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International Trade Law Practicum

THE AVAILABILITY OF NATIONAL SECURITY MEASURES UNDER WTO LAW AND OPTIONS FOR RESPONSE

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Executive Summary

In recent years, several disputes between states have led to invocations of security exceptions under WTO law. Herein the disputes regarding the transit of goods through Russia from Ukraine, the embargo placed upon Qatar by Saudi Arabia, Bahrain, Egypt, and the UAE, and the United States' steel and aluminum tariffs are examined to provide context for this memorandum. The recent trend of disputes brought to the WTO DSB involving the invocation of security exceptions is contrasted against the historical practice of avoiding adjudication in such disputes.

The interpretative analysis of GATT Article XXI pursuant to VCLT Article 31 yielded arguments which militated in favour of, and against, a finding of justiciability. The examination of the ordinary meaning of the provision found that the words 'which it considers' imbued Article XXI with a degree of deference to invoking states which militates in favour of a finding of non-justiciability. The weight of this factor was reduced due to the ambiguity of whether the deferential language extended to the subparagraphs found in Article XXI(b). The examination of the context of Article XXI considered language found other components of the WTO Agreement, specifically the DSU and TBT Agreement, which militated against a finding of non-justiciability. The examination of the object and purpose of the treaty focused on the legal distinction between the GATT 1994 as a component of the WTO Agreement and the GATT 1947. This examination found that part of the object and purpose of the treaty was to banish unilateralism in favour of a durable multilateral trading regime which militated against a finding of non-justiciability. The supplementary analysis of Article XXI pursuant to VCLT Article 32 found that the original drafters of the security exception (members of US delegation in Geneva) turned their mind to, and rejected, the notion that state discretion imbued by the 'which it considers' language extended beyond the determination of 'necessary' to the subparagraphs of Article XXI(b). Ultimately, this memorandum concludes that the arguments militating in favour of a finding of justiciability are more persuasive.

An examination of the ordinary meaning of Article XXI largely yielded arguments in favour of a finding of non-justiciability with a caveat. The source of these arguments is the deferential language 'which it considers'. The caveat to this argument is due to the fact that there exists ambiguity over whether this deferential language modifies solely the words 'necessary of the protection of its essential security interests' or whether it also modifies the subparagraphs found in Article XXI(b). If the latter is true the provision could be classified as self-judging, whereas the former interpretation would leave the door open on certain types of adjudicative review.

The internal structure of Article XXI sheds light on the meaning of essential security interest, particularly through paragraph (b), which has a chapeau and three subparagraphs. Each subparagraph serves to qualify essential security interests. They are thematically linked to war. The principle of ejusdem generis in subsection (iii), aligns such an association to "other emergency in international relations". The details provided in defining essential security interests favour a more objective evaluation of an essential security interest at stake in a dispute, leaving the phase "it considers necessary" to refer to the state's action, determined subjectively by the state involved.

Two differences distinguish Article XXI from the other GATT defence provision – Article XX. The latter lacks the words "it considers" before necessary, and a chapeau precedes a list of situations that trigger the exception. WTO jurisprudence has established a two-step approach to Article XX analysis, with an in-depth substantive analysis of the measures in question taken by a party. The absence of a chapeau in Article XXI would suggest a lower degree of scrutiny by a panel for this element. The additional word "it considers" before "necessary" also directs a panel to give deference to the state's choice of intervention. The presence of a chapeau in XXI(b) with qualifiers in each subparagraph suggest the panel has some scope in determining the legitimacy of an essential security interest.

Security provisions appear in other WTO agreements. The provisions in GATS and TRIPS are very similar to Article XXI. In the TBT "essential security interests" is used in the preface with no qualifiers. In the body of the treaty the term "national security" appears four times in association with a list of other exceptions, reminding one of GATT Article XX. There is one final reference to essential security similar to paragraph (a) of Article XXI. Although national security broadens the scope of essential security, its use in a list, without explicit phrasing "it considers" makes a stronger case for justiciability.

GATT 1947 is legally distinct from GATT 1994. The latter was part of a more legalistically oriented dispute resolution process involving the DSU. This addressed dissatisfaction under the GATT 1947 regime, where a party could unilaterally frustrate the process. Under the WTO an appeal process was established and a negative consensus for adoption of panel reports. This system was to provide predictability and strengthen multilateral dispute settlement. Panel formation occurs at the request of one party with automatic terms of reference set for the panel. The DSU requires panels to use objective assessment and does not provide any exceptions for Article XXI. All of these features strongly support a panel's ability to examine and adjudicate Article XXI defences.

The VCLT 31(3)(b) includes subsequent state practice as a component of treaty interpretation. This memorandum explores five situations where article XXI was relevant. They are reviewed, along with the opposing views of parties expressed at Council meetings. Many parties expressed a need to defer to the state invoking Article XXI, but others questioned the appropriateness of actions taken and did not believe parties should be allowed to abuse the system by invoking Article XXI. Contracting parties criticized the use trade measures for non-economic reasons, and this concept was adopted in the Ministerial Declaration of 1982 in the aftermath of sanctions against Argentina. The US's prevention of the panel from addressing Article XXI in Nicaragua's complaint frustrated an opportunity for its interpretation. The panel was unable to recommend any measures that would resolve Nicaragua's complaint and returned the question of Article XXI back to Council for a formal interpretation. In 1996, after the US passing of the Helms-Burton Act, it appeared that the matter may finally be addressed by a panel under the new DSU regime, but the members involved reached a diplomatic resolution, letting the formal WTO process lapse. The risk of panel adjudication that might politicize the multilateral trading system was an ongoing concern. Subsequent practice shows that while many parties appreciated the need for states to be able to protect their security interests, allowing unfettered unilateralism was problematic as it would undermine the system and lead to its collapse. This debate favours panel justiciability but with a measure of deference to a member invoking a defence.

The examination of the object and purpose of the WTO Agreement yielded arguments which militated strongly against a finding of non-justiciability. The examination focuses on the wording of the preamble to the WTO Agreement and academic work by Akande and Williams. Regardless of whether the intention of States Parties is framed as a move from unilateralism to multilateralism or an intention to create legal obligations, both are incongruent with a finding of non-justiciability.

Supplementary analysis of GATT Article XXI was warranted due to the ambiguity regarding whether the deferential language 'which it considers' modifies the subparagraphs of Article XXI(b). Archival research summarized in a yet-unpublished Pinchis-Paulsen paper demonstrates that members of the US delegation in Geneva in 1947 disagreed over the draft language of the new security exception provision for the ITO Charter. The paper shows that the drafters of the provision which eventually became Article XXI of the GATT turned their mind to, and rejected, the notion of having the deferential language apply to the subgraphs found in Article XXI(b).

Numerous other treaties including some that are not trade related have national security provisions. Comparing the language and structure of such provisions may give helpful insight into the interpretation of GATT Article XXI. A 2008 ICJ decision involved a security exception provision with similar self-determining language in a treaty between France and Djibouti. The matter was justiciable. A good faith standard was applied and a fair degree of deference was accorded by the Court to France, that had invoked the security defence. The dissent is noteworthy in regard to the adequacy of the depth of analysis. Bilateral Investment Treaties are another source of security exceptions. Copious ICSID arbitration cases resulted after Argentina's reliance on its essential security provision in its investment treaty with the US, leaving numerous decisions interpreting the relevant national security clause.

The principle of good faith, which defines the standard of review for Article XXI invocation, is best understood as a bifurcation of three obligations. First, good faith conduct in dispute settlement or 'procedural good faith', which is imported into WTO law through Articles 3.10 &4.3 of the DSU. Second, substantive good faith with respect to obligations of a state, which stems from Article 26 VCLT ('*pacta sunt servanda'*) and is incorporated as customary international law through Article 31(3)(c) VCLT as a 'relevant rule of international law'. Third, good faith conduct in the interpretation of treaties which stems from Article 31 VCLT and is incorporated into WTO law through Article 3.2 of the DSU. The recent Panel Report in *Russia – Traffic in Transit* demonstrates that both substantive good faith with respect to the obligations of a state (Article 26 VCLT) and good faith in the interpretation of treaties (Article 31 VCLT) have a bearing on the invocation of Article XXI. This good faith obligation applies both to the Member's definition of the essential security interests said to arise from the emergency in international relations at issue and, crucially, to their connections with the measures in question.

Members who are impacted by Article XXI invocation have a few avenues available for seeking the withdrawal of the measures or securing compensation for their trade distorting effects. These options all have different timeframes for response, different use-cases, effect the global trading system differently and have the potential for differing impacts on the trading relationships. There are two basic types of complaints that exist within the WTO dispute settlement framework: violation complaints and non-violation complaints. For a violation complaint to be made out there must be a violation of treaty obligations, in which case the nullification and impairment of benefits accruing under the covered agreements will be presumed. Non-violation complaints, on the other hand, require a complainant to show that benefits have been nullified or impaired even though there has been no violation of the covered agreements. In other words, the invoking party does not need to demonstrate a violation of treaty obligations to make out a non-violation complaint. Beyond conventional violation and non-violation

complaint responses, a third available option for responding to national security measures is to re-interpret a tariff as a safeguard measure under Article XIX. A fourth option is to adopt countermeasures in general international law, outside of the WTO process. A fifth option is to make no formal legal response, and a sixth is to opt instead for diplomatic means or lobbying. GATT Article XXI is an exceptional remedy and is rarely invoked, so a wide array of solutions should always be kept under consideration.

WTO dispute settlement violation claims are the conventional response to tariff barriers that effect the trade of WTO Members. Within the structure of the DSU, members initiate consultation, bring a complaint before a panel or the Appellate Body, seeking DSB authorization for a response that is 'equivalent' to the 'nullification or impairment' resulting from the tariff measure. DSB compliant violation claims are very time consuming, with the period of time between the initiation of consultation and the adoption of a panel report regularly exceeding two years. In the event of resort to the Appellate Body and/or Article 21.5 compliance proceedings, this period can span three or more years. The resulting temporal gap between the institution of a tariff barrier and the institution of DSB compliant response, known as the 'remedy gap', drives Members to considers other solutions.

Article XXI is a broadly drafted provision meant to protect the legitimate national security interests of Member states. The broad drafting of Article XXI makes measures invoked under it construable as lawful at face value, while the politically sensitive nature of national security to Member states makes challenging Article XXI's boundaries a contentious issue. As a remedy specifically designed for WTO compliant measures, non-violation complaints are a compelling option when Members are met with the Article XXI exception. An important consideration is whether a panel or the Appellate Body will respect an agreed upon position between the two parties that a measure is lawful, or whether there would be an independent review of the measures on the logic of the *Indonesia – Safeguard* discussed in the next section. Since non-violation complaints are used when there is no violation of the treaty, a Member must justify why they could not anticipate a measure which was in compliance with GATT obligations. *US – COOL* established that a Member must demonstrate that the measure in question has a 'significant degree' of 'novelty' which would render the measure unreasonable to expect. Non-violation complaints are a unique but ultimately viable option for response and are cited in both Mexico and Turkey's Requests for Consultation regarding US steel and aluminum tariffs.

Re-interpreting Article XXI tariffs as an Article XIX safeguard measure is a strategy which some affected Member states might resort to in order to nullify the prohibition against unilateral action. In this approach, a tariff measure which has been purported to

be defensible under Article XXI is treated as an Article XIX emergency action or safeguard. The crux of this approach is not whether the invoked measure is illegal, but rather whether WTO Members are entitled to treat an Article XXI measure as a safeguard measure. Article XIX:3(b) states that when domestic legislations brings rise to a complain which is taken 'without prior consultation', threatens serious injury and such damage would be 'difficult to repair', then the right to retaliate begins upon the taking of the action. The resulting effect is that a Member can response quickly to measures, thereby avoiding the negative impact of the remedy gap and working around the prohibition against unilateral action that usually constrains actions within the WTO framework. An obvious question here is whether a panel or the Appellate Body will make an independent assessment of the true character of a measure invoked under Article XXI. The Appellate Body Report in *Indonesia, Safeguard on Certain Iron or Steel Products* tells us that a Panel has a duty under Article 11 of the DSU to assess objectively whether a measure is indeed a safeguard. By this logic, it is conceivable that a measure invoked under Article XXI could be determined by a panel or the Appellate Body to be a safeguard measure. The emphasis which the Panel in *Russia – Traffic in Transit* put on avoiding disguised barriers to trade suggests that the obligation of the DSU referred to in *Indonesia – Safeguard on Certain Iron or Steel Products* would also be exercised in the context of Article XXI.

General international law countermeasures find their legal basis not from the WTO framework, but in Articles 22 & 49-55 of the International Law Commission's Articles on State Responsibility. The problem here is that, as a *lex specialis* regime, the WTO's more specific rules displace the ILC Articles. The grand bargain that brought the WTO into being means that Members trade their right to unilateral action for a rules-based system with a dispute settlement mechanism and comprehensive compliance procedures. This is embodied in Article 23 (c) of the DSU, which requires states to obtain DSB authorization before enacting countermeasures, cementing the prohibition against unilateral action.

This memorandum explores a couple of options for instituting general international law countermeasures. The first is fall back theory, where in extreme situations where there is a break down in a *lex specialis* regime like the WTO, a Member can fall back to general international law countermeasures. For example, if there as a finding of non-justiciability then the grand bargain of the WTO would be displaced. With an Appellate Body decision likely on the way, this result continues to be plausible. In the event that the WTO regime can be displaced, Article 52(2) of the ILC Articles allows for "such urgent countermeasures as are necessary to preserve its rights", before any notification of the intent to do so.

A second procedural argument is available for the use of general international law countermeasures. This argument, provided in *EC – Export Subsidies on Sugar*, relies on estoppel as a general principle of international law observed under Article 3.10 of the DSU. The European Communities understood that estoppel may arise from express statements or from various forms of conduct. If such conduct, upon a reasonable construction, implies the recognition of a certain factual or judicial situation, the Member invoking Article XXI could be estopped from responding to general international law countermeasures. Alternatively, estoppel can be understood as prohibiting parties who engage in dispute settlement in bad faith by taking actions that significantly inhibit the integrity and efficiency of the dispute settlement process from responding to general international law countermeasures.

The Article XXI national security exception is broadly drafted, meaning that the option of not responding with retaliatory trade measures should always be under consideration. Without a modern Appellate Body decision and many previous reports providing a broad interpretation, the spectre of substantial liability if retaliation measures are not made out in front of a DSB panel is very real. The Russian Federation, the European Union, Turkey and Canada are all set to appear at the WTO regarding the legality of their retaliation against US steel and aluminum tariffs. Members who take no WTO or general international law response also can resort to lobbying or diplomatic means to achieve concessions or the effect the retraction of the measure. A Member can choose to intervene domestically in the invoking Member to achieve concessions, either through legal or administrative proceedings in the domestic legal system or through lobbying domestic representatives. Alternatively, a Member can make a strong normative response by raising the measures in WTO Councils and Committees.

Introduction

The seventy years following the establishment of the multilateral trading regime with the GATT 1947 have seen very few invocations of national security exceptions to treaty obligations. Recently, this trend has begun to change. The use of Article XXI of the GATT 1994 has seen a significant upswing during 2017 and 2018. The current flurry of trade-distorting measures sought to be justified under the provision has made understanding the justiciability of a state's invocation of a national security exception and the potential responses available to affected WTO Members a priority. This memorandum has two principal purposes. First, it sets out a legal framework for the interpretation of Article XXI of the GATT 1994 to provide guidance for assessing the justifiability of trade-distorting measures under the provision. Second, it provides a thorough analysis of the response options available to WTO Members by evaluating

the benefits and drawbacks of each option from a legal, political, and policy perspective.

Part I of this memorandum begins with a description of the trade-distorting measures taken by Russia, the United Arab Emirates, and the United States, respectively, in three disputes currently before the DSB of the WTO. In each case, the Member instituting the measures has invoked the security exception provision of either the GATT 1994, GATS, and/or TRIPS. This section then undertakes an interpretative analysis of Article XXI of the GATT 1994 using the framework codified in sections 31 and 32 of the *Vienna Convention on the Law of Treaties*. This analysis informs the development of a legal framework to assess the legality of Members' invocations of these national security exceptions by drawing upon: (i) the negotiating history of the security exceptions; (ii) a comparative analysis of the language of the security exceptions in the GATT 1994 and security exceptions found in other free trade agreements; (iii) statements and submissions by WTO Members in meetings and dispute settlement proceedings; and (iv) academic literature.

Part II of this memorandum begins with an overview of how WTO Members have historically responded to invocations of security exception provisions. Then, an overview of each common response tactic is provided, including a discussion of: (i) WTO dispute settlement violation claims; (ii) re-interpreting Article XXI tariffs as an Article XIX safeguard; (iii) WTO dispute settlement, non-violation claims (iv) responding with general international law countermeasures; (v) making no WTO or general international law response; and (vi) resorting to diplomacy or domestic lobbying. This section concludes with an evaluation of the legal, political, and policy benefits and drawbacks to each of these tactics.

The measures taken by the United States described in *United States – Certain Measures on Steel and Aluminum Products* would affect 16.6 billion dollars (CAD) worth of Canadian exports, based on 2017 figures. The countermeasures instituted by Canada affect another 16.6 billion dollars (CAD) worth of American exports. The US-Canada trade relationship is one of the largest in the entire world. Furthermore, the debate over the interpretation of national security exceptions speaks to the foundational balance between international legal obligations and state sovereignty. The implications of the resolution of this issue has the potential to destabilize the entire multilateral trading regime. The recent flurry of trade-distorting measures sought to be justified under these provisions could represent the new standard for conducting international trade in coming years. Therefore, developing a framework for assessing the scope for challenging invocations of national security exceptions under the WTO rules and a

comprehensive understanding of broader response options is essential for Canada's state interests.

Recent Invocations of National Security Measures

Summary:

In recent years, several disputes between states have led to invocations of security exceptions under WTO law. Herein the disputes regarding the transit of goods through Russia from Ukraine, the embargo placed upon Qatar by Saudi Arabia, Bahrain, Egypt, and the UAE, and the United States' steel and aluminum tariffs are examined to provide context for this memorandum. The recent trend of disputes brought to the WTO DSB involving the invocation of security exceptions is contrasted against the historical practice of avoiding adjudication in such disputes.

Historically, WTO member states have exercised restraint in invoking the national security exception under WTO law to seek to justify trade distorting measures. Following the failure to establish the ITO, many GATT contracting parties were cognizant of the fact that the justiciability of invocations of Article XXI of the GATT 1947 and the appropriate forum for such disputes presented a number of unsettled legal questions. This mutual restraint can be partially attributed to a fear of a pandora's box situation, particularly during a period of escalating tensions between the United States and the Soviet Union.

During the Cold War, the economic interests of the GATT contracting parties typically aligned with their security interests and thus there was little incentive to enact protectionist trade measures against strategic allies. The aftermath of the Cold War saw the establishment of the WTO and a dramatic increase in the number of WTO Members. Many states reaped economic benefits from the stability brought by the multilateral trading regime and were disincentivized from invoking national security exceptions in a way that could destabilize the entire trading regime. Following a recent rise of populist and nationalistic political figures across the globe, this mutual restraint appears to be waning.

Since the beginning of 2017, three separate incidents involving measures claimed to be national security related have given rise to disputes before the WTO Dispute Settlement Body (DSB). The first dispute is between Russia and the Ukraine and arose in connection with Ukraine's desire to negotiate a trade agreement with the European Union (EU). The second dispute is between the United Arab Emirates (UAE) and Qatar,

although Qatar has brought similar complaints against Saudi Arabia and Bahrain. This dispute arose in the larger context of the Saudi Arabian-led blockade placed on Qatar by Saudi Arabia, Bahrain, Egypt, and the UAE. The third dispute arose out of the Trump administration's decision to institute steel and aluminum tariffs under section 232 of the *Trade Expansion Act of 1962*. Nine countries – Canada, China, India, the EU, Mexico, Norway, Russia, Switzerland, and Turkey – have initiated WTO disputes in response to the tariffs. This section will provide an overview of the three disputes.

A. DS 512 – Measures Concerning Traffic in Transit (Ukraine v. Russia)

On December 16, 2015, Russian President Vladimir Putin announced that Russia would suspend the *Treaty on a Free Trade Area between members of the Commonwealth of Independent States* with respect to Ukraine. This decision was widely viewed in Europe and North America as an attempt to deter Ukraine from implementing the *EU – Ukraine Deep and Comprehensive Free Trade Area*, which was set to enter into effect on January 1, 2016. Russia subsequently imposed further non-tariff barriers that became the substance of the first recent WTO dispute involving Article XXI of the GATT 1994.

On January 1, 2016, Russia announced, via Presidential Decree, measures concerning the traffic of goods destined for Kazakhstan from Ukraine that which required transit through Russian territory. The Decree required such goods to enter Russia through a point of entry along the Belarus-Russia border. These goods were also required to bear special identification seals equipped with GLONASS (Russia's equivalent to GPS) capabilities. Drivers transporting said goods were required to carry registration cards throughout their time in Russia.[1]

On July 1, 2016, Russia amended the Presidential Decree to prohibit goods in transit by road or rail that are subject to non-zero import duties under the Common Custom Tariff of the Eurasian Economic Union. The amendment also expanded the measures to affect goods travelling from Ukraine to the Kyrgyz Republic through Russia.[2]

On September 14, 2016, Ukraine initiated proceedings under the DSU by circulating a request for consultations to the Russian delegation at the WTO. Ukraine claimed that the abovementioned measures were a violation of Articles V:2, V:3, V:4, V:5, X:1, X:2,

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[1] WTO, *Russia – Measures Concerning Traffic in Transit: Request for the Establishment of a Panel by Ukraine*, WTO Doc WT/DS512/3 (2017), online: WTO <docsonline.wto.org> [*Rus-Ukr: Request for Panel*].

[2] *Ibid*.

X:3 (a), XI:1, and XVI:4 of the GATT 1994.[3] On February 9, 2017, Ukraine circulated a request for the establishment of a panel under the DSU.[4]

In its written submissions Russia asserted that the relevant measures are not WTO-inconsistent since they are justified under Article XXI. Further, Russia submitted that because Russia had invoked Article XXI neither the panel nor the WTO had jurisdiction to over the matter (i.e. that the matter is non-justiciable). Strangely, Russia then concluded by asking the panel to make a finding that its measures are justified under Article XXI of the GATT 1994.[5]

On March 28, 2019, the panel issued its final report. The panel interpreted Article XXI(b) as 'vesting in panels the power to review whether the requirements of the enumerated subparagraphs are met, rather than leaving it to the unfettered discretion of the invoking Member'. The panel determined that Article XXI(b)(iii) of the GATT 1994 is not totally "self-judging" in the manner asserted by Russia since the adjectival clause "which it considers" does not extend to the determination of the circumstances in each subparagraph.[6]

B. DS 526 – Measures Relating to Trade in Goods and Services (UAE v. Qatar)

On June 5, 2017, Saudi Arabia, Bahrain, Egypt, and the United Arab Emirates (UAE) issued statements declaring the severance of diplomatic ties with the State of Qatar (Qatar). Saudi Arabia subsequently closed its land borders with Qatar and – acting in concert with Bahrain, Egypt, and UAE – imposed a land, sea, and air embargo on Qatar. The coalition's stated justification was Qatar's alleged support of terrorist organizations and amicable relationship with Iran.[7]

On June 22, 2017, Saudi Arabia, Bahrain, Egypt, and the UAE issued a list of 13 demands that Qatar was required to agree to within 10 days for the embargo to be lifted.

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[3] WTO, *Russia – Measures Concerning Traffic in Transit of Ukrainian Products: Request for Consultations by Ukraine*, WTO Doc WT/DS512/1 (2016).

[4] *Rus-Ukr: Request for Panel*, *supra* note 1.

[5] WTO, *European Union Third Party Submission in Russia – Measures Concerning Traffic in Transit* (Geneva, 2017) [*EU Third Party Submission*].

[6] WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel*, WTO Doc WT/DS512/R (2019).

[7] "Qatar-Gulf crisis: Your questions answered", *Al Jazeera* (5 December 2017), online: < www.aljazeera.com>.

Most notable amongst the demands were: (i) closing the media network Al-Jazeera and its affiliate stations; (ii) closing the Turkish military base in Qatar and ceasing all joint military cooperation between Turkey and Qatar; (iii) reducing diplomatic relations with Iran; and (iv) announcing that Qatar is severing ties with terrorist, ideological, and sectarian organizations including the Muslim Brotherhood, Hamas, the Islamic State of Iraq and the Levant (ISIL), Al-Qaeda, Hezbollah, and Jabhat Fateh al Sham.[8]

On July 31, 2017, Qatar transmitted three analogous requests for consultation with the UAE, Bahrain, and Saudi Arabia respectively, regarding the blockade. On August 10, 2017, the UAE issued a communication stating that it would not engage in consultations with Qatar regarding the embargo. On October 6, 2017, Qatar requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU. Qatar alleged that the measures taken by the UAE were inconsistent with their obligations under Articles I:1, V:2, X:1, X:2, XI:1, and XIII:1 of the GATT 1994, Articles II:1, III:1, III:2, III:3, and XVI of the GATS, and Articles 3.1, 4, 41.1, 42, and 61 of the TRIPS Agreement.[9]

The UAE objected to Qatar's first panel request, citing Qatar's funding of terrorist organizations. The UAE cited Article XXI of the GATT 1994, Article XIVbis of the GATS, and Article 73 of the TRIPS Agreement in its objection. The UAE's position was that the issues of the dispute were not trade issues and that the WTO's dispute settlement system was not equipped to resolve political disputes of this nature.[10] Following the UAE's objection, the DSB deferred the establishment of a panel, but in accordance with the negative consensus rules in the DSU, established a panel in the matter on November 22, 2017 upon Qatar's second request.[11]

C. DS 550 – Certain Measures on Steel and Aluminum Products (US v. Canada)

On March 8, 2018, the United States imposed a 10% additional import duty on certain aluminum products and a 25% additional import duty on certain aluminum products

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[8] Patrick Wintour, "Qatar given 10 days to meet 13 sweeping demands by Saudi Arabia", *The Guardian* (23 June 2017), online: < www.theguardian.com>.

[9] WTO, *United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights: Request for the Establishment of a Panel by Qatar*, WTO Doc WT/DS526/2.

[10] "Qatar seeks WTO panel review of UAE measures on goods, services, IP rights", *WTO News* (23 October 2017), online: <www.wto.org>.

[11] WTO, *United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights: Constitution of the Panel Established at the Request of Qatar*, WTO Doc WT/DS526/3.

from all countries, with several exempt states. Argentina, Australia, Brazil, Canada, the EU, Mexico, and South Korea were initially exempt from the additional import duties on steel and aluminum. On April 30, 2018, the President of the United States issued a proclamation exempting imports from Argentina, Australia, Brazil, and South Korea from the additional import duties. The exemptions for imports from Canada, the EU, and Mexico were extended with a sunset clause for May 31, 2018. Following the expiration of the exemptions in May 2018, additional import duties were imposed on certain steel and aluminum imports from Canada, the EU, and Mexico.[12]

On May 31, 2018, Canada's Department of Finance published a notice of intent to impose countermeasures against the United States in response to the tariffs on Canadian steel and aluminum products. The notice stated that the countermeasures would affect up to $16.6 billion (CAD) in imports of steel, aluminum, and other products from the United States – an equivalent value to Canadian exports from 2017 that were affected by the United States measures.[13]

On June 1, 2018, Canada requested consultations with the United States under the DSU at the WTO. Consultations were held between Canada and the United States on July 20, 2018, but the parties failed to reach a satisfactory resolution of the matters at issue.[14]

On June 11, 2018, the United States circulated a communication in the DSB invoking national security exceptions with respect to *United States – Certain Measures on Steel and Aluminum Products*. The communication stated that:

> Canada's request concerns tariffs on imports of steel and aluminum Articles imposed by the President of the United States pursuant to Section 232 of the Trade Expansion Act of 1962. The President determined that tariffs were necessary to adjust the imports of steel and aluminum Articles that threaten to impair the national security of the United States. Issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement. Every Member of the WTO retains the authority to determine for itself those matters that it considers necessary to the

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[12] WTO, *United States – Certain Measures on Steel and Aluminum Products: Request for the Establishment of a Panel by Canada*, WTO Doc WT/DS550/11 (2018) [*US – Steel and Aluminum*].

[13] WTO, *United States – Certain Measures on Steel and Aluminum Products: Communication from the United States*, WTO Doc WT/DS550/10 [*US Steel Communication*].

[14] *US – Steel and Aluminum*, *supra* note 11.

protection of its essential security interests, as is reflected in the text of Article XXI of the GATT 1994.[15]

On October 18, 2018, Canada circulated a request for the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU. Canada submitted that the United States' measures were inconsistent with its obligations under Articles I:1, II:1(a) and (b), X:3(a), XI:1, XIX:1(a), and XIX:2 of the GATT 1994, as well as Articles 2.1, 2.2, 3.1, 4.1, 4.2, 5.1, 7, 8.1, 11.1(a), 11.1(b), 12.1, 12.2, 12.3 and 12.5 of the Agreement on Safeguards. Further, Canada submitted that the measures did not meet the requirements of Article XXI:(b) of the GATT 1994.[16]

Part I.I: Interpretation of Article XXI of the GATT 1994 Pursuant to the Vienna Convention on the Law of Treaties

Summary:
The interpretative analysis of GATT Article XXI pursuant to VCLT Article 31 yielded arguments which militated in favour of, and against, a finding of justiciability. The examination of the ordinary meaning of the provision found that the words 'which it considers' imbued Article XXI with a degree of deference to invoking states which militates in favour of a finding of non-justiciability. The weight of this factor was reduced due to the ambiguity of whether the deferential language extended to the subparagraphs found in Article XXI(b). The examination of the context of Article XXI considered language found other components of the WTO Agreement, specifically the DSU and TBT Agreement, which militated against a finding of non-justiciability. The examination of the object and purpose of the treaty focused on the legal distinction between the GATT 1994 as a component of the WTO Agreement and the GATT 1947. This examination found that part of the object and purpose of the treaty was to banish unilateralism in favour of a durable multilateral trading regime which militated against a finding of non-justiciability. The supplementary analysis of Article XXI pursuant to VCLT Article 32 found that the original drafters of the security exception (members of US delegation in Geneva) turned their mind to, and rejected, the notion that state discretion imbued by the 'which it considers' language extended beyond the determination of 'necessary' to the subparagraphs of Article XXI(b). Ultimately, this memorandum concludes that the arguments militating in favour of a finding of justiciability are more persuasive.

[15] *US Steel Communication*, *supra* note 12.

[16] *US – Steel and Aluminum*, *supra* note 11.

Following the recent flurry of invocations of national security exceptions under WTO law, the questions surrounding the justiciability of such invocations have returned to the fore of many conversations in the international trade community. This section presents our interpretation of Article XXI of the GATT 1994 as a basis for the construction of a legal framework for determining the justifiability of invocations of security exceptions under WTO law.

Until the panel issued its report in *Russia – Traffic in Transit* in April 2019, no adjudicative body had ruled on the justiciability of Article XXI of the GATT. Even after the panel's interpretive findings, the issue will remain a hotly debated question for the international community, at least until the WTO Appellate Body has pronounced on the matter. Amongst both states and academics, two predominant schools of thought exist with respect to the question of justiciability. The first camp argues that states must be the ultimate arbiters on questions of their own national security and that invocations of Article XXI of the GATT 1994 thus cannot be subject to any form of judicial review. The second camp argues that the language and drafting of the provision introduce an element of discretion for states, but that that discretion cannot amount to a trump card which precludes judicial review.

Within the WTO legal regime, interpretation begins with Article 31 of the *Vienna Convention on the Law of Treaties* (VCLT). The interpretative framework articulated in Article 31 of the VCLT has become a component of customary international law. The WTO Appellate Body recognized Article 31 as custom in its first report. The Appellate Body stated:

> [Article 31 of the VCLT] has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the *DSU*, to apply in seeking to clarify the provisions of the [GATT 1994] and the other "covered agreements" of the [WTO Agreement]. That direction reflects a measure of recognition that the [GATT 1994] is not to be read in clinical isolation from public international law.[17]

Therefore, Article 31 of the VCLT will provide the guide for the interpretative analysis of the national security exceptions under the WTO Agreement in order to establish a

[17] *United States–Standards for Reformulated and Conventional Gasoline* (1996), WTO Doc WT/DS2/AB/R at p 17 (Appellate Body Report), online: WTO <docsonline.wto.org>.

legal framework for assessing the legality of invocations of national security measures under WTO law.

> ARTICLE 31
>
> *General Rule of Interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the **ordinary meaning** to be given to the terms of the treaty **in their context** and in light of its **object and purpose** [emphasis added].
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) Any subsequent agreement between parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) Any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.[18]

While there are several security exceptions within the WTO regime – including Article XXI of the GATT 1994, Article XIV*bis* of the General Agreement on Trade in Services (GATS), and Article 73 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement – one exception has been invoked with greater frequency. This exception is found in Article XXI(b)(iii) of the GATT 1994. This memorandum will focus largely on Article XXI because of its comparatively high rate of use and historical importance as the initial security exception in the multilateral trading regime.

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[18] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS I-18232, art 32 [*VCLT*].

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.[19]

I.I.I: The Ordinary Meaning of Article XXI

Summary:

The examination of the ordinary meaning of Article XXI largely yielded arguments in favour of a finding of non-justiciability with a caveat. The source of these arguments is the deferential language 'which it considers'. The caveat to this argument is due to the fact that there exists ambiguity over whether this deferential language modifies solely the words 'necessary of the protection of its essential security interests' or whether it also modifies the subparagraphs found in Article XXI(b). If the latter is true the provision could be classified as self-judging, whereas the former interpretation would leave the door open on certain types of adjudicative review.

[19] *General Agreement on Tariffs and Trade 1994*, 15 April 1994, 1867 UNTS 187, art XXI.

The VCLT directs the analysis of Article XXI to begin with the text of the provision itself. The first step to applying the general rule of interpretation that the words of a treaty shall be given their ordinary meaning, in their context and in light of the treaty's object and purpose is identifying the key terms that are essential to resolving the question at hand. The key term with respect to the question of justiciability is "which it considers". In the event that the provision is justiciable, a couple of terms are important for determining the appropriate standard of review. These terms are "necessary" and "emergency". The term "construed" in the chapeau is relevant to both analyses.

The Oxford English Dictionary defines the key terms as follows:

> **Construe**;
>
> To give the sense or meaning of; to expound, explain, interpret.
>
> **Necessary**;
>
> That is needed.
>
> **Consider**;
>
> To regard in a certain light or aspect; to look upon (as), think (to be), take for.
>
> **Emergency**;
>
> As a political term, to describe a condition approximating to that of war.

The ordinary meaning of Article XXI(b)(iii) of the GATT 1994 can then be formulated as:

> Nothing in this Agreement shall be interpreted (construed) to prevent any contracting party from taking any action which the contracting party (it) looks upon as (considers) needed (necessary) for the protection of its essential security interests taken in time of war or other condition approximate to that of war (emergency) in international relations.

The United States' DS512 Submission on the Ordinary Meaning of Article XXI

Whereas Article XX is titled "General Exceptions" Article XXI is "Security Exceptions". The wording in the body of Article XXI adds "essential" as an additional characterization. The US has preferred to use the term "national" security interest and its Trade Expansion Act Section 232 uses this description. The subtle effect of this phrasing is to strengthen a perception that the applicability of the provision is a matter for the Member to decide, solely at their discretion. The plain meaning of essential in the Oxford English Dictionary includes "[o]f or pertaining to essence, specific being, or intrinsic nature" and "absolutely necessary; indispensably requisite". It gives a more generic quality, not specific to a particular member, but able to be ascertained by all members, hence not only predictable but also justiciable.

In its third-party submission in *Russia – Measures Concerning Traffic in Transit* the United States based its arguments on this form of textual analysis. The US' submission argued forcefully for an interpretation that would shield invocations of Article XXI of the GATT 1994 from judicial review. The US position was that while a WTO panel has "jurisdiction" (i.e. the ability to organize and hear a dispute, including receiving submissions from the parties and third-parties), the matter of the dispute is "non-justiciable" since the panel cannot make findings on Russia's invocation, other than to conclude that Article XXI of the GATT 1994 has been invoked.[20]

The analysis centres around the phrase "which it considers necessary" found in subparagraphs (a) and (b) of Article XXI. The ordinary meaning, according to the US, of "considers" is "regard (someone or something) as having a specified quality" or "believe; think". The specific quality in this instance is that the measure is "necessary", or more specifically "necessary for the protection of its essential security interests". Indeed, the US argued that the ordinary meaning of the text is that "the Member ("which it") must regard ("considers") an action as having the quality of being necessary".[21] This textual analysis forms the tether connecting Article XXI of the GATT 1994 to the concept of self-judgment.

While these words must be understood in context and in light of the object and purpose of the GATT 1994, it is clear that a purely textual analysis supports the contention that the provision is, at a minimum, partially self-judging. The term "it considers" adds an

[20] WTO, *Russia – Measures Concerning Traffic in Transit: Third Party Executive Summary of the United States of America* (Washington, 2018).

[21] *Ibid*.

element of subjectivity to the language of the provision. What remains unclear is whether that term solely modifies the words "necessary for the protection of its essential security interests" or whether it also modifies the words "taken in time of war or other emergency in international relations".

The Relevance of the Internal Structure of Article XXI to Ordinary Meaning

Summary:

The internal structure of article XXI sheds light on the meaning of "essential security interest", particularly through paragraph (b), which has a chapeau and three subparagraphs. Each subparagraph serves to qualify "essential security interests". They are thematically linked to war. The principle of ejusdem generis in subsection (iii), aligns such an association to "other emergency in international relations". The details provided in defining essential security interests favour a more objective evaluation of an essential security interest at stake in a dispute, leaving the phase "it considers necessary" to refer to the state's action, determined subjectively by the state involved. Support for a more deferential approach by a panel in interpreting article XXI can be inferred from opinions in ICJ decisions, discussed in later sections.

In interpreting Article XXI an aspect to consider is its structure, which is broken up into three paragraphs: (a), (b), and (c). The paragraphs have been placed together under one Article, as they have a common theme related to security.[22] Paragraph (a) addresses disclosure of information in relation to essential security interests but provides no insight into the interests themselves. Paragraph (c) does not use the words "essential security interests," instead it covers action taken in relation to matters of "international peace and security", with reference to states' obligations under the United Nations charter.

Paragraphs (a) and (b) of Article XXI refer to "essential security interests" and both use the pronoun "it" before the verb "considers". Article XXI(b) has a chapeau covering its three subsections.

[22] Michael Hann, "Vital Interests and the Law of GATT: an Analysis of GATT's Security Exception", 12 Mich J Int'l L 558 1990-1991 558, at 579.

> […] to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests […][23]

The words "it considers necessary" in the chapeau of XXI(b) follow "to prevent any contracting party from taking any action". This wording affords a WTO Member discretion to decide what is "necessary for the protection of its essential security interests" and the terms "relating to" limit those interests to certain types of security interests in the case of XXI(b)(i) and (ii). There is no indication that a WTO Member enjoys unfettered discretion to decide which interests have the required connection to the materials and processes mentioned in XXI(b)(i) and (ii). In other words, the nature of the "essential security interest" should be objectively apparent. The purpose served by the three subsections that follow the chapeau in XXI(b) is to help understand what is meant by "essential security interests". In defending itself the Member invoking Article XXI must also show the nexus between the "necessary" measures being taken and the specific essential security interest at hand. The panel is not precluded by any wording in either Article XXI or in the DSU in evaluating this connection. Thus, a panel addressing a matter involving Article XXI would need to consider whether there has been a security interest, if it was "essential," and if the response could be considered relevant to addressing the interest.

Each subparagraph of Article XXI(b) assists characterizing "essential security interests", whether it be by delineating the nature of the goods involved in trade or the circumstances in which the measures can be invoked. The inherently self-limiting manner in which the contents of the subparagraph (i) and (ii) are itemized implies that these can be objectively characterized. In subparagraph (i) fissionable materials would encompass military weapons with lethal destructive force as well as civil applications such as energy production. Subparagraph(ii) refers to "arms, ammunition and implements of war," which are materials used for military warfare. The second part of subparagraph(ii): "traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment" captures dual-purpose goods. The materials in these two subparagraphs have a military association related to armed conflict or war, which links them to the final subparagraph (iii) – "in time of war". Subparagraph (iii) describes the specific circumstances in which "essential security interests" can exist, specifically "in a time of war", or in "other emergency in international relations". The interpretation of each subparagraph must be considered in the context of this common subject matter.

[23] GATT Article XXI (b).

Interpretation of XXI(b)(iii) should include the application of the principle of ejusdem generis, which implies a need for a similar interpretation to the elements of a list. The conjunctive phrase "or other" would logically refer to an alternative of the same kind, as a different connotation would merit a separate subparagraph. The first term, "war", is a general term and the interpretation of the terms that follows needs to be restricted to align with the first term. Thus, interpreting an "emergency in international relations" should be considered in the context of war. As mentioned above[24], in the political context the meaning of the word "emergency" refers to a state of war. The descriptor "emergency" therefore connects the nature of international relations to war. The Oxford English Dictionary also includes in the definition of the word emergency: "[t]he arising, sudden or unexpected occurrence (of a state of things, an event, etc.)"[25]. In French, the word is "urgence", which underscores the ordinary meaning related to timeliness and exceptional circumstances, rather than a base-line state. The ordinary meaning captured in an "emergency in international relations" must therefore have the quality of something sudden and unexpected and is not consistent with an ever-present situation.[26]

Article XXI(b) does not include economic circumstances for which an essential security interest would be considered. A number of provisions in Article XX relate to economic factors for a state to take into account. Exceptions under Article XXI relating to security are distinct from these and reflect political considerations. [27] The ability of introducing economic measures through a loop hole was recognized during treaty drafting, to which the US delegate responded: "[W]e cannot make [Article XXI] so broad that, under the guise of security, countries will put on measures which really have a commercial purpose".[28] The role of qualifiers in XXI(b) that reflect war materials and war, serve to focus on this purpose served by Article XXI. Extending the meaning of "emergency in international relations" to include financial or economic situations would broaden the scope of Article XXI in a manner inconsistent with the rest of its contents. Matters related to economic concerns are addressed in the Safeguards Agreement of the WTO, which expands on GATT Article XIX. The 1982 Ministerial Declaration supported the

[24] See preceding section discussing ordinary meaning

[25] *OED Online*. March 2019. Oxford University Press. http://www.oed.com.proxy.queensu.ca/view/Entry/61130?redirectedFrom=emergency

[26] Espionage would be an example of a baseline threat to security.

[27] " (quoting U.N. EPCT/A/PV/33, pp. 20-21 and corr. 3, cited in ANALYTICAL INDEX OF GATI" 600 (WTO 1995)). at 204

[28] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, p. 21. (Also cited in *Russia – Transit* at para 7.93)

notion that "taking restrictive trade measures, for reasons of a non-economic character, not consistent with the GATT". [29]

I.I.II: The Context of Article XXI

Summary:

Two differences distinguish Article XXI from the other GATT defence provision – Article XX. The latter lacks the words "it considers" before necessary, and a chapeau precedes a list of situations that trigger the exception. WTO jurisprudence has established a two-step approach to Article XX analysis, with an in depth substantive analysis of the measures in question taken by a party. The absence of a chapeau in Article XXI would suggest a lower degree of scrutiny by a panel for this element. The additional word "it considers" before "necessary" also directs a panel to give deference to the state's choice of intervention. The presence of a chapeau in XXI(b) with qualifiers in each subparagraph suggest the panel has some scope in determining the legitimacy of an essential security interest.

Security provisions appear in other WTO agreements. The provisions in GATS and TRIPS are very similar to Article XXI. In the TBT essential security interests is used in the preface with no qualifiers but also with "national security" appearing four times in association with a list of other exceptions, reminding one of GATT Article XX.

GATT 1947 is legally distinct from GATT 1994. The latter was part of a more legalistically oriented dispute resolution process through the DSU, that addressed dissatisfaction under the GATT 1947 regime, under which a party could unilaterally frustrate the process. Under the WTO an appeal process was established and a negative consensus for adoption of panel reports. This system was to provide predictability and strengthen multilateral dispute settlement. Panel formation occurs at the request of one party with automatic terms of reference set for the panel. The DSU requires panels to use objective assessment and does not provide any exceptions. All of these features strongly support a panel's ability to examine and adjudicate Article XXI defences

[29] GATT Ministerial Declaration 29 Nov 1982 L/5425 at para 7(iii), online pdf: <https://www.wto.org/gatt_docs/English/SULPDF/91000208.pdf>

A. Immediate Context: Contrasting Article XXI with the General Exceptions of Article XX

The purpose of both Articles XX and XXI is to serve as defences once a violation of the GATT 1994 has been found to have occurred. Early panel interpretation of defence provisions of Article XX favoured narrow interpretation of the GATT exemptions.[30] However, subsequent AB decisions has indicated that the VCLT approach should be used for interpreting all provisions of the GATT.

The AB decision in *US - Shrimp* describes the application of Article XX:

> To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in doing so, negates altogether the treaty rights of other Members.[31]

The excerpt from *US - Shrimp* could apply equally to a situation under Article XXI. Allowing a party unilaterally to use a measure of intervention in an arbitrary manner under the guise of an essential security exception would undermine the GATT. Such an interpretation would be incongruous with the object and purpose of the treaty, which emphasizes fostering reciprocity and mutual advantage.

Establishing a violation is an objective process involving a review of the facts that will enable the panel to make a finding. The two Articles that offer defences differ in that Article XX has a chapeau and Article XXI lacks one. WTO interpretation sets out a two-stage process for the analysis of the former,[32] with an initial examination as to whether the measure in dispute falls under one of the exemptions in the paragraphs below the chapeau. An assessment under the chapeau is then carried out to ensure that the manner of implementation[33] would not "constitute a means of arbitrary or

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[30] "The Panel recalled the legal principle that exceptions were to be interpreted narrowly", *European Economic Community - Restrictions on Imports of Apples - Complaint of the United States, Report of the Panel* (1989), GATT Doc. L/6513, BISD 36S/135 at para 5.13 online: GATT<https://docs.wto.org/gattdocs/q/GG/L6599/6513.PDF>

[10] *United States-Import Prohibition of Certain Shrimp and Shrimp Products* (1998), WTO Doc WT/DS58/AB/R, para 157, reprinted in 38 ILM 118 (1999). [*US - Shrimp*]

[32] *Ibid*, at para 118

[33] *Supra* note 17, at 22; and *Brazil - Measures Affecting Imports of Retreaded Tyres* (2007), WTO Doc WT/DS332/AB/R at para. 215 (Appellate Body Report), online: WTO<https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm>

unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade."[34]

The absence of a chapeau in Article XXI at suggests that a two-step approach would not be necessary in situations where this defence is invoked, however, invoking a provision within a subparagraph of paragraph (b), requires establishing that the circumstances conform to the subparagraph. The wording of the chapeau "it considers necessary" would alter the manner of evaluating the second step – without depth of panel inquiry in reviewing the choice of action taken by a party under a provision in Article XXI. It does not, however, absolve the party invoking a defence from the burden of proof that the conditions set out in the exception are met. This idea is supported in the Appellate Body decision in *Wool Shirts and Blouses:*

> … it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[35]

The absence of "it considers" before "necessary" in the paragraphs in Article XX, leads to a presumption that a different standard for judicial review must apply for examining Article XXI. Adjudication in Article XX involves a substantive analysis of necessity. The burden is on the party invoking the exception to demonstrate that measures taken fall within the scope of one of the subsections of Article XX. The scope of the chapeau for Article XX is with respect to the actions taken by the party.[36] A full analysis will attempt to discern the true object and purpose of the action taken, consider the context, examine if a necessity threshold had been reached, whether alternative measures were available and weigh the proportionality of the violation's impact to the impact of the opposing threat:

> As the Appellate Body has explained, a necessity analysis involves a process of "weighing and balancing" a series of factors, including the importance of the objective, the contribution of the measure to that

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[34] GATT, art XX

[35] WTO, *United States – Measure Affecting Imports of Woven ` Shirts and Blouses from India: Report of the Appellate Body*, WT/DS33/AB/R. at 14 [*Wool Shirts and Blouses*]

[36] Ocho notes that the scope of the chapeau "addresses the manner in which the questioned measured is applied, not to the measure or its specific content as such". Juan Ocho, "General Exceptions of Article XX of the GATT 1994 and Article XIV of the GATS", (31 October 2010) online: <https://www.uio.no/studier/emner/jus/jus/JUS5850/h12/tekster/ochoa-general-exceptions.pdf>

> objective, and the trade-restrictiveness of the measure.[37] The Appellate Body has further explained that, in most cases, a comparison between the challenged measure and possible alternatives should then be undertaken.[38] The burden of proving that a measure is "necessary to protect public morals" within the meaning of Article XX(a) resides with the responding party, although a complaining party must identify any alternative measures that, in its view, the responding party should have taken.[39]

In view of the different language used in Article XXI, such a comprehensive review would be excessive. This does not, however, preclude a panel's ability to objectively review a defence or excuse the defending party from any burden of proof.

A panel must consider the overall framework of the GATT and the context for a panel's interpretive function based on its mandate in the Dispute Settlement Understanding. The language in Article 11 of the DSU gives a clear mandate for objective assessment:

> a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

Invoking an Article XXI defence to completely avoid a panel's scrutiny would not be consistent with Article 11 of the DSU. The EU has argued in its third-party submission in *Russia transit* that if the matter was not justiciable the panel would not be able to fulfill its obligation[40].

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[37] Appellate Body Reports, *Korea – Various Measures on Beef*, para. 164; *US – Gambling*, para. 306; and *Brazil – Retreaded Tyres*, para. 182.

[38] Appellate Body Report, *US – Gambling*, para. 307 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 166). See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 321 (referring to Appellate Body Report, *US – Gambling*, para. 307). In the context of Article 2.2 of the TBT Agreement, the Appellate Body stated that "[i]n most cases, a comparison of the challenged measure and possible alternative measures should be undertaken". (Appellate Body Report, *US – Tuna II (Mexico)*, para. 322) The Appellate Body then proceeded to identify circumstances in which comparison with possible alternative measures may not be required, for instance, when the challenged measure is not trade restrictive, or when it makes no contribution to the objective. (Ibid., fn 647 to para. 322)

[39] Exert taken from *EC- Measuring Prohibiting The Importation and Marketing of Seal Products*, Appellate Body report, 22 May 2014, WT/ DS400/AB/R, at para 5.169

[40] *Supra* note 5, at para 18.

B. The United States' Viewpoint in DS512 on the Context of Article XXI

In its third-party submission in *Russia – Measures Concerning Traffic in Transit* the United States supported its textual analysis with several comparative contextual arguments. First, the phrase "which it considers" appears in subparagraphs (a) and (b) of Article XXI but does not appear in subparagraph (c). This suggests that the element of self-judgment was intended in enumerated circumstances of subparagraphs (a) and (b), but not in circumstances relating to sanctions authorized by the United Nations' Security Council. Second, while a number of subparagraphs of Article XX use the phrase "necessary", never is it accompanied by the phrase "which it considers". The US argued this demonstrates the drafter's intent to include an element of subjective judgment of the Member invoking the national security exceptions of Article XXI while excluding this subjectivity from the general exceptions of Article XX. Thirdly, the US cited Articles 26.1 (relating to non-violation complaints under XXIII (1)(b)) and 26.2 (relating to other complaints under XXIII (1)(c)) of the DSU as provisions of WTO law that contain both "which it considers" language, as well as a condition precedent requirement (i.e. a panel determination) for the effective invocation of a provision. Its argument was that the contrasting absence of a condition precedent for invoking Article XXI of the GATT 1994 is evidence of the WTO Members' intent for invocations of national security to not to be subject to panel review.[41]

C. Context within WTO Treaties Containing Similar Provisions

Within the WTO Agreement, the GATT 1994 resides in Annex I along with other agreements on trade such as the TBT Agreement, as well as the GATS and the TRIPS. Prior to 2017, there had been no panel adjudication involving essential security interests exceptions in any of the Agreements. The essential security exceptions found in GATS and TRIPS are very similar to Article XXI, which shows a degree of consistency across the WTO regime. The TBT Agreement differs, int that the clause "essential security interests" lacks any qualifiers and the TBT Agreement also uses the term "national security."

The wording of the security exception in TRIPS is identical to Article XXI of the GATT with a minor semantic difference in the words "Contracting Party" having been replaced by "Member", to achieve consistency with the 1994 GATT. There has been, however, some clarification on the ability of developing countries struggling with costs of licenses for patented medicines to determine a national emergency:

The Declaration on the TRIPS Agreement and Public Health (Declaration), adopted in Doha, in November of 2001, provides that "[e]ach member has the right to determine

[41] *Ibid*.

what constitutes a national emergency or other circumstances of extreme urgency."[42] This Declaration extends the meaning of essential security interests outside of war and endorses full discretion in decision-making to a member.

In GATS the security exception is found in Article XXIV bis.

1. Nothing in this Agreement shall be construed:

a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:

i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;

ii) relating to fissionable and fusionable materials or the materials from which they are derived;

iii) taken in time of war or other emergency in international relations; or

c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1 b) and c) and of their termination.

There are minor differences from Article XXI under paragraph (b). The exception in GATT Article XXI(b)(i) has been moved to subparagraph(ii) and "fusionable" has been added to fissionable and material. The GATS subparagraph(i) is identical to GATT Article XXI(b)(ii) except the "trade in arms, ammunitions and implements of war and such traffic in other goods and materials" has been replaced with "the supply of services". The similar wording for the security exceptions within both GATS and TRIPS underscores that the primary association with military conflict and war is the prerequisite for situations in which such exceptions would be applicable.

The GATS provision also includes a notification requirement to the Council for Trade in Services regarding the termination of actions under 1(b) and (c). The additional

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[42] DOHA WTO Ministerial 2001WTO Declaration on the TRIPS agreement and Public Health, adobted Nov 20, 2001, at 5c. online: WTO<https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm>, Lindsay notes that developing countries have argued that the provision is self-judging. Peter Lindsay in " The ambiguity of GATT Artilce XXI: Subtle Success or Rampant Failure?", Duke Law Journal 52: 1277, 2003 at 1283 -4

provision in paragraph 2 makes the notification requirement explicit, which is consistent with the Decision issued by Council in 1982 requiring notification under the GATT.

The continuity within the WTO Agreements extends to the Agreement on Import Licensing Procedures, where under Article 1 General Provisions, paragraph 10, Article XXI of the GATT is incorporated by reference:

> 10. With regard to security exceptions, the provisions of Article XXI of GATT 1994 apply.

In contrast, the TBT Agreement[43] is an anomaly in that the clause "essential security interest" arises first in the preamble, where it is qualified only by a reference to "protection". The "it considers" wording is also lacking.

> *Recognizing* that no country should be prevented from taking measures necessary for the protection of its essential security interest;

Within the Agreement itself the wording changes to "national security", with no additional descriptive information. The use of the term "national security" is in a list of exceptions, which resemble items in paragraphs of Article XX of GATT, such as those relating to human, animal or plant life or health, or prevention of deceptive practices, suggesting that it is of the same class as these other items. The "national security" term appears in Article 2.2, and 2.10 then again in Articles 5.4 and 5.7. There is no description related to military equipment or war in association with the term "national security" in the TBT Agreement.

> Article 2.2 of the TBT Agreement:
>
> 2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the

[43] *Agreement on Technical Barriers to Trade, TBT,* 1868 UNTS 120 (1994)

risks non-fulfilment would create. Such legitimate objectives are, *inter alia:* **national security requirements**; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information, related processing technology or intended end-uses of products. (emphasis added)

Article 2.10 of the TBT Agreement:

2.10 Subject to the provisions in the lead-in to paragraph 9, where urgent problems of safety, health, environmental protection **or national security** arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 9 as it finds necessary, provided that the Member, upon adoption of a technical regulation, shall:

Article 5.4 of the TBT Agreement:

5.4 In cases where a positive assurance is required that products conform with technical regulations or standards, and relevant guides or recommendations issued by international standardizing bodies exist or their completion is imminent, Members shall ensure that central government bodies use them, or the relevant parts of them, as a basis for their conformity assessment procedures, except where, as duly explained upon request, such guides or recommendations or relevant parts are inappropriate for the Members concerned, for, *inter alia*, such reasons as: **national security requirements**; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological or infrastructural problems.

Article 5.7 of the TBT Agreement:

5.7 Subject to the provisions in the lead-in to paragraph 6, where urgent problems of safety, health, environmental protection or **national security** arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 6 as it finds necessary, provided that the Member, upon adoption of the procedure, shall:

Finally, in Article 10.8.3 “essential security interest” when read with the introductory phrase of 10.8 is identical to Articles XXI(a) serving as exception to the disclosure of information containing “they consider”.

Article 10.8 of the TBT Agreement:

10.8 Nothing in this Agreement shall be construed as requiring:

10.8.1 the publication of texts other than in the language of the Member;

10.8.2 the provision of particulars or copies of drafts other than in the language of the Member except as stated in paragraph 5; or

10.8.3 Members to furnish any information, the disclosure of which they consider contrary to their **essential security interests**.

The question arises as to whether "essential security interest" and "national security" are interchangeable. The application of the principle of statutory interpretation that where the wording within a treaty is different it must be so for a reason would thus suggest that the terms are unique and have different meanings. "National security" as used in the TBT agreement is categorized alongside exemptions seen in Article XX GATT. There is no specific wording linking "national security" to war or emergencies in international relations, suggesting that the term "national security" is broader. One can postulate that this could include terrorism, cybercrime or other general threats, but the fact that it is placed with equal standing next to provisions that under Article XX, strongly indicates that it must be different from "essential security interests". In WTO jurisprudence where Article XX provisions have been invoked Member has the burden of proof of demonstrating that the conditions set out in the exception are met[44] and panels have performed objective substantive analyses evaluating the measures employed. The implication would be that national security reasons would similarly be analysed.

D. Context within WTO: The Dispute Settlement Understanding as Supporting Justiciability

When the GATT was drafted it was done so on the understanding that it would function under the auspices of the ITO, which would have had the role of dispute resolution. Analysis of the GATT must consider this context. With the failure of ITO ratification, the GATT, which came into force in 1948, stood on its own, both for the promotion of free trade and for dealing with associated trade disputes between members.

Membership in the GATT initially comprised 23 contracting parties. The approach to the resolution of disputes was outlined in GATT Articles XXII and XXIII. During the

[44] Appellate Body Report, United States — Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

GATT's initial existence diplomacy played an important role[45]. Diplomatic talks were considered the first steps of settling disputes. Negotiations and bargaining would weigh the perceived value of "normative condemnation" of the transgressor by other members and market punishment.[46] Article XXII, entitled "Consultation," directs parties to initiate consultation and afford each other an opportunity to make representations in "any matter affecting the operation of the Agreement". The earliest disputes, such as Czechoslovakia's complaint were dealt at Council by a vote of the contracting parties.

As the number of parties grew, by the mid 1960's the process for settling disputes was replaced by panels of 3 – 5 independent experts[47]. Panels would then draft a report for adoption through consensus at the GATT Council, at which point they would become legally binding.[48] The consensus principle prevented panel report adoption without endorsement by all contracting parties. Hence the veto power of the responding party significantly weakened the dispute resolution process.

Dissatisfaction with the dispute settlement mechanisms grew in the 1980s, by which point only 60% of the panel reports were being adopted.[49] A procedural rule reform in 1989 allowed for the establishment of a panel when one party filed a complaint,[50] but the rules regarding the adoption of panel reports by consensus remained in place.

By the time the text of the GATT 1947 was incorporated into the WTO Agreement as part of the GATT 1994, membership had increased to 128.[51] The WTO Agreement of

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[45] Busch writes that under GATT, diplomatic norms were viewed as the way to settle things whereas under WTO – where "right perseveres over might"– is a more legalistic approach has evolved. Mark Busch, & Eric Reinhardt, E "The Evolution of GATT/WTO Dispute Settlement" (2003) at 143 online (pdf): <http://faculty.georgetown.edu/mlb66/TPR2003_Busch_Reinhardt.pdf> -

[46] *Ibi*d at 147.

[47] WTO, "Historic Development of the WTO Dispute Settlement System" online: WTO<https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm#txt2>

[48] *Ibid*. Codification of this process occurred in 1966, with additional documentation in 1979, 1982 and 1984. WTO, "Decision of 5 April 1966 on procedures under Article XXIII", online: WTO<https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/a2s1p1_e.htm >;

[49] David Shapiro, "Be Careful What You Wish For: US Politics and the Future of the National Security Exception to the GATT", 31 Geo Wash. J Intl L & Econ 97 (1997-1998) at 105

[50] "If the complaining party so requests, a decision to establish a panel or working party shall be taken at the latest at the Council meeting, following that at which the request first appeared as an item on the Council's regular agenda, unless at that meeting the Council decides otherwise." GATT, *Improvements to the GATT Dispute Settlement Rules and Procedures,* L/6489 (1989) at 4, online: GATT<https://www.wto.org/gatt_docs/English/SULPDF/91420188.pdf>

[51] WTO, " The 128 countries that have signed GATT by 1994", online: WTO<https://www.wto.org/english/thewto_e/gattmem_e.htm >; As of July 2018 there are 164

1994, which concluded the Uruguay round and created the WTO, included numerous additional agreements on trade in goods, as well as the GATS and the TRIPS (Annex 1B and 1C respectively). Annex II of the WTO Agreement contained the new Understanding on Rules and Procedures Governing the Settlement of Disputes. The dispute process became more legalistic, establishing rules and procedures with timelines, in an attempt to address concerns about the GATT dispute settlement system.

The process of adoption of panel reports underwent a major change, known as the negative consensus. Individual members could no longer block a panel report, however, an appellate system to review panel decisions was established, giving both parties to the dispute an opportunity for appeal. The effect of this rule was to strengthen the dispute settlement process, which was one of its objectives. Article 23 of the DSU is titled "Strengthening of the Multilateral System". It mandates that Members have recourse to the rules and procedures of the DSU when they seek to redress a violation of obligations under the covered agreements.[52]

> When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding. [53]

As pointed out by the EU in its third-party submission in the Russia-Ukraine dispute, if Article XXI was non-justiciable this would represent a relocation of ultimate authority to decide the outcome of disputes from panels and the Appellate Body to individual Members. The creation of the DSU was designed to eliminate the ability of a party to be able to unilaterally block a panel decision which in effect would deny the opposing contracting party recourse to dispute resolution.[54] An interpretation of non-justiciability of Article XXI would would run counter to both a plain meaning and purposive interpretation of Article 23 DSU, therefore contradicting the objectives of the WTO Agreement.[55]

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members of the WTO. WTO, "Members and Observers" 29 July 2016 online: WTO<https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm >

[52] *EU Third Party Submission*, Supra note 5.

[53] *DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization,* Annex 2, 1869 UNTS 401, 33 ILM 1226 (1994), Article 23 [DSU]

[54] *EU Third Party Submission*, *supra* note 5.

[55] *Ibid*.

Further examination of the DSU identifies three additional Articles that militate in favour of interpreting Article XXI of the GATT 1994 as justiciable.[56] First, Article 3.2 states:

> [t]he dispute settlement system is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

If a WTO Member had complete discretion to declare that a measure is necessary for protecting its essential security interests, Members would not be able to predictably rely on remedial action and the negative impact of a violation on a party would remain unaddressed.[57] This interpretation of Article XXI would put the sustainability of the trading system into doubt. This view was expressed succinctly by a US scholar:

> If every WTO Member arrogates for itself the right to be the final arbiter on questions relating to trade and national security, such action could deliver a mortal blow to the GATT-WTO system.[58]

The DSU's function needs to include justiciability on matters including Article XXI exceptions using the principles of public international law treaty interpretation referred to in Article 3.2. One such principle is that of good faith, which is captured in Article 26 of the VCLT and discussed in a separate section below.

Second, Article 7, titled "Terms of Reference of Panels" begins with the standard terms for panels, namely "[t]o examine, in the light of the relevant provisions [in the agreement cited by the parties] the matter referred to the DSB by (name of party)…".[59] To suggest that an issue is not justiciable would be deeming the matter to be immune from panel examination, contrary to the working of Article 7. These terms of reference are a change from previous GATT rules which allowed a party to restrict the scope of a panel. In this way an individual party could influence dispute settlement in its own favour by restricting what a panel could examine or even block the establishment of a

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[56] *Ibid*, at para 14 - 21

[57] *Ibid.*

[58] Kevin Kennedy, "The GATT – WTO system at Fifty*",* Digital Commons at Michigan State University College of Law, 1 Jan 1998, at 441-442 online (pdf): <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?Article=1389&context=facpubs>

[59] *Supra* at note 49, art 7

panel.[60] Under the DSU once a request is made by one Member to proceed with panel adjudication, the other party cannot stop it. Only if both parties agree would a panel's role be restricted. As Article 7 explicitly provides that standard terms of reference be used, they can only be changed if both parties in the dispute agree.

A panel's duty to address all provisions is reinforced in Article 7.2 of the DSU that indicates "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."[61] This wording does not restrict any particular portion of any agreement, Article XXI is not mentioned as an exception. Nor can the term "address" be presumed to allow deferring to one's parties argument. There is no indication in the DSU that an item within the GATT, including Article XXI, is outside of the scope of panel review and adjudication. The degree of examination by the panel may be limited and could involve deference to the rational for the Member's actions if the panel determines that the standard of good faith has been upheld by the invoking Member. Interpreting Article XXI as non-justiciable would be inconsistent with the terms of reference of the panel in this dispute.

Third, Article 11, titled "Function of Panels", with a requirement for a panel's objective assessment was noted earlier. Deeming Article XXI as not justiciable would preclude a panel from fulfilling its obligation of objective assessment and the making of a recommendation.[62]

I.I.III: Subsequent State Practice – Approach to Dispute Settlement

Summary:

The VCLT 31(3)(b) includes subsequent state practice as a component of treaty interpretation. Five situations where article XXI was relevant are reviewed and opposing views of parties expressed at Council meetings are presented. Many parties expressed a need to defer to the state invoking Article XXI, but others called actions inappropriate and did not believe parties could be allowed to abuse the system by invoking Article XXI. Contracting parties criticized the use of trade measures for non-economic reasons, and this concept was adopted in the Ministerial Declaration of

[60] The Nicaragua – US dispute in the 1980's described below in the section Subsequent State Practice, illustrates this situation and undoubtedly contributed to member dissatisfaction with the dispute settlement process under the GATT.

[61] *Ibid*.

[62] *Ibid.*

1982 in the aftermath of sanctions against Argentina. The US's ability to prevent a panel from addressing Article XXI in the Nicaragua case frustrated an opportunity for its interpretation. The panel was unable to recommend any measures that would resolve Nicaragua's complaint and returned the question of Article XXI back to Council for a formal interpretation. In 1996, after the US passed the Helms-Burton Act, it appeared that the matter may finally be addressed by a panel under the new DSU regime, but the members involved reached a diplomatic resolution, letting the formal WTO process lapse. The risk of panel adjudication that might politicize the multilateral trading system was an ongoing concern. Subsequent practice shows that while many parties appreciated the need for states to be able to protect their security interests, allowing unfettered unilateralism was problematic as it would undermine the system and leads to its collapse. This debate favours panel justiciability but with a measure of deference to a member invoking a defence.

Under Article 31(3)(b) of the VCLT interpretive consideration needs to be given to "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Subsequent practice gradually creates new international norms, which under the principle of international law known as opinio juris become legally binding.

> The importance of such subsequent practice in the application of a treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.[63]

Article XVI of the WTO Agreement states that "the WTO shall be guided by the decisions, procedures and customary practices followed by the [contracting parties] to GATT 1947…".[64] Article 3. 2 of the DSU states that the DSU "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."[65] As there is very little case law around Article XXI, but GATT contracting parties and WTO members have taken measures that contravene GATT provisions and have justified them based on their essential security interests a review of these situations will provide insight for Article XXI interpretation. A review of some of the key disputes that arose and how contracting parties reacted to them can be relevant to the interpretive exercise if the statements and

[63] UN (1966), *Yearbook of the International Law Commission 1966*, vol. II, Yearbook of the International Law Commission, UN, New York, at 221.

[64] *World Trade Organization Agreement: Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154 art XVI.

[65] DSU, *Supra* note 53 art 3.2

actions amount to "subsequent practice" within the meaning of Article 31(3)(b) of the VCLT.

The application of subsequent practice has been acknowledged by the AB in *Japan – Alcohol Beverages:*

> Generally, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.[66]

Subsequent practice therefore allows a panel to interpret a treaty as it has evolved as a consequence of events and actions that have followed the treaty's drafting.

A. Czechoslovakia, the First Invocation of an Article XXI Defence Supports Deference

The earliest invocation involving Article XXI came was in 1949, as the Cold War was beginning. Following the dispute process of Article XXIII, Czechoslovakia complained about the US imposition of export license bans on war materials. Czechoslovakia maintained that the US "interpreted the expression 'war material' so extensively that no one knew what it really covered,"[67] and that the application of the ban resulted in a violation of GATT Articles I and XIII. The fact that the US defended itself against expansive measures taken, shows it was defending itself on the merits of the case.[68]

The contracting parties discussed the complaint at their meeting on 8 June 1949. The US cited Article XXI as part of its defence along with Article XX. Pakistan was of the view that the US action was taken in the interest of peace and security. The UK expressed the view that "the United States action would seem to be justified because every country must have the last resort on questions relating to its own security",[69] however, it went on to state that "the CONTRACTING PARTIES should be cautious

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[66] *Japan - Taxes on Alcoholic Beverages*, (1996), WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R at 12-13 (Appellate Body report), [*Japan - Alcoholic Beverages*]

[67] GATT, *Summary Record of Twenty-second Meeting 8 June 1949*, CP.3/SR22 - II/28, BISD II/28, at 2 online: GATT<http://www.worldtradelaw.net/reports/gattpanels/usexportrestrictions.pdf.download>

[68] Hannes Schloemann & Stefan Ohlhoff "Constitutionalization and dispute Settlement in the WTO: National Security as an Issue of Competence" (1999) 93(2) Am J of Int'l Law April, 424 at 433

[69] S*upra* note 63 at 3

not to take any step which might have the effect of undermining the General Agreement."[70]

There was no analysis of the components of Article XXI (b), but a general deference to the US's ability to invoke the security provision. The debate among contracting parties remained at a broad level. In concluding comments, the Chairman summarized Czechoslovakia's questioning of US action being a violation of GATT, as

> … not appropriately put because the United States Government had defended its actions under Articles XX and XXI which embodied exceptions to the general rule contained in Article I.[71]

A vote was held under Article XXIII (2), with 17 of 23 contracting parties siding with the US, hence the Czechoslovak compliant was dismissed. The process of voting reflected that contracting parties accepted jurisdiction over Articles XXI.[72].

B. Sweden, Economic Measures Under the Pretense of the Security Exception are Criticized

In 1975, Sweden introduced a quota system to protect its footwear industry, citing a need for "a minimum domestic production capacity in vital industries" and explaining that the "decrease in domestic production had become a threat to the planning of-Sweden's economic defence in situations of emergency as an integral part of its security policy".[73] Contracting parties expressed doubts about Sweden's justification of the measures, at a time where unemployment was high internationally[74]. Although announced as "temporary" there was no termination date for the quotas. Many members reserved their rights under the GATT agreement. Sweden maintained that "the measure was taken in conformity with the spirit of Article XXI, but his Government did not wish to deprive contracting parties of the possibility to enter into consultations.[75] Sweden

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[70] *Ibid.*

[71] *Ibid.*

[72] This interpretation is put forward by Schloemann, *supra* note 68 at 432. In fn43 Schloemann cites Bhala who views that this indicates formal jurisdiction under Article XXIII for Article XXI matters. Raj Bhala, "National Security and International Trade Law: What the GATT Says, and What the United States Does", (1998) 19 U Pa J Intl Econ L at 263, 278, 279

[73] GATT, *Council meeting minutes Oct 31, 1975*, GATT Doc C/M.109 at 8 online (pdf): GATT<https://www.wto.org/gatt_docs/English/SULPDF/90430147.pdf>

[74] GATT – Council of Representatives – *Draft Report on Work since the Thirtieth Session* (C/W/264.Add.1) 7 November 1975. Sweden – Import restrictions on certain footwear (C/M/109).

[75] Ibid C/W.264 at 4

eventually vacated the measures, but the response from the international community to the decision of imposing the measures in 1975 suggests that invoking measures for economic reasons under the guise of a national security exception is viewed with disapproval.

C. Argentina, Objections to Economic Penalties for Non-Economic Reasons

During the 1982 Falklands war the EC, Canada and Australia restricted imports from Argentina, citing UN Security Council Resolution 502 and their rights under Article XXI GATT. At the May 1982 GATT Council meeting members raised concerns.[76] Brazil argued that the measures were not justified under Article XXI:

> [Brazil] pointed out that while the motives for the trade sanctions against Argentina were clear, the justification was not; and he felt that this type of action set a dangerous precedent.[77]

Other members objected to the use of economic measures being used for non-economic purposes. Czechoslovakia referred to the "difficulty of insulating international economics from politics" and voiced its concern that,

> countries having an economically strong position could abuse their power. Since one purpose of the GATT was to reduce the danger and damage arising from arbitrary measures, attempts should be made in all cases, including the present case, to ensure the highest possible degree of adherence to the GATT rules. Furthermore, he felt that in GATT, as a matter of principle, political considerations should not outweigh economic and trade considerations.[78]

Japan also shared concerns about political motives interfering with trade. "In [Japan's] view, the interjection of political elements into GATT activities would not facilitate the carrying out of its entrusted tasks."[79] Singapore viewed that "the invocation of Article XXI and the imposition of trade restrictions as acts of a political nature should not

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[76] GATT Council minutes of meeting 7 May 1982, C/M/ 157 22 June 1982, online at: <https://docs.wto.org/gattdocs/q/GG/C/M157.PDF>

[77] *Ibid*, at 5

[78] *Ibid* at 9

[79] *Ibid*

induce the Council to bring extraneous factors into this case." Although Singapore acknowledged "Article XXI allowed a contracting party the right to determine the need for protection of its essential security interests, [h]is delegation none the less saw a danger in the broad interpretation which Article XXI permitted."[80]

Cuba pointed out that in the UN Security Council resolution 502 "economic and trade sanctions against Argentina were not mentioned".[81] Pakistan also referred to Resolution 502, stating that as the situation "was not an extreme emergency in international relations, the use of trade restrictions did not, in this case establish a working precedent"[82].

Hungary also had concerns,

> stating that the security considerations under Article XXI of the General Agreement were within the realm of the individual contracting parties. [Hungary] said that this type of provision should therefore be handled with great care, which had not been the case in the present instance as questionable measures had been taken.[83]

Clearly, a number of contracting parties saw the invocation of Article XXI as problematic in the case of Argentina. Members holding an opposing viewpoint maintained that political matters were not within GATT competence. The US stated that "regrettably, contracting parties had in the past used sanctions involving trade in the context of their security interests as they perceived them", and that GATT did not have the authority to resolve political or security concerns. [84]

Although formal procedures under Article XXIII were not initiated, the discussions led the GATT Council to adopt a Decision to introduce procedural guidelines for the invocation of Article XXI:

> "Considering that the exceptions envisaged in Article XXI of the General Agreement constitute an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved;

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[80] *Ibid* at 7

[81] *Ibid* at 6

[82] *Ibid* at 7

[83] I*bid* at 8

[84] *Ibid* at 8

> "Noting that recourse to Article XXI could constitute, in certain circumstances, an element of disruption and uncertainty for international trade and affect benefits accruing to contracting parties under the General Agreement;
>
> "Recognizing that in taking action in terms of the exceptions provided in Article XXI of the General Agreement, contracting parties should take into consideration the interests of third parties which may be affected;
>
> "That until such time as the CONTRACTING PARTIES may decide to make a formal interpretation of Article XXI it is appropriate to set procedural guidelines for its application;
>
> The CONTRACTING PARTIES decide that:
>
> 1. 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.
>
> 2. When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement.
>
> 3. The Council may be requested to give further consideration to this matter in due course. [85]

This Decision imposed a notification requirement when measures under Article XXI are introduced. In the preamble, the reference to a disruptive effect of invoking Article XXI raises the possibility that a member's benefits may be impacted. However, the Decision states that parties "retain their full rights" under the GATT. This would include pursuing a remedy under Article XXIII for the nullification or impairment of benefits.

Article XXIII states:

> If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
>
> (a) the failure of another contracting party to carry out its obligations under this Agreement, or

[85] GATT, *Decision Concerning Article XXI of the General Agreement 30 Nov 1982*, GATT Doc L/5426, online: <https://www.wto.org/gatt_docs/english/SULPDF/91000212.pdf>

> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement
>
> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned[86]

The situation under Article XXIII(1)(a) would refer to a situation where an alleged violation that has occurred and cannot be successfully justified by an exception, whereas Article XXIII(1)(b) would still allow the pursuit of nullification or impairment in the situation where a defence such as Article XXI was successful in justifying tariffs or other measures. In *EEC- Oilseeds* a WTO panel explained:

> The idea underlying [the provisions of Article XXIII:1(b)] is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.[87]

The Decision does not provide clarity in how to approach seeking redress when Article XXI has been cited as justification for GATT violation.

This Decision came on the heels of the Ministerial Declaration of Nov 29, 1982 that reinforced the goals of the GATT in "furthering well-being" through the expansion of trade and cautioned about protectionism. In its priorities for the 1980's Council explicitly reaffirmed that contracting parties undertook "- to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement." [88]

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[86] GATT, *Supra* note 19 art XXIII (1)

[87] *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, (1989) L/6627 – 37S/86, (Panel Report), at para 144 [*EEC – Oilseeds*], online: <https://www.wto.org/english/tratop_e/dispu_e/gatt_e/88oilsds.pdf>

[88] GATT *Supra* note 28

D. Nicaragua, Potential Opportunities for Panel Interpretation of Article XXI

In 1982 under President Reagan, the US responded to the recent change in the Nicaragua's government by using trade measures, by directly supplying arms to Contra rebels as well as by mining the waters around Nicaragua's ports. Nicaragua in turn responded through legal challenges. The military action was challenged on the basis of Nicaragua's 1956 Treaty of Friendship, Commerce and Navigation with the US at the ICJ, discussed below. In response to the reduction of Nicaragua's sugar import quotas and the redistribution of theses quotas to other countries Nicaragua brought a complaint against the US under GATT for violations of Articles II, XI, XIII and Part IV of the GATT. After a period of consultation, a panel was convened to hear the complaint.

Nicaragua argued that economic measures should not be used for non-economic purposes. In support, Nicaragua invoked the GATT November 1982 Ministerial declaration paragraph 7(iii) where contracting parties undertook "to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement".[89] Nicaragua anticipated that the US would defend its actions in terms of foreign policy and security considerations, justifying itself by invoking GATT Article XXI and claiming that the protective trade measures taken were necessary for its essential security interests.

> Nicaragua also referred to the fact that the United States had explained the introduction of this measure in terms of foreign policy and security considerations. Nicaragua believed that it was a fundamental principle that no contracting party should use trade measures to exert pressure for the purpose of solving non-economic problems. This principle had been embodied in paragraph 7(iii) of the Ministerial Declaration of November 1982.[90]

The US considered that evaluating the trade matter in isolation rather than in a broader context would be "disingenuous"[91]. It claimed that its actions were not solely motivated by trade considerations and were not taken for trade policy reasons but as part of a broader dispute. The US maintained "that the review and resolution of that broader

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[89] *Ibid* at 3.

[90] *United States – Imports of Sugar from Nicaragua* (1984) WTO Doc L/5607-31S/67, (Panel report) at para 3.9 online: WTO<http://www.worldtradelaw.net/reports/gattpanels/ussugarnicaragua.pdf.download>

[91] *Ibid at* para*3.11*

dispute was not within the ambit of the GATT".[92] The US maintained "that the regulation of its domestic sugar market was entirely valid under the GATT."[93] Article XXI of the GATT was not invoked.

The panel acknowledged that the US measures were part of a "more general problem". The panel's terms of reference were:

> To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Nicaragua, relating to the measures taken by the United States concerning imports of sugar from Nicaragua (L/5492 and L/5513), and to make such findings as will assist the CONTRACTING PARTIES in making recommendations or rulings, as provided in Article XXIII.

It proceeded in accordance with GATT provisions and concerned itself only with trade. The panel determined it did not need to examine the US quota system under Article XI but would focus on the US reduction in Nicaragua's allotted quota under Article XIII:2. The numbers showed a reduction that was inconsistent with US obligations. The panel determined that "the United States had failed to carry out its obligations under the General Agreement."[94] Having determined this inconsistency the panel found it unnecessary to further examine violations under Articles II or under Part IV. As the US did not invoke any defence provision such as Article XXI, the Panel did not examine possible justifications.[95] In other words, the panel was not called upon to examine the exception in Article XXI. Subsequently, the US did not adopt the panel's recommendations and did not change Nicaragua's sugar quota.[96]

The case brought before the ICJ by Nicaragua involved the interpretation of a non-precluding clause related to essential security in the 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the US and established a standard for analysis for such a provision. Article XXI of this treaty contained similar wording to Article XXI of GATT:

> 1. [T]he present Treaty shall not preclude the application of measures:
>
> […]

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[92] *Ibid.*

[93] Ibid at para 3.12

[94] *Ibid*, para 4.7

[95] *Ibid*, para 4.4

[96] Schloemann, *Supra* note 68 at 434

> (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. [97]

The ICJ contrasted the wording in this treaty with Article XXI of GATT, which includes the phrase "it considers necessary".

> That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it "considers necessary for the protection of its essential security interests", in such fields as nuclear fission, arms, etc.[98]

In consequence, the ICJ made a detailed assessment of the Customary International Law doctrine of collective self-defence. It examined the facts to ascertain whether the measures taken by the US could be justified as "necessary". In approaching this analysis, the Court drew a distinction between treaty provisions where the phrase "considers necessary" is used, on the one hand, and the wording in the Treaty of Friendship, Commerce and Navigation, where "necessary" lacked the complementary verb "considers", on the other hand:

> […] by the terms of the Treaty itself, whether a measure is necessary to protect the essential security interests of a party is not, as the Court has emphasized (paragraph 222 above), purely a question for the subjective judgment of the party; the text does not refer to what the party "considers necessary" for that purpose.[99]

There was no further elaboration as to whether the Court had a role in assessing the reasonableness of a party's subjective interpretation or the extent to which it must be deferential to it. Nor was any opinion given as to whether "it considers necessary" encompasses both the preceding part of the sentence in Article XXI, that is, the action taken by a state, or also the determination of the essential security interest. After this

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[97] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)*, (Judgement of 27 June 1986) 1984 ICJ Rep 396, at para 221, online: <https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>

[98] *Ibid*, at para 222

[99] *Ibid*, at para 282

decision an increasing number of treaties have adopted the more restrictive wording "it considers necessary"[100].

The characterization used by the ICJ that Article XXI should be interpreted subjectively by the State invoking it was echoed in the *China -Raw materials* WTO panel decision in 2012:

> The Panel does not consider that the terms of Article XI:2, nor the statement made in the context of negotiating the text of Article XI:2 that the importance of a product "should be judged in relation to the particular country concerned", means that a WTO Member may, on its own, determine whether a product is essential to it. If this were the case, Article XI:2 could have been drafted in a way such as Article XXI(b) of the GATT 1994, which states: "Nothing in this Agreement shall be construed ... to prevent any contracting party from taking any action *which it considers necessary* for the protection of its essential security interests" (emphasis added). In the Panel's view, the determination of whether a product is "essential" to that Member should take into consideration the particular circumstances faced by that Member at the time when a Member applies a restriction or prohibition under Article XI:2(a).[101]

Article XI is titled General Elimination of Quantitative Restrictions. Article XI:2(a) provides for an exclusionary provision to a general prohibition in XI:1 to limit the scope of such restrictions.

> 2. The provisions of paragraph 1 of this Article shall not extend to the following:
>
> (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;

China had argued that the product must be essential to the exporting Member, whereas the EU countered that a "broad interpretation would make other provisions redundant." [102] The panel determined that:

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[100] This increase is documented in Investor State treaties, particularly after 2000. Karl P. Sauvant & Mevelyn Ong et al, "The Rise of Self-Judging Essential Security Interest Clauses in International Investment Agreements", (2016) Columbia F.D.I. Perspectives, No. 188 online: <http://ccsi.columbia.edu/files/2016/10/No-188-Sauvant-Ong-Lama-and-Petersen-FOR-WEBSITE-FINAL.pdf>

[101] *China – Measures Related to the Exportation of Various Raw Materials*, (2011) WT/DS394/R, WT/DS395/R, WT/DS398/R at para 7.276 (Panel report) [*China-Raw Materials*]

[102] *Ibid* at para 7.268

> [t]he phrase "essential to" is defined as "affecting the essence of anything; 'material', important" "constituting, or forming part of, the essence of anything", and "absolutely necessary, indispensably requisite". The phrase "to the exporting" Member appears to have been added to the initial draft of Article XI:2(a) to clarify that "the importance of any product should be judged in relation to the particular country concerned". Thus, a product may fall within the meaning of Article XI:2(a) when it is "important" or "necessary" or indispensable" to a particular Member[103].

The panel went on to examine the use of "essential products" in other parts of WTO Agreements and determined that it "must take into consideration the particular circumstances faced by that Member at the time that a Member applied the restriction." These were then evaluated objectively by the panel. The lack of restrictive wording "it considers necessary", therefore allowed the panel to engage in an extensive analysis. The corollary would suggest that when the wording "it considers necessary" is used the extent of the panel's ability to consider particular circumstances related to essential security interests would be less rigorous or even limited.

In 1985 President Reagan imposed further trade measures on Nicaragua. He ordered a stop of all imports and exports to and from Nicaragua. This time the President was clear in invoking an essential security threat as the rationale behind this move. His Executive order read:

> […] I, RONALD REAGAN, President of the United States of America, find that the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and hereby declare a national emergency to deal with that threat.[104]

The proclamation sparked debate among GATT contracting parties at a meeting in May 1985. GATT members voiced their concerns about the plausibility that an "extraordinary threat" had occurred: "It was not plausible that a small country with modest resources could constitute an extraordinary threat to the national security of the United States."[105]

Peru called the response disproportionate:

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[103] *Ibid* at para 7.275

[104] *United States -Trade Measures Affecting Nicaragua* (1986) WTO Doc L/6053 at para 3.1 (Panel Report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/gatt_e/85embarg.pdf>

[105] GATT, *Council Minutes of Meeting 29 May 1985*, GATT Doc. C/M/188, at 6, online: GATT<https://www.wto.org/gatt_docs/English/SULPDF/91150029.pdf>

> determination of all peoples based on peaceful solutions to disputes. Peru could not accept the US justifications for the measures. It was not plausible that a small country with modest resources could constitute an extraordinary threat to the national security of the United States. The measures were disproportionate and were one more step in an escalating US effort to destabilize Nicaragua.

It urged the US to remove the measures.

Cuba supported resolution through the GATT and decried the US's arbitrariness:

> this dispute concerned all contracting parties and that GATT was the proper forum to discuss its implications for the General Agreement, because if the principles underlying common commitments were infringed, any contracting party could fall victim to arbitrary measures.[106]

Comments were directed to the requirement for a state of war or emergency in Article XXI(b)(iii), as Czechoslovakia pointed out that "this Article dealt with emergency situations and therefore had to be applied according to the specific provisions in paragraphs (b)(i), (ii) or (iii)."[107] India also stated that "the security exception should not be used to impose economic sanctions for non-economic purposes."[108]

The US took the position that the matter was outside of the GATT framework. The US also

> […] emphasized that Article XXI left to each contracting party the judgement of any action "which it considers necessary for the protection of its essential security interests ...." As his delegation had noted on previous occasions, when trade actions taken by other countries for security reasons had been raised in GATT, the United States had seen no basis for contracting parties to question, approve or disapprove the judgement of each contracting party as to what was necessary to protect its essential security interests; and the GATT had never done so. It was not for GATT to approve or disapprove the judgement made by the United States as to what was necessary to protect its national security interests; GATT was a trade organization and had no competence to judge such matters.[109]

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[106] *Ibid* at 5

[107] *Ibid* at 10

[108] *Ibid* at 5 - 11

[109] *Ibid* at 4-5

Canada, Japan, Australia, and the EU all regretted the use of trade measures for political purposes and viewed that the GATT lacked competence for resolving the underlying problem.

> Canada considered that this was fundamentally not a trade issue, but one which could only be resolved in a context broader than GATT; his delegation urged the two parties to seek a solution in that other context.[110]

Australia and the EU accepted the ability for a state to invoke Article XXI in situations but urged that any measures adopted must consider the impact on the GATT system.

> Australia had made it clear that it regretted the imposition of trade sanctions against Nicaragua. However, the United States was permitted under Article XXI of the General Agreement to take action of this kind with no requirement to justify such action. Nevertheless, Australia believed that contracting parties should avoid any action which could threaten GATT's credibility and undermine attachment to the principles of an open multilateral system.[111]

The EU also raised a concern about potential abuse of Article XXI if applied arbitrarily.

> … the [European] Community's concern was to protect the GATT multilateral system from being damaged by any ill-considered development of a situation that could neither be dealt with nor settled in the GATT framework.
>
> …
>
> the authors of the General Agreement had provided for security exceptions under Article XXI. The General Agreement left to each contracting party the task of judging what was necessary to protect its essential security interests. The Community understood that this discretion — left to each contracting party, developed or developing, for in this matter there was no question of a North/South problem — would be exercised in a spirit of responsibility, discernment, moderation, ensuring above all that discretion did not mean arbitrary application.[112]

Similarly, Norway had reservations regarding the *carte blanche* application of Article XXI by a Member:

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[110] *Ibid* at 12

[111] *Ibid* at page 12-13

[112] *Ibid* at page 13

> Article XXI stipulated certain conditions under which trade measures could be taken for non-economic purposes. Norway stressed the need for the utmost prudence in exercising the rights inherent in that Article; this aspect was particularly important for smaller countries, not least the developing contracting parties. With respect to the specific case before the Council, Norway doubted whether such prudence had been exercised. He endorsed the view of the representative of the European Communities that contracting parties should show responsibility, discernment and moderation when resorting to Article XXI, and that discretion did not mean arbitrary application.[113]

When after months of negotiation a GATT panel was established, the US was able to set a condition on the panel preventing it from assessing Article XXI. Ironically, the need to impose such a restriction could be interpreted as an acknowledgement by the US that GATT panels do have authority to examine the applicability of Article XXI.

The terms of reference for the panel were:

> "To examine, in the light of the relevant GATT provisions, of the understanding reached at the Council on 10 October 1985 that the Panel cannot examine or judge the validity of or motivation for the invocation of Article XXI:(b)(iii) by the United States, of the relevant provisions of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/211-218), and of the agreed Dispute Settlement Procedures contained in the 1982 Ministerial Declaration(BISD29S/13-16), the measures taken by the United States on7 May 1985 and their trade effects in order to establish to what extent benefits accruing to Nicaragua under the General Agreement have been nullified or impaired, and to make such findings as will assist the CONTRACTING PARTIES in further action in this matter" (In para 1.4 of decision).[114]

The panel considered the practical effects of making a recommendation in light of the negative impact experienced by Nicaragua, as a consequence of US measures. Its options were to

> a) recommend that the United States withdraw the embargo (or, which would amount in the present case to the same, that the United States offer compensation) or (b) authorize Nicaragua to suspend the

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[113] *Ibid* at page 13-14

[114] GATT, *Council Minutes of Meeting 12 March 1986*, GATT Doc. C/M/196 at 7, online: GATT<https://docs.wto.org/gattdocs/q/GG/C/M196.PDF>

application of obligations under the General Agreement towards the United States.[115]

Option (a) was not satisfactory because the US would not be under an obligation to follow the panel's recommendation as the panel could not establish a US violation without examining an Article XXI defence,[116] something it was precluded from doing. Furthermore, as the US had already stated that it would not modify its position, so it was not be possible for the panel to recommend any measures that were mutually satisfactory to both parties. [117]

Unable to evaluate the US actions, the panel was left to focus on the impact on Nicaragua. In this regard the panel was attempting to adjudicate a non-violation complaint and explore if any remedy could be offered. Option (b) would allow Nicaragua to suspend its import obligations to the US. However, the US had already prohibited all exports to Nicaragua. The panel noted that "suspension of obligations by Nicaragua towards the United States could not alter the balance of advantages accruing to the two contracting parties under the General Agreement in Nicaragua's favour." Both parties had acknowledged this point in their submissions.[118] The panel concluded that even if Nicaragua experienced nullification or impairment of benefits, the contracting parties could not take any "decision under Article XXIII:2 that would re-establish the balance of advantages which had accrued to Nicaragua under the General Agreement prior to the embargo".[119]

Thus, the outcome left Nicaragua it no further ahead. The panel viewed its own role in a very narrow way.[120]Nicaragua had called on the panel to interpret GATT provisions "within the context of the general principles of international law taking into account inter alia the judgement by the International Court of Justice and United Nations resolutions." The panel considered this to be outside of its mandate. It was to "examine the case before it "in the light of the relevant GATT provisions", although they might be inadequate and incomplete for the purpose."[121]

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[115] *United States – Trade Measures Affecting Nicaragua* (1986), GATT Doc L/6053 online: GATT<https://www.wto.org/gatt_docs/English/SULPDF/91240197.pdf

[116] *Ibid* at para 5.9

[117] *Ibid* at para 5.10

[118] *Ibid* at paras 5.10, 4.9, 4.10

[119] *Ibid.*at para 5.11

[120] *Ibid* at para 5.3

[121] *Ibid* at 5.15

The panel acknowledged that the economic impact of the US embargo on Nicaragua was "severe". It went on to state that "embargoes imposed for security reasons create uncertainty in trade relations and, as a consequence, reduce the willingness of governments to engage in open trade policies and of enterprises to make trade-related investments."[122] In a nutshell, embargos "ran counter to basic aims of the GATT, namely to foster non-discriminatory and open trade policies, to further the development of the less-developed contracting parties and to reduce uncertainty in trade relations".[123]

In the penultimate paragraph the panel raised three unresolved issues. First, how can parties ensure that the security exception is not invoked "excessively or for purposes other than those set out in this provision"?[124]Second, does a panel's inability to examine the security exception because the terms of reference withheld this authority adversely limit the "affected contracting party's right to have its complaint investigated in accordance with Article XXIII:2"?[125] Third, does Article XXIII:2 provide a meaningful redress mechanism when a two-way embargo has been imposed? In conclusion, the panel requested that the General Council consider these questions in a formal interpretation of Article XXI.

E) US Helms-Burton Act – a Preference for a Negotiated Solution

In 1996, not long after the WTO came into existence, President Clinton signed the Helms-Burton Act. The Act bolstered the longstanding US trade embargo against Cuba that dated back to 1962. Americans had not received compensation for expropriated properties. Although Soviet money that had supported the communist Cuban economy stopped when the Soviet Union collapsed, the US maintained the embargo, and began citing other reasons including terrorism and migration. A final incident that propelled the act into law occurred when the Cuban military shot down two small aircraft in international airspace near Cuba.

The Helms-Burton Act was particularly objectionable to third parties. Title 3 of the Act imposed a liability of those who trafficked in confiscated property by creating a private right of action against them. The president had the power to suspend this measure. Title 4 affected those who conducted such business and their families with travel restrictions into the US. The Act also called for secondary boycotts of products from countries that imported goods from Cuba.

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[122] *Ibid* at para 5.16

[123] *Ibid.*

[124] *Ibid* at para 5.17

[125] *Ibid*

Numerous WTO Members expressed their concern about the Helms-Burton Act at a General Council Meeting, particularly the extraterritorial aspect of the law.[126]

The EU responded by passing laws forbidding compliance with the Helms-Burton Act and granting a right to sue US parties for any losses incurred. The EU filed a complaint with the DSU citing numerous violations including the secondary boycott and requested a panel to adjudicate over the dispute[127]. Public statements of US officials had justified the Helms-Burton Act by invoking an essential security interest.

By early 1997 a panel was set up. A few months later, however, the EU requested deferring the matter by temporarily suspending the case, in anticipation that the US President would be able to reach an agreement with Congress. A deal was reached with the EU in May 1998 in which the US would waive sanctions against the EU, while the EU would limit investment in expropriated in Cuba and drop its WTO case. The EU deferral at WTO expired and the case did not proceed.

Canada and Mexico were also affected by Helms-Burton Act. Both countries passed laws to neutralize harm from US legislation.

The legalistic nature of dispute resolution under the new DSU regime is adversarial. Diplomatic settlements permit discussion and compromise, and hence retain flexibility. They can address political questions that arise under questions of essential security interests and may allow for face saving ways of resolving matters. Adjudication of Article XXI remained unchallenged for over 20 yrs.

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[126] WTO, *General Council Minutes of Meeting 16 April 1996*, WTO Doc WT/GC/M/11, pp. 5-9

[127] WTO, *Request for the establishment of a panel by the European Communities,* WTO Doc WT/DS38/2 at 1-2 (European Communities' panel request), online: WTO<https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds38_e.htm>

F) Roger Alford on State Practice

One notable academic whose work can aid in further understanding the arguments around a justiciable interpretation of Article XXI of the GATT 1994 is Professor Roger Alford of Notre Dame Law School. Alford acknowledges that the degree to which the provision is self-judging is an open question and thus focuses his attention on state practice since ratification of the GATT 1947 to determine how states appear to interpret Article XXI.

In his analysis of state practice, Alford examines the 1949 US-Czechoslovakia dispute over export licences, the dispute between Argentina and the British Commonwealth nations over sanctions imposed during the Falkland War, the US-Nicaragua dispute, the EC-Yugoslavia dispute over trade sanctions, the US-Cuba dispute over the US *Cuban Liberty and Democratic Solidarity Act*, and Saudi Arabia's accession to the WTO. Alford draws the following conclusion from his analysis:

> All States agree that the security exception can only be invoked in good faith and a strong majority of the States maintain that the security exception is self-judging. States interpreting the exception as self-judging are concerned with the need to effectively protect their security interests and to subordinate trade commitments to those interests. They are also concerned about institutional competency and politicization of the WTO. The minority of States that oppose a self-judging interpretation express concerns about abuse of the security exception by economically powerful States.[128]

I.I.IV: Object and Purpose of the WTO Agreement

Summary:

The examination of the object and purpose of the WTO Agreement yielded arguments which militated strongly against a finding of non-justiciability. The examination focuses on the wording of the preamble to the WTO Agreement and academic work by Akande and Williams. Regardless of whether the intention of States Parties is framed as a move from unilateralism to multilateralism or an intention to create legal obligations, both are incongruent with a finding of non-justiciability.

[128] *Ibid* at 708.

The VCLT incorporates the object and purpose of treaties into the interpretation of their contained provisions. The preamble to the WTO Agreement states:

> *Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,
>
> *Recognizing* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,
>
> *Being desirous* of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations,
>
> *Resolved*, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariff and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,
>
> *Determined* to preserve the basic principles and to further the objectives underlying this multilateral trading system,
>
> [Emphasis added]

The emphasized parts of the preamble warrant discussion with respect to the interpretation of Article XXI. The preamble demonstrates that two of the objectives of the treaty were 'to develop a more durable multilateral trading system' and to 'preserve the basic principles underlying the multilateral trading system'. We argue that these objectives militate against an interpretation of Article XXI as non-justiciable. First, a finding of non-justiciability would set the foundation for potential exploitation of the multilateral trading system through the use of bad faith invocations of national security exemptions. This potential for abuse would not lead to a more durable multilateral trading system, in fact, the exact opposite effect would result. Second, many of the basic principles underlying the multilateral trading system (e.g. efficient division of labour) would not be preserved in a world where economically powerful states are free to enact protectionist trade measures with total impunity. Therefore, the object and purpose of

the WTO Agreement militates against an interpretation of Article XXI as non-justiciable.

Scholarly commentary on the topic is another lens through which to view the object and purpose of the WTO Agreement. One can certainly imply from the preamble and text of the WTO Agreement that parties clearly intended, at a minimum, to create legal obligations. Professors Dapo Akande and Sope Williams use this lens to examine the question of justiciability. Their approach is two-fold; undermine the arguments of those who favour non-justiciability and use the very nature of legal obligations to argue for an interpretation of Article XXI of the GATT 1994 that is justiciable.

The Akande-Williams argument centres around the basic concept of a legal obligation. In their view, if Article XXI is entirely self-judging, then the GATT 1994 does not create any legal obligations for Members: states have not effectively bound themselves because they possess the ability to unilaterally withdraw from their obligations by invoking the national security exception at any time. This argument is tethered to the rules of interpretation through an examination of the drafters' intent. It is beyond doubt that the drafters of the GATT 1947 intended to create legal obligations that would bind states parties. Further, the drafting of the DSU and GATT 1994 demonstrates that states clearly intended for those legal obligations to be enforceable through adjudication. For Akande and Williams, this simple fact is enough to preclude any interpretation of Article XXI of the GATT 1994 as entirely self-judging.[129]

To support this view of self-judging obligations, Akande and Williams cite Judge Sir Hersch Lauterpacht's concurring judgment in the *Norwegian Loans*[130] (France v. Norway) case from the International Court of Justice (ICJ). Judge Lauterpacht held that a unilateral declaration purporting to accept the compulsory jurisdiction of the ICJ which subjected such an acceptance to a condition within the sole discretion of the State concerned was invalid. His reasoning was simple – that a self-judging instrument does not manifest the acceptance of any legal obligation at all. Stating "[a]n instrument in which a party is entitled to determine the existence of its obligation is not a valid and enforceable legal instrument of which a court of law can take cognizance. It is not a legal instrument. It is declaration of a political principle and purpose". To Akande and Williams, to interpret Article XXI of the GATT 1994 as entirely self-judging would –

[129] Dapo Akande & Sope Williams, "International Adjudication on National Security Issues: What Roles for the WTO?" (2003) 43 Va J Int'l L 365 at 383 [*Akande & Williams*].

[130] *Case of Certain Norwegian Loans (France v Norway)*, [1957] ICJ Rep 9 at 34.

by Judge Lauterpacht's logic – mean accepting a view that the drafters of the GATT 1947 did not intend to create a legal instrument.[131]

Part I.II – Supplementary VCLT Interpretation of Article XXI

Summary:

The supplementary analysis of GATT Article XXI was warranted due to the ambiguity regarding whether the deferential language 'which it considers' modifies the subparagraphs of Article XXI(b). Archival research summarized in a yet-unpublished Pinchis-Paulsen paper demonstrates that members of the US delegation in Geneva in 1947 disagreed over the draft language of the new security exception provision for the ITO Charter. The paper shows that the drafters of the provision which eventually became Article XXI of the GATT turned their mind to, and rejected, the notion of having the deferential language apply to the subgraphs found in Article XXI(b).

Under Article 32 of the VCLT, recourse may be had to the preparatory work of a treaty to confirm the result of an Article 31 analysis or when such an analysis results in ambiguity or a manifestly absurd result.

ARTICLE 32

Supplementary Means of Interpretation

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
>
> (a) Leaves the meaning ambiguous or obscure; or
>
> (b) Leads to a result which is manifestly absurd or unreasonable.[132]

[131] *Akande & Williams, supra* note 42.

[132] *VCLT, supra* note 18.

In this instance, Article 32 has an important role to play in resolving the residual ambiguity following the Article 31 analysis of Article XXI of the GATT 1994. Due to the aforementioned ambiguity surrounding whether the self-judging language (i.e. "which it considers") solely modifies the words "necessary for the protection of its essential security interests" or whether it also modifies the words "taken in time of war or other emergency in international relations", an examination of the preparatory work of the GATT 1947 is warranted. This section will examine the drafting history of Article XXI of the GATT 1947 to help illuminate the common intention of the contracting parties as well as examine some of the United States' internal preparatory work to illustrate the circumstances of the conclusion of the GATT 1947.

ITO Charter Drafting History

The preliminary drafts of the GATT 1947 were developed in the shadow of negotiations for a stillborn United Nations organization, known as the International Trade Organization (ITO). The international community began discussions for the creation of the ITO following the conclusion of World War II in 1945. Even though the ITO Charter never came into force, its development is essential to understanding the origins of the security exceptions found in Article XXI of the GATT 1947.

The first traces of language that resembled Article XXI of the GATT 1947 are found in a United States (US) proposal[133] (the first proposal) for an ITO Charter circulated in 1945. In the Commercial Policy chapter of the first proposal there was a single provision on the topic of 'exceptions' that contained language similar to both the general and national security exceptions found in Articles XX and XXI of the GATT 1947, respectively.

In February of 1946, the Economic and Social Council of the United Nations adopted a resolution calling for an international conference on trade and employment to consider the creation of the ITO. In preparation for the conference, the US submitted a 'Suggested Charter'[134] for the ITO. The language of the first proposal had been further

[133] US, Department of State, *Proposals for Expansion of World Trade and Employment* (Publication 2411, Commercial Policy Series) (1945) at 18. Section G of the Charter contained a 'General Exceptions' provision which stated that "[t]he undertakings in this Chapter should not be construed to prevent members from adopting or enforcing measures: … relating to the traffic in arms, ammunition and implements of war, and, in exceptional circumstances, all other military supplies; … undertaken in pursuance of obligations for the maintenance of peace and security…".

[134] US, Department of State, *Suggested Charter for an International Trade Organization of the United Nations* (Publication 2598, Commercial Policy Series 03) (1946) at 24. Article 32 of the 'Suggested Charter' stated that "[n]othing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by a Member of measures: … Relating to fissionable materials; 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; In time of war or other emergency in international relations, relating to the protection of the essential security interests

developed and codified into Article 32, entitled 'General Exceptions to Chapter IV'. As before, both general and national security exceptions (as distinguished in the GATT 1947) were found within a single Article under one chapeau.

The form of Article 32 was retained in the London draft Charter prepared by the Preparatory Committee of the United Nations Conference on Trade and Employment in November of 1946.[135]

At the New York Conference in early 1947, the Drafting Committee moved the general exceptions to Article 37 and altered the nature of the chapeau.[136] The chapeau to Article 37 of the New York draft is analogous to the chapeau of Article XX of the GATT 1947. The additional element required that "measures not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".

The Geneva Conference in 1947 saw the largest restructuring of the 'exceptions' provision in the draft ITO Charter. The US proposed to take subparagraphs (c), (d), (e), and (k) from Article 37 of the New York draft and create an entirely separate Article which would exempt states from their obligations under the entire Charter, not just the Commercial Policy chapter.[137] This proposal was adopted by the committee and implemented in the Geneva draft ITO Charter as the Article 43 'General Exceptions' of the Commercial Policy chapter and the new Article 94 'General Exceptions' in the General Provisions chapter.[138] Several changes to the draft are worth emphasizing.

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of a Member; … Undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security…".

[135] GATT, *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, GATT Doc E/PC/T/33 (1946).

[136] GATT, *Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment*, GATT Doc E/PC/T/34 (1947). Article 37 stated "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in Chapter V shall be construed to prevent the adoption or enforcement by any Member of measures: … Relating to fissionable materials; 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; In time of war or other emergency in international relations, relating to the protection of essential security interests of a Member; … Undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security".

[137] GATT, Council, *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, GATT Doc E/PC/T/W/23 (1947).

[138] GATT, *Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, GATT Doc E/PC/T/186 (1947). Article 43 stated "[s]ubject

First, the choice was made that the chapeau of Article 94 should not include the language about "arbitrary or unjustifiable discrimination" from the former Article 37 despite its inclusion in Article 43. Second, the decision was made to expand the scope of Article 94 exceptions as they exempted states from all obligations under the Charter. Lastly, the structure of Article 94's three subparagraphs became what is now Article XXI of the GATT 1947.

GATT 1947 Drafting History

The initial drafts of the GATT 1947 were developed at the Geneva Conference in 1947 alongside the ITO Charter. In fact, the vast majority of the GATT 1947 provisions were copied from the Commercial Policy chapter of the draft ITO Charter.

In Geneva, the draft GATT underwent a similar restructuring process with respect to its 'exceptions' provisions. At the outset, the newer General Exceptions found in Article 94 of the ITO Charter became Part I of Article XIX of the Geneva draft of the GATT.[139] Likewise, the General Exceptions listed in Article 43 of the draft ITO Charter became Part II of Article XIX of the Geneva draft of the GATT. This structure kept both exception provisions as component parts of the same Article, whereas the Geneva draft ITO Charter contained separate Articles for each exception provision.

The initial discussions that led to the eventual separation of the two parts of Article XIX were recorded in a Verbatim Report[140] from the eleventh meeting of the Tariff Agreement Committee on September 5, 1947. The representative from France was the first to suggest the separation of the two parts into separate Articles – Articles XIX and

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to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Member of measures…". Article 94 stated "[n]othing in this Charter shall be construed (a) to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or (b) to prevent any Member 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 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 Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security".

[139] GATT, *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, (Draft) General Agreement on Tariffs and Trade*, GATT Doc E/PC/T/189 (1947).

[140] GATT, UNESC, *Verbatim Report – Eleventh Meeting of the Tariff Agreement Committee Held on Friday, 5 September 1947 at 230pm in the Palais de Nations, Geneva*, GATT Doc E/PC/T/TAC/PV/11 (1947), at 23-26.

XIX(A). The US representative suggested that Article XIX(A) be titled 'Security Exceptions' to distinguish it from the 'General Exceptions' listed in Article XIX.

Both proposals were eventually adopted, and thus the two parts of the former Article XIX were split into separate Articles with distinct titles and introductory language. These changes were reflected in the final Geneva GATT draft[141] from October of 1947, wherein the 'General Exceptions' of Article XIX had taken the form of the final draft GATT Article XX and the 'Security Exceptions' of Article XIX(A) had taken the form of the final draft GATT Article XXI.

US Internal Debate Regarding Article XXI

As noted above, the United States played a central role in the development of Article XXI of the GATT 1947. The language of the provision originates in the United States Draft Charter for the ITO and it was the US that proposed creating a new exceptions provision which would apply to the whole Charter, separate from the existing general exceptions provision. Therefore, records of internal debate between members of the US delegation with respect to Article XXI have the potential to illuminate the intent behind the language of the provision. The inclusion of this type of information in the VCLT Article 32 analysis is not automatic. In *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, the Appellate Body discussed the type of information that can be included under Article 32 of the VCLT, stating:

> We stress, moreover, that Article 32 does not define exhaustively the supplementary means of interpretation to which an interpreter may have recourse. It states only that they *include* the preparatory work of the treaty and the circumstances of its conclusion. Thus, an interpreter has a certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties.[142]

In that case the EC argued for a narrow interpretation of Article 32, insisting that there must be a 'direct link' to the treaty text and 'direct influence' on the common intentions must be shown for an event, act, or instrument to qualify as a "circumstance of the conclusion" of a treaty. The Appellate Body rejected this view, stating:

> An "event, act or instrument" may be relevant as supplementary means of interpretation not only if it has actually influenced a specific aspect

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[141] GATT, *Final Act, GATT and Protocol of Provisional Application*, GATT Doc E/PC/T/214/Add.1/Rev.1 (1947).

[142] *European Communities–Customs Classifications of Frozen Boneless Chicken Cuts* (2005), WTO Doc WT/DS269/AB/R at para 283 (Appellate Body Report), online: WTO <docsonline.wto.org>.

> of the treaty text in the sense of a relationship of cause and effect; it may also qualify as a "circumstance of the conclusion" when it helps to discern what the common intentions of the parties were at the time of the conclusion with respect to the treaty or specific provision. […] Thus, not only "multilateral" sources, but also "unilateral" acts, instruments, or statements of individual negotiating parties may be useful in ascertaining "the reality of the situation which the parties wished to regulate by means of the treaty" […].[143]

Thus, for discussions that were internal to a particular negotiating party to be imported into the Article 32 analysis a tether to the common intention of parties is likely required. While it is not a certainty that a Panel would allow the inclusion of the following information in their analysis, its importance and potential inclusion warrants discussion.

This examination of the internal debate amongst members of the US delegation to the United Nations Conference on Trade and Employment focuses on the quarrel between members of the State Department and the War and Navy Departments (collectively, the Services Departments) over the wording of the national security exception during the second preparatory committee meeting in Geneva.[144] The debate centred around three principle actors: Clair Wilcox and Seymour Rubin of the State Department, and Harold Neff of the War Department. Wilcox, who led the Office of International Trade Policy at the State Department, was an economist from the faculty of Swarthmore College and had served as head negotiator for the ITO Charter. Rubin, an assistant legal advisor for economic affairs at the State Department, was an alumnus of Harvard Law School with experience working at the Securities and Exchange Commission. Neff, who was the special assistant to the Under Secretary of War, was a lawyer from Virginia and a professor of international law.[145]

The disagreement between the State Department and the Services Departments over the scope and wording the national security exception dated back to a time prior to the first preparatory meeting held in London. The Services Department sought a national security exception that would allow the US to impose trade restrictions, discriminatory measures, and unilateral economic sanctions.[146] Further, they contested that the ITO Charter's non-discrimination commitments and argued that abidance of the US' Charter

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[143] *Ibid*, at para 289.

[144] For a more complete account of these discussions see: Mona Pinchis-Paulsen, *Trade Multilateralism and National Security: Antinomies in the History of the International Trade Organization* (2019) [unpublished, archived on SSRN].

[145] *Ibid* at 7, 20.

[146] *Ibid* at 8, n 37.

obligations constituted 'economic disarmament'.[147] In a memorandum authored by Wilcox, he argued that the Services Departments sought an exception 'so broad as to permit any nation, seeking individual advantage in trade under the guise of security, completely to escape from the obligations it had assumed under the ITO Charter'.[148] The State Department's rebuttal was to argue that Services Departments' position 'assumes that any aspect of military security, no matter how remote or indirect, must override all considerations of economic and social well-being', and such a position 'is wholly at variance with [the US'] established foreign policy.'[149] The State Department was wary of the fact that other states could use the exception for 'every form of discrimination and restrictive practice.'[150]

One episode of the quarrel that was particularly well-documented surrounded the US' proposal to relocate subparagraphs (c), (d), (e), and (k) of the general exception in the commercial policy (then Article 37) to a separate chapter of the Charter to create a new exception provision for the entire Charter (later Article 94). Following two initial attempts to draft mutually agreeable language for this new general exception provision, Wilcox requested that Rubin compose new draft language after discussing with Neff regarding his concerns surrounding the previous draft language.[151] Rubin composed the following language for the provision:

> [Without limitation of any other exception or qualification] Nothing in this Charter shall be construed to compell [sic] any Member to furnish any information the furnishing of which it considers contrary to its essential security interests, or to prevent the adoption or enforcement by any Member of any measure or agreement which may [deem] consider to be necessary and to relate to:
>
> 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 good 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;

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[147] *Ibid* at 8, nn 39-40.

[148] *Ibid* at 8, n 43.

[149] *Ibid* at 8, n 42.

[150] *Ibid* at 8, n 45.

[151] *Ibid* at 17.

> d) [Undertaken] Undertakings in pursuant of obligations under the United Nations Charter for the maintenance of international peace and security.[152]

In discussions with the delegation, Rubin explained that the draft included the language "and to relate to" due to Neff's demands for its inclusion.[153] Neff argued for the retention of the words because they created an "independent clause" that made it 'clear' that the US had an opportunity for 'unilateral action'.[154] To Neff, the wording enabled states to determine whether a measure was 'necessary' *and* how it 'related to' the conditions listed in the subparagraphs. The inclusion of this language sparked opposition from a number of US delegates. Their opposition can be summarized by a statement by one delegate, Kenneth Vandevelde, who said: 'Neff's proposal regarding the national security exception is nothing less than an assault on the Charter as an instrument of the rule of law.'[155] On a vote regarding Neff's proposed language 'and to relate to', three delegates (Neff, Thorp, and Brossard) voted for retaining the language and nine delegates (Rubin, Arnold, Brown, Evans, Hawkins, Leddy, Ryder, Schwenger, and Terrill) voted against the language and instead sought to include the words 'relating to'.

Following the vote regarding Neff's proposed language, both Neff and Rubin provided a memorandum to Wilcox regarding the wording of the national security exception. Neff's memorandum argued that the delegation's current amendments to the exception provision did not provide the United States with unilateral power to interpret its security interests under the ITO Charter. Further, he argued 'unilateral interpretation is not really reserved by the language used even if the person interpreting gave the most complete value to the word "consider", which is not in itself inevitable.'[156] Neff was steadfast in maintaining his position that the exception provision should be 'clear and conspicuous' about states reserving the unilateral power for interpretation.[157]

Rubin's memorandum to Wilcox presented the counterargument to Neff's memorandum. To Rubin, the current wording of the amendment afforded sufficient latitude for the US government to address its security concerns without gutting state's core obligations under the ITO Charter. Rubin argued that Neff's wording would 'make

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[152] *Ibid* at 17, n 120.

[153] *Ibid* at 17, n 123.

[154] *Ibid* at 18, n 125.

[155] *Ibid* at 18, n 128.

[156] *Ibid* at 21, n 165.

[157] *Ibid* at 21.

unchallengeable by the Organization or any other Member a justification, however far-fetched, of any action on this basis.'[158] Further, Rubin argued that the present amendment language 'does not permit this completely open escape from the Charter'.[159]

Neff would ultimately loss his campaign for clear and unambiguous language reserving the unilateral power to interpret the national security exception provision. This quarrel between the State Department and the Services Departments shows that the US – who drafted the amendment to the national security exception provision – turned their mind to the issue of justiciability while drafting the wording of the provision. Further, the debate shows that both the State Department and the Services Departments felt that the language of the amendment would ensure that a measure would not escape justiciability in the event that the provision was invoked in bad faith. While it is far from certain that a WTO panel would consider these documents as part of a VCLT Article 32 analysis, they are nonetheless illustrative of the drafter's intent with respect to Article XXI of the GATT.

Part I.III: Other Treaties with Provisions Similar to Article XXI

Summary:

Numerous other treaties including some that are not trade related have national security provisions. Comparing the language and structure of such provisions may give helpful insight into the interpretation of GATT Article XXI. A 2008 ICJ decision involved a security exception provision with similar self-determining language in a treaty between France and Djibouti. The matter was justiciable. A good faith standard was applied and a fair degree of deference was accorded by the Court to France, that had invoked the security defence. The dissent is noteworthy in regard to the adequacy of the depth of analysis. Bilateral Investment Treaties are another source of security exceptions. Copious ICSID arbitration cases resulted after Argentina's reliance on its essential security provision in its investment treaty with the US, leaving numerous decisions interpreting the relevant national security clause.

[158] *Ibid* at 23, n 181.

[159] *Ibid* at 23, n 182.

I.III.I: Other Treaties and Similar Provisions

Many other international treaties, both trade-related and otherwise, contain provisions invoking similar national security exceptions. It is insightful to compare how different language and construction of a provision changes the extent to which parties can exercise discretion in determining a security need. This results in a spectrum from little to absolute discretion. Disputes based on the interpretation of these clauses that lead to legal cases arise infrequently. A few have been before the ICJ but many more before ICSID arbitrators. Although ICSID decisions are not judicial and carry less weight than ICJ jurisprudence, they may be helpful in understanding how adjudicators approach interpretation of national security clauses. These decisions would not be binding on a WTO panel, but the analysis taken would be based on the same customary rules of interpretation of international law that a WTO panel would rely on.

Free Trade Agreements Without Security Provisions

To date there have been no cases of arbitrations or judicial procedures adjudicating exemptions related to essential security interests or national security in Free Trade Agreements (FTAs). Although many FTAs have a national security provision, this is not universal. The FTAs between Korea and the European Union, Korea and India, Korea and the Association of Southeast Asian Nations[160] and The Mercosur Free Trade Agreement[161] have no such provisions.

Free Trade Agreements with Provisions Identical to Article XXI

Most free trade agreements follow elements of the GATT Article XXI with identical language and including the phrase "it considers necessary".[162] Some include the same structure, with three paragraphs (a), (b) and (c). Most variation occurs around the composition of the elements in XXI(b). NAFTA serves as an example of this. The text of NAFTA Article 2102 is laid out in a similar manner as GATT Article XXI, with parts (a), (b) and (c) and the words "it considers necessary" in the same locations.[163]

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[160] Ji Yoo & Dukgeun Ahn, "Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?" (2016) 19 J of Intl Econ L 417 at 436

[161] *MERCOSUR Free Trade Agreement,* Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay,26 Marc 1991 online: <http://www.worldtradelaw.net/fta/agreements/mercosurfta.pdf.download >

[162] Roger Alford, "The Self-Judging WTO Security Exception" (2012) 3 Utah L Rev 697 at 735.

[163] *North American Free Trade Agreement,* United States, Canada and Mexico, 17 December, 1992, (entered into force on January 1, 1994) [NAFTA]

Article 2102

The subparagraphs of (b) are arranged in a different order with the GATT subparagraph(b)(i) moved down to the third position and its wording changed from fissionable materials to nuclear materials and nuclear explosive devices. It is noteworthy that Article 1138 contains an exclusion for pursuing private dispute settlement using arbitration under Article 2102 (National Security), which strengthens the premise that this provision is meant to be self-judging.

> Article 2102:
>
> 1. Without prejudice to the applicability or non-applicability of the dispute settlement provisions of this Section or of Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures) to other actions taken by a Party pursuant to Article 2102 (National Security), a decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of another Party, or its investment, pursuant to that Article shall not be subject to such provisions.

NAFTA also contains exceptions in Part IV General Procurement, chapter 10. Article 1018(1)[164] is a similar provision with the phrase "it considers necessary" allowing

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Subject to Articles 607 (Energy - National Security Measures) and 1018 (Government Procurement Exceptions), nothing in this Agreement shall be construed:

> (a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;
>
> (b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests
>
> > (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,
> >
> > (ii) taken in time of war or other emergency in international relations, or
> >
> > (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or
>
> (c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

[164] NAFTA, *ibid.* Part IV General Procurement, chapter 10, Article 1018:

1. Nothing in this Chapter shall be construed to prevent a Party form taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes.
2. Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same condition prevail or a disguised restriction on trade between Parties, nothing in this Chapter shall be construed to prevent any Part from adopting or maintain measures:
   (a) necessary to protect public morals, order or safely;

unilateral restriction relating to government procurement to be exempt based on essential security interests related to "arms, ammunition or war material, to procurement indispensable for national security or for national defence purposes." Article 1018(2) is drafted in a manner similar to GATT Article XX. It lists the protection of public morals, order or safety, the protection of human, animal or plant life – items similar to those under Article XX. Like Article XX, 1018(2) starts with a prefacing chapeau specifying the manner of application not being "arbitrary of unjustifiable discrimination" or a "disguised restriction on trade".

The 1997 EU Treaty of Amsterdam has a security exemption in Article 296 that is similar to GATT Article XXI. Paragraph (1)(a) paraphrases GATT Article XXI (a) (words from XXI are italicized.)

> 1. The provisions of this Treaty shall not preclude the application of the following rules:
>
> (a) no Member State shall be obliged to supply *information the disclosure of which it considers contrary to* the *essential interests* of its *security;*[165]

Paragraph (b) of Article 296(1) captures the theme in XXI(b), but is condensed and has no subparagraphs. It contains the words "it considers necessary", but modifications in this provision weaken a state's discretion. There is no reference to fissionable materials of XXI(b)(i) nor circumstances such as war as in XXXI(b)(iii). The products listed in Article 296 (1)(b) are identical to XXI(b)(ii) of the GATT. They are called "arms, munitions and war materials". The provision is explicit in referencing materials that have civilian application as inapplicable and paragraph (2) leaves open the ability of modifying the list of products involved. These details limit the ability of self-determination by a state.

> (b) any Member State may take such measures as *it considers necessary for the protection of the essential interests* of its *security* which are connected with the production of or trade in *arms,* munitions and *war* material; such

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(b) necessary to protect human, animal or plant life or health;
(c) necessary to protect intellectual property; or
(d) relating to goods or services of handicapped persons, of philanthropic institution or of prison labor

[165] *Treaty of Amsterdam, Amending the Treaty on European Union, The Treaties Establishing the European communities and Certain Related Acts,* 10 November 1997, O.J. C 340/1, art 296 online: <https://www.refworld.org/docid/51c009ec4.html> [Treaty of Amsterdam]

measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.[166]

The explicit itemization has the effect of narrowing the scope of this exception and gives more certainty to its meaning as compared to the more ambiguous nature of Article XXI. In consequence an EU security exemption is less deferential to member states compared to the GATT. The language in the recently negotiated CETA agreement also reflects the focus on military in the national security exception but includes a provision similar to GATT Article XX. [167]

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[166] *Ibid.*

[167] *Comprehensive Economic and Trade Agreement*, Canada and the EU, 30 October 2016, (provisional application 21 September 2017) [CETA]

Article 19.3 – Security and general exceptions

1. Nothing in this Chapter shall be construed to prevent a Party from taking any action or from not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement:

a. of arms, ammunition* or war material;

(* The expression "ammunition" in this Article is considered equivalent to the expression "munitions".)

b. or to procurement indispensable for national security; or

c. for national defence purposes.

2. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent a Party from imposing or enforcing measures:

a. necessary to protect public morals, order or safety;

b. necessary to protect human, animal or plant life or health;

c. necessary to protect intellectual property; or

d. relating to goods or services of persons with disabilities, of philanthropic institutions or of prison labour.

Free Trade Agreements with Increased Objectivity in Language of Exception

There are FTAs that do not include "it considers necessary" wording. Some simply omit the word "it" before "considers necessary",[168] arguably making the standard more objective. Article XVI.02 of the CARICOM - Costa Rica Free Trade Agreement of 1994 provides an example: "…to prevent any Party from taking any actions considered necessary for the protection of its essential security interests…"[169] The Andean Community, a customs union established by the 1969 Cartagena Agreement, retains an exemption to weapons, ammunition and other war material and all other military Articles, as well as the export and use of nuclear material.[170] The exclusions are in a list with other exceptions such as those found in GATT Article XX and are preceded by a chapeau that simply indicates that these conditions are exceptions, but has no language as to the determination of how or who determines when the exception is applicable.[171] There is no wording in the Cartagena Agreement that allows a party to judge the necessity of invoking these provisions.

The language in 1996 Canada-Israel Free Trade Agreement was more objective without the phrase "it considers necessary"[172], but the 2018 renegotiated agreement was modified to include these words (Article 20.2).[173]

> 1996 Article 10.2
>
> Nothing in this Agreement shall be construed:
>
> (a) to require either party to furnish or allow access to any information the disclosure of which would be contrary to its essential security interests;
>
> (b) to prevent either Party from taking any actions necessary for the protection of its essential security interests:

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[168] Alford, *supra* note 162 at 737 footnote 266

[169] *CARICOM Costa Rica Free Trade Agreement*, CARICOM members (Barbados; Belize; Dominica; Grenada; Jamaica; St. Kitts and Nevis; St. Lucia; and St. Vincent and the Grenadines) and Costa Rica, 9 March 2004, (entered into force 1 January 2005) Article XVI.02 [CARICOM Costa Rica Free Trade Agreement]

[170] Alford, *supra* note 162 at 735

[171] Andean Subregional Integration Agreement (Cartagena Agreement), Bolivia, Colombia, Ecuador, Peru, and Venezuela, 26 May 1969 Article 73, online:

< https://www.jus.uio.no/english/services/library/treaties/09/9-01/andean_integration_consolidated.xml#treaty-header1-10> [Cartagena agreement]

[172] Alford, *supra* note 162 at 736 footnote 265

[173] Canada-Israel Free Trade Agreement, Chapter 20 Exceptions, 25 May 2018, online:< http://www.sice.oas.org/Trade/can-isr/CAN_ISR_2018_text_e.asp#A20_2>

2018 Article 20.2: National Security

This Agreement does not:

(a) require a Party to furnish, or allow access to, any *information if that Party determines* that the disclosure of the information would be contrary to its essential security interests;

(b) prevent a Party from taking any action that *it considers necessary* to protect its essential security interests:

In some agreements a party's discretion is markedly weakened with explicit wording similar to the chapeau in GATT Article XX, as in the EU – South Africa Agreement of 1999,[174] which contains the following clause: "Such prohibitions or restrictions shall not, however, constitute a means of arbitrary or unjustifiable discrimination… or a disguised restriction on trade between Parties".

The recent Trans-Pacific Partnership Agreement has a very limited security provision – that includes clauses identical to GATT Article XXI (a) and XXI (c) only, completely eliminating XXI (b).[175] General exceptions are incorporated into this treaty by reference to Article XX of the GATT.

Free Trade Agreements Increasing Unilateral Determination of a Security Exception

At the other end of the spectrum are agreements that appear to give a state expansive power to determine exceptions themselves. This is done by using broad language in describing the essential security interest or simply leaving it undefined. An example of

[174] Alford, *supra* note 162 at 736

[175] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, Australia Brunei Canada Chile Japan Malaysia Mexico New Zealand Peru Singapore and Vietnam, 8 March 2018 (entered into force 30 December 2018) chapter 29 [Trans-Pacific Partnership Agreement]

Article 29.2: Security Exceptions

Nothing in this Agreement shall be construed to:

(a) require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

(b) preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

such a treaty is NAFTA's successor, the CUSMA.[176] The renegotiated agreement removed references to "arms, ammunition or war materials" as well as "procurement *indispensable* for national security or national defense purposes" (italics added). Instead there is no elaboration – the phrase simply states: "the protection of its own essential security interests".

> CUSMA Article 32.2: Essential Security
>
> 1. Nothing in this Agreement shall be construed to:
>
> (a) require a Party to furnish or allow access to information the disclosure of which it determines to be contrary to its essential security interests; or
>
> (b) preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

The legal effect would be an expansion of the definition of essential security. Security would not need to be restricted to military threats, but could, in theory, be expanded to threats beyond those circumscribed by Article XXI relating to military matters or war, hence could include new threats like terrorism, cyber-security and potentially others, if deemed by the State to be "essential".[177] In this way the application of the exclusion opens the ability to include economic situations or other events as determined by the State invoking the exception.

Finally, strengthening unilateral state discretion has been done by imposing limitations on an adjudicating panel. The text of the treaty can directly disallow a tribunal's authority to review the matter, making the exception explicitly non-justiciable. An example can be found in the India-Singapore Comprehensive Economic Co-operation Agreement 2005:

> […] where the disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a security exception as set out in Article 6.12 of the Agreement, *any decision of the disputing Party taken on such security considerations shall be non-justiciable* in that *it*

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[176] *Canada United States Mexico Agreement*, Canada United States and Mexico, 30 November 2018 [CUSMA]

[177] As discussed below the interpretation of such broad clauses by arbitration tribunals in Bilateral Investment treaties has created conflicting interpretations but shows that an unqualified term in an exemption is asserted it may result in litigation with unpredictable outcomes.

> *shall not be open to any arbitral tribunal to review the merits* of any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal.[178] (emphasis added)

Another example of a provision precluding justiciability is found in the US- Korea agreement where a footnote to the relevant Article 23. 2(b) states:

> For greater certainty, if a Party invokes Article 23.2 in an arbitral proceeding initiated under Chapter Eleven (Investment) or Chapter Twenty Two (institutional Provisions and Dispute Settlement) the *tribunal or panel hearing the matter shall find that the exception applies*.[179] (italics added)

Insights from Treaties of Freedom, Commerce, and Navigation

Treaties of Freedom, Commerce and Navigation (FCN) were precursors to Bilateral Investment Treaties (BITs). The language used in provisions allowing exceptions did not routinely include the wording "it considers", but otherwise reflected the exclusionary concepts related to trade in nuclear and war materials seen in Article XXI of the GATT. This was reflected in the US model provision.

> The present Treaty shall not preclude the application of measures: . . . (b) relating to fissionable materials, to radioactive by-products . . . or to materials that are the source of fissionable materials; (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 or security or necessary to protect its essential security interests.[180].

The impact of the 1986 ICJ ruling in the dispute between Nicaragua and the US discussed above was to draw attention to the consequences of adding the words "it

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[178] M Nolan & F Sourgens, "The limits of discretion? Self-judging emergency clauses in international investment agreements", *Yearbook of International Investment Law and Policy 362 (with Michael Nolan; Karl Sauvant ed.: Oxford University Press, 2011).* Chapter 9 at 39 online: <ssrn.com/abstract=3055968>, *supra* note at 24

[179] Yoo, *supra* note 160 at 438-439. Such a clause also incorporated into 2009 agreement with Peru, 2012 agreement with Colombia and 2012 agreement with Panama

[180] Alford, *supra* note 162 at 739 – references a 1970 paper with text of model used in treaties of FCN.

considers". Absent such words the court saw its obligation to make an objective analysis, instead of deferring to a subjective interpretation by a State.

The approach was endorsed shortly thereafter by the ICJ in a dispute between Iran and the US based on a 1955 treaty on Amity, Economic Relations, and Consular Rights. Under Article XXI (2) of this treaty[181] disputes were supposed to be submitted to the International Court of Justice, if they could not be settled. Iran alleged that US attacks on Iranian oil platforms in the 1987 and 1988 were a violation of the treaty[182]. The US relied upon Article XX1d: Exclusion clause which captured activities "necessary to fulfill 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". In its decision [183] the Court deemed that it can objectively assess the lawfulness of measures referred to in Article XX 1d. It then went on to rule that although the attacks were not necessary, and were disproportionate, they did not affect freedom of commerce, so did not violate the treaty.

I.III.II: Bilateral Investment Treaties - a Source of Arbitral Jurisprudence

Investment protection was formerly achieved through treaties of FCN. When the ITO did not come into being and the GATT became a multilateral trade agreement, investment became a major component of FCN treaties. Provisions often directed that disputes be resolved through recourse to the ICJ. The focus of these treaties in the post-colonial era of the late 1960s and 1970s was on protecting investment from expropriation. These treaties started to grant direct rights of action to corporations. With the establishment of ICSID in 1965 dispute resolution moved away from the ICJ to arbitration. Increasingly more BITs were concluded by the 1990s and thereafter, some as part of trade agreements. The goal shifted to promoting the flow of investment. The OECD provided sample legal material to assist treaty drafting. The use of BITs grew exponentially over the last two decades. Presently, there are over 2000 BITs in place, with an assortment of variations in the wording of exclusionary provisions.

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[181] *IRAN Amity, Economic Relations, and Consular Rights*, United States and Iran, 15 August 1955, (entered into force 16 June 1957) Article XX, online: <https://www.state.gov/documents/organization/275251.pdf>

[182] In 1987 and 1988 the US attacked Iranian oil platforms in the Persian Gulf, alleging they were being used as bases to attacking shipping vessels, including those registered under the US. Pieter Bekker,, "The World Court Finds that US attacks on Iranian Oil Platforms in 1987-88 were not Justifiable as Self-Defense, but the United States Did Not Violate the Applicable Treaty with Iran", Am Society of Intl Law, vol 8 Issue 25, online: <https://www.asil.org/insights/volume/8/issue/25/world-court-finds-us-attacks-iranian-oil-platforms-1987-1988-were-not>

[183] *Ibid*

The language in the 1998 OECD draft text mirrors GATT Article XXI, with minor structural changes, such as moving XXI(a) down to be the second paragraph.

> Nothing in this Agreement shall be construed:
>
> a. to prevent any Contracting Party from taking any action which it considers necessary for the protection of its essential security interests:
>
> (i) taken in time of war, or armed conflict, or other emergency in international relations;
>
> (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons of mass destruction;
>
> (iii) relating to the production of arms and ammunition;
>
> b. to require any Contracting Party to furnish or allow access to any information the disclosure of which it considers contrary to its essential security interests;
>
> 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.

XXI (b) has been moved up. The chapeau is identical and contains the phrase "it considers necessary". The subparagraphs all relate to war. The equivalent subparagraph to Article XXI (b)(iii) adds "or armed conflict" after "war" and is followed by "other emergency in international relations.[184] The language in the 1998 model changed

[184] Negotiating Group on the Multilateral Agreement on Investment, "The Multilateral Agreement on Investment Draft Consolidated Text" 22 April 1998, OECD, at 76 online pdf: <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>

somewhat from the 1997 model which included optional provisions in square brackets[185]. "It considers necessary" was one such optional phrase.[186]

What falls under "essential security interest" will depend on the treaty. The OECD model is limited to defence and peace and security interest. Non-specific essential security interest can include financial crises, environmental and health concerns.[187] ICSID tribunals have considered whether a national financial crisis is an essential security interest, although adjudication on the same matter has yielded conflicting verdicts.[188]

At the start of the century Argentina's handling of its currency crisis led to numerous disputes against Argentina. Many involved the US-Argentina BIT, with an interpretive focus on the particular the text of Article XI:

> This treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[189]

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[185] 1997 OECD Draft Text Essential Security Exemption:

Nothing in this Agreement shall be construed:

a. to prevent any Contracting Party from taking any action [which it considers] necessary for the protection of its essential security interests [including those:]

(i) taken in time of war, [or] armed conflict, [or other emergency in international relations];

(ii) relating to the implementation of national policies or international agreements respecting the non-proliferation [inter alia] of nuclear weapons or other nuclear explosive devices;

(iii) relating to the production of arms and ammunition;]

b. to require any Contracting Party to furnish or allow access to any information the disclosure of which [it considers] [would be] contrary to its essential security interests;

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.

[186] Negotiating Group on the Multilateral Agreement on Investment, "The Multilateral Agreement on Investment Consolidated Texts and Commentary" 13 May 1997, OECD, at 68 online pdf: <http://www1.oecd.org/daf/mai/pdf/ng/ng971r2e.pdf>

[187] Nolan, *supra* note 178.

[188] *Ibid* at 39 n 238

[189] Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, United States and Argentina, (14 November 1991), IC-BT 385 (1992), (entered into force 23 September 1992) at Art. XI online: <https://2001-2009.state.gov/documents/organization/43475.pdf>[US-Argentina BIT]

Although the ultimate decisions were conflicting, there was a preponderant view that the language of the provision allowed tribunals to make determinations based on an analysis of necessity and proportionality. In *CMS v Argentine Republic* the tribunal stated that it would apply a "substantive review that must examine whether the state of necessity or emergency meets the conditions laid down by customary international law and the treaty provisions and whether it thus is or is not able to preclude wrongfulness."[190]

In *LG&E v Argentine Republic* it was argued that the language used in the BIT, was self-judging. The panel was influenced by whether at the time of treaty signing the US and Argentina considered the provision to be self-judging. It ultimately decided that in 1991 this language had not been considered self-judging by the signing parties. The panel went on to say " [w]ere [it] to conclude that the provision is self-judging, Argentina's determination would be subject to a good faith standard review anyway".[191] The panel then analyzed discriminatory treatment, arbitrary treatment, where proportionality was considered as well as an extensive examination of the state of necessity.[192] The panel held that between Dec 2001 and April 2003 Argentina was in the "state of necessity" and during that period was exempt from responsibility.[193]

In *Continental Casualty v Argentine Republic* the tribunal would have applied a similar good faith standard to its analysis with wording "it considers necessary".[194] Allowing a high degree of deference to the state invoking this defence, such an interpretation still might put under analysis proportionality and reasonableness and examine the nexus between the effectiveness of the action taken and the underlying essential security interest.

The impact of these decisions has influenced the crafting of international investment agreements. A 2016 report on the use of self-judging essential security interest clauses noted that they were being used with increasing frequency. The study noted that prior

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[190] *CMS Gas Transmission Company v Argentina Republic*, ICSID Case No. ARB/01/8, IIC 65 (2005), award (May 12, 2005),[*CMS v Argentine Republic*]

[191] *LG&E Energy Corp v Argentine Republic, ICSID Case No. ARB/02/1*, Decision on Liability at 214 online pdf: <https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf> [*LG&E v Argentine Republic*]

[192] *Ibid.* Discriminatory treatment considered at paras 140 – 148, Arbitrary treatment at paras 149 – 163, Indirect expropriation at paras 176 – 200 and State of Necessity at paras 226 - 261

[193] *Ibid* at 266-267. The panel found that Argentina did was not liable for expropriation or adopting arbitrary measures. It was, however, liable for having breached the fair and equitable standard,

[194] *Continental Casualty Company v Argentina Republic*, ICSID Case No. ARB/03/9; IIC 336 (2008), award (September 5, 2008), at [*Continental Casualty v Argentine Republic*]

to 2000 only a small amount of treaties had such clauses, whereas by 2015 60% of new agreements did.[195] The scope of clauses could increase in two ways: by not defining the essential security interest or by varying the wording such as adding a footnote directing the tribunal to exercise deference to a party's interpretation of its security interests.[196]

I.III.III: Other Treaties with Arbitral Decisions Relating to Security Exclusions

In 2008 the ICJ ruled on a provision in an international treaty between Djibouti and France that contains wording analogous to "it considers necessary", namely, "if the requested State considers". In 2006 Djibouti took its case against France to the ICJ, asserting that France had violated its obligations under the 1986 Convention on Mutual Assistance in Criminal Matters between the [Djiboutian] Government and the [French] Government. One matter related to a request for a rogatory letter that France refused to provide. The background events related to the murder of a French judge in Djibouti in 1995. Djibouti deemed the death to be a suicide. France also began an investigation, and among those implicated in the murder was Djibouti's president. In 2004 Djibouti decided to reopen the investigation and issued an international letter rogatory request for France provide the record of its investigation.[197]

In 2005, the French investigating judge with responsibility for responding to the international letter rogatory decided not to honour the request. Her reasoning was based on the ground that Djibouti had not provided reasons for reopening the investigation. She also noted that

> Article 2(c) of the [Mutual Assistance] 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, ... ordre public or other ... essential interests [of France].[198]

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[195] Karl Sauvant & Mevelyn Ong, "The rise of self-judging essential security interest clauses in international investment agreements", (2016) 188 Perspectives on topical foreign direct investment issues at 2

[196] *Ibid.*

[197] "The Court will now turn to examining the obligation to execute the **international letter rogatory** set out in Article 1 of the 1986 Convention and, according to Djibouti, elaborated in Article 3, paragraph 1, of the Convention, in the following terms: 'The requested State shall execute in accordance with its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting State for the purpose of procuring evidence or transmitting Articles to be produced in evidence, records or documents'." *Certain questions of Mutual Assistance in Criminal Matters (Djibouti v France),* judgement [2008] ICJ General List No. 136, at para 120

[198] *Ibid* at para 28

In addition, the French judge explained that providing the requested information would deliver "French intelligence service documents to a foreign policy authority".[199]

Article 2 of the Convention states:

> Assistance may be refused:
>
> (a) if the request concerns an offence which the requested State considers a political offence, an offence connected with a political offence, or a fiscal, customs or foreign exchange offence;
>
> (b) if the request concerns an offence which is not punishable under the law of both the
>
> requesting State and the requested State;
>
> (c) if the requested State considers that execution of the request is likely to prejudice its
>
> sovereignty, its security, its ordre public or others of its essential interests.[200]

Djibouti argued that despite the subjective language of the provision, "the State must act reasonably and in good faith"[201] and argued that there is an obligation to give reasons. Djibouti's position was that under Article 17 of the Convention France should have to provide reasons for its refusal, and that its defence should go "beyond a bald reference to Article 2 (c)."[202]

The ICJ held that it had the power to examine the reasons that underlay a party's decision to invoke the provision 2(c).

> The Court begins its examination of Article 2 of the 1986 Convention by observing that, while it is correct, as France claims, that the terms of Article 2 provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties.
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> […]
>
> This requires it to be shown that the reasons for refusal to execute the letter rogatory fell within those allowed for in Article 2. Further, the

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[199] *Ibid* at para 147

[200] *Ibid,* at para 3 Decision of Judge Keith

[201] *Ibid,* at para 135

[202] *Ibid.*

> Convention requires (in Article 3) that the decision not to execute the letter must have been taken by those with the authority so to decide under the law of the requested State. The Court will examine all of these elements.[203]

The Court went on to find that there was no violation of Article 2(c).[204]

> Having found that France's reliance on Article 2 (c) was for reasons that fell under that provision, but that it has not complied with its obligation under Article 17, the Court now considers whether, as Djibouti has contended, a violation of Article 17 precludes a reliance on Article 2 (c) that might otherwise be available.[205]

The Court examined whether France violated Article 17, which requires that when failing to provide assistance "[r]easons shall be given for any refusal of mutual assistance".[206] In this matter France was found to be in violation.

Although the Court applied the good faith standard, it did not lay out an approach[207] that could be used to guide such an examination. In a separate decision Judge Keith acknowledges the Court's ability to examine reasons behind a provision that has the language "it considers":

> The power of the requested State to refuse assistance under Article 2 (c) is particularly broad, when all the features of its wording are considered both in their own terms and by comparison with the wording of subparagraphs (a) and (b) of the provision. Notwithstanding that, I agree with the Court that it has power to examine the reasons even although that power of examination is very limited.[208]

He also states:

> In support of its power the Court refers to the proposition codified in Article 26 of the Vienna Convention on the Law of Treaties and to two judgments of the Permanent Court of International Justice as affirming that the concept of good faith applies to the exercise of such broad

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[203] *Ibid* at para 145

[204] *Ibid* "[…] the Court finds that those reasons that were given by Judge Clément do fall within the scope of Article 2 (c) of the 1986 Convention." At para 148

[205] *Ibid* at para 153

[206] *Ibid* at para 149

[207] Nolan, *Supra* note 178 at 48

[208] *Supra* note with Judgement citation at para 4 Decision of Judge Keith

> powers, and to two judgments of its own as affirming the competence of the Court when faced with treaty provisions giving wide discretion (Judgment, para. 145).[209]

Judge Keith notes that in becoming members of the United Nations states accept the principles of abuse of rights and misuse of power and deems that "[they] may be relevant to the exercise of power in issue in this case"[210].

Judge Keith is critical that the depth of analysis used by the Court in arriving at its decision: "[T]he Court does no more than quote six sentences from the judge's reasons which appear to relate only to the declassified documents and not at all to the other "case in progress" [211] He states: "International Law Commission similarly states in its commentary to what became Article 26 of the Vienna Convention that it is implicit in the requirement of the good faith application of treaty obligations that a party must abstain from acts calculated to frustrate the object and purpose of the treaty."[212] Judge Keith then reviews the purposes of the Convention and shows how the French judge's reasoning is circuitous, citing Article 2(c) without any underpinning reasons. In the following paragraphs Justice Keith proceeds to do what amounts to a reasonably in-depth assessment of the French judge's decision and is highly critical:

> Although she knows those documents and it is she who, under French law, is to make the definitive determination, she makes that determination only in the most general terms, without drawing in any express way on her particular knowledge.
>
> […]
>
> Moreover, to return to a point which the Court raises (Judgment, para. 148 and see para. 4 above), the judge gives no indication of why it would not be enough to withhold just the 25 declassified documents (consisting of about 50 pages) which she identifies and why the totality of the 35 volumes of the record must be withheld. [213]

Judge Keith also notes the disparity between the ruling of the French judge and the arguments presented by counsel for France at the Court.[214]

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[209] *Ibid*

[210] *Ibid*

[211] *Ibid* at para 147

[212] *Ibid* at para 6 Decision of Judge Keith

[213] *Ibid* at para 8, 9 Decision of Judge Keith

[214] *Ibid*

Whereas Judge Keith acknowledges that his examination may have been excessive "given the extent of the power conferred by Article 2 (c)",[215] he defends himself by stating that he "does not in any way question the substantive assessment by the requested State of likely prejudice to its national interests,"[216] but instead is focused on the purpose of the Convention. "It does not involve any attempt to assess and weigh the matters covered by Article 2 (c)". The depth of his examination of the French judge was also necessary to address the issues raised in Article 17.

This ICJ decision acknowledges that a provision with language deferential to a party within a treaty is not beyond the jurisdiction of the Court and remains subject to a review of whether the discretion has been exercised in good faith. However, it offers different interpretations as to how deep such a good faith analysis may go. Judge Keith's dissent makes a strong case that the Court may examine in some depth the object and purpose of a treaty to help determine if the actions taken by a party frustrate these. It remains unclear how a Court can determine a State's abuse of its right without examining the issue substantively to some degree.

Scholarly writing by Briese and Schill point to Judge Keith's approach in assessing a breach of good faith and abuse of power as similar to the evaluation of discretionary power in domestic judicial systems, where a high degree of deference is accorded. They suggest a similar approach be used by international courts adjudicating disputes where provisions use language that has been termed self-judging.[217]

Part I.IV: Article XXI & the "Good Faith" Standard

Summary:

The principle of good faith is best understood as a bifurcation of three obligations. First, good faith conduct in dispute settlement or 'procedural good faith', which is imported into WTO law through Articles 3.10 &4.3 of the DSU. Second, substantive good faith with respect to obligations of a state, which stems from Article 26 VCLT ('*pacta sunt servanda'*) and is incorporated as customary international law through Article 31(3)(c) VCLT as a 'relevant rule of international law'. Third, good faith

[215] *Ibid* at para 10 Decision Judge Keith

[216] *Ibid.*

[217] Robyn Briese, Stephan Schill, "Djibouti v France, Self-Judging Clauses before the International Court of Justice", 2009 10: Melbourne Journal of International Law 1 at 16

conduct in the interpretation of treaties which stems from Article 31 VCLT and is incorporated into WTO law through Article 3.2 of the DSU. The recent Panel Report in *Russia – Traffic in Transit* demonstrates that both substantive good faith with respect to the obligations of a state (Article 26 VCLT) and good faith in the interpretation of treaties (Article 31 VCLT) have a bearing on the invocation of Article XXI. This good faith obligation applies both to the Member's definition of the essential security interests said to arise from the emergency in international relations at issue and, crucially, to their connections with the measures in question.

Members of the World Trade Organization disagree about the justiciability of Article XXI of the GATT 1994. If Article XXI of the GATT is not a self-judging provision, there are multiple potential standards of review. This section explores one of the potential understandings, that the invocation of the national security exception is reviewable under a standard of good faith.

In *United States – Continued Suspension*, the Panel explained that the principle of good faith can be analysed in respect of three categories (a) good faith conduct in dispute settlement[218] (b) substantive good faith with respect to obligations of a State[219] and (c) good faith in the interpretation of treaties (Article 31 VCLT).[220] The Panel report highlights the substantive duty to perform treaty obligations as part of general international law, enshrined in Article 26 VCLT and outside of the WTO regime. The panel noted that the DSU does not exclude the application of the principle of good faith in the resolution of disputes.[221]

The trifurcation of the concept of good faith is further furnished by the Appellate Body in *US – Cotton Yarn*, who refer to the 'general principle of good faith that underlies all treaties'.[222] Additionally, the requirement in Article 31 (1) of the VCLT to interpret

[218] Dispute Settlement Understanding, Article 3.10

[219] Vienna Convention on the Law of Treaties, Article 26. Imported into Article 31 through Article 31(3)(c).

[220] WTO Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* (US – Continued Suspension), WT/DS320/R, as modified by WTO Appellate Body Report WT/DS320/AB/R, para 7.313.

"(a) good faith conduct in a dispute settlement procedure [per Art 3.10 DSU]; (b) substantive good faith, i.e. with respect to the substantive obligations of a state [derived from general international law]; (c) good faith in the interpretation process (Article 31 of the Vienna Convention on the Law of Treaties)"

[221] Ibid, para 7.327

[222] Appellate Body Report, US – Cotton Yarn, 81.

treaties in good faith (which has been incorporated in Article 3.2 of the DSU) is applicable in the interpretation of every WTO provision.[223] Article 4.3 and 3.10 of the DSU incorporates good faith into the consultation process and dispute settlement procedure, which can be understood as procedural good faith.[224] Each of these incorporations of good faith into the WTO law have different sources and implications for review.

I.IV.1: Good Faith Interpretation - Article 31[225]

Article 31 of the VCLT constitutes a codification of customary international law. Accordingly, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. This has been widely accepted by GATT and WTO panels and the Appellate Body, independently of the wording in Article 3.2 of the DSU[226]. The Panel report in *Russia – Traffic in Transit* provides the best example of good faith interpretation of Article XXI and is explored later in this section.

VCLT Article 31, however, is a tool for interpretation of treaties. There is a difference between good faith interpretation of treaties and a duty to act in good faith while applying the treaties.

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[223] Andrew D. Mitchell, Legal Principles in WTO Disputes, p.122.

[224] Appellate Body Reports, *US/Canada – Continued Suspension*, para.3.13:

"The DSU makes reference to 'good faith' in two provisions, namely, Article 4.3, which relates to consultations, and Article 3.10, which provides that, 'if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute.' These provisions require members to act in good faith with respect to the initiation of a dispute and in their conduct during dispute settlement proceedings."

[225] Relevant Case Law: GATT Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot–Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom* ('US – Hot-Rolled Lead and Bismuth Carbon Steel'), para. 6.46.; GATT Panel Report, *United States – Restrictions on Imports of Tuna* ('US – Tuna'), para.5.19.; GATT Panel Report, *United States – Anti-Dumping Duties on Imports of Stainless-Steel Plates from Sweden*, para.2.35.

[226] GATT Panel Report, United States – *Imposition of Countervailing Duties on Certain Hot–Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom* ('US – Hot-Rolled Lead and Bismuth Carbon Steel'), SCM/185, 15 November 1994, para 368; GATT Panel Report, *United States – Restrictions on Imports of Tuna* ('US – Tuna'), DS29/R, 16 June 1994, para 5.18.; GATT Panel Report, *United States – Anti-Dumping Duties on Imports of Stainless Steel Plates from Sweden*, ADP 117, 24 February 1994, para 235.

I.IV.II: Substantive Good Faith - Article 26

Panels and the Appellate Body have held that good faith in carrying out treaty obligations is to be presumed.[227] This is consistent with the traditional understanding of good faith in customary international law. This presumption means that the Panel or Appellate Body will assume that the Member acted consistently with its obligations under the GATT, in the absence of clear evidence to the contrary.

It is widely recognized that good faith is one of the general principles of law that are listed as sources of international law in Article 38(1) of the Statute of the ICJ. Article 26 of the VCLT is recognized as the root basis establishing a substantive obligation that WTO members must perform treaty obligations in good faith. It has been recognized as applicable in WTO proceedings through a number of avenues. In *US – Byrd Amendment*, the Appellate Body observed that:

> "Article 31(1) of the Vienna Convention directs a treaty interpreter to interpret a treaty in good faith in accordance with the ordinary meaning to be given to the terms of the treaty… Moreover, performance of treaties is also governed by good faith. Hence, Article 26 of the Vienna Convention [alluded to by several appellees referred in their submissions] provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith. The United States itself affirmed "that WTO Members must uphold their obligations under the covered agreements in good faith" [in reference to US Panel submissions & Appellate Body Report, US – FSC para.166.][228]

The Appellate Body used this to demonstrate a basis for a dispute settlement panel to determine whether a Member has not acted in good faith.

In reference to the Appellate Body's conclusion in *United States – Continued Dumping and Subsidy Offset Act of 2000* that a WTO tribunal could, in an appropriate case, find

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[227] Appellate Body Report, *European Communities – Trade Description on Sardines* ('EC – Sardines'), WT/DS231/AB/R, 26 September 2002, para 278; Panel Report, *Argentina – Definitive Safeguard Measures on Imports of Preserved Peaches* ('Argentina – Peaches'), WT/DS238/R, 14 February 2003, para 7.124; Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparels and Other Items* ('Argentina – Footwear'), WT/DS56/R, 25 November 1997, para 6.14. This presumption was also applied by GATT panels, See, e.g., Arbitrator Award, *Canada/European Communities – Article XXVIII Rights*, DS12/R – 37S/80, 26 October 1990, p 4; Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ('US – Gasoline'), WT/DS2/AB/R, 20 May 1996. Appellate Body Report, US - Offset Act (Byrd Amendment), 2.97.

[228] Appellate Body report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AR/R, 27 January 2003, para.296

that a Member has not acted in good faith[229], the United States stressed that the WTO dispute settlement system has a limited mandate, which is to determine conformity with the covered international agreements, not international law itself. Stating, "[a] finding that a Member had not acted in 'good faith' would clearly and unambiguously exceed the mandate of dispute settlement panels and the Appellate Body".[230] At the Appellate Body, the United States had claimed that there is no basis in the WTO for a panel to conclude that a Member has not acted in good faith, or to enforce a principle of good faith as a substantive obligation. This comment by the United States represents a (likely intentional) misrepresentation of the role of the VCLT and substantive good faith in WTO law, meant to create a vacuum seal around GATT 1994. The Panel in *Russia – Transit*'s recent report establishes the applicability of both substantive good faith and good faith interpretation to invocation of Article XXI has put a serious dent in the viability of these sort of arguments. This is discussed later in the section.

In Brazil's third-party submission[231] regarding *US – Hot Rolled Steel*, the concept of 'good faith' is held out as enshrined in Article 26 of the VCLT. Brazil's submission contends that, "Article 26 is directly incorporated into Article 31 of the VCLT through Article 31(3)(c), which provides: "There shall be taken into account, together with the context: […] (c) any relevant rules of international law applicable in the relations between the parties"[232]. This interpretation is supported by the Special Rapporteur of the International Law Commission's statement in relation to Article 26: "The intended meaning was that a treaty must be applied and observed not merely according to its letter, but in good faith. It was the duty of the parties to the treaty not only to observe the letter of the law, but also to abstain from acts which would inevitably affect their ability to perform the treaty".[233] This suggests that a state could violate their obligation to perform treaties in good faith even if it does not violate the treaty as written.

Article 26 of the VCLT is the root source of the substantive good faith obligations of WTO member states. These are embodied in the *pacta sunt servanda* principle, which implies that WTO members are under a good faith duty when carrying out their treaty obligations.[234] The applicability of Article 26 to Members' actions under WTO law is

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[229] Report of the Appellate Body, United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/R – WT/DS234/AB/R, para.297.

[230] DSB, Minutes of Meeting Held on 27 January 2003, WT/DSB/M/142 (6 March 2003) [57].

[231] WT/DS184/R, *US – Hot Rolled Steel*, Submission of Brazil as a Third Party, p.1.

[232] Ibid, fn.1.

[233] International Law Commission, 'Report of the International Law Commission Covering its 16th Session, 727th Meeting, 20 May 1964; [1964] 1 Yearbook of the International Law Commission [70].

[234] Anastasios Gourgournis, '*The Distinction between Interpretation and Application of Norms in International Adjudication*', Journal of International Dispute Settlement, vol.2, No.1 (2011), pp.31-57,

accepted widely, but the potential implications this has on the standard of justiciability and state discretion makes its application to measures for which Article XXI has been invoked very controversial. *Pacta sunt servanda* implies a general notion of fairness and even handed-ness in the performance of treaty obligations.

I.IV.III: Article XX GATT 'Chapeau': An Example of Good Faith in WTO Treaties

Article XX received important clarification when the Appellate Body in *US – Gasoline* presented a two-tiered test.[235] First, there is a provisional justification under the subparagraphs that include the general exceptions. Second, the invocations of general exceptions under Article XX undergo further appraisal of the measures under the introductory clauses of Article XX. The chapeau prohibits measures that are provisionally justified under one of the ten subparagraphs from constituting: (i) arbitrary discrimination; (ii) unjustifiable discrimination; or (iii) disguised restriction on international trade. Taken together, the application of the chapeau to the invocation of Article XX constitutes an obligation on the part of GATT members to undertake their use of exceptions in good faith. This chapeau is in reference to the action of applying certain measures, and not merely an interpretive exercise. For this reason, Article XX's chapeau is an expression of the substantive duty of good faith outlined in Article 26 of the VCLT, rather the interpretive standard described in Article 31 (1). Arbitrary discrimination or disguised restrictions on international trade are not a question of interpreting the text of Article XX. Rather, these sections are meant to capture a requirement of fairness and even handed-ness in the application of the Article XX.

This brings into question under which basis Article XXI can be interpreted as subject to a substantive good faith standard, given that Article XXI does not have a chapeau. One potential argument is that Article XXI clearly affords considerable discretion to a WTO Member. This discretion must be interpreted as bound a good faith obligation in choosing to invoke the measure. In other words, one can interpret that the wording "it considers necessary" affords discretion which is circumscribed by good faith. Without this understanding Article XXI would be subject to unfettered discretion, a result which would have long-lasting and potentially fatal implications for the WTO system as a whole.

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p.12. Citing ILC, 'Draft Articles on the law of treaties with commentaries', (1966) Ybk ILC Vol II, 202, 211, 221.

[235] Appellate Body Report, *US – Gasoline*, p. 22.

I.IV.IV: What Good Faith Interpretation and Application Means in the Context of Article XXI: Panel Report, *Russia – Traffic in Transit*

The Panel's application of good faith to Article XXI invocation in *Russia – Traffic in Transit* provides tremendous insight into how good faith analysis should be carried out. The Panel Report addresses both substantive good faith and good faith interpretation. The Panel began by articulating a limit to the discretion a Member enjoys in invoking Article XXI:

> "the discretion of a Member to designate particular concerns as "essential security interests" is limited by its obligation to interpret and apply Article XXI(b)(iii) if the GATT in good faith […] [t]he obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994. A Glaring example of this would be where a Member sought to release itself from the structure of 'reciprocal and mutually advantageous arrangements' that constitutes the multilateral trading system simply by re-labelling trade interests that it had agreed to protect and promote with the system, as 'essential security interests', falling outside the reach of that system".[236]

Looking at this explanation, it is interesting to note the similarity between the Panel's articulation of re-labelling protectionist trade measures as national security measures, and the third ground prohibited under Article XX's chapeau, 'disguised restriction on international trade'. This could suggest parallels between the doctrines and function of Article XX and Article XXI.

The Panel explained that the invoking Member has to articulate the essential security interests said to arise from the emergency in international relations 'sufficiently enough to demonstrate their veracity'.[237] All of this suggests that a Member's invocation of Article XXI is subject to a duty of good faith, both in terms of treaty interpretation under Article 31 VCLT, and in the application of treaty obligations, as laid out in Article 26 VCLT and the *pacta sunt servanda* principle.

The Panel clarified the applicable standard of review, explaining that the obligation of good faith applies to both (1) the Member's definition of the essential security interests

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[236] Panel Report, *Russia – Traffic in Transit*, paras. 7.132-3.

[237] Panel Report, *Russia – Traffic in Transit*, para. 7.134.

said to arise from the emergency in international relations at issue and (2) most importantly, to their connections with the measures in question. This obligation, in relation to Article XXI(b)(iii), is that the measures need to meet a "minimum requirement of plausibility in relation to the proffered essential security interests".[238]

These positions bear a strong resemblance to the submissions made by several third-party states during the dispute settlement process. Canada's position is that while invoking Members are entitled to a high level of deference, the invoking Member must substantiate (to a low standard) its good faith belief that the elements for its invocation under Article XXI(b)(iii) exist.[239] In its third party submission, China refers to the principle of substantive good faith embodied in Article 26 VCLT, arguing that Members invoking XXI(b) have to adhere to the principle of good faith.[240] The European Union, while highlighting the level of discretion available under Article XXI, articulates that invoking Members are required to submit an explanation as to why the measure was necessary. Accordingly, the European Union submits that the panel should review the determination to assess whether the invoking Member can plausibly consider a measure to be necessary and whether the measure was applied in good faith.[241] Moldova contends that panels have the ability to review whether Members apply WTO measures in good faith and in accordance with the requirements of Article XXI.[242]

Moldova goes further and considers an invoking Member obligated to demonstrate, "in addition to establishing the objective prerequisites in Article XXI(b) regarding the existence of an essential security interest", that the measure is not intentionally designed to serve a protectionist purpose.[243] This contention bears striking resemblance to the Panel's caveat that Article XXI (similarly to Article XX) cannot be used to disguise a protectionist trade-distorting measure. In a similar statement, Singapore contends that Members need to exercise their discretion in accordance with the principle of good faith and in light of the doctrine of abuse of rights. In keeping with this understanding, Singapore submits that the Member must at least subjectively consider there to be a threat to its essential security interests and a connection between that threat and the measures taken to protect it.[244] Turkey suggests a novel approach to facilitate the review

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[238] Panel Report, *Russia – Transit*, para. 7.138

[239] Canada's Third-Party Statement, para. 8.

[240] China's Third-Party Statement, para. 19.

[241] EU's Third-Party Statement, para. 21.

[242] Moldova's Third-Party Statement, para. 21.

[243] Ibid.

[244] Singapore's Third-Party Statement, para. 21.

of Article XXI invocation by a panel, that the complaining Member provides a prima facie case of inconsistency with Article XXI, thereby requiring a response from the responding member that puts forward and argument that the measure can be justified under Article XXI[245].

With regards to good faith a common thread emerges in the third-party submissions: that good faith in treaty interpretation and treaty application are relevant considerations to the review of Article XXI invocation by a panel or the Appellate Body. An invoking Member's decision to invoke Article XXI, while entitled to significant degree of discretion, can be reviewed on a standard for good faith with regard to a Member's (1) definition of the essential security interests said to arise from the emergency in international relations and (2) the essential security interests' connection with the measures in question. This is consistent with the Panel's approach, which affirms the applicability of substantive good faith (Article 26 VCLT) and good faith interpretation (Article 31 VCLT) to the invocation of Article XXI.

Part II: Options for Response to Article XXI National Security Measures

Summary:

Members who are impacted by Article XXI invocation have a few avenues available for seeking the withdrawal of the measures or securing compensation for their trade distorting effects. These options all have different timeframes for response, different use-cases, effect the global trading system differently and have the potential for differing impacts on the trading relationships. There are two basic types of complaints that exist within the WTO dispute settlement framework: violation complaints and non-violation complaints. For a violation complaint to be made out there must be a violation of treaty obligations, in which case the nullification and impairment of benefits accruing under the covered agreements will be presumed. Non-violation complaints, on the other hand, require a complainant to show that benefits have been nullified or impaired even though there has been no violation of the covered agreements. In other words, the invoking party does not need to demonstrate a violation of treaty obligations to make out a non-violation complaint. Beyond conventional violation and non-violation complaint responses, a third available option for responding to national security measures is to re-interpret a tariff as a safeguard measure under Article XIX. A fourth option is to adopt countermeasures in general international law, outside of the WTO

[245] Turkey's Third-Party Statement, para. 7.

process. A fifth option is to make no formal legal response, and a sixth is to opt instead for diplomatic means or lobbying. GATT Article XXI is an exceptional remedy and is rarely invoked, so a wide array of solutions should always be kept under consideration.

This paper has examined the wording and drafting history of the GATT, then expanded this analysis to include several bilateral investment treaties, treaties establishing international organizations, free trade agreements, ICJ jurisprudence and investment arbitration decisions. National security measures are present worldwide between different parties, in dozens of treaties, that protect a variety of interests. All the examination of national security measures in this memorandum is carried out for the purpose of informing potential responses to Article XXI. Members who are impacted by Article XXI invocation have a few avenues available for seeking the withdrawal of the measures or securing compensation for their trade distorting effects. These options all have different timeframes for response, different use-cases, effect the global trading system differently and have the potential for differing impacts on the trading relationships.

There are two basic types of complaints that exist within the WTO dispute settlement framework: violation complaints and non-violation complaints. For a violation complaint to be made out there must be a violation of treaty obligations, in which case the nullification and impairment of benefits accruing under the covered agreements will be presumed.[246] Non-violation complaints, on the other hand, require a complainant to show that benefits have been nullified or impaired even though there has been no violation of the covered agreements. In other words, the invoking party does not need to demonstrate a violation of treaty obligations to make out a non-violation complaint.[247] Beyond conventional violation and non-violation complaint responses, a third available option for responding to national security measures is to re-interpret a tariff as a safeguard measure under Article XIX. A fourth option is to adopt countermeasures in general international law, outside of the WTO process. A fifth option is to make no formal legal response and opt instead for diplomatic means or lobbying. GATT Article XXI is an exceptional remedy and is rarely invoked, so a wide array of solutions should always be kept under consideration.

Any member planning to react against an Article XXI invocation needs to consider that different trade measures implemented under Article XXI may require different reactions. In determining whether and how to respond, a member state should weigh

[246] See Article 3.8 DSU

[247] GATT Article XXIII:1(b).

the likelihood of success in challenging the original trade-distorting measure, the effects of the national security measures on its international trade and domestic industries, the potential costs if the response is deemed unlawful, the openness of the parties to mutually satisfactory adjustments and the member states' relative resources.

Part II.I: WTO Dispute Settlement, Violation Claim

Summary:

WTO dispute settlement violation claims are the conventional response to tariff barriers that effect the trade of WTO Members. Within the structure of the DSU, members initiate consultation, bring a complaint before a panel or the Appellate Body, seeking DSB authorization for a response that is 'equivalent' to the 'nullification or impairment' resulting from the tariff measure. DSB compliant violation claims are very time consuming, with the period of time between the initiation of consultation and the adoption of a panel report regularly exceeding two years. In the event of resort to the Appellate Body and/or Article 21.5 compliance proceedings, this period can span three or more years. The resulting temporal gap between the institution of a tariff barrier and the institution of a DSB compliant response, known as the 'remedy gap', drives Members to consider other solutions.

Legal Basis

The legal basis for bringing a violation claim in WTO dispute settlement is that a measure violates the GATT 1994 or another covered agreement and thereby nullifies or impairs benefits accruing to the complainant.[248] Violation complaints have their legal basis in Article XXIII:1(a) of GATT 1994.

Whether a violation complaint will be successful depends on the features of the measure adopted by the respondent and on the legal standard under Article XXI developed by panels and the Appellate Body. In the first part of this memorandum, we developed an interpretation of Article XXI, and the panel in *Russia – Traffic in Transit* recently provided guidance on the interpretation of Article XXI.

[248] Article 3.8 DSU codifies the GATT presumption that a nullification is presumed to exist whenever a violation of the GATT has been established.

Remedies provided by the WTO Dispute Settlement Process in the Case of Violation Claims

If a Member is of the view that the security measure cannot be justified under the Article XXI, it can use the procedures provided by the DSU to initiate consultations, bring its complaint before a panel and the Appellate Body and obtain a ruling to this effect. These proceedings may ultimately result in an authorization by the DSB to suspend equivalent concessions. These measures would be kept in place until the respondent eliminates the trade-restrictive measures covered by the DSB's rulings and recommendations. Any countermeasures authorized by the DSB must be "equivalent" to the "nullification or impairment" resulting from the trade law violation.[249]

Under the WTO DSU suspension of concession is a last resort remedy.[250] If there is a disagreement as to the appropriate level of compensation, an Article 22.6 arbitral panel can be initiated. The task of an Article 22.6 arbitral panel will be to determine whether the retaliation request complies with the requirements for the form of retaliation set out in Article 22.3, and the requirements regarding the amount of retaliation under the Article 22.4.[251]

The compensation or retaliation has to comply with the guidance provided by Article 22 DSU.[252] In *EC – Bananas III (Ecuador)*, Ecuador argued that it was the prerogative

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[249] Article 22.4 DSU; 6.10 Countermeasures by the prevailing Members (suspension of obligations) https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm.

[250] Joel Trachtman, 'The WTO Cathedral' (2007) 43 Stanford Journal of International Law, 135-136.

[251] Remedies Under the WTO Legal System, p.288.

[252] As a general rule, the sum of the countermeasures imposed in response to a trade distorting measure is limited to the amount of losses caused by nullification, violation or impairment. The level of compensation is an important consideration in any decision to take retaliatory measures. Article 22 of the DSU (Compensation and the Suspension of Concessions) suggests that "neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements". In the event of a failure to come into compliance, the affected party is to consider what concessions or other obligations to suspend based on certain criteria:

(a) first, suspend concessions or obligations with respect to the same sector(s) where panel found violation, nullification or impairment

(b) failing that, the affected party may seek to suspend concessions or other obligations in other sectors under the same agreement

(c) in especially serious situations where it is not practical or effective to suspend concessions or obligations, it may suspend concessions or obligations under another agreement.

(d) (i) trade in the sector or under agreement and the importance of such trade to the party

of the Member suffering nullification or impairment to determine whether it was "practicable or effective" to choose the same sector, another sector or even another agreement, for the purposes of suspending concessions or other obligations. The Panel held that the use of "consider" did grant a margin of appreciation (some deference), but that a Member's decision would be subject to review by the DSU Article 22.6 arbitrators. Arbitrators are entitled to weigh whether the member considered the necessary facts in an objective fashion. In the Appellate Body's view, "[the] margin of review by the Arbitrators implies the authority to broadly judge whether the complaining party in question has considered the necessary facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector under the same agreements, or only under another agreement provided that the circumstances were serious enough".[253] This passage confirms that measures taken by states in retaliation to offending measures, while benefiting from some deference, will be subject to review by a Panel.

Advantages

Respondent's Obligation to Withdraw

Violation complaints have the advantage that the responding party is under an obligation to withdraw its measures if they are found not to meet the requirements of Article XXI or another security exemption.

Cross-Retaliation

If the responding party fails to withdraw the measure, the procedures under Article 22 provide considerable flexibility to the complaining party to retaliate, including the possibility of suspending obligations under other agreements per 'cross-retaliation'. The DSB has authorized the suspension of IP rights as cross-retaliation during WTO proceedings three times; in *EC – Bananas*, *US – Gambling* services and *US – Cotton*, though the suspension of IP rights has never taken place.[254]

Preservation of Bargaining Leverage

(ii) the broader economic elements related to the nullification or impairment and the broader consequences of the suspension of concessions or other obligations

[253] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU, 25 September 1997, para 58.

[254] International Chamber of Commerce Commission on Intellectual Property, Cross-Retaliation under the WTO Dispute Settlement Mechanism involving TRIPS Provisions, p.3. Found at International Chamber of Commerce website: iccwbo.org.

The choice to respond through the WTO dispute settlement process provides the advantage of preserving bargaining leverage with other Members. In the event that a Member is successful in WTO litigation, they will obtain authorization to restore the balance of concessions that existed prior to the implementation of the national security measure. Additionally, while WTO litigation is an adversarial process, the relationship between the complainant and respondent countries will not be unduly strained, as the complainant is simply exercising its rights under the WTO Agreements.

Strengthening the Rules Based System

Resort to the WTO system has the potential to strengthen the rules-based system. When Members resort to and adopt the decisions of the DSB and Appellate Body, they reinforce the consensus that disagreements about compliance with WTO law should be settled by recourse to the DSU's rules and procedures rather than through unilateral action.

Disadvantages

The Remedy Gap

The effectiveness of violation complaints is diminished by the lack of a retrospective remedy, resulting in a 'remedy gap'. In WTO cases the level of countermeasures is calculated from the date when the reasonable period of time for implementation ends, which can take up to 15 months from the adoption of the panel and Appellate Body Reports.[255] The authorization to implement retaliation may be further delayed by arbitration about the level and form of the retaliation.[256] The injury suffered between the date of the adoption of the illegal measure by a respondent and the end of a reasonable period of time is not counted when calculating the appropriate level of countermeasures.

Time-Consuming

Relatedly, opting for violation complaints within the WTO framework is a very time-consuming process. The time period from the initiation of consultations regarding a measure to the adoption of the panel report by the DSB can easily be two or three years, which can be further prolonged by resort to the Appellate Body and compliance proceedings under Article 21.5 of the DSU. Violation claims are less timely than other options for response.

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[255] See, Art.21.3(c)

[256] See, Art. 22.6.

Obstruction of Compliance

Large, institutionally robust countries like the European Union and the United States have at their disposal substantial resources which afford opportunities to delay and water-down concessions achieved through the use of countermeasures. The entrenched domestic political, legal and regulatory frameworks in such countries subject even policy changes required under WTO rulings to vigorous debate in robust deliberative mechanisms that require the consultation of a myriad of domestic interest groups, and often many levels of government. These processes can make the implementation of decisions costly and time intensive, especially when dealing with supranational structures or multiple levels of domestic government and industrial interests. The prolonged saga of WTO compliance in *EC – Hormones* and *EC – Bananas* both demonstrate how even successful uses of violation complaints can see domestic compliance with rulings inhibited/delayed against large, institutionally robust Members.

Potential to Increase Protectionist Tendencies

Authors have also suggested that countermeasures can increase protectionist tendencies, "which is self-defeating in the sense that trade destruction caused by countermeasures reduces national economic welfare" and ultimately works against the objective of the WTO, promotion of international trade and the reduction of protectionism.[257]

Compensation not Inducement

Another concern with countermeasures is that Article 22.4 DSU calculates the allowable countermeasure based on their 'equivalence' to the amount of nullification or impairment. In other words, the level of countermeasures is calculated on the basis of the injury suffered, and not on the economic gain experienced by the respondent stemming from the trade-distorting measure.[258] This may mean that retaliation is ineffective in inducing the respondent to remove the national security measure, while resorting to intervention into the domestic legal system of the respondent member, lobbying of government or issue-specific negotiation could potentially deliver better results.

[257] Remedies Under the WTO Legal System, p.341.

[258] Remedies Under the WTO Legal System, p.335.

Part II.II: Re-interpreting Article XXI Tariffs as Article XIX Safeguards

Summary:

Re-interpreting Article XXI tariffs as an Article XIX safeguard measure is a strategy which some affected Member states might resort to in order to nullify the prohibition against unilateral action. In this approach, a tariff measure which has been purported to be defensible under Article XXI is treated as an Article XIX emergency action or safeguard. The crux of this approach is not whether the invoked measure is illegal, but rather whether WTO Members are entitled to treat an Article XXI measure as a safeguard measure. Article XIX:3(b) states that when domestic legislations brings rise to a complain which is taken 'without prior consultation', threatens serious injury and such damage would be 'difficult to repair', then the right to retaliate begins upon the taking of the action. The resulting effect is that a Member can response quickly to measures, thereby avoiding the negative impact of the remedy gap and working around the prohibition against unilateral action that usually constrains actions within the WTO framework. An obvious question here is whether a panel or the Appellate Body will make an independent assessment of the true character of a measure invoked under Article XXI. The Appellate Body Report in *Indonesia, Safeguard on Certain Iron or Steel Products* tells us that a Panel has a duty under Article 11 of the DSU to assess objectively whether a measure is indeed a safeguard. By this logic, it is conceivable that a measure invoked under Article XXI could be determined by a panel or the Appellate Body to be a safeguard measure. The emphasis which the Panel in *Russia – Traffic in Transit* put on avoiding disguised barriers to trade suggests that the obligation of the DSU referred to in *Indonesia – Safeguard on Certain Iron or Steel Products* would also be exercised in the context of Article XXI.

Legal Basis

The legal basis for re-interpreting a tariff as an Article XIX safeguard measure is that the tariff measure purported to be defensible under an Article XXI national security exception is actually an emergency action/safeguard measure within the meaning of Article XIX of the GATT. An important judicial question yet to be decided by a Panel or the Appellate Body is whether the DSB Panel or a complainant can choose to impute the characteristics of a safeguard measure on a tariff when the respondent country has in fact chosen to justify the trade-distorting measure under Article XXI, not having invoked Article XIX.

The Appellate Body in *Indonesia – Safeguard on Certain Iron or Steel Products* has recently determined that the question of whether something is a safeguard is an objective one. In this case, the Appellate Body carried out an objective determination which overturned the two parties mutually agreed position that the measure was indeed a safeguard. In fact, the Appellate Body agreed with the Panel that it was their duty, pursuant to Article 11 of the DSU, to assess objectively whether the measure at issue constitutes a safeguard measure in order to determine the applicability of the substantive provisions relied on for their claims[259]. The logical conclusion of this approach is that a Member invoking Article XXI, who does not interpret their measure as a safeguard, could then have their interpretation reviewed and overturned by a panel or the Appellate Body. It is unclear whether the characteristics used to determine that Indonesia's measures, which were brought in under domestic safeguard legislation, are not safeguards under WTO would be substantially similar to the characteristics the Appellate Body or a panel would look to in determining whether a measure invoked under Article XXI is a safeguard. Nonetheless, The Appellate Body's report speaks to the viability of this unorthodox approach, one that provides an opportunity to bypass the presumption against unilateral action without DSB approval.

Characterizing Article XIX Safeguard Measures

The approach of re-interpreting a measure invoked under Article XXI as an Article XIX safeguard has been adopted recently by the European Union in response to US measures in relation to steel and aluminum tariffs. GATT Article XIX is a trade response to suspend obligations in whole or in part, or to withdraw from or modify trade concessions. The argument is that this measure can get around the presumption that unilateral action to suspend GATT obligations is illegal,[260] since Article XIX provides a prescribed set of circumstances for response. Trade action in response to Article XIX safeguard measures can be actionable in between 30 and 90 days[261], depending on the specific facts of the case.

Responses will be limited to those laid out in GATT Article XIX:3, which authorizes WTO Members to take action to suspend 'substantially equivalent concessions or other obligations'[262], the suspension of which is not disapproved by the WTO. Article XIX states that the breaching party would have to notify the WTO and relevant trading partners of the action, then following thirty days those affected trading partners would

[259] Appellate Body Report, *Indonesia – Safeguard on Certain Iron or Steel Products*, paras. 5.20 & 6.21

[260] See, DSU Article 22

[261] See GATT Article XIX:3(A)

[262] See GATT Article XIX:3(a)

be able to respond by taking their own action and suspend 'substantially equivalent concessions or other obligations'. In the event that the measure adopted by the invoking state can be successfully characterized as an Article XIX safeguard measure, a Member can accomplish an efficient and relatively immediate response to Article XXI invocation.

There are three basic requirements for a GATT Article XIX safeguard measure. First, there must be an increase of imports of the product in question. Second, this increase of imports must be caused by developments that were not foreseen and must result from obligations that the country applying the safeguard measure must respect under the GATT. Finally, the increase of imports must cause or threaten to cause 'serious injury' to a domestic industry producing a 'like' or 'directly competitive' product.[263]

The thrust of this approach is not whether the measure in question meets the requirements of a safeguard. Rather the question is whether other WTO Members are entitled to treat the US measure as a safeguard, regardless of whether the measure is characterized as a safeguard by the US and of whether it is legal or illegal. GATT Article XIX:3(b) provides some guidance on this subject. If the domestic legislation bringing rise to the complaint was taken 'without prior consultation', threatens serious injury, and if such damage would be 'difficult to repair', WTO Members would have a right to retaliate upon the taking of the domestic action by the respondent state.

Advantages

Timeliness of response

The timeline for Article XIX safeguard actions allows a complainant to suspend concessions in a timely fashion, sometimes within 30 and 90 days of the trade distorting measure. Under GATT Article XIX:3(b), when safeguard actions were taken "without prior consultation" and cause or threaten to cause serious injuries that are difficult to repair, then the right of affected Members to retaliate begins upon the taking of the measures. Since a measure later justified under Article XXI would be likely to have

[263] GATT Article XIX:1(a)

"If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession"

been levied without prior consultation – for the simple reason that the Member implementing the measure does not regard it as a safeguard measure requiring such consultation – a response could be available immediately upon the taking up of the measures.

Inducement

The best responses are those which can be felt first. The timelines of response available under Article XIX is more likely to achieve success than other remedies, which are subject to the remedy gap. Even if eventually deemed inconsistent with the GATT in the future, measures provisionally justified under Article XIX can bring a direct cost on the respondent Member's economy.

Short-term protection of domestic interest groups

Measures adopted under the pretense of Article XIX, when aimed at steadying the economic prospects of industries and constituencies affected by an Article XXI measure, can provide short- or medium-term relief. Even if the measures don't bring an end to measures justified under Article XXI, a complainant can avoid political and economic costs at home.

Remedy gap in favour of complainant

For conventional violation complaints, the complainant bears the burden of the remedy gap. By interpreting the measure as an Article XIX safeguard, a complainant may get to retaliate for several months, or even years, before being forced to withdraw by the DSB without further repercussions.

Disadvantages

Likelihood of unsuccessful WTO litigation

The legality of treating tariffs invoked under Article XXI as a safeguard measure is unsettled. This strategy is meant to facilitate immediate unilateral retaliation. The choice to institute retaliation to tariffs based on this argument certainly could result in WTO litigation against the instituting party. See the United States' challenge of the EU's retaliation.[264]

[264] DS559, *European Union – Additional Duties on Certain Products from the United States*

DSB likely to recommend withdrawal of the measures

If a panel and the Appellate Body conclude that the suspension of concessions or other obligations is inconsistent with the GATT 1994, the DSB will recommend the withdrawal of the measures.

Potentially seen as a 'bad faith' use of GATT provisions

The choice to argue that a measure which is: (1) invoked under Article XXI, (2) does not meet the conventional requirements of a safeguard under Article XIX (as laid out in WTO panel reports AB Reports, or the Agreement on Safeguards) (3) is indeed a safeguard, could be seen as a bad faith use of the legal options provided by the GATT 1994. To then go and use this approach to undermine a provision that has been seen as sacrosanct even since the negotiations that led to GATT opens the door to being seen as 'bad faith' use of GATT provisions, in contravention to 4.3 and 3.10 of the DSU.

Part II.III: WTO Dispute Settlement, Non-Violation Claims

Summary

Article XXI is a broadly drafted provision meant to protect the legitimate national security interests of Member states. The broad drafting of Article XXI makes measures invoked under it construable as lawful at face value, while the politically sensitive nature of national security to Member states makes challenging Article XXI's boundaries a contentious issue. As a remedy specifically designed for WTO compliant measures, non-violation complaints are a compelling option when Members are met with the Article XXI exception. An important consideration is whether a panel or the Appellate Body will respect an agreed upon position between the two parties that a measure is lawful, or whether there would be an independent review of the measures on the logic of the *Indonesia – Safeguard* discussed in the next section. Since non-violation complaints are used when there is no violation of the treaty, a Member must justify why they could not anticipate a measure which was in compliance with GATT obligations. *US – COOL* established that a Member must demonstrate that the measure in question has a 'significant degree' of 'novelty' which would render the measure unreasonable to expect. Non-violation complaints are a unique but ultimately viable option for response and are cited in both Mexico and Turkey's Requests for Consultation regarding US steel and aluminum tariffs.

Legal Basis

The legal basis for making a WTO Dispute Settlement non-violation claim is that a measure nullifies or impairs the benefits accruing to a Member under the GATT 1994, without necessarily violating the treaty itself. The main non-violation provisions in the GATT framework are Article XXIII:1(b) and DSU Article 26.1. Article XXIII:1(b) of the GATT 1994 forms the legal basis for making a WTO dispute settlement non-violation claim against the measures of another Member, so long as these measures nullify or impair any 'benefit' of the Agreement.[265] Unlike other remedies, a member can approach the DSB with a non-violation complaint even when an agreement has not been violated.

Whether a non-violation claim will be successful depends on whether a panel or the Appellate Body decides that the measure in question, even if imposed consistently with the requirements of Article XXI, can nonetheless nullify or impair benefits accruing to the complainant Member under the GATT 1994. While there is a presumption that measures which violate the covered agreements nullify or impair benefits accruing to other WTO Members, no such presumption exists in the case of measures that meet the requirements of an exception.

Non-violation complaints operate on a mutual (and in some ways, consensual) basis, meaning these can be used in circumstances requiring increased discretion to affect a mutually satisfactory adjustment. For example, when Article XXI has been invoked, or in regard to a dispute with an indispensable trading partner. There is no requirement of a dispute settlement adjudicator to determine whether the action was unlawful, but a panel or the Appellate Body is required to make a determination that the measure in question did not violate the covered agreements. Whether agreement between the two parties that a measure wasn't in violation to the covered agreements is sufficient to make this determination is not settled, but very plausible. The adjudicator must also determine the compensation agreeable between the two parties on a mutual basis.

The drafting history of the GATT suggests that non-violation complaints were contemplated and indeed accepted as responses to the invocation of Article XXI national security measures. It was the US delegate at the time of drafting the ITO who suggested that, "it is true that an action taken by a Members under Article 94 [the precursor to Article XXI] could not be challenged in the sense that it could not be claimed that the Member was violating the Charter; but if that action, even though not

[265] R. Rajesh Babu, Remedies Under the WTO Legal System, Nijhoff International Trade Law Series 11 (2012); p.206-207.

in conflict with the terms of Article 94, should affect another Member, I should think that the Member should have the right to seek redress of some kind under Article 35 [of which Article XXIII:1(b) is the modern equivalent] as it now stands. In other words, there is no exception from the application of Article 35 to this or any other Article"[266]. In fact, the addition of a note to clarify that the provisions of paragraph 2 of Article 35 (XXIII) applied to Article 94 was rejected as unnecessary.[267] This demonstrates that Article XXIII:1(b) was intended to function as a viable remedy even when measures meet the requirements of the security exception.

Test under Article XXIII:1(b)

The panel report in *Japan – Film* spells out the elements of non-violation per Article XXIII:1(b)

(1) Application of a measure by a WTO member

(2) a benefit accruing under the relevant agreement

(3) nullification or impairment of the benefit as the result of the application of the measure.[268]

The burden of proof falls upon the complainant[269]. If the claiming party can provide a detailed justification for its claim, then it can establish a presumption that what is claimed is true[270].

Non-Violation Complaints – A Flexible & Exceptional Remedy

Member-state approaches to the concept of 'non-violation' nullification and impairment have been varied over the years, with these attitudes coming to a head

[266] EPCT/A/PV/33, p.26-27.

[267] EPCT/A/PV/33, p.27-29 and EPCT/A/PV/33/Corr.3.

[268] Panel Report, *Japan – Film*, para 10.41. See also Panel Report, *Korea – Procurement*, para 7.85. *EC - Asbestos* also followed this test, para 8.283. On appeal, the application of this test was not challenged.

[269] Panel Report, *EC – Asbestos*, para. 8.277-8.278.

[270] See Article 26.1 DSU; Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement.

during discussions in the Uruguay Round[271]. In *EEC – Oilseeds*[272], the EEC submitted that weight should be given to the clear language of the texts, stating that non-violation under Article XXIII:1(b) ought to remain exceptional, since otherwise the trading world would be plunged into a state of precariousness and uncertainty.[273] The United States agreed with the cautious approach to the interpretation of non-violation complaints under the GATT, but still defended the application of non-violation nullification or impairment since the measure in question was a significant change in governmental subsidy policy or a measure affecting the competitive position of the product concerned.[274] The Panel in *Japan – Film* and later the Appellate Body in *EC – Asbestos* both agree that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept.[275]

In *EC – Asbestos*, the Appellate Body rejected claims by the EC that Article XXIII:1(b) only applies to measures within the provisions of the GATT 1994, stating that "a measure may, at one and the same time, be inconsistent with, or in breach of, a provision of the GATT 1994 and, nonetheless, give rise to a cause of action under Article XXIII:1(b)"[276]. This is consistent with the panel reports in *Japan – Film* and *EEC – Oilseeds*, which both support claims that Article XXIII:1(b) applies to measures which simultaneously fall within the scope of application of other provisions of the GATT 1994. This demonstrates the flexibility of Article XXIII:1(b) measures, and the benefit of including them in any request for consultation.

Article 26 DSU clarifies the use of non-violation complaints of the type described in Paragraph 1(b) of Article XXIII of GATT 1994. As mentioned earlier, Article 26.1(a) DSU states that the complaining party shall present a detailed justification of any

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[271] Remedies Under the WTO Law, p.207-208:

"During the Uruguay Round of negotiations, there was an attempt to specify [GATT]'s scope of application to non-violation complaints. Initially, Negotiators considered clarifying the requirements for invoking a non-violation complaint in the DSU, including giving an explanation of reasonable expectation."

[272] Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, BISD 37S/86, 14 December 1989, para. 118.

[273] Ibid, para.113.

[274] Ibid, para.114.

[275] Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, 22 April 1998, para.10.36:

"[…] Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules."

[276] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 5 April 2001, paras. 188-189.

complaint relating to measures which are not in contravention of the WTO agreement. The Panel in *EC – Asbestos* went on to state that, when situations fall under an Article XX exception, a stricter burden of proof should be applied in the context of parties invoking Article XXIII:1(b) non-violation complaints.[277] This stricter burden of proof would be attached to the existence of legitimate expectations and whether the initial Decree could be reasonably anticipated.[278] One can expect that this heightened burden of proof will also apply to the Article XXI security exception.

Reasonable or Legitimate Expectations

The burden of proof for Article XXIII:1(b) non-violation complaints is significant, which has resulted in NVNI claims being rejected four times in the past few decades.[279] Perhaps the most significant evidentiary hurdle is the legitimate or reasonable expectations of the complainant[280], the second step of the *Japan – Film* test. The Panel in *Japan – Film* explains that, "in order for expectations of a benefit to be legitimate, the challenged measures must not have been reasonably anticipated […] if the measures were anticipated, a member could not have had a legitimate expectation of improved market access to the extent of the impairment caused by these measures."[281]

The trouble is that the modus operandi of non-violation complaints implicitly recognizes or at least lends support to the position that the measure in question is lawful under the GATT/WTO framework. The question then becomes why the complainant couldn't reasonably anticipate or expect a respondent country to act in a way that falls within the GATT/WTO rules. The Panel in *Korea – Procurement* frames its approach to solving this apparent contradiction in digestible terms,

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[277] Panel Report, *EC – Asbestos*, paras. 8.280-282. "Furthermore, in the light of our reasoning in paragraph 8.272 above, we consider that the special situation of measures justified under Article XX, insofar as they concern non-commercial interests whose importance has been recognized a priori by Members, requires special treatment. By creating the right to invoke exceptions in certain circumstances, Members have recognized a priori the possibility that the benefits they derive from certain concessions may eventually be nullified or impaired at some future time for reasons recognized as being of overriding importance. This situation is different from that in which a Member takes a measure of a commercial or economic nature such as, for example, a subsidy or a decision organizing a sector of its economy, from which it expects a purely economic benefit. In this latter case, the measure remains within the field of international trade. Moreover, the nature and importance of certain measures falling under Article XX can also justify their being taken at any time, which militates in favour of a stricter treatment of actions brought against them on the basis of Article XXIII:1(b)."

[278] Panel Report, *EC – Asbestos*, para. 8.282

[279] DS44 *Japan – Film*; DS135 *EC – Asbestos*; DS163 *Korea – Procurement*; DS234 *US – Byrd Amendment*.

[280] Raj Bhala, Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade", 42-007.

[281] Panel Report, Japan – Film, para.10.76.

> "The basic premise is that Members should not take actions, even those consistent with the letter of the treaty, which might serve to undermine the reasonable expectations of negotiating partners. This has traditionally arisen in the context of actions which might undermine the value of negotiated trade concessions. In our view, this is a further development of the principle of *pacta sunt servanda*… which is expressed in Article 26 of the [VCLT]"[282].

A complainant's legitimate expectations that certain measures which are *prima facie* lawful under the GATT will not be taken can, in part, be demonstrated by showing that the measures were crafted to subvert reasonable exploitations through partial non-fulfillment of obligations.

The Panel's provisional acceptance of non-violation complaints in *US – COOL (Recourse to Article 21.5 of the DSU)* demonstrates that the evidentiary burden is not insurmountable. In conditionally accepting the complaints, the Panel concluded that the amended regulations introduced a "significant degree of regulatory novelty to the labelling of the products relevant to the dispute" [283] which lives up to the legitimate expectation requirement. In coming to this conclusion, the Panel weighed the extent that the new measures marked a notable departure from past policy, the international prevalence of similar measures, and the success or failure of similar legislative measures in the respondent country.[284]

When dealing with an exceptional provision like Article XXI, an untested alternative to determining reasonable expectations is to examine how closely the circumstances resemble the described grounds for invocation contained in the treaty. The degree to which the measure invoked under Article XXI is consistent with its wording should be a good barometer of whether it could have been reasonably anticipated. Such an approach could facilitate the successful use of non-violation complaints in response to Article XXI, an important consideration since the broad discretion provided under Article XXI is likely to limit the availability or success of other remedies.

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[282] Panel Report, *Korea – Procurement*, [7.93].

[283] Report of the Panel, *US – Certain Country of Origin Labelling (COOL) – Recourse to Article 21.5 of the DSU by Canada and Mexico*, para.7.712.

[284] *US – COOL, Recourse to Article 21.5*, section 7.8.5.2.

Remedies provided by the WTO Dispute Settlement Process in the Case of Non-Violation Claims

Remedies of non-violation claims are restricted by the DSU. When a measure has been found to nullify or impair benefits accruing directly or indirectly under the relevant covered agreement but does not violate the terms of the covered agreement, there is no obligation to withdraw the measure. The Appellate Body's report in *India – Patents (US)* explains that the "ultimate goal is not the withdrawal of the measure concerned […] rather achieving a mutually satisfactory adjustment, usually by means of compensation"[285] as codified in Article 26.1(b) of the DSU. The Panel in *EC – Asbestos* explains that, "a finding based on Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU never results in an obligation not to apply or to withdraw the measure in question"[286]. The member is asked instead to make 'a mutually satisfactory adjustment' which can include compensation.

In reaching an agreement, the relevant parties should avail themselves to the Article 21(3) DSU arbitration procedure, which can include a determination of the level of benefits nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment.[287] It is important to note that these suggestions will not be binding.

Advantages

Can be applied to prima facie lawful measures

NVNI complaints can be applied when the trade-distorting measures is lawful at face value. Article XXI is a very strongly worded provision with a limited standard of review. Any Member facing a measure which has been justified under Article XXI should understand that panelists and member states disagree about the Article's scope, and that some parties will see nearly any measure supported by Article XXI as lawful at face value.

Can be applied to politically sensitive measures

Member states have historically been weary of invoking or challenging the invocation of Article XXI. GATT XXIII:1(b) non-violation complaints could avoid a panel having

[285] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 16 January 1998, para. 41.

[286] Panel Report, *EC – Asbestos*, para 8.270.

[287] Article 26.1(c), DSU

to make a decision on this contentious issue, cushioning the effect of proceedings on the world trading system as a whole. Article 26 of the DSU does require panels and the Appellate Body to "determine that a case concerns a measure that does not conflict with the provision", but there isn't yet definitive Panel or Appellate Body reports to indicate whether a mutually agreed position between complainant and respondent that a measure is WTO consistent would be sufficient for a panel or the Appellate Body to accept.

Potentially timelier than violation complaints

Trade measures that are imposed for national security reasons are nearly certain to impair or nullify benefits under GATT 1994. As non-violation complaints do not need to prove a violation of treaty law, all that needs to be settled in dispute settlement is the amount of the nullification and impairment caused. Once that is determined, the complaining member will be entitled to some concessions as part of a 'mutually satisfactory adjustment'. That a complainant must not establish before the panel that a violation of treaty law actually took place means that decisions in front of a panel should be timelier than those for violation complaints, where a DSB ruling can be expected maybe two years after the invocation of a trade distorting measure.

Solid back-up plan

Non-violation complaints can easily be included alongside other measures. Both Turkey[288] and Mexico[289] have already invoked Article XXIII:1(b) in their requests for consultations regarding certain measures on steel and aluminum products imposed by the United States, ostensibly justified under the Article XXI national security exception. Turkey specifically referenced the use of domestic legislation to nullify and impair benefits accruing under GATT 1994, while Mexico states that the trade measures taken by the United States are nullifying or impairing the benefits accruing to Mexico under the GATT of 1994.

[288] Request for Consultations by Mexico, *United States – Certain Measures on Steel and Aluminum Products*, WT/DS511/1, p.4. "Mexico considers that the benefits accruing to Mexico directly and indirectly under the GATT 1994 are being nullified or impaired as a result of the application of the measures identified above within the meaning of Article XXIII:1(b) of the GATT 1994".

[289] Request for Consultations by Turkey, *United States – Certain Measures on Steel and Aluminum Products*, WT/DS564/1, p.5. "Section 232, as interpreted and applied by the United States' authorities, as well as the ongoing use of Section 232 by the United States' authorities, nullify and impair benefits accruing to Turkey under the GATT 1994 and impede the attainment of the objectives of the GATT 1994 with respect to Turkey, within the meaning of Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU".

Disadvantages

The burden of legitimate expectations

The need to establish the legitimate expectations of any Member affected by a non-violation nullification or impairment can be a barrier to succeeding in the complaint. The complainant Member needs to explain why it didn't expect the other party to implement the measures at issue, when the complainant knew that the exception provisions existed.

Stricter burden of proof for exceptional Articles under the GATT

The burden of proof that a complainant must contend with under Article XXIII1(b) is elevated for exceptional provisions, Article XXI included. This was originally established with respect to Article XX in *EC – Asbestos.*[290]

Limited supportive panel reports

Non-violation complaints have faced little success since the WTO was founded in 1995, in contrast to the pre-WTO period. The likely cause of this performance is that non-violation complaints have rarely been the focal point of a request for consultation. As a result, there are scant few panel or Appellate Body reports to consult. It will be hard to gauge the chance for success on past experiences.

Non-Violation Complaints in other WTO Treaties

TRIPS 'Non-Violation' Complaints (Article 64.2)

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the governing treaty for intellectual property under the WTO, has seen a mutually imposed moratorium on the use of non-violation complaints. Some Members (including the United States and Switzerland) advocate in favour of non-violation cases being allowed in order to discourage members from engaging in legislative activity which creatively allows them to avoid their TRIPS commitments. On the other hand, the vast majority of Members had voted in May 2003 (TRIPS Council) in favour of banning non-violation complaints completely or extending the moratorium.[291] Most recently, members in Buenos Aires in December 2017 agreed to extend the moratorium until 2019.

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[290] Panel Report, *EC – Asbestos*, paras. 8.280-282

[291] WTO, TRIPS, 'Non-Violation' Complaints (Article 64.2): Background and the Current Situation, https://www.wto.org/english/tratop_e/trips_e/nonviolation_background_e.htm

The fact that influential members of the WTO, including the United States and Switzerland, advocate for the use of non-violation complaints under TRIPS is important to note. The justification provided during this advocacy, that non-violation cases should be allowed in order to discourage members from engaging in legislative activity which creatively allows circumvention of WTO commitments, is equally applicable in the context of the GATT 1994. Often, determinations made within an invoking member's civil service, whose functions and criteria are informed by domestic legislation, are used to inform a state's invocation of the national security exception. As the most prominent advocate of a self-judging national security exception, it is worth noting the United States' support for non-violation complaints as a response to creative domestic legislative activity. This suggests that self-judging national security exceptions may not themselves be inimical to non-violation complaints.

GATS 'Non-Violation' Complaints (Article XXIII:3)

The General Agreements on Trade in Services (GATS) dispute settlement provisions also allow for both violation complaints and non-violation complaints. Under Article XXIII:3, a member can claim nullification or impairment of benefits it could expect to accrue under the agreement in the absence of a conflict with the provision of the GATS.[292] Unlike the TRIPS agreement, there is no active moratorium against the use of non-violation complaints under GATS.

Part II.IV: General International Law Countermeasures

Summary:

General international law countermeasures find their legal basis not from the WTO framework, but in Articles 22 & 49-55 of the International Law Commission's Articles on State Responsibility. The problem here is that, as a *lex specialis* regime, the WTO's more specific rules displace the ILC Articles. The grand bargain that brought the WTO into being means that Members trade their right to unilateral action for a rules-based system with a dispute settlement mechanism and comprehensive compliance procedures. This is embodied in Article 23 (c) of the DSU, which requires states to obtain DSB authorization before enacting countermeasures, cementing the prohibition against unilateral action.

[292] WTO, GATS, Dispute Settlement System Training Module: Chapter 4: Legal Basis for a dispute https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c4s4p1_e.htm

This memorandum explores a couple of options for instituting general international law countermeasures. The first is fall back theory, where in extreme situations where there is a break down in a *lex specialis* regime like the WTO, a Member can fall back to general international law countermeasures. For example, if there as a finding of non-justiciability then the grand bargain of the WTO would be displaced. With an Appellate Body decision likely on the way, this result continues to be plausible. In the event that the WTO regime can be displaced, Article 52(2) of the ILC Articles allows for "such urgent countermeasures as are necessary to preserve its rights", before any notification of the intent to do so.

A second procedural argument is available for the use of general international law countermeasures. This argument, provided in *EC – Export Subsidies on Sugar*, relies on estoppel as a general principle of international law observed under Article 3.10 of the DSU. The European Communities understood that estoppel may arise from express statements or from various forms of conduct. If such conduct, upon a reasonable construction, implies the recognition of a certain factual or judicial situation, the Member invoking Article XXI could be estopped from responding to general international law countermeasures. Alternatively, estoppel can be understood as prohibiting parties who engage in dispute settlement in bad faith by taking actions that significantly inhibit the integrity and efficiency of the dispute settlement process from responding to general international law countermeasures.

Legal Basis

The legal basis for bringing into force general international law countermeasures is the International Law Commission (ILC)'s Articles on State Responsibility, which establishes countermeasures in general international law. Article 52 (2) of the ILC Articles on State Responsibility allow for such urgent countermeasures as are necessary to preserve a State's rights, without prior notification.

An important judicial question yet to be decided by a Panel or the Appellate Body is to what extent the ILC Articles on State Responsibility, and the Article 52 (2) exception found within, have any force of law within or without the WTO framework.

ILC Articles on State Responsibility

The ILC Articles on State Responsibility 2001 codified the customary rules and State practice on countermeasures.[293] The Articles allow a State to react to an internationally wrongful act by the taking of countermeasures, as necessary to ensure the cessation of the wrongful act and reparation for the consequences. Article 22 of the ILC Articles states that "the wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded, if, and to the extent, that the act constitutes a countermeasure taken against the latter State".[294] The most important prerequisite for any lawful countermeasure is the existence of an internationally wrongful act against which the injured State can take countermeasures. This understanding was incorporated into the WTO framework, where both an internationally wrongful act and prerequisite procedures should be present when deploying countermeasures.

According to the ILC Articles, there are three procedural requirements for any countermeasure. First, the injured State must call on the responsible state to comply with its obligations of cessation and reparation before any resort is made to countermeasures.[295] Second, the injured State that decides to enact countermeasures should notify the responsible State of the decision and offer to negotiate with the State. An important exception to this second requirement is Article 52(2) of the ILC Articles on State Responsibility, which allows for "such urgent countermeasures as are necessary to preserve its rights", before any notification of the intent to do so. The third requirement is that countermeasures cannot be taken, or must be suspended without undue delay, if the internationally unlawful act has ceased and the dispute is pending before a court or tribunal which has the authority to make binding decisions for the parties.[296] Under the principle of proportionality[297], a presumptively legal countermeasure by the affected party may be deemed unlawful if the retaliation is disproportionate to the offending party's measure.

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[293] Trade Remedies under WTO Law, p.226-227.

[294] ILC Articles on State Responsibility, Article 22.

[295] the Air Services Agreement of 27 March 1946 (1978), UNRIAA, vol. XVIII, 416, at 444, paras 85-7and by ICJ in the Babcikovo-Nagymaros Project (n 48) 56, para.84

[296] ILC Articles on State Responsibility 2001, Article 52(3).

[297] ILC Articles on State Responsibility, Article 51:

"Countermeasures must be proportionate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question".

& Thomas Franck, On Proportionality of countermeasures in international law, American Journal of International Law, 102.4 (Oct.2008), p.1-2.

Article 23 (a) of the DSU requires Members to not make unilateral determinations to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to the dispute settlement process. Article 23 (c) of the DSU requires states enacting countermeasures to follow the procedures set forth in Article 22 to determine level of suspension of concessions and obtain DSB authorization in accordance with those procedures before suspending concessions. Whether taking countermeasures with or without prior DSB approval, it is prudent for the enacting party to follow the Article 22 DSU guidelines for the compensation and the suspension of concessions. This entails prioritizing countermeasures which target the same sectors (failing that, the same WTO agreement) where a panel might later find violation, nullification or impairment.

In the WTO, countermeasures are dealt with under the DSU rules. The result is that countermeasures function in the WTO in ways which defer from the basic rules laid out in the ILC's Articles on State Responsibility. One avenue that has not been subject to WTO litigation is whether exceptions like the one to prior notification and consultation requirements outlined in Article 52(2) of the ILC's Article on State Responsibility have any effect under the DSU. A plain meaning reading of Article 23.2(a) DSU suggests that unilateral declarations that a violation has occurred, outside of recourse to the dispute settlement procedures in accordance with DSU provisions, need to be consistent with the findings of the DSB or a final arbitration award. Without an arbitration award or a report adopted by the DSB, the DSU rules are clear that countermeasures cannot be adopted unilaterally. This can be further seen in the goal of Article 23 DSU, the rejection of self-help and the strengthening of the multilateral trading system at the expense of unilateralism.

Advantages

Maintaining bargaining leverage

General international law countermeasures can maintain bargaining leverage in an otherwise inflexible situation. Whichever Member instituted the trade-distorting measures will feel the consequences of their actions within the domestic economy, encouraging interest groups and lobbyists to contest or protest again the measure.

Timeliness/Immediacy

With a strongly worded exception like Article XXI, general international law countermeasures provide a very timely response to tariffs. The rather immediate effects can protect national industries before they are drastically affected.

Inducement/Deterrent effect

Measures in response are more effective when they take effect quickly. Having already picked a pathway which is outside the DSU, and therefore likely outside WTO law, the 'remedy gap' which impedes the inducement and deterrent effects of WTO countermeasures do not apply. Immediate protection in the domestic economy or immediate damage to the respondent's economic interests are available.

Short-term protection of domestic interest groups

General international law countermeasures, despite their shortcomings, allow Member governments to enact protective measures to shield domestic interest groups that would otherwise by harmed economically. Even if the measures don't bring an end to measures justified under Article XXI, a complainant can avoid political and economic costs at home in the short- to medium-term.

Disadvantages

Reduction of national economic welfare

Authors have also suggested that countermeasures can increase protectionist tendencies, "which is self-defeating in the sense that trade destruction caused by countermeasures reduces national economic welfare" and ultimately works against the objective of the WTO, promotion of international trade and the reduction of protectionism.[298]

Negative effect on rules-based system

A failure to resort to the WTO dispute settlement system weakens the rules-based system. When Members deliberately take unilateral measures that ignore or avoid entirely the DSU and decisions of the DSB or Appellate Body, they chip away at the consensus that disagreements about compliance with WTO law should be settled by recourse to the DSU's rules and procedures.

[298] Remedies Under the WTO Legal System, p.341.

II.IV.I: Other Potential Arguments for General International Law Countermeasures

Fall-back theory

Extra-systemic countermeasures can be used to induce compliance with rules inside 'contained regimes' of international law, like the WTO. Even if a treaty-based system like the WTO can be deemed to have suspended the rights of Members to take countermeasures under general international law (Article 23 DSU), this right can be revived when the remedies within a self-contained system have proven unsuitable or unable to redress the situation created by a wrongful/illegal act. Mr. Gaetano Arangio-Ruiz (former Special Rapporteur for State Responsibility) identified a hypothetical scenario where a State may lawfully resort to measures which are not allowable under a treaty agreement but are available under general international law: when a wrongful conduct persists while the dispute settlement procedures are in progress and interim measures of protection are either unavailable or have been disregarded by the wrong-doing state.[299] This situation has parallels to the invocation of Article XXI, where a Member can resort to the DSB but be unable to access any interim measures, and even after DSB approval would not be availed of a retroactive remedy, in the event they were successful at all.

The use of such unilateral countermeasures which are outside of a self-contained regime like the WTO would of course have to be limited to the most extreme of situations. Arangio-Ruiz suggests that fall backs to general international law should be limited to the most extreme situations because of a strong presumption against derogation from *lex specialis* regimes. There is little question that the integrity of *lex specialis* regimes like the WTO are generally considered intransgressible. If one can argue an existential threat to the self-contained system, with a proper linkage to the measures enacted by the respondent, the injured state could be entitled to pick from a wide array of possible reactions, ranging from the termination or suspension (partial or total) of the treaty in question to countermeasures proper:

> "When applied to WTO law, Arangio-Ruiz's theory leads to the conclusion that the right to take extra-systemic countermeasures is generally precluded (by express derogation) but may be revived in cases of extremely grave violations of the system's rules by virtue of the incompressible core of the

[299] Bianchi and Gradoni, Developing Countries, Countermeasures and WTO Law: Reinterpreting the DSU against the Background of International Law, ICTSD Dispute Settlement and Legal Aspects of International Trade, December 2008, p.21. Quoting:

G. Arangio-Ruiz, 'Fourth Report on State Responsibility', Yearbook of the International Law Commission (1992), vol. II, Part one, 1 at 40-41, para. 117-122

general rules applicable in case of breach. Therefore, albeit in a very limited (and difficult to define) set of circumstances, Article 23 DSU could be set aside."[300]

Arguments to look beyond the self-contained regime of the GATT 1994 could also be justified by highlighting the 'remedy gap' inherent in GATT violation complaints. Violation complaints do not provide retroactive remedies, something which has had a tremendous impact on the ability of DSB approved retaliation to induce compliance. This stated purpose of DSB approved retaliation is to induce compliance, but the restrained definitions on proportionality, coupled with the lack of a retro-active remedy mean that respondent's parties are not made to give up concessions equivalent to any domestic gains or made to properly compensate a complainant.

Estoppel

In *European Communities – Export Subsidies on Sugar*, the Appellate Body considered the European Communities' argument that estoppel is a general principle of international law, and therefore "one of the principles members are bound to observe when engaging in dispute settlement procedures, in accordance with Article 3.10 of the DSU."[301] The European community argued that "estoppel may arise not only from express statements, but also from various forms of conduct […] where, upon a reasonable construction, such conduct implies the recognition of a certain factual or judicial situation."

In the event that a complainant Member feels compelled to initiate general international law countermeasures, they could argue that either the complainant or respondent party is estopped from bringing their claims within the WTO framework by recognition of a certain factual or judicial situation. The continued delays in Appellate Body appointments, which bring into serious question the ability of the DSB appeals process to deal with the significant backlog of WTO dispute settlements, could qualify as a 'certain factual or judicial situation' as imagined by the European Communities. This argument could be stronger if the respondent country has a direct involvement in the 'factual or judicial situation'. The idea here would be that the party responsible for a certain factual or judicial situation, when arguing that the proper response under DSU Article 23 is to bring a WTO case against the measure, is estopped from making that argument based on their previous actions.

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[300] Bianchi and Gradoni, Developing Countries, Countermeasures and WTO Law: Reinterpreting the DSU against the Background of International Law, ICTSD Dispute Settlement and Legal Aspects of International Trade, December 2008, p.22.

[301] Appellate Body Report, *European Community – Export Subsidies on Sugar*, para.311.

This argument could also be understood in relation to good faith obligations, as the European Communities argument in *EC and certain member States – Large Civil Aircraft*. The European Communities argued that the good faith obligation contained in Article 3.10 of the DSU can be analysed in the light of the general international law principle of estoppel.[302] This argument would complement the importance of good faith to Article XXI invocation recognized in the *Russia – Transit* Panel report, by incorporating procedural good faith requirements from the DSU. The basic premise is that the respondent would have engaged in dispute settlement in bad faith by taking actions which significantly inhibit the integrity and efficiency of the dispute settlements process.

Part II.V: No WTO or General International Law Response

Summary:

The Article XXI national security exception is broadly drafted, meaning that the option of not responding with retaliatory trade measures should always be under consideration. Without a modern Appellate Body decision and many previous reports providing a broad interpretation, the spectre of substantial liability if retaliation measures are not made out in front of a DSB panel is very real. The Russian Federation, the European Union, Turkey and Canada are all set to appear at the WTO regarding the legality of their retaliation against US steel and aluminum tariffs.

Legal Basis

When confronted with any measure which nullifies or impairs benefits accruing under the GATT or other WTO treaty, the state can choose not to respond. There is no legal obligation for Members to take any action against potential or actual violations of WTO law by other Members.

Advantages

Hard to evaluate chances of success for WTO or GIL claims

[302] Panel Report, *EC and certain member States – Large Civil Aircraft*, para.7.101.

This memorandum demonstrates that the level of justiciability and remedies at play when Article XXI has been invoked are complicated and unsettled. Invocation of the Article XXI national security exception is one of the strongest justifications available under the GATT or any WTO treaty. With recent WTO panel guidance but no Appellate Body report on the justiciability or contours of Article XXI, it is difficult for member states to properly evaluate the strengths, weaknesses, opportunities and threats associated with trade retaliation.

Avoids expensive litigation, countersuits

Whether or not a country is certain of the legality of their countermeasures, the potential expense of defending these claims in front of a panel are not insubstantial. In response to measures put in place by those countries affected by certain measures on steel and aluminum products, the United States has challenged the retaliatory measures taken in WTO dispute settlement. The Russian Federation[303], the Mexico[304], Turkey[305] and Canada[306] will all have to defend their response measures in front of panels.

Respects the complex consensus behind the multi-lateral system

Challenging Article XXI invocations in front of WTO panels could have an indelible impact on the multilateral trading system, and the complex international consensus that allows its continued functioning. The choice not to respond protects from this possibility, while respecting the course of action taken by most WTO members in response to Article XXI invocation since the inception of the WTO/GATT. For example, Cuba could have challenged the US embargo at the WTO and chose not to.

Leaves room for diplomatic or lobbying efforts

The choice not to retaliate does open the member state to uncompensated suspension of benefits for the time period that the national security measure remains in place, but this route allows for the potential of vindications without the risk of countermeasures or other retaliation being deemed unlawful by a WTO panel.

Disadvantages

Political consequences at home

[303] DS566, *Russian Federation – Additional Duties on Certain Products from the United States*

[304] DS560, *Mexico – Additional Duties on certain Products from the United States*

[305] DS561, *Turkey – Additional Duties on Certain Products from the United States*

[306] DS557, *Canada – Additional Duties on Certain Products from the United States*

The idea of providing no response can be hard to sell at home and invoke feelings of weakness on the part of trade negotiators and the governments that they represent. It is understandable that member states confronted (in their view unfairly) with Article XXI measures want to adopt a quick, decisive responses to seem strong to their constituencies and protect vital trade.

No chance of compensation

The choice to not respond opens up your economy to the effects of the tariffs invoked under Article XXI, with no chance of achieving concessions or compensation in relation to the nullification or impairment caused by the measure.

Part II.VI: Lobbying/Diplomatic Means

Summary:

Members who take no WTO or general international law response have the opportunity to resort to lobbying or diplomatic means to achieve concessions or the effect the retraction of the measure. A Member can choose to intervene domestically in the invoking Member to achieve concessions, either through legal or administrative proceedings in the domestic legal system or through lobbying domestic representatives. Alternatively, a Member can make a strong normative response by raising the measures in WTO Councils and Committees.

The choice to make no legal intervention at the WTO, while an option in itself, also leaves the door open for other means of response.

A Member can choose to:

(1) Intervene domestically in the trading partner in order to achieve concessions. This process could include instigation of legal or administrative proceedings in the trading partner's domestic legal system. This could be done in conjunction with the lobbying of politicians.

Allowable trade retaliation under the WTO is limited to an amount equivalent to the complainant's injury, and even then, not for measures accruing during the 'remedy gap' period. Resorting to intervention into the domestic legal system of the respondent

member, lobbying of government or issue-specific negotiation could potentially deliver results equivalent to the economic gain received by the respondent country, rather than just the equivalent injury to the complainant Member's economy.

(2) Raise the measures in WTO Councils/Committees. For example, on March 23rd, 2018, 40 Members of the WTO took the floor regarding the "Presidential Proclamation on Adjusting Imports of Steel into the United States" coming into force. Members can raise issues in WTO Councils or Committees, either alone or alongside other Members. This process can create official discussions that can be cited in later proceedings, while also being a strong normative gesture.

Conclusion

The scope of this memorandum ambitiously attempts to conduct an analysis of a novel point of law within the WTO *lex specialis* regime as well as outlining potential options for response to invocations of security exceptions; several options containing points of unsettled law themselves. In turn, this memorandum is more modest with respect to stating conclusions.

With respect to the interpretation of Article XXI of the GATT, this memorandum concludes that the arguments in favour of justiciability are stronger than those that militate against such a finding. With respect to the applicable standard of review, this memorandum finds that invocations of Article XXI are reviewable on a standard of good faith. This memorandum supports the position that invocations of Article XXI are reviewable on a good faith standard with respect to all three manifestations of good faith obligations in the WTO: good faith conduct in dispute settlement, substantive good faith with respect to obligations of a state and good faith in the interpretation of treaties.

This memorandum explored several available options for response: WTO dispute settlement violation claims, re-interpreting Article XXI tariffs as Article XIX safeguards, WTO dispute settlement non-violation claims, general international law countermeasures, making no formal WTO or general international law response, and lobbying/diplomatic means. Our deliberate choice to avoid making a general conclusion favouring one response option over any other reflects the importance of the specificities of the measure in question, the trading relationship between parties to a dispute, uncertainty regarding the nature of future panel and Appellate Body reports and numerous other factors. Rather than coming to a conclusion which favours one of

these response options over the others, this memorandum goes in to detail explaining the legal basis, procedural considerations and likely points of contention when using each measure to respond to Article XXI tariffs. For each response option, the inclusion of several advantages and disadvantages furnishes readers with accessible reasons for and against choosing a measure to respond to Article XXI. Combined, the discussion of each measure and the advantages and disadvantages associated with its use provide a compelling tool for the evaluation of response options, which can then be applied to particular set of facts.

A final remark with respect to Panel Report in D512 – *Traffic in Transit* is warranted. While this memorandum makes multiple references to the Panel Report published in late March 2019, the research phase of this memorandum was largely complete by the time of publication. While there are similarities in the conclusions reached by the Panel and this memorandum, the two largely developed independent of one another and any assessment of security exceptions moving forward should take heed of the points raised in both this memorandum and by the Panel Report.