



## 23-2 Saving the WTO from the national security exception

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### ABSTRACT

For any member of the World Trade Organization (WTO) not making alternative arrangements, enforceability of the rules of the global trading system, a distinguishing feature of the WTO, ceased to exist on December 11, 2019, because the United States blocked appointments to the Appellate Body of the WTO dispute settlement mechanism. A major obstacle to the United States accepting any resolution of this impasse—thus permitting dispute settlement to once again be binding on all WTO members—is settling the issue of whether claims of national security to legitimize trade measures are reviewable. This is a red line for the United States, which argues this claim is nonreviewable. In the emerging area of great power competition, the United States is unlikely to accept a return to fully effective WTO dispute settlement absent a compromise that finds determinations of national security nonjusticiable. This paper offers a compromise: There would be no adjudication of whether a measure was justified under the WTO's national security exception, but those WTO members adversely affected would have an immediate right to rebalance trade concessions themselves by imposing retaliatory trade measures against the WTO member invoking the exception.

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## INTRODUCTION

The members of the World Trade Organization (WTO) agree that their institution must be reformed.<sup>1</sup> It is generally felt that the most essential reform is to find a solution to restoring a dispute settlement mechanism that all members will again accept as final and binding.<sup>2</sup> Last year, the United States undertook the task of consulting with other members to resolve the issue. These discussions turned out to have been an initial phase, with no complete resolution in sight. The process now continues under the new leadership of Guatemala as its facilitator, with the European Union and others expressing hope that a negotiated solution could be reached by the 13th WTO Ministerial Conference (MC13), scheduled for Abu Dhabi in late February 2024.<sup>3</sup>

Full enforceability was a key feature that distinguished WTO agreements from most other international institutions. It was a central feature of the WTO when the organization was founded on January 1, 1995. Panel and Appellate Body decisions were made final and binding. Its predecessor, the General Agreement on Tariffs and Trade (GATT) of 1947, had a dispute settlement system that generally led to the enforcement of obligations, with a crucial difference: A recalcitrant litigant could prevent a panel decision from being adopted, leaving the legal result in limbo. During the last GATT negotiation, the Uruguay Round, both the European Union and the United States regarded this feature as a defect that needed to be remedied. The European Union and others desired to curb US unilateralism through the latter's use of Section 301, and the United States wished to diminish the adverse effects of the European Union's Common Agricultural Policy (CAP) on world trade and the EU's ability to block GATT panel reports challenging EU agricultural barriers. The European Union and United States worked together to prevent members who lost a case from blocking the adoption of panel reports. They achieved this through the automatic adoption of dispute settlement reports by "a negative consensus," meaning that all WTO members present at a meeting of the Dispute Settlement Body (DSB) would have to unanimously agree *not* to adopt a report for it to fail to be adopted. This was a null set, in that a winner before a panel in a politically sensitive dispute would be unlikely to join a consensus against adoption.<sup>4</sup>

On December 11, 2019, the WTO's binding dispute settlement process ceased to exist. Through the exercise of a veto over appointments to the WTO

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1 World Trade Organization, [MC12 Outcome Document WT/MIN\(22\)/24 WT/L/1135](#), June 22, 2022. The G7 trade ministers reiterated this objective in their virtual meeting hosted by Japan on April 4, 2023.

2 Ibid. The MC12 contained the following agreement on the issues of dispute settlement reform in its outcome document: "We acknowledge the challenges and concerns with respect to the dispute settlement system including those related to the Appellate Body, recognize the importance and urgency of addressing those challenges and concerns, and commit to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024."

3 World Trade Online, [WTO Dispute Settlement Reform Talks Enter 'New Phase,' with Non-U.S. Facilitator](#), February 28, 2023.

4 The GATT dispute settlement system had a good track record in run-of-the-mill commercial disputes but tended to run into problems in politically sensitive disputes with high stakes, particularly those involving agriculture.

Appellate Body (AB),<sup>5</sup> the United States ended the review stage of WTO dispute settlement. Given that at least three sitting AB members were needed to hear an appeal, the AB could no longer muster a quorum. The substantive US concerns were that (1) AB decisions curbed members' ability to use trade remedies (antidumping duties, countervailing duties, and safeguards to address unfair or otherwise injurious trade that caused harm to domestic industries), contrary to the intention of GATT negotiators; and (2) the AB could not find subsidies under the "public body" doctrine where monies were passed through various state-controlled entities to state-owned enterprises engaged in commerce, nullifying in those cases the use of the WTO Subsidies and Countervailing Measures Agreement as a remedy.<sup>6</sup> Both of these faults were magnified by the competition between Western market economies and China. These two challenges would be difficult enough to resolve or at least address; but then another issue arose that, if left unresolved, would likely prevent the restoration of the enforceability of WTO obligations. This is the use of national security (also called "essential security interests") to justify trade restrictions. A series of decisions have been reached by dispute settlement panels in the last four years since the decision of the *Russia—Measures Concerning Traffics in Transit*<sup>7</sup> panel was adopted in April 2019 and opened the door to panel review of whether the use of the national security exception is justified under WTO rules. The red line position of the United States is that what is in a country's national security interest is a nonjusticiable issue, a matter that only a sovereign can decide, and a decision that cannot be reviewed.

Providing authoritative and enforceable outcomes is the essence of any dispute settlement system, whether it is a process of adjudication or arbitration before a neutral panel (with or without a right of appeal), mediation, or other forms of conciliation. The current objective of WTO members, as decided by them at their last Ministerial Conference (MC12 in Geneva, June 2022), is to restore dispute settlement at the WTO that is binding and supported by all. Clearly, any solution will need to have sufficient respect for each member's sovereignty (which developing country members often term "policy space") inherent in the concept of the nation-state,<sup>8</sup> and be consistent with the essential nature of the WTO itself, which is a collection of trade agreements, an *acquis*, containing a wide variety of negotiated rights and obligations affecting the commerce of each member.

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5 Appointments to the AB and even beginning the nomination process were deemed to require a positive consensus, which the United States refused to join.

6 Office of the United States Trade Representative, *Report on the Appellate Body of the World Trade Organization*, February 2020, Washington. The "public body" issue: Under the WTO Subsidies and Countervailing Measures Agreement, a subsidy cannot be found without finding "a financial contribution by a government or any public body." The AB held that government ownership of the entity providing the financing was insufficient to find that it was a public body. The entity had to also have other government functions assigned to it.

7 Panel report, *Russia—Measures Concerning Traffic in Transit*, WT/DS512/R (April 5, 2019).

8 Not all WTO members are countries or recognized by all as such. The European Union is not a country. Hong Kong and Macao are not recognized as countries. Taiwan is not recognized as a country and is referred to formally in the WTO as the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu. Each of these entities was admitted to the WTO because it has sovereignty, control, over its trade. For the purposes of this paper, for ease of communication, the use of "member" and "country" are interchangeable.

Participation in the multilateral trading system is based on a negotiated balance of concessions among participants. Antithetical to this balance is a member unilaterally withdrawing from part of the bargain it had agreed to for a reason it deems justifiable, with little possibility of others responding. This, however, is what occurs if a WTO member cites national security as a reason for its action, and then claims that its own judgment of what is in its security interests is both nonreviewable and nonactionable as a violation of the rules.

Respect for sovereignty is not debated daily in either the WTO or elsewhere in trade relations, but when it emerges in discussion, it is clear that members are deeply attached to preserving their freedom of action. The most recent example is Brexit. The UK Treasury estimated that the cost of Brexit to the British economy would be over 5 percent of GDP, a shockingly large price to pay for leaving the European Union and the common market. When the UK Ambassador to the WTO was asked why this price was acceptable, his one-word answer was “sovereignty.” Once Brexit became a reality, one of the most difficult issues that remained with respect to Northern Ireland was the role of the European Court of Justice as the final body that would judge whether EU rules were being adhered to.

Likewise, the single most important issue—which in fact dominated the congressional debate on the bill authorizing the United States to join the WTO—was whether WTO membership would have an adverse effect on US sovereignty.<sup>9</sup> The discussion came to a head in the President Clinton’s acceptance of a domestic judicial review mechanism of all future WTO dispute settlement rulings against the United States, with the possibility of US withdrawal from the WTO if decisions were found to be decided improperly under the WTO’s rules on at least three occasions.<sup>10</sup>

As the Commerce Power under the US Constitution lies with the Congress, and the key to US membership in the WTO was resolving both the issue of sovereignty and the reliability of dispute settlement, the restoration of binding dispute settlement is clearly a highly sensitive trade issue for any US administration. The seriousness of the issue for the United States should have been clear from it taking the unusual step of unilaterally dismantling the WTO dispute settlement system, despite having been one of the multilateral system’s leading proponents for most of the last seven decades. Even if other WTO members might view blocking AB appointments as an act of petulance from an administration that did not value trade agreements, they should by now understand that this concern is bipartisan and has been articulated by the past four US administrations, Republican and Democratic alike. Therefore, reconstructing a binding dispute settlement system that includes the United States will be difficult and cannot be achieved by simply demanding that the United States return to the fold. Rather, the task demands considering the US complaints on their merits and seeing whether there is a mutually agreed resolution that preserves the enforceability of obligations as well as the balance

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9 GovInfo, [Uruguay Round Agreements Act](#), November 30, 1994. Mr. Moynihan: “Mr. President, on July 8, 1916, in a speech on the House floor, Cordell Hull, then a Democratic Congressman from Tennessee, called for a ‘permanent international trade congress’ to formulate agreements to dismantle destructive trade practices. Today, over 78 years later, it is with great honor that I, as chairman of the Committee on Finance, bring to the floor of the Senate legislation that will finally realize that vision.”

10 C-SPAN, [General Agreement on Tariffs and Trade](#), November 23, 1994. Note, the United States did not join the International Court of Justice and still is not bound by its rulings.

of concessions, and does not open the door to widespread abuse of an open-ended national security exception.

Complicating the prospects of reaching a solution is the fact that the United States and China are locked in what is euphemistically termed “a strategic competition.” The concept is taking on some flavor of a new Cold War in terms of not just rhetoric but the imposition of restrictions on trade. While in gross terms, trade between the two countries remains strong and is in fact growing, in specific areas it is decreasing, and for some products sharply, in what is the beginning of a strategic decoupling.<sup>11</sup> The restrictive actions taken by the United States either have been or would likely be, if a legal defense were needed, deemed necessary to serve US national security. Litigating whether the national security exception applied would itself pose systemic risks.

## THE NATIONAL SECURITY EXCEPTION

The trading system, as promulgated by GATT and the WTO, is based on reciprocity—a balance of concessions. These trade benefits are often measured in terms of perceived additional access to foreign markets in return for a participant ceding additional access to its own market. How exceptions are used is a very serious matter. It is untenable to have an exception that is nonreviewable simply based on its being invoked.

The national security exception is contained in WTO GATT Article XXI(b), which reads in relevant part:

Nothing in this Agreement shall be construed

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interest...

(iii) taken in time of war or other emergency in international relations<sup>12</sup>

Like most successful systems of rules, the global trading system has, for most of its 75 years, depended on voluntary and good faith compliance. It has also required the self-restraint of its participants in invoking exceptions, and only very rarely resorting to the national security exception. An additional concern is that WTO members, and GATT contracting parties before the WTO era, have sought to avoid ceding to adjudicators any authority to define their country’s core sovereign interests, often by settling with those adversely affected,<sup>13</sup> or narrowing the scope for review of the measure.<sup>14</sup>

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11 Chad P. Bown and Yilin Wang, [Five Years into the Trade War, China Continues Its Slow Decoupling from US Exports](#), Realtime Economics blog, Peterson Institute for International Economics, March 16, 2023.

12 World Trade Organization, [General Agreement on Tariffs and Trade](#).

13 World Trade Organization, [DS38: United States—The Cuban Liberty and Democratic Solidarity Act](#). Under the Helms-Burton Act, the United States applied sanctions to firms from its other trading partners that dealt with Cuba. The United States and the European Communities (the predecessor organization to the European Union) were engaged in a dispute on the Helms-Burton extraterritorial application of sanctions, a case in which the parties decided to allow the panel to lapse. The DSB established a panel at its meeting on November 20, 1996. On April 25, 1997, the chair of the panel informed the DSB that, at the request of the European Communities, the panel had suspended its work. The panel’s authority lapsed on April 22, 1998, pursuant to Art. 12.12 of the Dispute Settlement Understanding.

14 World Trade Organization, [General Agreement on Tariffs and Trade: United States—Trade Measures Affecting Nicaragua](#), Panel Report L/6053, October 13, 1986, Geneva.

The current argument in the WTO with respect to the national security exception has focused on whether a member should be free to judge for itself the validity of its claim of national security as a justification for imposing its trade-restricting measure. There is an equally strong view held by many WTO members that it is intolerable for any country to impose trade restrictions simply by declaring that it is in their national security interest to do so. This clash of views is unresolvable. While the United States has hinted that Article XXI disputes should be addressed through nonviolation disputes, it has never articulated how this could work and ignored, at least to date, whether countries adversely affected by a trade measure imposed in the name of national security should have an automatic right of response. Since the nonviolation provisions of the WTO and GATT dispute settlement mechanisms have rarely been used, the idea has never gotten much attention or traction.

### WTO DISPUTE SETTLEMENT PRACTICE REGARDING THE NATIONAL SECURITY EXCEPTION

From its beginnings in the early postwar era, the GATT/WTO system has struggled with the scope of Article XXI's national security exception and its potential for abuse. For decades, governments showed admirable restraint in the use of Article XXI in order to protect the integrity of the GATT/WTO system. But in recent years, as WTO disciplines have eroded, the use of "national security" as a justification for trade restraints has proliferated.<sup>15</sup> Some of these actions have been clearly legitimate, but some have been highly questionable. Starting with *Russia—Measures Concerning Traffic in Transit*,<sup>16</sup> WTO panels have sought to limit the national security exception by subjecting its use to dispute settlement review. While doing so has exposed dubious claims under Article XXI, the panel decisions have come at the expense of further controversy over the scope of the WTO's dispute settlement mechanism itself, particularly on the part of the United States, which was once one of its biggest proponents and is now its biggest critic.

It is not surprising that panels have chosen to review the attempts by some WTO members to invoke the WTO's national security exception. Russia's seizure of Ukraine's territories in the Donbas and Crimea and President Donald Trump's Section 232 tariffs on imported steel and aluminum presented particularly unsympathetic sets of facts. The *Russia—Measures Concerning Traffic in Transit* dispute took place in the midst of President Vladimir Putin's 2014 invasion of Ukraine in violation of the UN Charter and postwar international norms, foreshadowing his more recent invasion of Ukraine in February 2022. Invading the territory of a neighboring country and then claiming a WTO right to also apply trade measures to force the latter to yield land is a particularly heinous

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15 National security is referenced, for example, in the following WTO dispute settlement cases:

- DS526: United Arab Emirates—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights
- DS567: Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights
- DS597: United States—Origin Marking Requirement
- DS615: United States—Measures on Certain Semiconductor and Other Products, and Related Services and Technologies

16 At its meeting on April 26, 2019, the DSB adopted the panel report.

departure from serving the purposes of international obligations. President Trump's Section 232 tariffs were widely viewed in Geneva and by US trading partners as an effort to invoke GATT Article XXI and Section 232 of the US Trade Expansion Act of 1962 for blatantly protectionist and self-serving purposes, so these measures were effectively doomed in any adjudication on the merits.

But having ventured into this previously unexplored territory, WTO panels are now confronting even harder cases, including the US decision to treat Hong Kong as part of China after China's adoption of the *Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region* and arrests of leading Hong Kong democracy activists, as well as China's recent challenge to US export controls on semiconductors, supercomputers, and semiconductor manufacturing equipment in *United States—Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*.<sup>17</sup> There is no declared state of war between the United States and China, and yet the relationship is clearly not one of untroubled peace.

While theoretically subjecting the use or misuse of national security to dispute settlement review superficially advances the rule of law, to what extent does it really further this objective? As a practical matter, the WTO is likely to find it extraordinarily difficult to secure compliance with future national security rulings, which come with high institutional costs for an organization that is already struggling. While invoking "national security" is a time-honored way for governments to abuse their powers and circumvent scrutiny in a domestic setting, this is not acceptable in the administration of a multilateral trade agreement. A government that maintains (and may even believe) that a measure relates to the protection of its essential security is unlikely to comply with a contrary WTO panel ruling by current or former trade diplomats, government lawyers, and academics who think otherwise. Indeed, even in highly dubious cases, governments are likely to dig in to defend their actions, having presented a national security rationale for them.<sup>18</sup>

WTO panel decisions on national security also risk validating deeply troubling actions by member governments. The *Russia—Measures Concerning Traffic in Transit* panel went out of its way to construct a path for dispute settlement review of national security measures, but ended up finding that Russia was entitled to invoke Article XXI(b) to justify restrictions on the movement of Ukrainian goods through its territory in a time of war or national emergency, a decision that did nothing to curb further Russian abuses and indeed risked emboldening President Putin's claims to Ukraine. In *United States—Origin Marking Requirement*, a panel found that a key part of the US response to China's crackdown on Hong Kong's democracy activists was a WTO violation and could not be justified under GATT Article XXI(b)(iii), effectively insulating actions by China and the Hong Kong administration, which many found deeply repugnant from a human rights standpoint. In the larger frame of measures imposed in the name of essential security interests, a labeling requirement that recognized the effective control of Hong Kong by China is a relatively mild measure. If the

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17 World Trade Organization, [DS615: United States—Measures on Certain Semiconductor and Other Products, and Related Services and Technologies](#).

18 Council on Foreign Relations, [Meeting: C. Peter McColough Series on International Economics with Katherine Tai](#), December 19, 2022.

United States engaged in a more aggressive manner, militarily or by declaring that a state of hostilities existed between China and the United States, the panel, following the reasoning in *Russia—Measures Concerning Traffic in Transit*, might have exonerated the United States from a WTO violation. That is a bizarre result. Current rulings provide all the wrong incentives—blessing a more aggressive act when invoking the national security exception and giving a free pass to egregious conduct.

Panel decisions on Article XXI cases have done little to raise confidence in the WTO and have become a serious obstacle to advancing much needed reforms to restore functioning dispute settlement, oversight, and negotiating systems. More broadly, the panel decisions on national security are dragging a GATT/WTO system that is already under fire from both activists and free traders even deeper into disrepute.

Agree or disagree that there is a valid invocation of the national security exception, it will remain as a practical matter nonjusticiable by those feeling strongly enough to invoke it, because adverse rulings will be ignored. But the exception's use will also remain unconstrained if there is no cost to invoking the measure other than disdain from one's trading partners. A pragmatic solution is needed. Will a recognized right of response lead to a proliferation of claims of national security to justify trade restrictions? We do not think so. The incentive to invoke this exception exists at present. Facing automatic trade consequences for its use will be a brake on its ill-considered use. At present, the practice of major trading countries is to retaliate even where there is no WTO right to do so.<sup>19</sup>

### **WHY WAS THE ARTICLE XXI EXEMPTION SO RARELY INVOKED?**

Until recently, GATT/WTO members showed admirable restraint in invoking Article XXI, recognizing its potential for abuse and institutional risks for the GATT/WTO system. Discussions at the WTO nevertheless showed that GATT/WTO members viewed the national security exception as a sovereign matter not subject to dispute settlement review. The following paragraphs discuss prime examples.

During the 1982 Falklands War between the United Kingdom and Argentina, Argentina challenged the UK ban on imports of Argentine goods. The European Economic Community (EEC, the predecessor of the European Union), on behalf of the United Kingdom as it was then a Member State, responded:

The EEC and its Member States had taken certain measures on the basis of their inherent rights, of which Article XXI of the General Agreement was a reflection. The exercise of these rights constituted a general exception, and required neither notification, justification nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement.

The European representative stated that the EC/United Kingdom, as a GATT contracting party, was “in the last resort—the judge of its exercise of these rights.” The Canadian representative added that “the GATT had neither the

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<sup>19</sup> Examples include the European Union in the case of US steel and aluminum measures by recharacterizing US tariffs as safeguard measures where compensation is owed under WTO rules, and China, without stating that it is doing so, with respect to US export restrictions on advanced technologies.



competence nor the responsibility to deal with the political issue which had been raised” and his delegation “could not, therefore, accept the notion that there had been a violation of the General Agreement.”<sup>20</sup> The US representative joined in by adding, “The General Agreement left to each contracting party the judgment as to what it considered to be necessary to protect its security interests. The Contracting Parties had no power to question that judgement.”

In 1985, Article XXI was again invoked to justify a trade measure. A panel was established to consider Nicaragua’s challenge in *United States—Trade Measures Affecting Nicaragua* to the Reagan administration’s trade embargo, but its terms of reference stated explicitly that “the Panel cannot examine or judge the validity or motivation for the invocation of Article XXI(b)(iii) by the United States.”<sup>21</sup> Ultimately, in a report that was never adopted, the panel stated:

The Panel did not consider the question of whether the terms of Article XXI precluded it from examining the validity of the United States’ invocation of that Article as this examination was precluded by its mandate. It recalled that its terms of reference put strict limits on its activities because they stipulated that the Panel could not examine or judge the validity of or the motivation for the invocation of Article XXI:(b)(iii) by the United States. . . . The Panel concluded that, as it was not authorized to examine the justification for the United States’ invocation of a general exception to the obligations under the General Agreement, it could find the United States neither to be complying with its obligations under the General Agreement nor to be failing to carry out its obligations under that Agreement.<sup>22</sup>

The need to define national security was avoided by narrowing the scope for panel review.

How far the national security exemption could be extended to excuse conduct otherwise inconsistent with the multilateral trade rules arose once again early in the WTO era. On May 3, 1996, the European Communities requested consultations with the United States concerning the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 and other legislation enacted by the US Congress regarding trade sanctions against Cuba. The EC claimed that US trade restrictions affected citizens of EC countries and their commerce, which was inconsistent with obligations under the WTO agreement. The EC also alleged that even if these measures were not in violation of specific provisions of the GATT or the General Agreement on Trade in Services (GATS), they nevertheless nullified or impaired its expected benefits under both agreements and impeded the attainment of the GATT’s objectives. The European Communities requested the establishment of a panel on October 3, 1996. Two years later, the panel was dissolved without issuing a report.<sup>23</sup> Both the EC and the United States decided

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20 World Trade Organization, *General Agreement on Tariffs and Trade: Minutes of Meeting—Held in the Centre William Rappard on 7 May 1982*, C/M/157, June 22, 1982, p. 10.

21 World Trade Organization, *General Agreement on Tariffs and Trade: Minutes of Meeting—Held in the Centre William Rappard on 12 March 1986*, C/M/196, April 2, 1986, p. 7.

22 World Trade Organization, *General Agreement on Tariffs and Trade: United States—Trade Measures Affecting Nicaragua*, Panel Report L/6053, October 13, 1986, Geneva, paras. 5.1-5.3.

23 World Trade Organization, *DS38: United States—The Cuban Liberty and Democratic Solidarity Act*.

that the issue of what was or was not valid under the national security exceptions of the GATT and GATS should not be adjudicated. They negotiated a pragmatic solution outside of the dispute settlement process.

### WTO DISPUTE SETTLEMENT PANELS' CONTROVERSIAL FORAYS INTO THE NATIONAL SECURITY ISSUE

In the United States, the current chief justice, John Roberts, is regarded as an institutionalist. This means he understands the political bounds of the judicial function. For the US Supreme Court, not every case is deemed to be justiciable. Starting with Chief Justice John Marshall's landmark opinion in *Marbury v. Madison*, the court has cited the political question doctrine to limit the ability of federal courts to address cases involving issues that fall within the purview of another branch of government (such as Congress) or are otherwise beyond the competence of the judiciary to review and resolve. The US Supreme Court has only very rarely ruled that the president abused his foreign affairs powers in times of war.<sup>24</sup> In contrast, the Appellate Body dove into particularly thorny and unclear issues that perhaps should have been left to future generations of WTO negotiators or addressed through other WTO mechanisms.

There could not be a more politically charged issue than a government invoking an exception based on its national security interests. Even against an action by a member not known for its adherence to the rule of law, it was a particularly unwelcome development for the multilateral trading system that the panel in *Russia—Measures Concerning Traffic in Transit* believed it could find Russia's invocation of Article XXI's essential security exception subject to dispute settlement review. While the panel ostensibly limited its review to whether Russia's actions fell within the enumerated conditions in subparagraphs (i), (ii), and (iii) of Article XXI(b)—relating to disclosure of sensitive information, trade in fissionable materials, traffic in arms, actions taken in time of war or other emergency in international relations, or in support of UN resolutions—it proceeded to issue a series of sweeping rulings that brought virtually every aspect of national security claims within its purview.<sup>25</sup>

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24 Justia, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Truman nationalized the steel mills during the Korean War. The decision was handed down two and a half weeks after oral arguments.

25 While the panel initially found that the national security actions under Article XXI were not subject to panel review, it went on to add: "The obligation of good faith, referred to in paragraphs 7.132 and 7.133 above, applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, *but also, and most importantly, to their connection with the measures at issue. Thus, as concerns the application of Article XXI(b)(iii), this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e., that they are not implausible as measures protective of these interests*" (emphasis added). It then added: "The Panel must therefore review whether the measures are so remote from, or unrelated to, the 2014 emergency that it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of the emergency." In short, drawing a page from the AB, the panel expanded its authority to encompass the "action" itself, despite its earlier finding that this aspect of Article XXI was nonjusticiable.

This came amidst a string of new Article XXI disputes, including Qatar's challenges to sanctions by Saudi Arabia, the United Arab Emirates,<sup>26</sup> and Bahrain<sup>27</sup> over its ties to Iran (e.g., *Saudi Arabia—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*);<sup>28</sup> challenges by China, the European Union, India, Canada, Norway, the Russian Federation, Switzerland, Mexico, and Türkiye to President Trump's Section 232 tariffs on steel and aluminum (e.g., *United States—Certain Measures on Steel and Aluminum Products*,<sup>29</sup> hereinafter "US Section 232"); Hong Kong's challenge to US requirements that products from Hong Kong be labeled as products of China following a crackdown on pro-democracy protesters opposing China's new National Security Law in *United States—Origin Marking Requirement*;<sup>30</sup> and China's latest challenge to US, Japanese, and Dutch export controls on semiconductors, semiconductor manufacturing equipment, and supercomputers in *United States—Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*.<sup>31</sup>

The finding of WTO-inconsistency of a member's invocation of the national security exception does not necessarily end a matter, as it tends to ensure a mockery of the rules-based trading system through so-called "appeals into the void," referring to appeals to a nonexistent AB in order to stay proceedings (which is what has happened in 15 cases through January 2023)<sup>32</sup> and retaliation by an aggrieved party with no recognized right of response (e.g., the European Union's decision to term the US Section 232 tariffs a safeguards measure, giving its retaliatory measures a transparent veneer of WTO consistency).

## PARSING THE GATT ARTICLE XXI(B) EXCEPTION—SEEKING HELP FROM THE VIENNA CONVENTION

The United States has long argued that the entirety of Article XXI is "self-judging." However, in a series of recent cases, WTO panels have found that security measures are subject to limited dispute settlement review, limited in a semantic rather than a practical way. Specifically, panels have been finding that a WTO member is free to decide what actions it considers necessary to protect

26 World Trade Organization, *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*, WT/DS526/3, September 3, 2018.

27 World Trade Organization, *Bahrain—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights: Request for Consultations by Qatar*, WT/DS527/1, G/L/1181 S/L/416 IP/D/36, August 4, 2017.

28 World Trade Organization, *Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights*, Panel Report WT/DS567/R, June 16, 2020, Geneva.

29 World Trade Organization, *United States—Certain Measures on Steel and Aluminum Products*, Panel Report WT/DS544/R, December 9, 2022, Geneva.

30 World Trade Organization, *United States—Origin Marking Requirement*, Panel Report WT/DS597/R, December 21, 2022, Geneva.

31 World Trade Organization, *United States—Measures on Certain Semiconductor and Other Products, and Related Services and Technologies: Request for Consultations by China*, WT/DS615/1, G/L/1471, S/L/438, G/TRIMS/D/46, IP/D/44, December 15, 2022, Geneva.

32 Trade Beta Blog, *Technical Note: Appeals 'into the Void' in WTO Dispute Settlement*, February 13, 2021.

its essential security interests, but it is for the panel to determine whether the member's actions are justified by the underlying conditions enumerated in Article XXI(b)(i), (ii), and (iii). Again, the text of Article XXI is deceptively simple:

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.

As the panel noted in *Russia—Measures Concerning Traffic in Transit*, Article XXI(b) can be interpreted in different ways and is capable of multiple meanings:

7.63. The text of the chapeau of Article XXI(b) can be read in different ways and can thus accommodate more than one interpretation of the adjectival clause “which it considers”. The adjectival clause can be read to qualify only the word “necessary”, i.e., the necessity of the measures for the protection of “its essential security interests”; or to qualify also the determination of these “essential security interests”; or finally and maximally, to qualify the determination of the matters described in the three subparagraphs of Article XXI(b) as well.<sup>33</sup>

In reaching this conclusion and rejecting US claims that Article XXI(b) is self-judging, however, the panels employed wildly disparate reasoning. The United States has argued that Article XXI(b) represents “a single relative clause” that follows the word “action,” beginning with the key phrase “which it considers necessary” and importantly extending to each subparagraph (i), (ii), and (iii). In contrast, complainants typically have argued that the self-judging phrase “which it considers” is limited to the reference to “action” in the *chapeau* and does not extend to the subparagraphs identifying conditions under which Article XXI(b) can be invoked, i.e., relating to fissionable materials, traffic in arms, ammunition and implements of war, or measures taken in time of war or another international relations emergency. In short, the provision, when subject to litigation, requires a parsing that borders on sophistry. The whole idea of the multilateral trading system is that it is designed to provide businesses and their governments with certainty. Article XXI does the reverse.

In seeking to resolve these differences, panels, as directed by Article 31 of the Vienna Convention, have typically started with the text of GATT Article XXI(b) and sought to discern a clear meaning. The most extreme example was

<sup>33</sup> World Trade Organization, *WTO Analytical Index: GATT 1994—Article XXI (DS Reports)*, Geneva, p. 4, para. 9.

the panel's decision in *United States—Origin Marking Requirement*,<sup>34</sup> which conducted an elaborate (and largely incomprehensible) grammatical analysis before bludgeoning the words of the provision enough to find that there is “no basis in the text for a reading under which there is a single relative clause and the phrase ‘which it considers’ governs the subparagraphs as well as the *chapeau*.” While we acknowledge that panelists are usually capable people earnestly trying to do their best to answer an issue put before them, the solution to the use and abuse of the national security exception does not lie in looking in various dictionaries and consulting the Vienna Convention. A clear negotiated solution is necessary. Exit the panelists and bring in the negotiators.

While it is important to see if the text of a WTO provision provides a clear meaning, it is also key to keep the limits of such analysis in mind. As the panel noted in *United States—Measures on Steel and Aluminum Products*, a review of the wording of Article XXI(b) “reflect[s] the potential limitations of a purely grammatical analysis of the terms of Article XXI(b) and the significance of additional interpretative considerations in ascertaining the meaning of the terms in their context.”<sup>35</sup> Disputes rarely arise in situations where the text has a clear meaning. If a government knows it is going to lose under the text, the only reasons to continue to defend a dispute is if it is politically preferable to have a panel deliver the bad news to powerful stakeholders, as opposed to telling them itself, or to delay the inevitable and enjoy the use of the measure before judgment is rendered. Moreover, the texts of some WTO provisions were drafted so as to be deliberately ambiguous. This occurs when the negotiators were unable to resolve their differences and sought language that would allow each of them to go home and tell their governments that they succeeded in securing a favorable outcome that supports their preferred positions. If such gaps appear, they are best left to future generations of negotiators, rather than through unauthorized “gap filling” by panels or the Appellate Body. Finally, the most sensitive provisions of WTO agreements are frequently drafted at the last minute in late-night sessions by sleep-deprived negotiators who are scribbling potential compromises on a piece of paper, or more recently onto a computer screen, for consideration by their counterparts or adversaries.<sup>36</sup> While GATT and WTO negotiators were and are almost always highly skilled, many are not native English speakers, which can sometimes lead to less than optimal phrasing or imprecise language. Despite the Appellate Body's obsessive reliance on the *Oxford English Dictionary* as its main tool to discern the meaning of GATT and WTO texts, we have yet to see one employed in an actual negotiating room.

To their credit, the panels dealing with Article XXI(b) disputes over the scope of the national security exception appear to have recognized the limits of textual analysis. In situations where, as in Article XXI(b), textual analysis under Article 31

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34 World Trade Organization, *United States—Origin Marking Requirement*, Panel Report WT/DS597/R, December 21, 2022, Geneva.

35 World Trade Organization, *United States—Certain Measures on Steel and Aluminum Products*, Panel Report WT/DS544/R, December 9, 2022, Geneva, para. 7.121. This case is hereinafter referred to as “US Section 232.”

36 While WTO agreements undergo a “legal scrub,” governments sometimes prefer to save their edits for things that really matter, as opposed to cleaning up grammar or phrasing, or decide that trying to change the text would lead to a reopening of negotiations over a disputed provision or upset an issue that has been resolved.

of the Vienna Convention on the Law of Treaties still “leaves the meaning ambiguous or obscure,” panels have sought guidance from secondary tools, including the context, object, and purpose of an agreement under Article 31 of the Vienna Convention and supplementary means of interpretation, such as the negotiating history, as permitted under Article 32.<sup>37</sup>

In finding contextual support for dispute settlement review of Article XXI claims, panels have pointed to the broad scope of the dispute settlement provisions of GATT Article XXIII and the DSU, which do not contain carve outs for Article XXI from panel or AB review.<sup>38</sup> They have also looked to the “object and purpose” of the WTO agreements, particularly the provisions of Article 3.2 of the DSU, which set a goal to promote the “security and predictability” of the multilateral trading system.<sup>39</sup> In this regard, panels have noted the potentially disruptive costs of opening up Article XXI to unimpeded use and the risk of its potential abuse for protectionist purposes, which would undermine the WTO agreement.

### SEARCHING FOR BALANCE BETWEEN FREEDOM OF ACTION AND ACCOUNTABILITY

The panels are to be commended for sharply examining Article XXI’s negotiating history, which typically got the short shrift from the Appellate Body. The GATT and WTO are fortunate to have detailed negotiating records, including the original negotiation and drafting of the GATT 1947 and the International Trade Organization (ITO) Charter from 1946 to 1948. These records often shed useful light on the meaning of key provisions of the agreements and what the negotiators were trying to achieve. They also show that many of the issues and concerns about the scope of Article XXI(b) that panels have faced were discussed in detail by the original negotiators of the GATT 1947 and ITO Charter 75 years ago.

As the panels noted, the negotiating history of GATT 1947 clearly suggests that use of Article XXI is subject to the agreement’s dispute settlement provisions. After combing through the records of New York and Geneva negotiating sessions, the panel in *Russia—Measures Concerning Traffic in Transit* concluded:

The negotiating history therefore confirms the Panel’s interpretation of Article XXI(b) of the GATT 1994 as requiring that the evaluation of whether the invoking Member has satisfied the requirements of the enumerated subparagraphs of Article XXI(b) be made objectively rather than by the invoking Member itself.

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37 Secretariat of the United Nations, *Vienna Convention on the Law of Treaties, 1969, United Nations Treaty Series*, vol. 1155, Article 31.

In contrast, the AB focused almost exclusively on textual analysis, rendering some of its decisions less than persuasive and in some cases at odds with the negotiating history or at least the understanding of negotiators.

38 World Trade Organization, *United States—Certain Measures on Steel and Aluminum Products*, Panel Report WT/DS544/R, December 9, 2022, Geneva, para. 7.123.

39 World Trade Organization, *United States—Origin Marking Requirement*, Panel Report WT/DS597/R, December 21, 2022, Geneva, paras. 7.145-50. World Trade Organization, *United States—Certain Measures on Steel and Aluminum Products*, Panel Report WT/DS544/R, December 9, 2022, Geneva, para. 7.125. World Trade Organization, *Russia—Measures Concerning Traffic in Transit*, Panel Report WT/DS512/R, April 5, 2019, Geneva, para. 7.79.

In other words, there is no basis for treating the invocation of Article XXI(b) (iii) of the GATT 1994 as an incantation that shields a challenged measure from all scrutiny.<sup>40</sup>

This finding has basically been adopted, with minor variations, by subsequent panels that have looked into the negotiating history.<sup>41</sup>

While the July 1947 records of the Geneva negotiating sessions show that the delegates clearly thought Article XXI should be subject to dispute settlement, this leaves open the question of exactly what type of dispute settlement, since GATT Article XXIII and its precursors in the ITO Charter cover both violations of the agreement and so-called “nonviolation nullification and impairment” (i.e., actions that, while not directly in violation of GATT rules, may nevertheless impair the benefits of a tariff concession owed to another GATT/WTO member and upset the balance of concessions achieved in market access negotiations between those involved).

The US delegation initially introduced the text of what became Article XXI as part of a broader set of exceptions in Article 37 of the draft ITO Charter. Article 37 encompassed what would eventually become GATT Article XX on General Exceptions, including for public health, preservation of natural resources, and law enforcement, and also included a narrower version of what became GATT Article XXI’s exception for a member’s essential security interests.<sup>42</sup> The key discussion about the ITO Charter’s security provisions took place in Geneva at the 33rd meeting of Commission A of the Preparatory Committee of the United Nations Conference on Trade and Employment on July 24, 1947.<sup>43</sup> At that point, a decision was made to move the security exception into Article 94 so it encompassed all provisions of the ITO Charter and was not limited to the provisions of Chapter IV on Commercial Policy.<sup>44</sup> The drafters who created the multilateral trading system understood the importance of the exception.

After discussing the wording of various Article XX exceptions (e.g., the *chapeau*, conservation of exhaustible natural resources, state-trading monopolies, measures to ensure compliance with laws and regulations, customs enforcement, patents and copyrights, plant variety rights, etc.), the delegates turned to the Article XXI(b)(iii) exception for security measures in times of war or other international relations emergencies. Concerns were raised by the delegate from

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40 World Trade Organization, *Russia—Measures Concerning Traffic in Transit*, Panel Report WT/DS512/R, April 5, 2019, Geneva, para. 7.100.

41 World Trade Organization, *United States—Origin Marking Requirement*, Panel Report WT/DS597/R, December 21, 2022, Geneva, paras. 7.164-75.

42 For an early version of Article 37, see United Nations Economic and Social Council, *Preparatory Committee of the International Conference on Trade and Employment: Committee II*, Draft Report E/PC/T/C.II/54, November 16, 1946, London, pp. 22-23.

43 United Nations Economic and Social Council, *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, Report E/PC/T/A/PV/33, July 24, 1947, Geneva.

44 United Nations Economic and Social Council, *Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment: Adopted by the Preparatory Committee 22 August 1947*, Report E/PC/T/186, September 10, 1947, Geneva. At that time, Chapter IV encompassed Articles 16-51 of the draft ITO Charter. Article 94 was part of Chapter IX, entitled “General Provisions,” and had broader application to the entire Charter.

the Netherlands that the exception was “possibly a very big loophole in the whole Charter.”<sup>45</sup> Presumably because the United States was the principal drafter of the security exception, Mr. John Leddy, the US delegate, responded as follows:

We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide of an exception and we could not put it into the Charter simply by saying: “by any Member of measures relating to a Member’s security interests,” because that would permit anything under the sun. Therefore, we thought it well to draft exceptions that would take care of really essential security interests and, at the same time, so far as we could to limit the exceptions and to adopt that protection for maintaining industries under every conceivable circumstance. . . . I think there must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security purposes. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.<sup>46</sup>

As the Committee chairman noted, it is not possible to seriously constrain the exercise of measures to defend a member’s security interests; and “when the ITO is in operation, I think the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind to which the Netherlands delegate has drawn our attention.” However, he also asked whether by moving the Article out of the Commercial Policy chapter’s consultation and dispute settlement provisions in Article 35 and into the general provisions of the entire Charter, the Committee was removing “any possibility of redress.”<sup>47</sup> The Australian delegate urged that “a Member’s rights under Article 35(2) are not in any way impinged upon.” This was a reference to what was then Article 35 of the draft Charter, which, coming out of the New York negotiating session,<sup>48</sup> set out its consultation and dispute settlement provisions as follows:

Article 35 - Consultation, Nullification or Impairment

2. If any Member should consider that any other Member is applying any measure, *whether or not it conflicts with the terms of this Charter, or that any situation exists, which has the effect of nullifying or impairing any object of this Charter*, the Member or Members concerned shall give sympathetic consideration to such written representations or proposals as may be made with a view to effecting a satisfactory adjustment of the matter. If no such adjustment can be effected, the matter may be referred to the Organization, which shall, after investigation,

45 Ibid, p. 19 (Dr. Speekenbrink [Netherlands]).

46 Ibid, p. 20 (J.M. Leddy [United States]). Leddy, while a young State Department officer at the time, was a key member of the US delegation and would go on to a distinguished career in the Departments of State and Treasury. That he was given responsibility for addressing draft essential security language was an indication of his high standing in the delegation because this was a major point of difference within the US delegation and the subject of congressional concerns. Whereas the Department of Defense wanted broad scope for security measures and thus totally exempt them from scrutiny, the Department of State officials (e.g., Clair Wilcox) raised concerns that an overly broad security exception represented a potential loophole and was open to abuse for protectionist purposes.

47 Ibid, p. 26.

48 United Nations Economic and Social Council, *Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment*, Report E/PC/T/34, March 5, 1947, New York.



and, if necessary, after consultation with the Economic and Social Council of the United Nations and any appropriate intergovernmental organizations, make appropriate recommendations; to the Members concerned. The Organization, if it considers the case serious enough to justify such action, may authorize a Member or Members to suspend the application to any other Member or members of such specified obligations or concessions under this Chapter as may be appropriate in the circumstances. If such obligations or concessions are in fact suspended, any affected Member shall then be free, not later than sixty days after such action is taken, to withdraw from the Organization upon the expiration of sixty days from the day on which written notice of such withdrawal is received by the Organization.<sup>49</sup> (Emphasis added.)

Leddy responded:

I think that the place of an Article in the Charter has nothing to do with whether or not it comes under Article 35. Article 35 is very broad in its terms, and I think probably covers any action by any Member under any provision of the Charter. *It is true that an action taken by a Member under Article 94 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 in conflict with the terms of Article 94, should affect another Member, I should think that that Member would have the right to see redress of some kind under Article 35 as it now stands.* In other words, there is no exception from the application of Article 35 to this or any other article.<sup>50</sup> (Emphasis added.)

Leddy was clearly referring to the nonviolation nullification and impairment provisions of Article 35, which later became Article XXIII of GATT 1947. In his formulation, a national security measure could not be challenged as a violation of the Charter, but nevertheless could be pursued as a nonviolation nullification or impairment of benefits accruing under the agreement or as an “other situation.” After some back and forth, the Australian delegate acquiesced to this approach. The Chairman then closed the session by saying: “Then I am in agreement with the Sub-Committee on Chapter VIII, that we have considered and approved this draft of Article 94.”<sup>51</sup>

This interpretation is consistent with the US delegation’s later report entitled “Preliminary Summary of Geneva Draft of ITO Charter,” setting out changes to the draft text that were agreed to during the Geneva meetings to address concerns raised by Congress and US stakeholders: “The national security exceptions have been moved from Article 37 (New York), where they only applied to Chapter V (New York), to a new Article 94, where they apply to the whole Charter. They have been worded as to make it clear that members will be able to apply them as they themselves determine (Senate Finance Committee).”<sup>52</sup>

49 The consultation and dispute settlement provisions of the Lake Success draft were later transferred to a different section of the agreement in the Geneva negotiating session and became Article 93 of the final Havana Charter. A revised version of the New York draft, with different wording, became GATT 1947 Articles XXII (consultation) and XXIII (dispute settlement).

50 United Nations Economic and Social Council, *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, Report E/PC/T/A/PV/33, July 24, 1947, Geneva, pp. 26-27.

51 *Ibid.*, p. 30.

52 Simon Lester, *More GATT Article XXI Negotiating History*, International Economic Law and Policy Blog, May 1, 2018.

The reference to the Senate Finance Committee indicates that the Committee, which has jurisdiction over US trade policy, likely had raised concerns about the limited scope of the national security exception in the New York draft. Leddy's explanation is also confirmed by a document entitled "An Informal Summary of the ITO Charter" prepared by the UN Conference on Trade and Employment, which explains that under Article 94, "Members may also do whatever they think necessary to protect their security interests relating to atomic materials, arms traffic, and wartime or other international emergencies, and to maintain peace according to their obligations under the United Nations Charter."<sup>53</sup>

In January 1948, a GATT Working Party, as part of a review of the ITO Charter's dispute settlement procedures, stated:

Such action, for example, in the interest of national security in time of war or other international emergency would be entirely consistent with the Charter but might nevertheless result in the nullification or impairment of benefits accruing to other Members. Such other Members should, under those circumstances, have the right to bring the matter before the Organization, not on the ground that the measure taken was inconsistent with the Charter, but on the ground that the measure so taken effectively nullified benefits accruing to the complaining Member.<sup>54</sup>

## **CONCLUSION: A BETTER APPROACH TO HANDLING NATIONAL SECURITY DISPUTES**

Given the increasing use of the national security exception to the WTO's rules by member governments, it appears clear that there can be no return to binding dispute settlement acceptable to all without agreement as to how claims of national security are to be dealt with. WTO dispute settlement panels, at the request of individual members, have intruded into this most sensitive of all subjects, despite decades of GATT and WTO participants seeking to avoid having panels determine what was in a country's national security interest. The negotiating history of Article XXI demonstrates that the drafters were concerned that the exception to the rules might go too far and be used to upset the balance of concessions achieved through the entirety of their negotiations. At the same time, they understood that sovereigns could not be constrained to act as their essential security interests required. The solution must address both concerns.

The impasse over justiciability of national security claims can have more than one solution. A sweeping way to avoid the problem is to allow WTO members to opt out of dispute settlement for this class of cases. Were a member to opt out for national security cases, no WTO member could question the invocation by the opting-out member of the exception. To provide balance and symmetry, the member opting out would not be allowed to bring a dispute settlement challenge against other members' invocations of the exception. While a logically possible outcome, this solution would run contrary to the overall objective of restoring binding dispute settlement for all matters, of having a rules-based international

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53 United Nations Economic and Social Council, *United Nations Conference on Trade and Employment: An Informal Summary of the ITO Charter*, E/CONF.2/INF.8, November 21, 1947, New York, p. 35.

54 United Nations Economic and Social Council, *United Nations Conference on Trade and Employment: Committee VI—Organization*, Report E/CONF.2/C.6/W.30, January 9, 1948, p. 2.

trading system, and of maintaining a balance of concessions, since it would be taken as invitation for the aggrieved member to respond to any extent that they saw fit—in effect, to over-retaliate.

A more promising solution lies in insulating national security claims from panel review while not shielding members from the consequences of invoking the exception. The United States suggested something along these lines, but since the WTO's nonviolation doctrine has fallen into the trade law's dustbin and the idea was put forward as part of a US defense of President Trump's Section 232 tariffs on steel and aluminum, it does not appear to have gotten much attention.

In stating that it would not accept adjudication on the issue of national security, the United States suggested that adversely affected countries bring a nonviolation case against it; not to review the legitimacy of the claim, but to restore the balance of concessions:

From the beginning of the trading system, it has been the U.S. view that the appropriate remedy where a Member is impacted by another Member's essential security measures is to seek a non-violation / nullification or impairment claim. The reality is we designed a WTO where rebalancing could take place without interfering with a Member's sovereign responsibilities in the area of national security.<sup>55</sup>

Invocation of a nonviolation approach would revive a WTO doctrine that has languished in recent years.<sup>56</sup> The nonviolation nullification and impairment (NVNI) doctrine offers an alternative, and a potentially more workable alternative. It also has major advantages in dealing with politically charged disputes that realistically cannot be resolved through legal proceedings and panel or AB findings.

The judgment of a country invoking the national security exception under Article XXI would be nonjusticiable, just as the drafters of Article XXI apparently intended. However, members adversely affected could be authorized, after litigation or as part of a rebalancing procedure, to suspend substantially equivalent concessions on the grounds that such actions nullify or impair the benefits of trade concessions. The handling of nonviolation claims in these circumstances could be accelerated through a shortened and simplified dispute settlement procedure. A member would be free to act in its essential security interests and the validity of such measures would be nonjusticiable. If one or more members alleged that their trade interests were harmed by the measures, the Director-General would immediately appoint a panel to consider the matter with a 60-day fuse to reach a preliminary determination, with relief retroactive to the date of that determination (if upheld on appeal, and if there is once again an appellate stage to dispute settlement). Since the underlying rationale for the national security claim would be nonjusticiable, the only issue for the panel would be whether the action impairs a tariff concession or otherwise has a negative impact on imports or exports of others, which will almost certainly be the case, and the panel would undertake an assessment of the amount of resulting trade damage. Once that is determined, the parties would seek a negotiated

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55 Office of the United States Trade Representative, [Statements by the United States at the Meeting of the WTO Dispute Settlement Body](#), January 27, 2023.

56 Jean Monnet Center for International and Regional Economic Law and Justice, [Evolution of Non-violation Cases](#). See also [Analytical Index of the GATT](#).

agreement on compensation. This could take place within a shortened time frame, after which, absent agreement, the injured party would be free to suspend equal concessions in order to restore a reciprocal level of benefits.

This change in the rules could be achieved on a de facto basis if members were to indicate their acceptance of the right of members whose trade was adversely affected to respond to restore the balance of trade concessions, since it is within the membership's power to unilaterally adopt this manner of proceeding without formal changes to the DSU, and as a way to avoid panel review of whether their action met the conditions set out in Article XXI(b)(i), (ii), or (iii). This procedure could be made more formal through a National Security Multi-Party Interim Arrangement (NSMPIA). The European Union and several dozen other WTO members have pointed toward achieving binding dispute settlement without amending the DSU. The MPIA format can be applied here with potentially a large number of members joining.

Alternatively, if a WTO reform agenda actually gets underway, the WTO could adopt a renegotiation procedure along the lines of GATT Article XXVIII, in which national security actions could be notified to the WTO and subject to accelerated procedures for compensation negotiations. If necessary, where trade compensation could not be agreed, the member whose trade was adversely affected could rebalance the level of trade concessions itself by imposing retaliatory trade measures. There would be the potential for panel review if the rebalancing is deemed excessive. This would largely eliminate the need for a panel process.<sup>57</sup> This would be somewhat analogous to GATT Article XXVIII, which provides for withdrawal, renegotiation, and rebalancing of previously agreed tariff concessions. If a member determines that a previously agreed tariff concession is no longer workable, GATT Article XXVIII provides a procedure for it to notify other members of its intent to withdraw the concession. This is followed by a fast-track trade negotiation to determine if the parties can agree on appropriate compensatory reductions in other tariffs to restore the balance of concessions. If the parties cannot agree, the member can still withdraw the concession, but the injured parties have a right to rebalance by raising their tariffs on an equivalent amount of trade. Under this scenario, if a WTO member invokes the Article XXI national security exception to impose import restrictions, countries whose trade is adversely affected would have the right to immediately withdraw substantially equivalent concessions (that is, limit the imports from the invoking country in like amount) without any panel proceeding or other authorization from the WTO if an agreement on compensation could not be reached within a relatively brief period, e.g., 60 days.

If the invoking country felt the response was excessive, it could bring a case to the WTO for adjudication on the issue of what was needed to rebalance the preexisting level of concessions. In our view, the right of an equivalent response should be automatic, without requiring additional litigation, other than perhaps

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57 Jennifer Hillman, interviewed by Chad P. Bown, [The Dreaded WTO Ruling on Trump's National Security Tariffs](#), *Trade Talks* (podcast), Episode 175, January 22, 2023. Simon Lester and Huan Zhu, 2019, [A Proposal for 'Rebalancing' to Deal with 'National Security' Trade Restrictions](#), *Fordham International Law Journal* 42, no. 5: 1451-74. Lester and Zhu suggested that compensation would be immediately owed to adversely affected parties after notification of Article XXI measures.

on whether the level of response was calibrated correctly. Of course, the member invoking Article XXI could offer trade compensation and avoid others acting to limit its trade. That would be a matter for negotiation.

This approach would offer a cleaner, simpler, and quicker mechanism for resolving national security disputes without the baggage of having panels issue findings on whether such measures are justified by war, an international emergency, or traffic in arms, while more effectively discouraging spurious invocations of Article XXI by imposing a clear, timely price for members who invoke it.

Providing for automatic rebalancing would likely have a positive impact by making members more reluctant to apply broad-based purported “security” measures against their trading partners, particularly with a shaky justification. The potential adverse effects on its trade from compensation or retaliation would impose large costs, and without the 3-5 years of delay that is incurred when a case meanders through the WTO’s dispute settlement mechanism. It would bring within the system measures such as the increased US Section 232 tariffs on steel and aluminum, as well as bypass the need for responding countries (the European Union in this instance) to stretch to categorize the US measure as a safeguard in order to provide legal cover for its retaliatory response under GATT Article XIX.

There would be little incentive for members to pursue a DSU challenge to a claim of national security when approval of its retaliation was already granted in principle in advance, and the result of litigation could only be underlining that right. The proposal would preserve what the GATT and WTO originally set out to do: maintain a reciprocal balance of concessions. Without this change, the trading system would be seen as increasingly irrelevant. This fix is also worth considering as it is a compromise that may prove broadly acceptable where otherwise an impasse may persist.

Taking Article XXI(b) outside of the full dispute settlement process and converting it into a form of NVNI or rebalancing under Article XXVIII would offer clear advantages for the WTO, which already has enough problems without diving into controversial national security disputes. Since the end of a full-scale WTO dispute cannot be reached within a reasonable period of time for compensation/retaliation under DSU Article 22,<sup>58</sup> our recommended abbreviated nonviolation process focused solely on compensation/retaliation would end up in exactly the same place as a full-scale WTO dispute—a process that wends its way through consultations, hearings, panel rulings, an appeal to the Appellate Body (if it is ever reconstituted), DSB adoption, a “reasonable period of time for compliance,” an almost inevitable DSU Article 21.5 dispute about whether the losing party actually complied, and an arbitral ruling on whether the retaliation

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58 World Trade Organization, *Understanding on Rules and Procedures Governing the Settlement of Disputes: Article 22—Compensation and the Suspension of Concessions*.

level under Article 22.6 was excessive. Our proposal eliminates this prospect of 3-5 years of litigation, importantly without the same levels of institutional damage to the WTO entailed in a full-blown WTO dispute.<sup>59</sup>

At the same time, the NVNI doctrine or rebalancing would more effectively discourage abuse of Article XXI(b), which has been a longstanding and legitimate concern. If a government is engaging in protectionist actions and its invocation of national security is a sham, the prospect of having its trading partners lined up to restrict its trade would offer a more effective deterrent than current WTO dispute settlement litigation, which can take years, allows the defendant to reap the benefits of WTO-inconsistent restrictions in the interim, and ultimately can be appealed “into the void” given the demise of the AB, preventing any resolution through dispute settlement.

The current approach to national security disputes is diminishing confidence in the WTO as a global institution. A means must be found to restore the binding nature of WTO dispute settlement in a manner that all potential litigants can accept. Solving the national security dispute settlement impasse is an essential element in assuring the enforceability of the rules of the global trading system and restoring a fully functioning WTO.

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59 Note: Pending formal amendment of Art. XXI, prior to any member invoking Art. XXI, that member should state that it will not object to another member whose trade is adversely affected rebalancing the level of concessions which had been of benefit to that member. In such cases, the Secretariat will advise the Chair of the Dispute Settlement Body that judicial economy mandates that no panel be formed to adjudicate the validity of the claim that national security interests required the invocation of the Article XXI exception. This will not prevent the subsequent adjudication of whether the withdrawal or suspension of any concessions by a member whose trade was adversely affected achieved the appropriate level of rebalancing of concessions.



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