the Suppression of Acts of Nuclear Terrorism, Art. 7, Apr. 13, 2005, 2245 U.N.T.S. 89.

51) United Nations Convention on the Law of the Sea, Art. 302, Dec. 10, 1982, 1833 U.N.T.S. 397.

One thing to keep in mind is that provisions for refusal to furnish information are sometimes not in the context of security exceptions. Rather, they contain practical details of the information furnishing procedure and the mediation of disputes between the parties involved in the agreement, such as Article 72 of the Rome Statute of the International Criminal Court.[52] The provision is important but in a different context than security exceptions clauses.

## III. Review of Provisions for Refusal to Furnish Information

Based on the review in Chapter II, this chapter examines refusal to furnish information in more detail. The provision will be analyzed with a particular focus on Article XXI of GATT, which provided the basis for its introduction. As mentioned earlier, there are few studies on the provision for refusal to furnish information. Also, no international court interpretation of this provision has been made so far. There were only intermittent claims from some parties to certain disputes. This means that no reliable legal standards have been established to interpret and apply the provision.

### *1. Analyzing the Text of the Current Provision*

The original text of Article XXI (a) of GATT, which provides for refusal to furnish information as a part of Security Exceptions, reads as follows:

> (*a*) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests;

Unlike paragraphs (b) and (c) in the security exceptions clauses, paragraph (a) does not contain any special requirements, which can give

52) Rome Statute of the International Criminal Court, Art. 72, Jul. 17, 1998, 2187 U.N.T.S 3.

the governments of the contracting parties a considerable amount of discretion. In the words of John Jackson, this is an "all-embracing" passage.[53] It distinguishes itself from paragraphs (b) and (c), which impose a variety of prerequisites[54] and are currently facing international disputes over whether or not their conditions have been met. Moreover, paragraphs (b) and (c) differ in that they require the "action" of the government of a contracting party, whereas paragraph (a) presupposes "inaction."[55] The former means that the government actively takes action against the agreement, while the latter means it need not take any action. In short, the latter means that a party may not provide any information to anyone if doing so is considered detrimental to its national security. It is sometimes also interpreted in such a way that invoking paragraph (a) itself meets all conditions and does not require any separate prerequisites. The meaning of each phrase contained in this provision is examined in detail below.

*1) All Forms of Information*

The key wording of this clause shows its broad applicability as it is framed in such a way that it does not require the provision of "any information." The broad nature of "information" can be confirmed in its dictionary meaning. "Information" means (i) knowledge obtained from investigation, study, or instruction, (ii) intelligence and news, and (iii) facts and data.[56] In addition, information includes signals and letters that represent the attributes or data that exist in order and combination, such as the nucleic acid sequence of DNA or the binary number system of

53) Jackson, *supra* note 12, at 748.

54) With regard to the difference between ¶ (b) and (c) of Art. XXI, *see* Hahn, *supra* note 11, at 579.

55) *See id*.

56) *Information*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/information (last visited Feb. 16, 2021). Oxford English Dictionary defines the term as follows: 1. The shaping of the mind or character; communication of instructive knowledge; education, training, advice, 2. Knowledge communicated concerning some particular fact, subject, or event that of which one is apprised or told; intelligence, news, 3. The action or fact of imparting the knowledge of a fact or occurrence; communication of news; notification and others. *See Information*, Oxford English Dictionary, https://www.oed.com/view/Entry/95568?redirectedFrom=information#eid (last visited Feb. 16, 2021).

computers.[57] In summary, any medium and means intended to convey facts or knowledge expressed in various ways such as letters, pictures, figures, numbers, or symbols correspond to "information." In fact, it covers a wide range of areas. Therefore, the phrase "any information" as defined by this clause can be understood to include all types of information.

Furthermore, this provision stipulates only "information" with no restrictions on its owner. It does not matter whether the information is privately owned or owned by the government. It also does not ask how the information is produced, organized, or accumulated. All of them are included within the scope of paragraph (a) if they are included in the field of "information" as per the dictionary definition discussed above. There is also an interpretation that the "information" mentioned herein is mainly related to the fulfillment of obligations under GATT.[58] However, considering the basic purpose and the normal significance of the security exceptions clauses, it is questionable whether this interpretation is valid. As Article XXI states "nothing in this Agreement requires," it makes more sense to see this refusal provision as being applicable to all forms of information, regardless of trade partners or areas. Even if one follows the interpretation of "product trade relevance," there will be no significant difference in reality because the areas covered by GATT are vast and related to all commodity products. Therefore, even if the scope is limited to "information related to goods trade," it still covers a broad range of information.

The implications of the widespread application of Article XXI (a), implemented through "information" as a medium, are evident in two respects. First, this provision applies to the operation of the other two provisions, (b) and (c). In the structure of the present clause, paragraph (a) also applies in the case of provision of information with respect to national security-related measures taken under paragraphs (b) and (c).[59] This means

57) *See id.*

58) *See* Hahn, *supra* note 11, at 583, 584.

59) Decision Concerning Article XXI of the General Agreement of 30 November 1982, ¶ 1, L/5426 (Dec. 2, 1982), GATT BISD (29th Supp.), at 23, 24 (1982) ("Subject to the exception in Article XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI").

that even after taking actions under paragraphs (b) and (c), the contracting party may, at its own discretion, not provide the information to other countries. Of course, this refusal could be invoked only if other requirements set out in paragraph (a) are met, for example, where disclosure of the information will compromise the security interests of the state. However, even these requirements give the Parties wide discretion, as discussed below. Furthermore, paragraph (a) has a particularly important implication, especially in terms of refusal to furnish information during dispute resolution procedures.[60] This is because even if a dispute arises, it can practically disable the whole proceedings of an international court with relevant jurisdiction.

*2) Furnishing of Information*

What are the specific forms of action that contracting parties can refuse to take under this provision? Paragraph (a) provides for the possibility of refusing to "furnish" information. "Furnish" means "to prepare for work or active service, or to equip a person," or it means "to provide (an instrument, organ, etc.) with (some appendage subsidiary to its function)."[61] In other words, furnishing of information means providing or delivering information to someone who asks for information to help them carry out their work. Consequently, in accordance with this provision, it can mean that one can refuse to take such an action. It does not matter who asks for information. It may be the government of another contracting party, an international organization, an enterprise, or an individual. The point is, regardless of the subject, the requested information may not be provided. Therefore, it does not matter for what legitimate purpose the information is used and how safely it is protected because the provision of information, by itself, is a subject of rejection with no separate condition

60) *See* Hahn, *supra* note 11, at 616; Letter from United States Trade Representative, to Mr. Georges Abi-Saab, Chairperson of Panel in Russia—Measures Concerning Traffic in Transit (DS512) (Nov. 7, 2017), ¶ 4.

61) *Furnish*, Oxford English Dictionary, https://www.oed.com/view/Entry/75677?rskey=3EYjF1&result=2&isAdvanced=false#eid (last visited Feb. 16, 2021). Merriam-Webster Dictionary defines the term as follows: To provide with what is needed; Supply, give. *See Furnish*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/furnish (last visited Feb. 16, 2021).

attached for furnishing information.

*3) Information Disclosure Contrary to Essential Security Interests*

What kind of circumstances must exist in order to refuse the furnishing of information? It is possible when "disclosing" such information is "contrary to" the country's "essential security interests," which is discussed below.

(1) Disclosure of Information

First, it is necessary to define what "disclosure" of information means. Disclosure of information means "to make it known or public,"[62] or "to expose to view" by others.[63] In short, it includes both individual transfer and public dissemination of knowledge. It is somewhat different from the Korean connotation of "open to the public," which mainly means public dissemination. Therefore, disclosure of information includes both giving information to government officials in other countries and making a declaration to the public. The same goes for notifying companies or corporate representatives, and there are no special rules regarding the method of disclosure. Regardless of how it is done (whether the methods used are traditional or digital), the information is considered "public" if it becomes known to someone who did not have knowledge of it previously or if the general public has access to it.

(2) Contrary to Essential Security Interests

Second, the disclosure of such information must be contrary to the essential security interests of the concerned country. Each of the "essential security interests" and "contrary to" is examined below.

(a) Essential Security Interests

Regarding what essential security interests are, a WTO panel in April

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62) *Disclose/Disclosure*, Merriam-Webster dictionary, https://www.merriam-webster.com/dictionary/disclose (last visited Feb. 16, 2021); Oxford English Dictionary defines the term as follows: The action or fact of disclosing or revealing new or secret information; the action of making something openly known. *See Disclosure*, Oxford English Dictionary, https://www.oed.com/view/Entry/53779?redirectedFrom=disclosure#eid (last visited Feb. 16, 2021).

63) *See id.*

2019 defined them as "those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally."[64] This was understood as a narrower concept than the simple "security interests."[65] This decision was the first to address Article XXI of GATT in the background of a dispute between Russia and Ukraine, which was triggered by Russia's restrictions on the transit of Ukrainian goods within the country. Paragraph (b) of Article XXI was the main subject of this dispute, and the panel decision was finalized as neither party appealed. The phrase "essential security interests" in paragraph (b), which was closely and thoroughly scrutinized throughout this dispute, also appears in paragraph (a). Therefore, the interpretation of this phrase through paragraph (b) may also apply to the interpretation of paragraph (a) in respect of refusal to furnish information. In any case, the ruling suggests that essential security interests can span several areas. This is because the protection of the territory and the people, and the maintenance of law and order can extend to many areas. If so, it should be borne in mind that evaluating "essential security interests" in paragraph (a) may cover several areas too. Any interests related to the performance of the essential functions of the state, such as the protection of the territory and the people and the maintenance of law and order, can be considered essential security interests. As a result, refusal to furnish information may be invoked in connection with the performance of these various national functions.

Paragraphs (a) and (b) are framed quite differently but they stipulate the same "essential security interests." Paragraph (b) lists three applicable situations, imposes several specific conditions, and links them to the

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64) The original text of the dispute panel decision is as follows:

> 7.130. "Essential security interests", which is evidently a narrower concept than "security interests", may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.

Panel Report, *Russia-Traffic in Transit*, *supra* note 2, ¶ 7.130.

65) *See id*.

"essential security interests" mentioned in the chapeau or the introductory paragraph. Thus, even though the essential security benefits are interpreted widely, to satisfy the conditions of each of the three situations connected to them, the scope has to be defined in detail in reality. On the other hand, paragraph (a) simply states "essential security interests" without imposing any conditions. Therefore, the concept of essential security interests, which can be applied in many areas, is bound to be emphasized in paragraph (a).

On the other hand, the part that requires special attention in this regard is the good faith of the country taking action. The panel hearing the Ukrainian-Russian dispute emphasized "good faith" of the country taking action as one of the encompassing principles of Article XXI.[66] More specifically, the issue is directly related to whether or not a state that is seeking the security exceptions has "sufficiently demonstrated the veracity" of its actions in the end.[67] In other words, the security exceptions clauses should find a balance between the conflicting values of security interest protection and free trade.[68] The same is true of the interpretation and application of essential security interests. Although essential security interests cover a wide range of areas, it is not acceptable to expand and invoke them without proper grounds. Hence, in the process of evaluating essential security interests in the interpretation and application of paragraph (a), the country's "good faith" is an important criterion, and it is important to verify the nature and hidden rationale of the action in question. The panel saw that in the case of Russia's trade restrictions, good faith was established given that there was indeed an armed engagement between the two countries.

Although the existence of good faith is an important guideline, it is questionable whether it can serve as a legal basis for objectively confirming the good faith of the country invoking the clause in actual disputes related to paragraph (a). Probably, refusal to furnish information for obvious

66) *See id*. ¶ 7.132-7.134.

67) *See id*. ¶ 7.134.

68) Emphasis on this part has been made since the beginning. GATT, *Summary Record of the Twenty-Second Meeting*, GATT/CP.3/SR.22, Corr. 1 (Jun. 8, 1949) ("every country must be the judge in the last resort on questions relating to its own security. On the other hand, every contracting party should be cautious not to take any step which might have the effect of undermining the General Agreement").

reasons other than to protect essential security interests can only be regarded as invoking paragraph (a) without good faith. Such cases are rare, and it would be even more difficult to prove them. In particular, since this provision is entirely about refusing to furnish information, the absence or lack of data would make it more difficult to prove it.

(b) "Contrary to" Component

The disclosure of information should be "contrary to" essential security interests. "Contrary to" means "a fact or condition incompatible with another." [69] If the injury or damage presupposes the occurrence of specific harm, then "contrary to" simply refers to inconsistent or conflicting situations, which can be understood as a broader concept. Furthermore, there is no "necessary" requirement in paragraph (a) for refusal to furnish information unlike in paragraph (b). Instead, the wording "contrary to" is used. While the WTO and ICJ have placed high standards in interpreting "necessary" requirements,[70] there have not been many cases discussing the criteria for the "contrary to" component. Considering the dictionary meaning of "contrary to," this is another reason why the discretionary power of the parties is relatively more guaranteed under paragraph (a).

In this context, the situations "contrary to essential security interests" stipulated in paragraph (a) are quite comprehensive. This is because the two components, "essential security interests" and "contrary to," can be interpreted broadly. The study previously noted that "disclosure" means the dissemination of information through various methods. It also confirmed that the scope of "information," which was the starting point of the discussion, is also extremely wide. Thus, one can reason that the situation in which "the disclosure of information is contrary to essential

69) *Contrary*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/contrary (last visited Feb. 16, 2021). Oxford English Dictionary defines the term as follows: Opposed in nature or tendency; diametrically different, extremely unlike, Opposed to one's well-being or interest; calculated to thwart to harm; prejudicial, unfavourable, untoward. *See Contrary*, Oxford English Dictionary, https://www.oed.com/view/Entry/40465?rskey=AziFm3&result=1&isAdvanced=false#eid (last visited Feb. 16, 2021).

70) *Military and Paramilitary Activities in and against Nicaragua (Nicaragua. v. U.S.*), *Merits, Judgment, 1986 I.C.J. Reports 14 (June 27)*, p. 78, paras. 141-142 [hereinafter *Military and Paramilitary Activities*].

security interests" also has a comprehensive scope of application, and would be able to deduce the legal implications of Article XXI (a) of GATT.

*4) Self-Judgment*

The last of part of this section is the problem of "self-judgment." Paragraph (a) states that a contracting party may refuse to furnish information if "it considers" the disclosure to be contrary to its essential security interests, which is the so-called "self-judgment" provision. In the recent dispute between Ukraine and Russia, the WTO panel addressed this issue as well.[71] As mentioned above, although this dispute mainly revolved around paragraph (b) of Article XXI, paragraph (a) contains the same self-judgment language. Therefore, the panel's decision provides important guidelines for the interpretation of paragraph (a). In this dispute, Russia took the position that the panel could not hear the case since the self-judgment provision deprived the panel of the right to hear it, but the panel dismissed that argument. The panel affirmed that the WTO panel and the Appellate Body decide whether or not the requirements related to Article XXI are met, despite the self-judgment provisions.[72] However, it acknowledged that such judgments of the concerned country should be fully respected.[73] In short, there is a wide room for discretionary power for each state in terms of national security issues, but that does not provide a basis for self-judgment beyond the written provisions in the agreement. It is true that the provision of "self-judgment" has considerable weight,[74] but this does not necessarily mean that the country has the monopoly of judgment. Rather it means a third party (particularly the panel) can proceed with an objective evaluation as to whether the various conditions of this provision have been met.[75]

Even in the interpretation of Article XXI (a), the self-judgment provision does not preclude panel review or other objective evaluation. It is still possible and necessary to determine whether the various requirements

71) *See Russia-Traffic in Transit*, *supra* note 2, ¶ 7.57.

72) *Id.* ¶ 7.102-7.103.

73) *See id.* ¶ 7.79, 7.102, 7.131.

74) *See Military and Paramilitary Activities*, *supra* note 70, at 141-42.

75) *See Russia-Traffic in Transit*, *supra* note 2, ¶ 7.77-7.82.

related to refusal to furnish information as discussed above have been met. However, unless it falls under an overt abuse of the clause or disguised arguments, if a contracting party determines that the furnishing of information is contrary to its essential security interests, then its judgment should be respected as it is. The panel decision discussed above supports this interpretation. Paragraph (a) is somewhat cursory compared to paragraphs (b) and (c), which contain various objective indicators. Thus, even though they contain the same self-judgment provisions, the extent of discretion accorded to the contracting party invoking the clause is broader under paragraph (a).

### 2. *Review of Negotiation Records*

So, how was the provision for refusal to furnish information in Article XXI of GATT introduced? The exact background of its introduction is not clear. The security exceptions clauses were already included in the US proposal for the establishment of the International Trade Organization (ITO) as an international organization dealing with international trade after World War II. In September 1946, the draft charter for establishing the ITO, proposed by the US Department of State, contained an exceptions clause related to national security (excluding refusal to provide information). However, national security exceptions were not specified in a separate clause, but were rather written under the General Exceptions clause.[76] The general exceptions provided for in Article 32 of this draft included the contents of today's GATT Article XX, which permits measures to protect public morals, health, and natural resources as exceptions, as well as Article XXI, which specifies measures related to fissionable materials, measures to secure military supplies such as weapons, measures to protect essential security interests in the event of a war and emergency, and measures to fulfill obligations under the UN Charter.[77] In short, separate clauses on security exceptions were not established. Rather, it was merely listed as one

76) United States Department of State, Suggested Charter for an International Trade Organization of the United Nations 24 (Sept. 1946) (Article 32: General Exceptions to Chapter IV) [hereinafter *U.S. Proposal of 1946*].

77) These were included in ¶ c, d, e, and k of this article, respectively. *See id.*

of the 12 general exceptions.[78] It should be noted that the four items on national security contained herein are almost identical to those in today's Article XXI (b) and (c). The only difference is the absence of the present paragraph (a) dealing with refusal to furnish information.

This part is also confirmed in another exceptions clause in the US proposal at the time. In September 1946, the US proposal had in mind the establishment of the ITO and the conclusion of a separate agreement on major trade goods, with exceptions that would apply if such an agreement were signed,[79] namely Article 49 of the draft ITO charter proposed by the US. Paragraph 1 of this article stipulates public morals, health, and protection of natural resources, and Paragraph 2 in succession stipulates measures related to nuclear fissionable materials, measures to secure military supplies such as weapons, measures to protect essential interests in a war or emergency, and measures to carry out duties under the UN Charter.[80] The former corresponds to the general exceptions in GATT while the latter to the security exceptions. Again, it was similar to the previous Article 32 in terms of the stipulated exceptions. However, considering that the general exceptions and the national security exceptions were divided into paragraphs 1 and 2 separately, it seems that there was an "initial" idea that the two exceptions were different in nature. Even in this case, refusal to furnish information was not included in the clause.[81] So, it is possible to deduce that the provision for refusal to furnish information was not proposed in the first place when security exceptions were posited.

The ITO charter negotiations continued over the next year based on the US proposal. The Drafting Committee, which met in New York in February 1947, prepared a new draft document[82] called the "New York Draft."[83]

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78) *Id.*

79) *Id.* at 34 (Art. 49: Exceptions to Provisions Relating to Intergovernmental Commodity Agreements).

80) *Id.*

81) *See id.* ¶ 2.

82) Precisely speaking, it is a subcommittee ("Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment") under the Preparatory Committee of the United Nations Conference on Trade and Employment held by the United Nations Economic and Social Council.

83) United Nations Economic and Social Council, *Report of the Drafting Committee of the*

This document drafted not only the ITO charter but also GATT. Article 37 of this document provided for "General Exceptions to Chapter V,"[84] which very closely followed the US proposal of September 1946 (Article 32).[85] Twelve exceptions were reduced to 11 though.[86] Four security exceptions were included in the 11 general exceptions. Once more, refusal to furnish information does not appear herein. Moreover, the GATT text included in this document also stipulated the same content (Article 49) in Article XX (by replacing Chapter V with the Agreement), [87] thus excluding refusal to furnish information again.

On July 4, 1947, the US proposed a new amendment to the ITO Charter.[88] Article 94 of this amendment, for the first time, provided a separate clause for security exceptions.[89] Also, the four existing security exceptions (actions related to nuclear fissionable materials, actions to secure military supplies such as weapons, actions to protect essential security interests in a war or an emergency, and actions to fulfill obligations under the UN Charter) were defined in separate units, and, for the first time, refusal to furnish information was introduced in the chapeau, which can be seen as follows:

Article 94
General Exceptions

Nothing in this Charter shall be construed to require any

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*Preparatory Committee of the United Nations Conference on Trade and Employment*, E/PC/T/34 at 31-32 (Mar. 5, 1947) [hereinafter *New York Draft*].

84) *See id.*

85) *See U.S. Proposal of 1946, supra* note 76, p. 24 (Art. 32: General Exceptions to Chapter IV).

86) The last item in the original US proposal (¶ [l]) states that action taken by Member States in response to decisions or recommendations of the ITO is justified. This entry was removed from the New York draft. Cf. *U.S. Proposal of 1946*, *supra* note 76, Art. 32; *New York Draft*, *supra* note 83, Art. 37.

87) *See New York Draft*, *supra* note 83, at 77.

88) *See Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, Draft Charter, E/PC/T/W/236 (Jul. 4, 1947).

89) *Id*. at 13. Only the national security exceptions were separated and stipulated as separate provisions, but the title was "General Exceptions." It seems to have continued to be used to reflect the meaning of an exception that still applies as "general" throughout the agreement.

> Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or to prevent any Member from taking any action which it may consider to be necessary to such interests:
>
> a) Relating to fissionable materials or their source materials;
> b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
> c) In time of war or other emergency in international relations, relating to the protection of its essential security interests;
> d) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security[90)]

This clause is quite similar to the present clause. The only difference is that unlike the current GATT Article XXI, refusal to furnish information was written in the chapeau in conjunction with the four exceptions at the same time. This does not mean refusal to furnish information was permitted in any case. Rather, it was permitted only if the requested information was related to the four exceptions, i.e., related to fusion material ["relating to"- paragraph (a)], weapons and ammunitions ["relating to"- paragraph (b)], taken in times of wars and other emergencies ["in time of"- paragraph (c)), and to fulfill the obligations under the UN ["undertaken in pursuance of"- paragraph (d)]. Except for this difference, the clause is very similar to the current clause. It is also similar in that the clause can be invoked based on self-judgment. The wording, "which it considers contrary to its essential security interests," is the same as in Article XXI. However, it stated that a state will not be prevented from actively taking action that "it may consider necessary." The word "may" is the part where it differs from the current clause. It is believed that the current phrase, where "may" has been omitted more clearly indicates the state's authority to make judgments about its own circumstances.

The subsequent amendment to GATT (dated July 24, 1947) separated

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90) *Id.*

the general exceptions into two provisions, providing for today's general exceptions in paragraph 1 and the national security exceptions in paragraph 2.[91] The structure that provided the two types of exceptions was maintained as it was in the US proposal of September 1946. The contents included were also very similar. Therefore, even at this time, there was no provision for refusal to furnish information.[92] Presumably, the US' draft proposal for the ITO charter on July 4 had not yet been reflected in GATT at this point.

Adopted on August 30, 1947, the GATT's "Geneva Draft" contained language in Article XIX that is almost identical to that in the current Article XXI.[93] The provision for refusal to furnish information was also included, which is presumed to reflect the US proposal for the ITO Charter. Nevertheless, unlike the US proposal, the provision for refusal to furnish information was not written in the chapeau but was separated into paragraph (a). Furthermore, paragraph (b) set out actions to protect essential security interests in three subparagraphs, while paragraph (c) relates to measures to fulfill the obligations under the UN Charter. In other words, the refusal to furnish information clause was independently incorporated in paragraph (a), which is the same as the current structure of Article XXI.[94] One peculiarity though was that Article XIX of the Geneva Draft listed both national security exceptions and (today's) general exceptions under the General Exceptions clause. However, this time, the order was reversed with Paragraph I stipulating security exceptions and Paragraph II stipulating general exceptions.

Subsequently, on September 10, 1947, the amendment to the ITO Charter accepted the US proposal of July 4 and adopted a method of separately inserting a clause for security exceptions for the first time.[95]

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91) *See* United Nations Economic and Social Council, *Report of the Tariff Negotiations Working Party: General Agreement on Tariffs and Trade*, E/PC/T/135, at 54 (Article XIX; General Exceptions) (Jul. 24, 1947).

92) *See id.*

93) *See* United Nations Economic and Social Council, *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, E/PC/T/189, at 47 (Aug. 30, 1947) [hereinafter *Geneva Draft*].

94) *See id.*

95) *See* United Nations Economic and Social Council, *Report of the Second Session of the*

National security exceptions were included in Article 94 under the head "General Exceptions," and today's general exceptions were introduced in Article 43 under the head "General Exceptions to Chapter IV." Chapter IV prescribed Commercial Policy, which means trade policy in general.

Immediately afterward, on September 13, 1947, the amendment to GATT separately stipulated Article XX titled "General Exceptions" and Article XXI titled "Security Exceptions," completing the current structure of GATT.[96] The failure to launch the ITO left only GATT 1947 in place.

Following this trail, it can be seen that refusal to furnish information was not something that was discussed from the start. Indeed, it was introduced as a US proposal in the middle of negotiations, and its contents remain unchanged until now. It is difficult to ascertain the background in which the US proposed this phrase. Considering that the East-West Cold War era had already begun at that time,[97] it presumably reflects the atmosphere of the international community since the US may have felt reluctant to provide information related to international trade to the other party (Eastern Bloc) through the new trade order. The US was strengthening export restrictions against Eastern Bloc countries around this time, which resulted in some conflicts between them. It is thought that the introduction of the refusal to furnish information clause may have reflected the concerns of the US government at the time.

In summary, at the time of the ITO and GATT negotiations, security exceptions were one of the main subjects of discussion from the beginning, which mainly focused on fissionable materials, securing military supplies, wartime measures, and fulfillment of UN obligations. On the other hand,

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*Preparatory Committee of the United Nations Conference on Trade and Employment*, E/PC/T/186 (Sept. 10, 1947).

96) *See* United Nations Economic and Social Council, *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Tariff Agreement Committee/ Secretariat, Redraft of the Final Act, General Agreement on Tariffs and Trade and Protocol in the Light of Discussions Which Have Taken Place in the Committee*, E/PC/T/196 (Sept. 13, 1947).

97) British Prime Minister Winston Churchill said at Westminster College in Fulton, Missouri on March 5, 1946, "an iron curtain has descended across the Continent)" in his speech. International Churchill Society, The Sinews of Peace ("Iron Curtain Speech"), https://winstonchurchill.org/resources/speeches/1946-1963-elder-statesman/the-sinews-of-peace/. Churchill's speech is understood as a declaration that marked the beginning of the East-West Cold War.

refusal to furnish information was not a key subject and was added separately only at the end of the negotiations.

## IV. National Security and Refusal to Furnish Information

In the previous chapter, the legal meaning of the provision for refusal to furnish information and the negotiation proceedings were examined. Based on these findings, this chapter reviews how GATT/WTO and ICJ have handled this issue thus far.

### *1. GATT/WTO Precedents*

In the beginning of GATT's inception, the US invoked the security exceptions clauses in response to Czechoslovakia's claim that the US export controls violated Article I and Article XIII of GATT in 1949.[98] In particular, the US rejected Czechoslovakia's request for specific information on its export control measures, invoking the provision for refusal to furnish information under Article XXI (a). The US claimed that it is "contrary to its security interest—and to the security interest of other friendly countries—to reveal the name of commodities that it considers to be most strategic,"[99] invoking Article XXI (a), which had been newly introduced at the time.

Meanwhile, in 1961, Ghana took action to restrict trade with Portugal, which was a new member of GATT at the time, citing Article XXI of GATT as the basis for its actions. In this process, Ghana cited paragraph (a) of Article XXI. However, instead of invoking the provision as the legal basis for its action, Ghana merely focused on the phrase "contracting party was the sole Judge" with respect to essential security interests.[100] Since paragraphs (a) and (b) of Article XXI both contain the phrase "it considers,"

98) *See* Contracting Parties to the GATT, Third Session; GATT/CP.3/33 (May 30, 1949) (Statement by the Head of the Czechoslovak Delegation); GATT/CP.3/38 (Jun. 2, 1949) (Reply by the Vice Chairman of the U.S. Delegation); GATT/CP.3/39 (Jun. 8, 1949) (Reply of the Head of the Czechoslovak Delegation).

99) *See* GATT/CP.3/38, *id.*, p. 9.

100) *See* SR.19/12, *supra* note 99, p. 196.

the country emphasized its right to self-judge a situation via these two provisions. Ghana insisted that Portugal's policy in Africa (Angolan policy) was an emergency situation in international relations, which fell under Article XXI (b) (iii).[101)]

Moreover, although paragraph (a) was not invoked specifically, the positions of the EEC, Australia, and Canada, which initiated embargos against Argentina during the Falkland War, also indirectly refer to the provision for refusal to furnish information. According to them, their action under Article XXI did not require any justification, approval, or notification.[102)] The argument that invoking Article XXI was sufficient and no notification, explanation, etc., were required is closely related to not only paragraph (b) but also paragraph (a), the provision on furnishing of information.

As such, there are few cases in which Article XXI (a) has been invoked. There has been a recent movement toward invoking this provision because of the recognition of its new value, which is its potential to completely block any request for information provision in an international atmosphere where the interest in national security exceptions is growing. This suggests that reviews and legal developments are needed.

### *2. International Court of Justice Precedents*

Although disputes related to national security exceptions are sometimes dealt with in ICJ proceedings, they mainly addressed items other than refusal to furnish information. This is because, as previously discussed, there have not been many treaties including refusal to provide information. For example, the issue of the US-Iran military conflict has been dealt with in another ICJ dispute[103)] with national security exceptions. Intermittent military conflicts between the two countries from 1987 to 1988 led to the ICJ dispute. The 1955 US-Iran Treaty of Amity, Economic Relations and Consular Rights, which formed the legal basis for this dispute, provided

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101) *See id.*

102) *See* GATT Council, *Minutes of meeting held in the Centre William Rappard on 7 May 1982*, GATT Doc. C/M/157 (May 7, 1982), at 10-11.

103) *See Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Reports 161 (Nov. 6).*

security exceptions in Article XX but did not include any provision for refusal to furnish information.[104] In the proceedings, the ICJ affirmed that the US military action against Iranian oil production facilities at the time did not meet the security exceptions of the treaty (not applicable to the exercise of the right to self-defense).[105] Similarly, in the ICJ dispute between the US and Nicaragua, Article XXI, the security exceptions clauses included in the 1956 Treaty of Friendship, Commerce, and Navigation between the two countries,[106] became an issue.[107] The clause also did not include any content on refusal to furnish information. In this dispute, the ICJ, noting the word "necessary" in the clause, determined that the acts of mine-laying and port attacks on Nicaragua were not necessary to protect essential US security interests.[108]

The only ICJ ruling on the issue of refusal to furnish information came in the dispute between France and her former colony Djibouti.[109] In 1995, when Judge Bernard Borrel, a French national who was invited as technical advisor to the Djibouti judiciary, was murdered, Djibouti and France each

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104) This provision stipulates as follows:

> The present Treaty shall not preclude the application of measures: (d) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

105) *See Military and Paramilitary Activities*, *supra* note 70, para. 125, p. 218.

106) *See* Treaty of Friendship, Commerce and Navigation, U.S.-Nicaragua, Jan. 21, 1956, 367 U.N.T.S. 3 (*entered into force* May 24,1958).

107) The Treaty of Friendship, Commerce and Navigation, concluded between the two countries in 1956, stipulated in Article XXI, Paragraph 1, as follows:

> The present Treaty shall not preclude the application of measures : (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment:
>
> (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

108) *See Military and Paramilitary Activities*, *Judgment, 1986 I.C.J. Reports 14*, p. 141 para. 282.

109) *See Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, 2008 I.C.J. Reports 177 (June 4).*

proceeded with an investigation. Djibouti requested information from France in order to secure their investigative records in accordance with the MLAT that the two countries signed in 1986. However, France (the chief investigative judge) refused to provide that data. The French judge invoked Article 2 of the said treaty that stipulates that "the requested State may refuse a request for mutual assistance if it considers that execution of the request is likely to prejudice [the] sovereignty, … security, … public order or other…essential interests [of the party]." [110] Given that crime evidence and witness testimony are the subjects of MLATs, they also fall under the category of "information," therefore a request under the treaty means a request for information. Refusal of such a request means refusal to provide such information, which is also consistent with Article XXI (a) of GATT. The dispute between the two countries continued, and on January 9, 2006, Djibouti brought France to the ICJ. Djibouti argued that France's refusal to provide information violated Article 1 of the said treaty, which governs the obligations of the contracting parties to provide data. In response, the ICJ decided that France's refusal to provide data should ideally fall under Article 2 of the treaty, which provides security exceptions,[111] but France had actually violated Article 17 of this treaty by not presenting the grounds for rejection clearly.[112] In other words, what France had violated was Article 17, which stipulated the obligation to explain, and not Article 2 on national security exceptions.[113] Article 2 and Article 17 of this treaty are closely related.[114] According to the ICJ ruling, there was no problem in not

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110) This provision provides for the following:

> Article 2 (c) of the [1986] Convention ... provides that the requested State may refuse a request for mutual assistance if it considers that execution of the request is likely to prejudice [the] sovereignty, ... security, ... public order or other ... essential interests [of France]

111) *See Certain Questions of Mutual Assistance in Criminal Matters, Judgment, 2008 I.C.J. Reports 177 (June 4)*, p. 230, para. 148.

112) *See id.* pp. 57-58, paras. 149-152, ("Article 17 provides that '[r]easons shall be given for any refusal of mutual assistance'").

113) *See id.* para. 152.

114) *Id.* p. 232, para. 154, ("That Articles 2 and 17 are in a sense linked is undeniable. Article 2 refers to possible exceptions to the granting of mutual assistance and Article 17 to the duty to give reasons for the invocation of such exceptions in refusing mutual assistance").

providing information, but not providing grounds was a problem. If the rationale had been properly presented, the lack of information would have posed no particular problem.

GATT Article XXI (a), discussed above, is different from the French-Djibouti MLAT, which is the subject of this ICJ decision, in that it does not require the contracting parties to provide an explanation for the exceptions. Considering that paragraph (a) states "nothing in this agreement shall be construed to require any contracting party to furnish any information," and that it does not separately specify the obligation to explain, the action of not providing additional explanations by itself may be justified. The Djibouti-France dispute sheds light on the type of problem that arises from a provision like the one in paragraph (a).

Furthermore, two recent rulings have important implications, although they do not directly deal with the issue of refusal to furnish information under the security exceptions clauses. First is a dispute between India and Pakistan, which took place from May 2017 to July 2019. When Pakistan issued the death penalty against an Indian national, India sued Pakistan in the ICJ for violating the notification obligation under Article 36 of the Vienna Convention on Consular Relations. Issues surrounding national security were also addressed in this conflict.[115] According to confirmed facts, after the arrest of the Indian national, Pakistan did not inform him of his right to consular access and did not immediately notify India of his arrest.[116] With regard to the notification part only, Pakistan did not provide necessary "information" to India. However, Pakistan claimed that the Indian national was a spy and defined the case as a national security violation. In addition, it insisted that the obligations under Article 36 of this Convention did not apply to cases concerning national security interests.[117] India, on the other hand, refuted the claims, arguing that such exceptions did not exist in this Convention and its clauses.[118] In the ruling, the ICJ supported India's position and confirmed that such exceptions made by

115) *See Jadhav (India v. Pak.), Judgment, 2019 I.C.J. Reports 419 (July 17).*

116) *Id.* para. 103 (Pakistan notified India three weeks after the arrest).

117) *Id.* para. 69.

118) *Id.* para. 70.

Pakistan did not exist in the Convention.[119] Pakistan argued that a separate legal basis for security exceptions was introduced when the two countries signed an agreement in 2008 in accordance with Article 73(2) of the Vienna Convention. However, this argument was also rejected by the ICJ, which claimed that although there were separate agreements between the two countries, they were not to be interpreted as intending to deviate from the principles set out in Article 36.[120] Eventually, the ICJ ruled that Pakistan's failure to provide information violated Article 36(1)(b) of this Convention.[121] Turning this ruling upside down, it can be read that if bilateral agreements state an intent, not providing information may be justified if it relates to national security issues.

Another recent case is the 2013 ICJ dispute between Timor-Leste and Australia.[122] This dispute also offers important implications for the issues in the study. The dispute between the two countries was over the maritime boundary in the Timor Sea, and Timor-Leste brought the dispute to the Permanent Court of Arbitration in April 2016 in accordance with the United Nations Convention on the Law of Sea. On December 3, 2013, the Australian government confiscated and searched the offices of lawyers (near Canberra, Australia) advising Timor-Leste in the dispute to secure several "materials" related to legal advice, including a number of "documents, data, and other properties."[123] The legal basis for issuing a search and seizure warrant was the Australian Security Intelligence Organization Act of 1979.[124] In other words, Australia argued that it was a national security issue. In response to the search and seizure, Timor-Leste sued Australia on December 17, 2013, in the ICJ for infringement of sovereignty and state-owned property.[125] This ICJ dispute was withdrawn on March 6, 2015, after the two countries agreed on the maritime boundary in the Timor Sea. In any case, Timor-Leste applied for provisional measures

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119) *Id.* para. 82.

120) *Id.* para. 94-95.

121) *Id.* para. 149.

122) *See Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), Provisional Measures, Order, 2014 I.C.J. Reports 147 (Mar 3.)*

123) *Id.* para. 1.

124) *See id.*

125) *Id.*

in accordance with Article 41 of the Statute of the Court when it brought the case to the ICJ, which allowed this. The purpose of the interim measure was to prevent the Australian government from using the material obtained through the search and seizure under any circumstances and for any purpose during this dispute.[126]This data was ordered to be kept under seal.[127]

During the hearing on the interim measure, Australia promised not to use the confiscated data in the future, but hinted that it would make an exception for national security reasons (that is, data could be used in this case).[128] In response, the ICJ pointed out that once data has been submitted to someone, it is difficult to completely protect confidentiality.[129] Furthermore, based on this recognition, a strict interim measure was made, prohibiting access and use of the data in any case, including national security-related circumstances.[130] In April 2015, Australia applied for an order to change the interim measure after the two countries agreed to the maritime boundary in the Timor Sea through separate consultations.[131] The objective was to return the seized data to Timor-Leste.[132] The ICJ allowed this request of change.[133] The two countries agreed to close the case thereafter and, in response to their joint application, the ICJ removed the case from the list in June 2015.[134]

This dispute suggests that there is room for national security considerations in the use of information by the recipient country after the information is provided. This means that security interests can be invoked not only as grounds for refusal to provide information, but also as an

126) *See Questions relating to Seizure and Detention*, *supra* note 122, para. 55.

127) *See id*.

128) *Id.* para. 38, 45, 46.

129) *Id.* para. 47.

130) *Id.* para. 55.

131) *See Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Request for the Modification of the Order Indicating Provisional Measures of 3 March 2014, Order of 22 April 2015, I.C.J. Reports 2015,* p. 558, para. 9.

132) *Id.*

133) *See id.* para. 18.

134) *See Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Order of 11 June 2015, I.C.J. Reports 2015*, pp. 572, 574.

exception to restrictions on use once provided. It also suggests that once information is provided, it is difficult to sufficiently protect the confidentiality of it due to its nature.[135] For example, even in the case of the data return order in April 2015, the ICJ repeatedly affirmed that Australia's action to open accessibility to data on the grounds of security interest exceptions was an opportunity to recognize "irreparable harm" to Timor-Leste.[136] This ruling means that a decision to refuse to provide national security-related information may be inevitable.

## V. Re-Assessment of the Security Exceptions

National security exceptions are important in that no country would decide to conclude a treaty that undermines national security. Furthermore, given that the protection of national security and the achievement of treaty objectives sometimes conflict with each other, the national security exceptions clauses are even more important in terms of securing a balance between the two. The recent increase in the frequency of treaties including national security exceptions seems to reflect this perception. The problem, however, is that little in-depth review or analysis of this provision has been made thus far. Recently, disputes over this issue have increased, sparking fresh interest in the matter, but the law and precedent are still insufficient in many ways.

In particular, the provision for refusal to provide information included in some security exceptions are currently textually construed as being able to refuse to provide any information. Also, such refusal applies to all proceedings and the other party. If so, it can be a means of paralyzing dispute settlement proceedings, the dispute resolution process, or proceedings in a judicial court with relevant jurisdiction. This possibility has already been mentioned in recent disputes.[137] This interpretation is not

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135) *See Questions relating to the Seizure and Detention*, supra note 122, pp. 157-159, paras. 42-48.

136) *See Questions relating to the Seizure and Detention*, Order of April 22, 2015, *supra* note 131, pp. 559-560, para. 16.

137) *Russia—Traffic in Transit*, *supra* note 2, ¶ 7.27-7.30; For the US position on this

appropriate as it deconstructs the principle of the "rule of the law" and exacerbates the dispute. But it seems that there is no way to stop it with the current language. The provisions for refusal to furnish information at least need to be reassessed and reorganized for each treaty at an appropriate moment.

Of course, this is not an easy task, as countries will have to negotiate the conclusion of treaties. Moreover, if the situation is ambiguous, countries may wish to keep exceptions that can be widely used. However, if the national security exceptions are more systematically reorganized, the possibility of abuse can be reduced, and disputes between countries can be effectively resolved, while unnecessary disputes can be avoided. From this perspective, the provisions for refusal to furnish information need to be reorganized first, and the following content can be kept in mind during this process.

### *1. Deletion of the Provision for Refusal to Furnish Information*

First, it is possible to seriously consider whether the provision for refusal to furnish information can be eliminated. The importance of national security exceptions has been increasing in recent times. However, most of the national security situations currently discussed—apart from whether or not a particular country's invocation complies with the provision anyway—can be protected by the other provisions contained therein. For example, Article XXI of GATT can protect many of the issues that are being raised now through paragraphs (b) and (c). These two provisions ensure that actions taken in relation to fissionable materials, the production and acquisition of weapons and military supplies, wartime and other emergencies, or fulfillments of the obligations under the UN Charter are permitted regardless of GATT. The national security exceptions included in other treaties also contain most of this content. Therefore, "information" related to at least these four items could be protected through these provisions. For example, information on nuclear fissionable

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dispute, *see supra* note 60. (The US submitted a brief letter instead of a third-party submission to the effect that no argument or position will be made on the legal issues raised in this dispute because the panel does not have jurisdiction over the dispute.)

materials, information on the production of military supplies, information on national emergencies, and information on the implementation of UN Security Council resolutions can also be engraved as being included within the scope of these provisions. This is because these provisions now stipulate that "any action" can be taken. In other words, it can be seen that this includes actions that prohibit the provision of information corresponding to these four items or limit the use of such information when necessary.

It is thought that a large portion of the information that causes damage to national interests when disclosed by the state falls into the above four categories. Other information held by the state (financial information, medical information, tax information, key statistics, etc.) is important information, but it is unreasonable to view it as information that violates essential security interests. The criterion that applies here is not just whether it violates various confidentiality obligations under national laws, but also whether it is possible to fail to provide such information despite a violation of the treaty (or notwithstanding the treaty requirement). Therefore, it is not necessary to look at this issue based on whether it is confidential information under domestic law but rather based on whether it "contrary to essential security interests" as stated by the treaty. Most of the information managed by government agencies may not find it easy to meet this criterion. Information that meets this criterion, even if it is financial, tax, or industrial information, is probably directly or indirectly related to the military industry, military activities, or current or future emergencies. They can be protected by other provisions on existing national security exceptions, even without a separate provision for refusal to furnish information.

If so, it is questionable whether it is necessary to separate and define the provision on information. Although some treaties do not have provisions for refusal to furnish information, other national security exceptions are invoked to refuse to provide information.[138] Above all, refusal to furnish information is not subject to any other conditions. Therefore, national

138) The European Convention on Human Rights, for example, does not have a provision for refusal to furnish information under its national security exceptions clauses, but in certain cases, some countries still claim to refuse to provide information. *See* IAIN CAMERON, NATIONAL SECURITY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 438-444 (1st ed. 2000).

security exceptions with wide applicability have room for broad application in refusing to provide information. Structurally, it has the potential to trigger unnecessary disputes between countries. As discussed above, when the discussion on national security exceptions started, the main issue was not the refusal to furnish information, but other measures related to security interests.[139] Taking this into account, deleting this provision from security exceptions clauses can be one of the measures that can be taken in the future.

### *2. Adding Reasonable Conditions*

To operate current provisions for refusal to furnish information as they are, at least an additional requirement must be imposed to objectively evaluate the validity of their invocation. In Article XXI of GATT, paragraph (b) lists various conditions for each situation. Various objective requirements such as securing the military industry, supplying ammunitions and military goods, wartime situations, and national emergencies can be extracted. The same applies to paragraph (c), whose scope can be objectively determined by the details contained in the resolutions of the UN Security Council. Therefore, at least equivalent conditions should be added to paragraph (a). For example, the paragraph should prescribe what type and area of information, if not all information, fall under its category. If there is a sufficiently reliable secret protection device, it could be added that refusal to furnish information does not apply within that limit. Also, as with other provisions of the security exceptions clauses, "necessary" conditions can be considered for insertion. Looking at the disputes over security exceptions that have unfolded thus far, the "necessary" conditions requirement has played an important role in preventing abuse.

In fact, when this provision was first discussed at the time of introduction of ITO and GATT, these conditions appeared to be linked to the part on information provision, but the link disappeared when a separate clause was introduced. In the future, it is essential to revive this

139) *See* Chapter III, Section B ("Review of Negotiation Records") of this article.

part at an appropriate moment. For reference, although this is not a case for security exceptions clauses, other treaties that have provisions for refusal to furnish information stipulate more specific requirements for such an action. The WTO Agreement on Safeguards[140] and the Agreement on Pre-shipment Inspection[141] are some examples. The corresponding content in these treaties could be appropriately modified and partially applied to the provisions for refusal to furnish information in the context of security exceptions clauses.

### *3. Specifying the Situations in which the Provision for Refusal to Furnish Information Is Not Applicable*

Another alternative that can be considered in the future is to define the situations in which the provision for refusal to furnish information is not applicable. For instance, refusal to furnish information would not be applicable when the information is requested by a relevant international organization or an international court with legitimate jurisdiction. This is especially needed to block attempts by parties to delay or paralyze court proceedings in the dispute settlement procedure. The current blank mandate where no information needs to be provided to anyone does not fit

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140) Regarding refusal to provide information, the Agreement on Safeguards states the following:

> Article 12
> Notification and Consultation
>
> 10. The provisions on notification in this Agreement shall not require any Member to disclose confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

141) Meanwhile, the Agreement on Pre-shipment Inspection provides for refusal to provide information as follows:

> User Members shall provide information to Members on request on the measures they are taking to give effect to paragraph 9. The provisions of this paragraph shall not require any Member to disclose confidential information the disclosure of which would jeopardise the effectiveness of the pre-shipment inspection programmes or would prejudice the legitimate commercial interest of particular enterprises, public or private.

into a multilateral system because it makes any verification or discussion impossible. Given the current international trend, it is likely that several countries will invoke paragraph (a) instead of or together with paragraphs (b) and (c) of Article XXI of GATT. This is because once they invoke the provision, they will not have to provide any information. Moreover, like the other two provisions, no special effort has to be made to prove that the requirements have been met. This can virtually incapacitate the party raising a complaint or the third party in charge of dispute resolution.

Of course, not providing any information does not, by itself, stop the dispute resolution process. Even if either party does not submit any arguments or evidence, the ICJ or the WTO panel is under the obligation to make its own independent decisions.[142] However, objective evaluation will be difficult, and inevitably, there will be considerable difficulty over the course of the proceedings[143] It is also questionable whether the judge in charge can apply the so-called "adverse inference" to the state that has failed to provide information because the country exercised its rights accorded to it under the agreement instead of merely refusing to furnish relevant materials. Furthermore, even if a decision or judgment is made, the country might still not provide information on the implementation of the rulings. However, the current provision for refusal to furnish information does not have any effective countermeasure to block such an unreasonable move. Given these aspects, if a provision for refusal to provide information is maintained, the conditions or circumstances to which it would not apply should be specified.

## VI. Conclusion: Avoiding New Disputes in the Age of National Security Abuse

A nationalist trend has recently emerged in many countries due to opposition to rapid internationalization and global integration. The priority

142) *See* A. Nolkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23(3) Eur. J. Int. Law, 769, 777-781 (2012); Chester Brown, A Common Law of International Adjudication 83-90; 102-110 (1st ed. 2007).

143) *See* Akande & Williams, *supra* note 12, p. 394.

of national interests is spreading to many areas of the international community. Taking advantage of this atmosphere, the national security exceptions included in some treaties have now become the subject of renewed interest and are being increasingly invoked by countries. This is because the ambiguous concept of "security interests" allows deviation from complex legal obligations, which is sometimes attractive to states seeking to evade treaty clauses. Through this process, legal developments on security exceptions have taken place gradually.

The provision for refusal to furnish information is the blind spot in discussions on the security exceptions clauses. This regulation allows a state to refuse to provide any information if it determines that doing so would be contrary to its essential security interests. Also, such refusal is applied to all types of proceedings regardless of the other parties. Compared to the other items included in the national security exceptions clauses, this provision lacks objective standards and is too generous to the country invoking it. The application of this provision in itself is too easy. Moreover, the "information" that comes under its purview raises another problem. The word "information," which can encompass all kinds of data, documents, and records, can de facto disable all of the other items under the security exceptions clauses. Furthermore, it could also neutralize several other provisions contained in the treaty. In addition, the possibility that the dispute settlement process addressing this issue will be jeopardized cannot be ruled out.

Looking at the discussions and records at the time of introduction of this provision, it seems likely that the current provisions for refusal to furnish information were introduced without sufficient review. At this point, this provision is likely to emerge as an obstacle to resolving disputes on national security exceptions. Since such a move has been evident in recent state-to-state disputes, adjustments and modification of this provision will be required at the appropriate time in the future.