

A POSSIBLE SECOND RULING ON THE NATIONAL
SECURITY EXCEPTION UNDER THE GATT:
MAINTAINING A DELICATE BALANCE?

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I. INTRODUCTION

The General Agreement on Tariffs and Trade (GATT) seeks to liberalize international trade by removing or reducing trade barriers and other protectionist behaviors.¹ The GATT aims to achieve this goal by setting up a system of international trade based on core principles such as the most-favored nation (MFN) principle² and the national treatment principle.³ Nevertheless, these principles are not absolute. The GATT provides for exceptions that allow states to take measures to protect certain interests that would otherwise be inconsistent with their obligations under the treaty.⁴ It thus attempts to strike a balance between its general aim of trade liberalization and certain compelling domestic interests that may be inconsistent with that aim.

One such exception is found in Article XXI of the GATT, which allows states to derogate from their obligations under the agreement when national security so requires. Specifically, Article XXI stipulates that:

Nothing in this Agreement shall be construed

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1. MATTHIAS HERDEGEN, PRINCIPLES OF INTERNATIONAL ECONOMIC LAW 212 (2d ed. 2016).

2. General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (stipulating that where an advantage in trade is granted to any other party to the GATT, that advantage must also be granted to all other parties).

3. *Id.* at art. III (directing that foreign producers and their goods should be treated equally under the law by contracting parties to domestic producers and their goods).

4. AUTAR KRISHEN KOUL, GUIDE TO THE WTO AND THE GATT: ECONOMICS, LAW AND POLITICS 341 (6th ed. 2018).

- (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.⁵

In light of the perceived delicate balance struck between this exception and the GATT's broader aims, many World Trade Organization (WTO) member states have remained relatively reluctant to invoke this provision to justify protectionist measures.⁶ Recently, however, several states have begun to invoke this exception more explicitly.⁷ Challenges to such measures resulted in a WTO panel ruling on the security exception in 2019, and an opportunity for a second ruling exists in the cases pending against the United States at the WTO.

Debate over the applicability of the security exception primarily concerns subpart (b) of Article XXI. This paragraph describes three scenarios justifying derogation from a party's treaty obligations, each of which must satisfy the chapeau allowing a party to take measures "which it considers necessary

5. GATT, *supra* note 2, at art. XXI.

6. Daria Boklan & Amrita Bahri, *The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box?*, 19 *WORLD TRADE REV.* 123, 124 (2020) (noting that WTO members have "remained relatively cautious" about invoking the national security exception, in light of the lack of a universally accepted definition).

7. *Id.* at 124–25 (observing that states have "opened [a] Pandora's box" in recently invoking the national security exception to justify restraints of trade).

for the protection of its essential security interests.”⁸ This language has been the subject of debate in legal literature, particularly as to whether its satisfaction is left entirely to the self-judgment of a state invoking Article XXI to justify derogation, or whether it could be subject to scrutiny by a WTO panel.⁹ Where commentators assert that the language of paragraph (b) is subject to a WTO panel ruling, debate continues over the appropriate criteria a panel should apply. Central to the question of whether the applicability of this provision is subject to the interpretation of a WTO panel is the meaning of the phrase, “which it considers.” Does this phrase command that paragraph (b) is a totally self-judging provision, or is there room for analysis of its satisfaction by a WTO panel?

A review of how Article XXI has been invoked before 2019 reveals significant ambiguity in its scope and meaning.¹⁰ The first major ruling by a WTO panel on the meaning of Article XXI(b)(iii) came in 2019 in a dispute between Ukraine and Russia,¹¹ and illustrates the delicate balance that this article aims to illuminate. The WTO panel in this case was tasked with reviewing certain restrictions introduced by Russia in the aftermath of the Ukrainian revolution of 2014 and the entry into force on January 1, 2016 of the E.U.-Ukraine Deep and Comprehensive Free Trade Area. Ukraine claimed that Russian restrictions on traffic from Ukraine to third countries were in violation of Russia’s obligations under the GATT as a WTO member. Conversely, Russia claimed that these measures “[were] among those that Russia considers necessary for the protection of its essential security interests”, and that it took these measures “in response to the emergency in international

8. GATT, *supra* note 2, at art. XXI.

9. Compare Roger P. Alford, *The Self-Judging WTO Security Exception*, 3 UTAH L. REV. 697, 758 (2011) (arguing that Article XXI operates as a self-judging provision), with Hannes L. Schloemann & Stefan Ohlhoff, ‘Constitutionalization’ and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 AM. J. INT’L L. 424, 446–47 (contending that the existence of a “war or other emergency in international relations” can be submitted to a WTO panel, which will then assess it on the basis of a good faith requirement).

10. See, e.g., Panel Report, *Russia–Measures Concerning Traffic in Transit*, WTO doc. WT/DS512/R (adopted Apr. 5, 2019) [hereinafter *Traffic in Transit Report*] (providing in its appendix an extensive overview of the historical usage of Article XXI).

11. *Id.*

relations that occurred in 2014 that presented threats to the Russian Federation's essential security interests."¹² Russia thus relied on Article XXI(b) (iii) to justify its actions.

The Panel in this case explicitly communicated that invocations of Article XXI(b) (iii) are susceptible to a WTO panel's scrutiny and that it is not an entirely self-judging provision, contrary to the position that several states have previously taken.¹³ The Panel further described several criteria that must be taken into account when a panel reviews invocations of Article XXI. This paper will examine these criteria, and how they may potentially be applied in the cases currently pending against the United States at the WTO. Given the existence of this lone, recent panel ruling on the scope of the security exception of the GATT, it remains to be seen whether and how strictly a second panel will adhere to this precedent.

II. THE CASES AGAINST THE UNITED STATES

In 2018, based on Section 232 of the Trade Expansion Act of 1962, which allows the U.S. president to take certain measures to protect national security without congressional approval, then-President Donald Trump increased import tariffs on steel and aluminum to twenty-five percent and ten percent respectively. The United States has attempted to justify the tariffs by contending that steel and aluminum are essential for the U.S. defense industry and infrastructure maintenance.¹⁴ According to the Trump administration, cheap importation of steel and aluminum threaten domestic production of these products, and it is therefore necessary for the national security of the United States to take measures protecting domestic producers.¹⁵

Nine cases were brought at the WTO against the United States' tariffs on steel and aluminum, with allegations in each

12. *Id.* at ¶ 7.4.

13. *See e.g., id.* at ¶ 7.51 (noting that the United States contended that the Panel entirely lacked authority to review Russia's invocation of Article XXI).

14. Andreas Buser, *Justiciability of Security Exceptions in the US Steel (and other) Disputes: Some Middle-Ground Options and the Requirements of Article XXI lit. b (i)-(iii)*, EJIL:TALK! (Nov. 20, 2018) <https://www.ejiltalk.org/justiciability-of-security-exceptions-in-the-us-steel-and-other-disputes-some-middle-ground-options-and-the-requirements-of-article-xxi-lit-b-i-iii/> (citing a report prepared by the U.S. Department of Commerce).

15. *Id.*

case that the United States violated certain provisions of the GATT, mainly Articles I and II(1) (a)-(b), as well as certain provisions of the Agreement on Safeguards.¹⁶ The Trump administration has refuted these claims, pointing to the national security exception and communicating similar statements in response to the cases. For example, in its response to the case brought by China, the United States stated that:

[i]ssues 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 protection of its essential security interests, as is reflected in the text of Article XXI of the GATT.¹⁷

The United States thus simply refers to Article XXI without actually explicating the reasons why the measures would be justified. Of course, in the view of the United States, such an explanation is not necessary as the measure is a “non-justiciable exception.”¹⁸ However, as stated above, this argument was

16. See Request for the Establishment of a Panel by China, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/8 (Oct. 19, 2018); Request for the Establishment of a Panel by India, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS547/8 (Nov. 9, 2018); Request for the Establishment of a Panel by the European Union, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/14 (Oct. 19, 2018); Request for the Establishment of a Panel by Canada, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS550/11 (Oct. 19, 2018) (settled with the United States); Request for the Establishment of a Panel by Mexico, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS551/11 (Oct. 19, 2018) (settled with the United States); Request for the Establishment of a Panel by Norway, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS552/10 (Oct. 19, 2018); Request for the Establishment of a Panel by the Russian Federation, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS554/17 (Oct. 19, 2018); Request for the Establishment of a Panel by Switzerland, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS556/15 (Nov. 9, 2018); Request for the Establishment of a Panel by Turkey, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS564/15 (Oct. 19, 2018).

17. Communication from the United States, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/2 (Apr. 17, 2018).

18. See e.g., *Traffic in Transit Report*, *supra* note 10, at ¶¶ 7.51–52 (noting that the United States contends that there are “no legal criteria by which the

explicitly dismissed when put forward by Russia, so this seems to be a particularly difficult position for the United States to maintain at the WTO.¹⁹

A ruling in these cases by the panel is expected in the fall of 2021,²⁰ but the general view among commentators appears to be that the United States' arguments will be rejected by a GATT panel. Buser, for example, argues that the increased tariffs on steel and aluminum will be impossible to justify under Articles XXI(b) (i) and (ii).²¹ The United States will therefore have to rely on Article XXI(b) (iii), the same provision which was at the core of the dispute in *Russia-Measures Concerning Traffic in Transit*. Two concepts will thus be crucial in the analysis of the Panel on whether the United States has properly invoked Article XXI(b) (iii). First, there is the question of the existence of a situation of a "war or other emergency in international relations" to bring Article XXI(b) (iii) into effect; second, the Panel will need to address whether the measures taken were to protect "essential security interests" as contemplated by Article XXI(b).

III. THE MEANING OF A "WAR OR OTHER EMERGENCY IN INTERNATIONAL RELATIONS"

The Panel in *Russia-Measures Concerning Traffic in Transit* explained that "war" is to be considered part of the broader category of "emergenc[ies] in international relations", through the use of the word "or" together with "other" in the phrase "war or other emergency in international relations."²² The existence of both a war and an emergency in interna-

issue of a Member's consideration of its essential security interests can be judged").

19. Indeed, the Panel in *Russia-Measures Concerning Traffic in Transit* explicitly stated that their "interpretation of Article XXI(b) (iii) also means that it rejects the United States' argument that Russia's invocation of Article XXI(b) (iii) is 'non-justiciable,' to the extent that this argument also relies on the alleged totally 'self-judging' nature of the provision." *Id.* ¶ 7.103.

20. See e.g., Communication from the Panel, *United States-Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/17 (Feb. 8, 2021) ("[D]ue to the delays caused by the global Covid-19 pandemic, the Panel now expects to issue its final report to the parties no earlier than the second half of 2021.").

21. Buser, *supra* note 14.

22. *Traffic in Transit Report*, *supra* note 10, at ¶ 7.72.

tional relations are susceptible to an objective assessment by a panel.²³ War, in the view of the Panel, refers to an armed conflict. This can be an armed conflict between states (an international armed conflict) or an armed conflict between government forces and a non-state armed group, or between such groups within the same state (a non-international armed conflict).²⁴ An “emergency situation in international relations”, according to the Panel, is to be understood as a situation of armed violence, latent armed conflict, heightened tension or crisis, or of general instability that occupies or surrounds a state.²⁵ The Panel further concluded that political or economic disputes between WTO member states are not sufficient in themselves to constitute an “emergency situation in international relations” under Article XXI(b) (iii).²⁶

The United States appears to argue in the context of the current disputes that it either needs to prepare itself to respond against future threats, or that it is currently engaged in a trade war. As Buser has contended, these situations do not on their face appear to qualify as a “war or other emergency in international relations” under the GATT when analyzed under the Panel’s construction of the phrase.²⁷ Instead, the current situation described by the United States seems to be squarely of the purely political or economic kind which the Panel explicitly exempted from the scope of Article XXI of the GATT.

IV. THE SCOPE OF “ESSENTIAL SECURITY INTERESTS”

Viewed in light of the Panel’s decision in *Russia-Measures Concerning Traffic in Transit*, the United States faces an additional hurdle in arguing that the measures were taken to protect “essential security interests” as required by Article XXI(b). The Panel determined that essential security interests consist of those interests relating to the core functions of a state,

23. *Id.* ¶¶ 7.72–77.

24. *Id.* ¶ 7.72.

25. *Id.* ¶ 7.76.

26. *Id.* ¶ 7.75. It is notable that in support of its conclusion of a narrow definition of “other emergenc[ies] in international relations”, the Panel quoted the U.S. delegate to the GATT in 1947 who stated that “we thought it well to draft provisions which would take care of real essential security interests and . . . limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance.” *Id.* ¶ 7.92.

27. Buser, *supra* note 14.

namely the protection of its territory and population from external threats and, internally, the maintenance of law and order.²⁸ Since these interests depend enormously on the specific situation and perception of a state, and may shift due to changing circumstances, the Panel concluded that it is generally for states to determine what constitutes an “essential security interest.”²⁹

However, this does not completely insulate states from scrutiny. The Panel found that states’ discretion to evaluate what constitutes an “essential security interest” is limited by the general obligation to implement and interpret Article XXI(b)(iii) in good faith.³⁰ Therefore, WTO panels may determine whether there is sufficient evidence to suggest that a state has taken its decisions to declare certain matters as essential security interests in good faith, and panels may consider whether the measures taken plausibly serve to protect the claimed essential security interest.³¹ The good faith obligation on states, in the Panel’s view, therefore ensures that Article XXI cannot simply be used by states as a vehicle for circumventing their obligations under the GATT.³²

In determining what essential security interests are, the Panel noted that the further removed the claimed emergency is from axiomatic examples of emergencies in international relations, the more precisely a state will need to define its essential security interests.³³ Situations of armed conflict, or of the breakdown of law and order in a state, are provided as prototypical emergencies in international relations that would require a lesser degree of specificity from the invoking state.³⁴ In *Russia-Measures Concerning Traffic in Transit*, Russia elected not to define its essential security interests; nevertheless, in the Panel’s view, this did not present an issue for Article XXI’s invocation as it concluded that the situation in Ukraine consti-

28. *Traffic in Transit Report*, *supra* note 10, at ¶ 7.130.

29. *Id.* ¶ 7.131.

30. *Id.* ¶ 7.132 (basing this conclusion on Article 31(1) of the Vienna Convention on the Law of Treaties, which commands that all treaties are to be interpreted in good faith, as well as Article 26 which requires that parties perform their treaty obligations in good faith).

31. *Id.* ¶¶ 7.132–35, 7.138–39.

32. *Id.* ¶ 7.133.

33. *Id.* ¶ 7.135.

34. *Id.*

tuted a classic emergency situation in international relations sufficient to invoke Article XXI(b).³⁵

As Iryna Bogdanova has contended, criticism can be levied at the apparent minimal scrutiny of state actions demanded by the good faith inquiry.³⁶ Indeed, the Panel stated that “[w]hile Russia has not explicitly articulated the essential security interests that it considers the measures at issue are necessary to protect, it did refer to certain characteristics of the 2014 emergency that concern the security of the Ukraine-Russia border.”³⁷ Thus, despite the fact that Russia failed to explicitly articulate its essential security interests nor demonstrate how the measures taken were justified by the claimed emergency, the good faith requirement was still deemed met by the Panel. Accordingly, since the situation concerned what the panel considered a classic example of an emergency in international relations, a less stringent review of Russia’s determination of essential national security interests than might otherwise be required was deemed appropriate. This interpretation of the good faith requirement, which obviates any consideration of the connection of measures taken in response to a war or other “core” international relations emergency to the claimed emergency, risks eroding its operation as a check on states abusing Article XXI(b) for protectionist purposes.

The interpretation of the panel of the scope of the good faith requirement will likely be critical to the outcome in the cases pending against the United States. In contrast to the situation outlined by the Panel in *Russia-Measures Concerning Traffic in Transit*, no axiomatic example of a classic emergency in international relations appears available for the United States to cite. Accordingly, if the Panel follows the construction of the good faith requirement outlined in *Russia-Measures Concerning Traffic in Transit*, the United States will likely need to explicitly justify its essential security interests. This may prove difficult for the United States, as it may struggle to create a

35. *Id.* ¶¶ 7.136–37.

36. Iryna Bogdanova, *The WTO Panel Ruling on the National Security Exception: Has the Panel ‘Cut’ the Baby in Half?*, EJIL:TALK! (Apr. 12, 2019), <https://www.ejiltalk.org/the-wto-panel-ruling-on-the-national-security-exception-has-the-panel-cut-the-baby-in-half/> (critiquing the Panel’s acceptance of Russia’s arguments without requiring that Russia establish at least some causal relation between the measures and its claimed essential security interests).

37. *Traffic in Transit Report*, *supra* note 10, at ¶ 7.136.

compelling case that it is not solely pursuing purely commercial goals through its tariffs, which are interests that are not protected by Article XXI.³⁸ As Buser has argued, “GATT would be robbed of all legal meaning and capacity to uphold a liberal trading regime, if essential security interests would include commercial concerns.”³⁹

V. THE POTENTIAL IMPACT OF THE PENDING CASES

Taking into account the criteria outlined in the *Russia–Measures Concerning Traffic in Transit* case, it would appear difficult for the United States to justify these measures on the basis of Article XXI. Professor Joseph Weiler, for example, has called the essential security justification provided by the United States for these measures “a black lie” and argued that the United States has acted in bad faith by invoking the national security exception of the GATT.⁴⁰ Steve Charnovitz has gone as far as to describe the United States’ argument simply as “a sham.”⁴¹

A way out for the United States to avoid an unfavorable decision, particularly one that may establish negative precedent for states who wish to deploy Article XXI liberally, could

38. It is worth noting that U.S. representatives themselves rejected the invocation of commercial interests as essential security interests in the early stages of the negotiations over the GATT. See Simon Lester, *The Drafting History of GATT Article XXI: The U.S. View of the Scope of the Security Exception*, WORLD TRADE LAW: INT’L ECON. LAW & POLICY BLOG (Mar. 11, 2018) <https://worldtradelaw.typepad.com/ielpblog/2018/03/drafting-history-of-gatt-article-xxi.html> (noting that the U.S. delegate stated that “we cannot make [the essential security exception] so broad that, under the guise of security, countries will put on measures which really have a commercial purpose”).

39. Buser, *supra* note 14.

40. Joseph Weiler, *Black Lies, White Lies and Some Uncomfortable Truths in and of the International Trading System*, EJIL:TALK! (July 25, 2018), <https://www.ejiltalk.org/black-lies-white-lies-and-some-uncomfortable-truths-in-and-of-the-international-trading-system/>; see also José-Miguel Bello y Villarino, *Trade Retaliation in the Time of Trump*, EJIL:TALK! (Aug. 3, 2018) <https://www.ejiltalk.org/trade-retaliation-in-the-time-of-trump/> (stating that there has been “little evidence that the United States’ decision against foreign steel and aluminum could be seriously justified on national security grounds”).

41. Steve Charnovitz, *EU Can Retaliate Immediately Against Trump’s Metal Tariffs*, WORLD TRADE L.: INT’L ECON. L. & POL’Y BLOG (Mar. 9, 2018) <https://worldtradelaw.typepad.com/ielpblog/2018/03/eu-can-retaliate-immediately-against-trumps-metal-tariffs.html>.

be by preventing any of the pending cases from reaching a verdict. The GATT panel first delayed its decision for more than a year due to the COVID-19 pandemic, and the United States remains engaged in negotiations with several countries. The European Union, for example, is considering making certain concessions to the United States in order to resolve this controversial issue in transatlantic relations.⁴² The United States might be interested in such a resolution as this would avoid a negative ruling by the WTO panel and avoid aggravating the current stalemate in WTO dispute settlement. Given the different foreign relations strategies of the Biden administration as compared to the previous administration, an amicable settlement could conceivably be reached before the WTO panel takes the opportunity to publicly rebuke the United States' conduct.

If not, the outcome of the pending cases depends considerably on the degree to which the Panel adheres to the criteria announced in *Russia-Measures Concerning Traffic in Transit*. The Panel's ruling appears to strike a fair balance between judicial scrutiny and sovereignty of the states; though the good faith requirement appears to offer an overly broad escape route for states to engage in some protectionist behaviors, it appears unlikely to provide cover in a situation such as the one presented in the cases pending against the United States.

42. Barbara Moens, *EU Considers Bitter Pill to End Trump's Trade War*, POLITICO (Oct. 4, 2021) <https://www.politico.eu/article/eu-considers-bitter-pill-us-donald-trump-trade-war/> (noting that there is political will to achieve a deal, which would prevent damage to the transatlantic relationship and allow for a joint response to excess steel from China).