



The Conundrum of the Essential Security Exception: Can the WTO Resolve the GATT Article XXI Crisis and Save the Dispute Settlement Mechanism?

Stephen Kho

Yujin McNamara

Sarah Kirwin

Brooke Davies

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Crisis and Save the Dispute Settlement Mechanism?

The Conundrum of the Essential Security Exception: Can the WTO Resolve the GATT Article XXI Crisis and Save the Dispute Settlement Mechanism?

Stephen Kho, Yujin McNamara, Sarah Kirwin, and Brooke Davies¹

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¹ Stephen Kho and Yujin McNamara are partners, Sarah Kirwin is a counsel, and Brooke Davies is an associate, in the international trade practice of Akin Gump Strauss Hauer & Feld LLP. This article are the personal views of the authors, and does not necessarily reflect the views of Akin or any of the authors’ prior affiliations.

I. Introduction

The World Trade Organization (WTO) is in an existential crisis. Ever since the United States began blocking the appointment of new Appellate Body members, the WTO's dispute settlement mechanism began slowly breaking down. As the Appellate Body lost its ability to function, WTO Members realized that they were empowered to appeal disputes they had lost at the panel level "into the void," thereby preventing resolution. This, in turn, resulted in the filing of fewer disputes as Members instead started taking trade matters into their own hands. At the same time, Members began to more freely ignore their WTO obligations, knowing that if challenged, they could simply appeal adverse decisions "into the void" while still boasting their compliance with WTO rules because the dispute settlement mechanism would not have rendered a final decision based on a procedural technicality.

Some WTO Members are now actively attempting to resuscitate the faltering dispute settlement system. Over the past year, efforts to negotiate a solution to the Appellate Body impasse have intensified between the United States and other Members, so much so that WTO Director-General Ngozi Okonjo-Iweala recently suggested that dispute settlement reform could be one of the main "outcomes" of the upcoming 13th WTO Ministerial Conference.²

However, this is easier said than done. Despite recent progress in the reform discussions, the United States has seen to it that a key sticking point in the negotiations has become the justiciability of Article XXI(b) of the General Agreement on Tariffs and Trade of 1994 (GATT).³ Article XXI(b) is an exception that allows WTO Members to legally deviate from their trade obligations when necessary for the protection of their "essential security interests".⁴ As with the Appellate Body impasse, the United States stands largely alone in taking a hard-line position that Article XXI(b) must be wholly self-judging and thus non-justiciable under the WTO. In the view of the United States, Members may unilaterally determine for themselves whether their actions are taken for purposes of their essential security interests, or, in other words, whether they self-qualify to use the Article XXI(b) exception to justify what would otherwise be a WTO violation.⁵

Most other WTO Members, and all WTO panels that have considered this question, have disagreed with the United States. They assert that Article XXI(b) is not wholly self-judging, and at least some form of review is warranted by the WTO when a Member attempts to invoke Article XXI(b). Under this view, for example, a WTO panel should be able to consider factors

² *DG Okonjo-Iweala to G20: time to roll up our sleeves and deliver at MC13*, WTO (Aug. 24, 2023), https://www.wto.org/english/news_e/news23_e/dgno_24aug23_e.htm.

³ *Remarks by Ambassador Katherine Tai on the World Trade Organization and the Multilateral Trading System*, USTR (Sep. 22, 2023), <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2023/september/remarks-ambassador-katherine-tai-world-trade-organization-and-multilateral-trading-system>.

⁴ Equivalent provisions to Article XXI(b) can be found in the more recently adopted Article XIV *bis* of the General Agreement on Trade in Services ("GATS") and Article 73 of the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS Agreement"). For simplicity, this article will refer only to Article XXI, though the discussion applies equally.

⁵ U.S. Third Party Submission, *Russia – Traffic in Transit*, para. 2 ("Issues of national security are political matters not susceptible for 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.").

like the timing or subject matter of the action to determine whether that action falls within the basic scope of the criteria outlined in Article XXI(b).⁶

These views are fundamentally at odds. Despite being in the clear minority,⁷ the United States has continued to assert the non-justiciability of Article XXI(b), including in a recently initiated dispute by China concerning the October 2022 U.S. export control measures that restrict Chinese firms' access to advanced semiconductor technology.⁸ More importantly, the United States has now taken the position that it will not support WTO dispute settlement reform until the question of Article XXI(b)'s justiciability is resolved in its favour.⁹ It is even more concerning that the United States seems to be taking a heavy-handed position that all other WTO Members must agree that the "essential security" exception is self-judging as a precondition for the United States to agree to a resolution to the issues surrounding the WTO dispute settlement mechanism's functionality and relevance.

Given the current conundrum, this article argues that continued insistence by the United States of Article XXI(b)'s non-justiciability would be misguided. First, the text, context, object and purpose, and even the negotiating history of Article XXI(b), all point to the conclusion that there exists some space for review of an invocation of Article XXI(b) by WTO panels, even if limited. Thus, the U.S. position appears incorrect on a purely factual basis. Second, continued U.S. posturing on the self-judging nature of Article XXI(b) will only lead to more Members adopting the same position. While this may be the United States' objective, counterintuitively, the result would be to create an increasingly large loophole through which additional adherents of the view could justify by fiat any measure for which they wish to avoid WTO scrutiny, leading ultimately to the irrelevance of the WTO system as a whole. Third, insisting on a particular outcome regarding the interpretation of Article XXI(b), especially when that outcome is simply not legally supported, would run counter to the very principles the United States has defended globally up to this point, *i.e.*, the importance of the rule of law over strong-arm tactics, the social and economic benefits of collaboration among the global trading community, and the stability and longevity of the multilateral trading system as a means to negotiate and peacefully resolve economic disagreements.

In this article, we first analyze the legal accuracy of the U.S. position by asking whether the text of Article XXI, its context, and its object and purpose support the U.S. conclusion that the

⁶ Warren Maruyama and Alan Wm. Wolff, *Saving the WTO from the national security exception*, 23-2 PETERSON INST. INT'L ECON 1, 6 (May 2023), <https://www.piie.com/sites/default/files/2023-05/wp23-2.pdf>. See also, *e.g.*, Panel Report, *Russia – Traffic in Transit*, para. 7.110; Panel Report, *Saudi Arabia – IPRs*, paras. 7.241-7.242; Panel Report, *US – Origin Marking (Hong Kong)*, para. 7.185; Panel Report, *US – Steel and Aluminum Products (Turkey)*, paras. 7.143-7.144; Panel Report, *US – Steel and Aluminum Products (Switzerland)*, paras. 7.146-7.147; Panel Report, *US – Steel and Aluminum Products (Norway)*, paras. 7.116-7.117; Panel Report, *US – Steel and Aluminum Products (China)*, paras. 7.128-7.129.

⁷ Sarah Anne Aarup, *Reform or die? If the US gets its way, the WTO might do both*, POLITICO (May 9, 2023) (citing one trade diplomat stating that the discussions surrounding WTO reform can be characterized as the "U.S. against the rest"), <https://www.politico.eu/article/reform-die-usa-washington-world-trade-organization-wto-ngozi-okonjo-iweala-joe-biden/>.

⁸ Arjun Kharpal, *China brings WTO case against U.S. and its sweeping chip export curbs as tech tensions escalate*, CNBC (Dec. 13, 2022) (citing a USTR spokesperson who stated that "the WTO is not the appropriate forum to discuss issues related to national security"), <https://www.cnbc.com/2022/12/13/china-brings-wto-case-against-us-chip-export-restrictions.html>.

⁹ *Statement from USTR Spokesperson Sam Michel on Today's WTO Panel Ruling*, USTR (Aug. 16, 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/august/statement-ustr-spokesperson-sam-michel-todays-wto-panel-ruling>.

provision is self-judging. We then take a close look at the Article XXI(b)'s negotiating history and the extant WTO jurisprudence to determine the validity of U.S. claims that state practice supports its view of the historical record. We hope that our historical and legal research in this regard can be a useful tool for both practitioners and policymakers. Finally, we examine the United States' position today, its implications, and the foundational legal and policy risks arising from a conclusion that Article XXI(b) is wholly self-judging.

II. The Text, Context, and Object and Purpose of GATT Article XXI(b) Does Not Support the Conclusion that the Provision is Entirely Self-Judging

WTO panels must interpret the WTO agreements in accordance with the customary rules of interpretation of public international law.¹⁰ Therefore, this evaluation of Article XXI(b) must begin with an assessment of the text and context of this provision, as well as the object and purpose of the GATT with respect to this provision. As explained below, and consistent with all prior GATT-era and WTO-era panel rulings, these interpretive rules simply do not support a wholly self-judging interpretation of Article XXI(b). While Article XXI(b) does give Members broad discretion to implement measures necessary to protect their essential security interests, Article XXI(b) does not consign WTO panels to simply act as a rubber stamp for such unilateral and unfettered actions. Rather, balance must be struck between preserving Members' rights to protect their security interests, while maintaining the integrity and durability of a rules-based trading system that can outlast the whims of any Member.

GATT Article XXI states:

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

¹⁰ Vienna Convention on the Law of Treaties, Article 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms in their context and in the light of its object and purpose."). Under Article 3.2 of the DSU, Article 31(1) forms part of the "customary rules of interpretation of public international law". See Appellate Body Report, *US – Gasoline*, p. 17.

(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 explicitly stated, Article XXI(b) permits a Member to take “any action” that “it considers necessary for the protection of its essential security interests”. The term “any” conveys the broad scope of acceptable actions by a Member. For example, the Appellate Body has stated that the term “any” in the context of “any measure” refers to “measures of all types” and that the text does not distinguish between, or exclude, certain types of measures.¹¹ The phrase “to prevent a Member from taking any action”, considered in the context of the introductory clause of Article XXI(b), makes clear that no provision of the WTO agreements can prevent or discourage the invoking Member from taking any type of act whatsoever that satisfies the conditions in the remainder of the relevant provision.

Further, the use of the term “it considers” confirms that the determination of whether a Member faces a security threat, and what actions it should take to confront that threat, rest solely with the Member in question. The pronoun “it” refers to the Member invoking the exception. Dictionary definitions of “considers” include “to believe to be”, “to think of as”, and to “come to judge or classify”.¹² Thus, the security exceptions do not refer to any action that “is necessary”, but rather to any action that the invoking Member believes to be, thinks of as, or judges or classifies as “necessary”. As the panel in *Russia – Traffic in Transit* concluded, and subsequent panels reviewing Article XXI(b) have confirmed, to give legal effect to the phrase “which it considers”, the question of whether an action is “necessary” must be left to the discretion of the invoking Member.¹³

The deference accorded to a WTO Member under GATT Article XXI(b) applies not only to whether the Member taking the action considered doing so to be “necessary”, but also whether the Member acted “for the protection of its essential security interests”. The text makes clear that this element must be seen from the vantage point of the Member invoking the exception. In the context of this provision, the term “its” precedes “essential security interests” and connotes that the interests are those that belong to the invoking Member. This language recognizes that each Member might define its own “essential security interests” differently. As the *Russia – Traffic in Transit* panel explained, what a Member considers relevant in protecting itself “from external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances”.¹⁴ For these reasons, that panel found that the WTO allows each Member to define what it considers to be “its essential security interests”.

Article XXI(b) therefore permits Member discretion over the type of action it takes under Article XXI(b) (“any action”), whether that action is “necessary”, and whether that action will afford “protection” to what that Member identifies as its “essential security interests”. In short,

¹¹ Appellate Body Report, *EC – Asbestos*, para. 188.

¹² See Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/consider>. See also Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/consider>.

¹³ Panel Report, *Russia – Traffic in Transit*, para. 7.146; Panel Report, *US – Origin Marking (Hong Kong)*, paras. 7.27-7.28, 7.31; Panel Report, *US – Steel and Aluminum Products (Turkey)*, para. 7.129.

¹⁴ Panel Report, *Russia – Traffic in Transit*, para. 7.131.

the text of Article XXI(b) makes clear that Member discretion covers the whole of subparagraph (b).

This discretion is not limitless. The structure and context of the rest of the Article demonstrates that Member discretion *does not* extend to subparagraphs (i)-(iii).

Article XXI begins with an overarching chapeau (“Nothing in this Agreement shall be construed”) that covers three separate subparagraphs (a), (b), and (c). Subparagraph (b), in turn, also has an overarching chapeau (“to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests”) that then covers three further subparagraphs (i), (ii), and (iii). The structure of both of these subparagraph groupings make clear that they are all exhaustive lists, and not illustrative lists. In other words, under Article XXI(b), subparagraphs (i)-(iii) are an exclusive and exhaustive list, each of which may independently create a legitimate exclusion under subparagraph (b), but no other circumstance – no matter how similar – is permissible. As the panel in *US – Steel and Aluminum Products (China)* concluded, “Article XXI(b) is to be given meaning as a complete sentence with the enumerated subparagraphs (i) to (iii) representing alternative endings to the sentence that begins ‘Nothing in this Agreement shall be construed’.”¹⁵

Subparagraphs (i)-(iii) contain carefully crafted language that further *qualify* the type of action that would be permissible pursuant to Article XXI(b). Under subparagraph (i), for instance, an action must be “relating to” fissionable materials. Under subparagraph (ii), an action must be “relating” to the “traffic in arms” or other enumerated categories of goods. And under subparagraph (iii), an action must be “taken in the time of” a “war or other emergency in international relations”. Each of these conditions further narrow the permissible action to certain temporal or relational restrictions. Members cannot take “any action” under subparagraph (i), for example, if it does not *relate to* the listed materials. Put simply, a relational nexus must exist between the Member’s action and the listed materials if subparagraph (i) is to apply. Indeed, it would be non-controversial that a Member could not justify an import ban on, say, reinforced concrete by invoking Article XXI(b)(i).

In this regard, prior panels have not found convincing U.S. textual arguments asserting that Article XXI(b) and its subparagraphs form a “single relative clause” that extends Members’ discretion under “it considers” to subparagraphs (i)-(iii).¹⁶ For instance, the panel in *US – Steel and Aluminum Products (China)* considered that the text and the structure of the provision simply does not support the “single relative clause” reading because it does not “account for the structure of Article XXI(b) and the textual separation of the subparagraphs into an enumerated list, which corresponds to the role of the subparagraphs as alternative sentence endings that collectively delimit the scope of Article XXI(b)”.¹⁷

Moreover, doing so would be contrary to the principle of treaty interpretation that all terms of a treaty must be given meaning and effect, with none rendered to redundancy or inutility.¹⁸ In

¹⁵ Panel Report, *US – Steel and Aluminum Products (China)*, para. 7.111.

¹⁶ See, e.g., Panel Report, *US – Steel and Aluminum Products (China)*, paras. 7.119-7.121; Panel Report, *US – Steel and Aluminum Products (Norway)*, para. 7.107; Panel Report, *US – Origin Marking (Hong Kong)*, para. 7.57.

¹⁷ Panel Report, *US – Steel and Aluminum Products (China)*, para. 7.121.

¹⁸ See e.g., Appellate Body Reports, *US – Gasoline*, p. 23; *Japan – Alcoholic Beverages II*, p. 12; *India – Patents (US)*, para. 45.

the U.S. interpretation, the terms “relating to” and “taken in the time of” under subparagraphs (i)-(iii) would be rendered useless, as they would lose their intended purpose of qualifying an action in the particular circumstance captured under the subparagraph at issue. As such, under the rules of treaty interpretation, “relating to” and “taken in the time of” must be allowed to constrain the scope of Member action, pursuant to the ordinary meaning of those words. To do so, panels must have the authority to determine whether an action taken was in fact (i) “relating to fissionable materials” or their derivatives; (ii) “relating to the traffic in arms” or other such goods; or (iii) “taken in the time of” a “war or other emergency in international relations”. And to give those terms proper meaning as real limitations on a Member’s action, it must be within the panel’s purview to determine whether that action falls within the words enumerated in one of the subparagraphs of Article XXI(b). This has been the conclusion of every WTO panel that has adjudicated the question of Article XXI’s justiciability.¹⁹

The object and purpose of the GATT and the Marrakesh Agreement Establishing the World Trade Organization (the “WTO Agreement”) further lends support to the above textual interpretation. The preamble of the Agreement states that its purposes include to “eliminat[e] discriminatory treatment in international trade relations”; “to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade”; and “to preserve the basic principles and to further the objectives underlying this multilateral trading system”. Further, pursuant to Article 3.2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (“Dispute Settlement Understanding” or DSU), the dispute settlement system serves “to provide security and predictability to the multilateral trading system”, as well as to “preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements”. Taken together, these provisions make clear that an important object and purpose of the WTO agreements as a whole is to establish a long-lasting rules-based trading system that can predictably eliminate discriminatory treatment, and effectively enforce the rights and obligations that have been carefully negotiated among the vast majority of the global trading partners.

To now allow Members unfettered discretion to take “any action” without limitation and without review by the WTO dispute settlement system, simply on the bare invocation of “essential security interests” regardless of whether there are true security concerns or not, would simply be contrary to the object and purpose of the WTO agreements. Giving Members such a *carte blanche* to impose discriminatory treatment without question or accountability would render the dispute settlement system useless to rectify measures that could otherwise blatantly violate WTO rules. It would deny the purpose of the dispute settlement system to “clarify the existing provisions” of the various WTO agreements and would provide an all-too-easy loophole for any Member – regardless of its intentions – to take unilateral discriminatory action. Thus, a wholly self-judging interpretation of Article XXI(b) would make the multilateral trading system brittle and weak, easily manipulable, and ultimately irrelevant – the very opposite of “more viable and durable,” or more secure and predictable.

¹⁹ Panel Report, *Russia – Traffic in Transit*, para. 7.110; Panel Report, *Saudi Arabia – IPRs*, paras. 7.241-7.242; Panel Report, *US – Origin Marking (Hong Kong)*, para. 7.185; Panel Report, *US – Steel and Aluminum Products (Turkey)*, paras. 7.143-7.144; Panel Report, *US – Steel and Aluminum Products (Switzerland)*, paras. 7.146-7.147; Panel Report, *US – Steel and Aluminum Products (Norway)*, paras. 7.116-7.117; Panel Report, *US – Steel and Aluminum Products (China)*, paras. 7.128-7.129.

In sum, taken together, the text and context of GATT Article XXI(b), along with the object and purpose of the WTO agreements, make clear that action permissible under Article XXI(b) must be bound by certain conditions pursuant to subparagraphs (i)-(iii), the applicability of which must be subject to panel review.

III. The Negotiating History of Article XXI Does Not Support the Conclusion that the Provision is Entirely Self-Judging

The United States has asserted that a general “understanding” existed at the time of Article XXI’s negotiation that the provision was intended to be self-judging.²⁰ Not only does this not align with the final text of Article XXI,²¹ but it also does not align with the full historical record of the negotiations. In fact, our review of the negotiating history illuminates that the negotiating parties expressed hesitation – and even opposition – to the notion that Article XXI would entirely preclude panel review. This Section traces that negotiating history, starting with the International Trade Organization (ITO) negotiations that initially conceived of a security exception and ending with Article XXI’s re-negotiation during the 1994 Uruguay Round.

The origin of Article XXI dates back to discussions by an initially small group of countries – largely led by the United States – in the early 1940s to establish a multilateral global trading system. Those discussions eventually formalized under the aegis of the Preparatory Committee of the United Nations Conference on Trade and Employment, which was established on 18 February 1946 by the United Nations Economic and Social Council to negotiate a draft the ITO Charter.²² The ITO was envisioned to be just one of the many emerging agencies under the United Nations umbrella during that period.²³ Nineteen countries participated in the Preparatory Committee.²⁴

The Preparatory Committee’s negotiations began in earnest after the United States presented its first Suggested Charter for the ITO (“draft ITO Charter”) in September 1946, which was based on a set of principles it had devised with the UK from 1941-1945.²⁵ The negotiations were split into four rounds in London (1946), New York (1947), Geneva (1947), and Havana (1947-1948), with each meeting advancing on the prior round’s draft.²⁶ However, as its primary architect, the United States also made significant changes to the draft ITO Charter and

²⁰ U.S. First Written Submission, *US – Steel and Aluminum Products (Norway)*, paras. 167-168.

²¹ Prior WTO panels have cited the International Law Commission’s (“ILC”) interpretation of Article 31 of the Vienna Convention on the Law of Treaties, which states that “the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties”. The ILC has also referred to the “primacy of the text as the basis for the interpretation”. See Yearbook of the International Law Commission, 1966, vol. II, pp. 218-220, paras. 2, 11. See also Panel Report, *US – Origin Marking*, fn. 130.

²² Seymour J. Rubin, *The Judicial Review Problem in the International Trade Organization*, 63 HARV. L. REV. 78, 79 (1949).

²³ George Bronz, *The International Trade Organization Charter*, 62 HARV. L. REV. 1089, 1090 (1949).

²⁴ Those countries included Australia, Belgium, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxemburg, Netherlands, New Zealand, Norway, the Soviet Union, the Union of South Africa, the United Kingdom, and the United States. See Robert R. Wilson, *Proposed ITO Charter*, 41 A.J.I.L. 879 (1947).

²⁵ Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions*, 41 MICH. J. INT’L L. 109, 121 (2020).

²⁶ Rubin, *supra* note 22 at 78-79.

the security exception in the periods between those formal rounds. The draft was finalized and signed in March 1948 during the Havana Round.

Despite the U.S. Administration's leadership in negotiating the Charter, the U.S. Congress effectively killed the ITO's establishment after refusing to ratify it in 1950.²⁷ With the pre-establishment collapse of the ITO, it was the GATT 1947 that eventually brought the security exception under Article XXI into force. Adopted on October 30, 1947, the GATT 1947 directly incorporated a late-stage version of the draft ITO Charter's security exception. This Section evaluates how the ITO negotiators' position on the security exception evolved during this time period of the security exception's drafting and adoption. It places an emphasis on the internal discussions within the U.S. delegation, due to the outsized role the United States had in crafting the security exception and the importance WTO and GATT panels have placed on those internal deliberations in later disputes.

A. *The Evolving U.S. Position Pre-ITO Negotiations (May-September 1946)*

The United States had begun laying the groundwork for a multilateral trading system during World War II. The earliest proposals for a draft convention on international trading, informed by discussions with Canadian and UK officials, date back to 1944. Even those early documents already contained draft exceptions to the parties' trade obligations for the protection of their security interests.²⁸ One early draft, inspired by bilateral trade agreements the United States had concluded with Argentina and Mexico, read:

Nothing in this Convention shall be construed to prevent the adoption or enforcement of measures:

...

(c) relating to the traffic in arms, ammunition and implements of war, and, in exceptional circumstances, all other military supplies;

...

(h) undertaken in pursuance of obligations for the maintenance of international peace or security; . . .²⁹

During these preparatory years, sharp internal divisions arose within the U.S. government over the question of national security's relationship to global trade, with the U.S. Department of State ("State") on one side and the U.S. Departments of War, the Army, and the Navy ("Services Departments") on the other. These divisions defined the U.S. stance throughout the negotiation of the ITO and GATT 1947. As one commentator put it, the primary difference between the two was that, while State "understood national security as an exception to free trade rules, Services saw *free trade* as the exception, and national security as the rule".³⁰ However, in the

²⁷ Roy Santana, *GATT 1947: How Stalin and the Marshall Plan helped to conclude the negotiations*, WTO, https://www.wto.org/english/tratop_e/gatt_e/stalin_marshall_conclude_negotiations_e.htm ; see also Daniel Drache, *The Short but Significant Life of the International Trade Organization: Lessons for Our Time*, CSGR WORKING PAPER NO. 62/00 (2000), <https://core.ac.uk/reader/47530>.

²⁸ Pinchis-Paulsen, *supra* note 25 at 126-128.

²⁹ *Id.* at 128.

³⁰ *Id.* at 122-23.

time leading up to the ITO negotiations, both sides largely agreed that the security exception should be subject to at least some form of review in an international adjudicative forum, as described below.

After several rounds of internal negotiations and proposed drafts, in May 1946, the U.S. Executive Committee on Economic Foreign Policy (“ECEFP”), the inter-departmental body primarily charged with the Suggested Charter’s drafting, circulated a draft version for U.S. government stakeholder review.³¹ The exception included in the draft stated:

Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures . . . (b) relating to the traffic in arms, ammunition, implements of war and fissionable materials; (c) in time of war or imminent threat of war, relating to the protection of the essential security interests of a Member; . . . (j) undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace or security.³²

In response to the draft, the Services Departments raised a number of criticisms, most of which focused on their concern that the proposed exceptions were “much too narrow” to properly address U.S. security interests, namely its ability to control the trade of raw materials essential for U.S. defense and military capabilities.³³ Officials at State in turn responded that, if the scope of the exceptions were broadened, this would give a “carte blanche to other countries to violate their commitments with respect to commercial policy under the cloak of a sweeping security exception”.³⁴ Regarding the exception’s justiciability, some within the Services Departments at this point did appear to wish for the provision to be self-judging. During one discussion on 17 June 1946, representatives from the Services Departments sought an exception that would allow parties to “unilaterally” take action “which they feel might be helpful to security”.³⁵ However, others within the Services Departments still focused their arguments around *which body* should be able to review invocations of the exception, rather than whether the exception should be reviewable at all. One representative from the War Department expressed concern about placing handing “complete power” to interpret “national security exceptions” to the ITO Executive Board, while also recognizing the limitations of ICJ review.³⁶ That same War Department representative proposed in a 28 June 1946 not to exclude the exception from justiciability, but to recommend that “questions of interpretation involving national security” be left to the UN Security Council.³⁷ A State Department proposal in early July 1946 similarly suggested that, while the ITO Executive Board could be tasked with granting exceptions on the grounds of national defense, parties would have a right of appeal to the UN Security Council.³⁸

³¹ While the ECEFP had been internally negotiating draft exceptions for around two years before the May 1946 draft, the establishment of the Preparatory Committee was the point when it became clear that that exception would specifically be put towards a draft ITO Charter. *Id.* at 129-30.

³² *Id.*

³³ *Id.* at 130.

³⁴ Report of the Panel (Appendices), *US – Steel and Aluminum Products (Norway)*, para. 4.5.

³⁵ U.S. First Written Submission, *US – Steel and Aluminum Products (Norway)*, para. 89.

³⁶ Pinchis-Paulsen, *supra* note 25 at 143.

³⁷ *Id.*

³⁸ U.S. First Written Submission, *US – Steel and Aluminum Products (Norway)*, para. 91.

After further rounds of inter-departmental negotiation, the United States proposed a finalized draft ITO Charter to the Preparatory Committee in September 1946,³⁹ with a revised Article 32 that read:

Article 32

Nothing in Chapter IV shall be construed to prevent the adoption or enforcement by any Member of measures . . . (c) relating to fissionable materials; (d) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; (e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member; . . . (k) undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security⁴⁰

By this time, it had become the U.S. position that, to remedy concerns of abuse of the provision, countries would be permitted to resort to the nullification or impairment procedures in the ITO draft Charter, which could afford them compensation for measures taken under the security exception. But more importantly, the exception was still seen as justiciable at this point among the U.S. negotiators. As one expert commentator has put it, the primary debate concerned not justiciability itself, but rather “which body would undertake review of trade matters involving national security concerns—an organ of the ITO or the ICJ”.⁴¹

B. *The ITO Negotiations (October 1946-March 1948)*

1. **The London Round (October-November 1946)**

Multilateral negotiations over the U.S. draft of the ITO Charter began at the Preparatory Committee’s first official negotiation round in London in October 1946. By the end of the Round, no substantive changes had been made to the articles related to the security exception and its justiciability, and they remained as the United States tabled them. As the United States has itself stated in subsequent submissions, there was no consensus at the time for the article to be non-justiciable. For the United States:

These provisions lacked the key phrase that appears in the current text of GATT 1994 Article XXI(b) regarding action by a Member that “it considers necessary for” the protection of its essential security interests. In addition, the essential security exception set out in Article 32 of the ITO draft charter was one of twelve exceptions, several of which later formed the basis for the general exceptions at GATT 1994 Article XX. Thus, this initial proposed text drew no distinction between essential security interests and other issues that would permit derogation from ITO commitments.⁴²

³⁹ Panel Report, *Russia – Traffic in Transit*, para. 7.85

⁴⁰ U.S. DEP’T OF STATE, SUGGESTED CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS, Art. 32 (Sept. 1946), https://books.google.co.uk/books?id=LDYxAAAAIAAJ&printsec=frontcover&source=gbs_ViewAPI&redir_esc=y#v=onepage&q&f=false (emphasis added).

⁴¹ Pinchis-Paulsen, *supra* note 25 at 148.

⁴² U.S. First Written Submission, *US – Steel and Aluminum Products (Norway)*, para. 58.

Tellingly, the parties also decided *not* to change the review mechanism for the security exception. The Report of the London Round noted that “[t]he absolute right of appeal to the International Court of Justice in security matters, as set out in the United States Draft Charter, was not called into question”.⁴³ Thus, the absolute right to appeal issues involving invocation of the security exception remained.⁴⁴ The fact that the matter could be appealed to the ICJ, and therefore could be examined by it, makes clear that the security exception was not considered self-judging at the time of the conclusion of the London Round.

2. The New York Round (January-February 1947)

In January 1947, negotiators met again in New York to refine the Preparatory Committee’s work.⁴⁵ The most significant change arising from the New York negotiations relating to Article 37 (formerly Article 32) was to add the following chapeau (changes underlined below). The Article was published in a Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment on 5 March 1947:

Article 37

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in Chapter V shall be construed to prevent the adoption or enforcement by any Member of measures: . . . (c) relating to fissionable materials; (d) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; (e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member; . . .⁴⁶

The idea to add the above chapeau originated during the London Round, when the UK expressed concern about the potential for Member “abuse” of the provision as a pretext for economic protectionism. The chapeau was the UK’s proposed mechanism to avoid such abuse.⁴⁷ The U.S. delegation initially pushed back on the proposal, stating that it was unnecessary in light of the nullification or impairment procedures in draft Article 30, which were designed to prevent “evasions of the provisions”.⁴⁸ At any rate, in the words of the U.S. delegate, it was “impossible to draft exceptions which could not be abused, if good faith was lacking”.⁴⁹ Nevertheless, the chapeau was eventually included in the March 1947 draft.

⁴³ Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - London Draft, E/PC/T/33 (Oct. 31, 1946), at 26, <https://docs.wto.org/gattdocs/q/UN/EPCT/33.PDF>.

⁴⁴ Rubin, *supra* note 22 at 81.

⁴⁵ *Id.* at 80.

⁴⁶ Panel Report (Appendices), *US – Steel and Aluminum Products (Norway)*, para. 2.6.

⁴⁷ Pinchis-Paulsen, *supra* note 25 at 148-49.

⁴⁸ *Id.* at 149.

⁴⁹ *Id.*

The United States has asserted in subsequent WTO disputes that the addition of the chapeau suggested that there was not yet a consensus that the exception was self-judging.⁵⁰ To the United States, the inclusion of the language barring “arbitrary or unjustifiable discrimination” “contemplated panel review so that the exceptions would not be applied to discriminate unfairly. . . . This structure suggests that, at that time, not all drafters may have viewed the essential security exception in subparagraph (e) as self-judging”.⁵¹ Indeed, the United States itself was among them. In one report by the National Foreign Trade Council to the U.S. Senate Finance Committee, the Council emphasized the importance of “the preservation of the undiluted right of a day in court for any aggrieved member. Such a right of appeal should not in any case be subject to the veto of the agency against whose determination or decision the appeal would lie”.⁵²

After the New York Round, in the spring of 1947, State and the ECEFP considered two crucial changes. First, the ECEFP proposed consolidating the security-related exceptions into its own, dedicated provision at the end of the Charter to clearly indicate that it applied to the entirety of the agreement.⁵³ Second, the ECEFP considered eliminating the chapeau’s language concerning “arbitrary or unjustifiable discrimination” from the security exception provision based on concerns that its wording could “preclude the possible application of the exceptions to meet the legitimate circumstances for which the exceptions were designed”.⁵⁴ Instead, the ECEFP argued for reverting to the introductory language of the previously proposed Article 32.⁵⁵

The ECEFP’s two proposals were submitted for consideration by the other countries participating in the negotiations and were approved in the May 1947 decisions by the Preparatory Committee.⁵⁶ Under a new chapter at the end of the Charter, the United States consolidated the New York draft provisions and its proposed changes into a new draft Article 94 (formerly Article 37):

Article 94

1. Nothing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures:

...

(c) Relating to fissionable materials;

⁵⁰ U.S. First Written Submission, *US – Steel and Aluminum Products (Norway)*, para. 60.

⁵¹ *Id.* at para. 84.

⁵² Rubin, *supra* note 22 at 84.

⁵³ Panel Report (Appendices), *U.S. – Steel and Aluminum Products (Norway)*, para. 2.9.

⁵⁴ Pinchis-Paulsen, *supra* note 25 at 151.

⁵⁵ That previous language read: “[n]othing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures . . .”. See Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, U.S. Delegation, E/PC/T/W/23 (May 6, 1947), at 5, <https://docs.wto.org/gattdocs/q/UN/EPCT/W23.PDF>.

⁵⁶ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Working Party on Technical Articles, E/PC/T/WP.1/SR/11 (May 22, 1947), at 2, <https://docs.wto.org/gattdocs/q/UN/EPCT/WP1-SR11.PDF>.

(d) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;

(e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a contracting party.

Further changes were then made in an internally circulated June 1947 draft prepared by State (changes underlined).⁵⁷

Article 94

1. Nothing in this Charter shall be construed to prevent the adoption or enforcement by any Member of any measure which it may deem necessary:

a) relating to fissionable materials;

b) relating to traffic in arms, ammunition and implements of war, and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;

c) in time of war or other emergency in international relations, relating to the protection of its essential security interests;

d) undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security.

2. This article shall not be interpreted as limiting the generality of other provisions of this Charter.

It is worth noting that it is this phrase, “which it may deem necessary”, which was first included in the internal U.S. June 1947 draft, that the United States in subsequent WTO disputes refers to as making the security exception self-judging. The State lawyer who drafted the Article, however, had a narrower take on the purpose of this phrase, which he said was intended to simply clarify that each ITO Member had the right to determine whether its measures were “necessary”,⁵⁸ and nothing more (including whether they properly fell within the scope of the subparagraphs).

3. The Geneva Round (July-August 1947)

On July 4, 1947, in advance of the Geneva Round, the United States circulated an updated draft to the Preparatory Committee that incorporated much of the June 1947 internal draft’s changes,⁵⁹ including shifting the security exceptions to a new “Miscellaneous” Chapter:

⁵⁷ Pinchis-Paulsen, *supra* note 25 at 152-53.

⁵⁸ Pinchis-Paulsen, *supra* note 25 at 154.

⁵⁹ U.S. Delegation to U.N. Secretariat, Second Meeting of the U.S. Preparatory Comm. for the Int’l Conf. on Trade and Employment, Draft Charter, E/PC/T/w/236, (July 4, 1947), at 13, <https://docs.wto.org/gattdocs/q/UN/EPCT/W236.PDF>.

Article 94

Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or to prevent any Member from taking any action which it may consider to be necessary to such interests:

- a) Relating to fissionable materials or their source materials;
- b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
- c) In time of war or other emergency in international relations, relating to the protection of its essential security interests;
- d) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security.

Yet there remained considerable debate within the U.S. delegation about the revised Article 94. Just under the surface of the Geneva Round roiled a “tense battle” between State and the Services Departments over the enforceability of actions under the security exception.⁶⁰

The fragmentation within the U.S. position can be seen in the meeting notes of the U.S. delegation during the Geneva Round in early July 1947. From those notes, it appears that the core of the conflict focused on the danger of the exception’s potential to give members *carte blanche* to escape their ITO obligations using national security as a pretext. The Services Departments were insistent that, in the words of one representative, the United States “be given a free hand to make whatever decisions may be necessary without challenge by the ITO”.⁶¹ Similarly, another Services Department representative argued that the security exception should be revised to state explicitly that Charter provisions on the settlement of disputes “shall not apply” to security measures, and that “each Member shall have independent power of interpretation” over such measures.⁶² Meanwhile, as one State representative put it, many in his Department felt strongly that if members could use “the pretext of national security” to “take any measure whatsoever it might wish in complete disregard of all provisions of the Charter”, it would destroy the ITO.⁶³ In the words of a later retelling by the United States, “[t]he majority of the U.S. delegation declined to adopt these suggestions” by the Services Departments.⁶⁴

Interestingly, when the WTO panel in *Russia – Traffic in Transit* referred to that rejection of the Services Departments’ proposal as evidence that a majority of the U.S. delegation believed the security exception should be subject to review, the United States in response claimed that the suggestion was rejected simply because it was considered “unnecessary, as the majority of the U.S. delegation felt that the then-existing text adequately preserved U.S. freedom of

⁶⁰ Pinchis-Paulsen, *supra* note 25 at 122.

⁶¹ Panel Report (Appendices), *US – Steel and Aluminum Products (Norway)*, para. 4.23.

⁶² *Id.* at para. 4.17.

⁶³ *Id.* at para. 4.22.

⁶⁴ U.S. First Written Submission, *US – Steel and Aluminum Products (Norway)*, para. 97.

action”.⁶⁵ However, additional evidence seems to support the *Russia – Traffic in Transit* panel’s determination. For instance, in a meeting between the U.S. delegation, the State representative expressly stated that he felt sure “as a practical matter no injury could possibly come to the US” as a result of the ITO’s evaluation of whether “the measures introduced by the US were in fact taken in the interest of national security”.⁶⁶ Moreover, as a potential compromise, the representative of the Department of War proposed revising the dispute settlement chapter to state that any challenge relating to national security would be heard by the ICJ, with the ITO entirely excluded.⁶⁷ In other words, even those in the Services Departments still considered some form of judicial review of an invocation of the exception to be permitted as of early July 1947.

It was also around this time that U.S. politicians became concerned about the security exception. U.S. Senate hearings taking place after circulation of the New York draft underscored that many in Congress, including Senate Finance Committee Chairman Eugene Millikin were alarmed that the ICJ might be left to evaluate the validity of U.S. national security concerns.⁶⁸ In a July 10, 1947 memorandum, the War Department’s representative Harold Neff recounted that State had guaranteed to the U.S. Congress that the security exception would “be worded so as to give each Member freedom to apply them as it determines in the interests of its own security”, but he also acknowledged that some U.S. negotiators still did not have the “intent to reserve full power of unilateral interpretation”.⁶⁹ Nonetheless, by the end of July 1947, despite continuing reservations by many in State, the Services Departments’ view had appeared to largely win out publicly, bolstered by Congress.

The United States aside, other potential parties to the ITO were also debating the scope of the security exception at the same time. The Preparatory Committee delegates at the beginning of the Geneva Round appeared to assume that the exception would be reviewable. Although the record of the discussions on Article XXI’s justiciability is sparse, the main question under discussion in early July 1947 appeared to be not *if* the security exception should be justiciable, but rather *which* body should be able to exercise some form of review over invocations and interpretations of the security exception (at this point Article 94). At a July 16, 1947 meeting of the Preparatory Committee, for instance, the Australian delegate stated:

. . . obviously one cannot ignore security measures, and I would like to suggest [that we] should advise whatever is the appropriate international organization that there are trade problems associated with fissionable materials . . . we should ask advice from, or the opportunity to consult with, whatever is the most appropriate international body regarding the way in which this item should be treated.⁷⁰

⁶⁵ *Id.* at para. 97.

⁶⁶ Pinchis-Paulsen, *supra* note 25 at 161.

⁶⁷ *Id.*

⁶⁸ *Id.* at 162.

⁶⁹ *Id.* at 164-65.

⁷⁰ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, 30th Meeting of Commission A, E/PC/T/A/PV/30 (Jul. 16, 1947), at 17, <https://docs.wto.org/gattdocs/q/UN/EPCT/APV-30.PDF>.

In response to the Australian delegate's statement, a decision was made to discuss the matter further in another part of the negotiations.⁷¹

The most consequential discussion concerning Article XXI's justiciability came at a meeting on July 24, 1947, when the negotiators discussed the proposed Article 94, which the United States had circulated on July 4, 1947. In that meeting, in line with the shifting internal politics discussed above, the U.S. tone notably swayed in favor of limited review of actions under the security exception. The United States later asserted that other parties agreed with its stance, although WTO panels,⁷² expert commentators, and the named parties themselves disagreed with the U.S. assertion.

The relevant discussion from the July 24, 1947 Committee meeting is as follows:

First, the delegate from the Netherlands expressed concern that the reference to "essential security interests" was "very difficult to understand, and therefore possibly a very big loophole in the whole Charter". The delegate then asked, as a hypothetical, whether protectionist policies to develop a country's agriculture during a time of emergency to "bring as much food to the country as possible" would qualify under the exception.⁷³ The U.S. delegate replied:

We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying [in the chapeau]: '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 provisions which 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. With regard to sub-paragraph (e), the limitation, I think, is primarily in the time: first, 'in time of war.' I think no one would question the need of a Member, or the right of a Member, to take action relating to its security interests and to determine for itself—which I think we cannot deny—what its security interests are . . .

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 reasons. 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. We have given considerable thought to it and this is the best we could produce to preserve that proper balance".⁷⁴

⁷¹ *Id.* at 19-20.

⁷² U.S. First Written Submission, *US – Steel and Aluminum Products (Norway)*, para. 70 (stating that the exchanges from the July 1947 meetings of the Preparatory Committee "demonstrates that the drafters of the text that became GATT 1994 Article XXI(b) understood that essential security measures could not be challenged as violating obligations in the underlying agreement").

⁷³ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (Jul. 24, 1947), at 19, <https://docs.wto.org/gattdocs/q/UN/EPCT/APV-33.PDF>.

⁷⁴ *Id.* at 20-21.

The Netherlands delegate in response stated that he “certainly could not improve the text myself” and “only wanted to point out certain dangers. Otherwise I agree with it”.⁷⁵

After the exchange between the Netherlands and the United States, the Chairman of the Committee stated, “In defence of the text, we might remember that it is a paragraph of the Charter of the ITO 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”.⁷⁶

Later in the discussion, the question arose as to whether the security exception should be moved to a separate chapter at the end of the Agreement and, if so, what its chapeau should include. In response, the United States delegate stated:

I think that the place of an Article in the Charter has nothing to do with whether it comes under [the nullification or impairment procedures in] Article 35. . . [which] 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 [the security exception in] 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 seek 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.⁷⁷

In response to the U.S. delegate, the delegate from Australia stated, “Article 94 is so wide in its coverage—it says ‘or to prevent any Member from taking any action which it may consider to be necessary to such interests’—that I am very glad to have the assurance of the United States Delegate that in his opinion, at any rate, a Member’s rights under Article 35(2) are not in any way impinged upon”.⁷⁸ The delegate then asked whether “we [could] have a paragraph in Article 94 to make it clear, or some wording in Article 94, that says a Member’s rights under Article 35(2) will not be impinged upon?”⁷⁹ In response, the Chairman suggested that the mandate of the current meeting was not to change the wording of the provision but to merely confirm that the suggested changes were “in conformity with what we have decided”.⁸⁰ The Australian delegate then confirmed that it was satisfied in “light of the declaration of the United States representative confirming the applicability of Article 35”⁸¹ and withdrew its reservation.⁸² The Chairman then stated that he considered Article 94 to be properly “considered and approved”.⁸³

⁷⁵ *Id.* at 21.

⁷⁶ *Id.*

⁷⁷ *Id.* at 26-27.

⁷⁸ *Id.* at 27.

⁷⁹ *Id.*

⁸⁰ *Id.* at 28.

⁸¹ This quote was spoken by the Chairman in the form of a question to the Australian delegate.

⁸² Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (Jul. 24, 1947), at 28-29, <https://docs.wto.org/gattdocs/q/UN/EPCT/APV-33.PDF>.

⁸³ *Id.* at 29.

In later WTO disputes, the United States referenced these exchanges as a “demonstrat[ion] that the drafters of the text that became GATT 1994 Article XXI(b) understood that essential security measures could not be challenged as violating obligations in the underlying agreement. Nevertheless, any ITO member affected by essential security measures could claim that its expected benefits under the charter had been nullified or impaired”.⁸⁴ As an initial matter, this appears to be an attempt by the United States to establish a false equivalency between the availability of the non-violation nullification and impairment (NVNI) remedy and the issue of non-justiciability. Nothing in the text of the WTO agreements equates these two concepts, nor does it require the granting of benefits when a measure is determined to be non-justiciable. Furthermore, from the meeting notes, it does appear that no objection was registered to the U.S. assertions that Article 94 could not be challenged under the Charter, as the U.S. delegate argued. However, no delegate expressly noted their agreement with the U.S. interpretation either, and WTO panels have rejected the U.S. argument that the meeting proved the drafters collectively intended the security exception to be non-justiciable.⁸⁵

In further support of its argument, the United States has pointed to three additional commentaries drafted in the months after the Geneva Round, which it claims suggest the drafters acknowledged by the end of the Geneva Round that the security exception was self-judging. First, a U.S. internal September 1947 Summary Report of the Geneva Round stated that the security exception had “been so worded as to make it clear that members will be able to apply them as they themselves may determine”—next to that sentence was written in parentheses, “(Senate Finance Committee)”.⁸⁶ Second, a November 1947 summary of the draft charter prepared by the negotiating group states that the essential security exception would permit Members to 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.”⁸⁷ Third, a U.S. Tariff Commission commentary from that time stated that Article 94:

[R]eserves to the Members complete freedom of action to prohibit or regulate in any manner imports and exports of fissionable materials, implements of war, and supplies for the Army, Navy, and Air-Force; that is to say, with respect to such items[,] exports or imports may be prohibited unqualifiedly or the Member may discriminate as to where it obtains its imports or sends its exports.⁸⁸

The Commission’s commentary concluded that Article 94 included no requirement that Members obtain the “approval of the Organization for any action they take or refuse to take under these exceptions”.⁸⁹

However, to claim that these pieces of evidence suggest that *all* negotiating parties were aligned with a self-judging interpretation of the security exception is questionable. The first and third

⁸⁴ U.S. First Written Submission, *US – Steel and Aluminum Products (Norway)*, para. 70.

⁸⁵ Appendix 2, Panel Report, *US – Steel and Aluminum Products (Norway)*, paras. 2.44, 2.47.

⁸⁶ PRELIMINARY SUMMARY OF GENEVA DRAFT OF ITO CHARTER, CHANGES FROM NEW YORK DRAFT (Sept. 15, 1947), <https://worldtradelaw.typepad.com/files/wilcox-xxi.pdf>.

⁸⁷ United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter, E/CONF.2/INF.8 (Nov. 21, 1947), at 35.

⁸⁸ U.S. TARIFF COMM’N ANALYSIS OF GENEVA DRAFT CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION 95-96 (1947).

⁸⁹ *Id.* at 89-90.

commentary were *written solely by the United States*; as such, they reflect only the U.S. interpretation at that time. As for the second commentary, the report just confirms the conditionality of the text, *i.e.*, the text is only dealing with “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.” Moreover, the second and third commentaries expressly recognize the limitations on Members’ actions that are conveyed in the text of the provision.

As for the actual text found at the end of the Geneva Round, the exceptions language had changed from “action which it may consider necessary” to the security exception’s current formulation, “action which it considers necessary for the protection of its security interests”. The United States has argued in subsequent WTO disputes that this change “strengthened and emphasized the explicitly self-judging nature of this exception”,⁹⁰ but the former seems to give Members more flexibility than the latter.

The final text submitted to the Preparatory Committee in September 1947⁹¹ reads:

Article 94

Nothing in this Charter shall be construed . . .

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

i. relating to fissionable materials or the materials from which they are derived;

ii. relating to the traffic in arms, ammunition and implements of war and 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; . . . ”

Relatedly, Article 91 of the Geneva Draft Charter’s Chapter on Settlement of Differences (Chapter VIII) still contemplated review of Article 94, albeit in the form of advisory opinions:

Article 91

The Conference or the Executive Board may, in accordance with arrangements made pursuant to paragraph 2 of Article 96 of the Charter of the United Nations, request from the International Court of Justice advisory opinions on legal questions arising within the scope of the activities of the Organization.

⁹⁰ U.S. First Written Submission, *US – Steel and Aluminum Products (Norway)*, para. 64.

⁹¹ Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Draft Charter, E/PC/T/186 (Sep. 10, 1947), at 56, <https://docs.wto.org/gattdocs/q/UN/EPCT/186.PDF>.

Any resolution of the Conference under paragraph 3 of Article 90 or decision of the Conference under any other Article of this Charter shall be subject to review by the International Court of Justice through the means of a request by the Organization for an advisory opinion pursuant to the Statute of the International Court of Justice. The request for review of such resolution or decision shall be made by the Organization, in appropriate form, upon the instance of any substantially interested Member.⁹²

4. The Havana Round (November 1947-March 1948)

In November 1947, fifty-nine state delegations gathered in Havana to finalize and pass the ITO draft Charter as part of the UN Conference on Trade and Employment.⁹³ Regarding the draft security exception, the sub-committee charged with evaluating Article 94 made no meaningful modifications to this provision.⁹⁴

On January 16, 1948, the negotiating parties decided to incorporate a revision by the UK to alter the chapeau of Article 94 to read (changes underlined) that nothing in the Charter shall prevent a Member from taking an action “which it considers necessary for the protection of its essential security interests; where such action” relates to fissionable materials, etc. When asked about the change’s impact on the article, the UK delegate responded that the change “would neither permit, nor condemn, nor pass any judgment whatever on, unilateral economic sanctions”.⁹⁵ The meeting notes then state that a “majority of the Sub-Committee expressed support for this text”.⁹⁶

At a meeting by the same sub-committee on February 17, 1948, it was recorded that the delegate from India “expressed some doubt whether . . . the bona fides of an action allegedly coming within Article 94 could be questioned and also whether such an action could be countered collectively by Members of the Organization or only by affected Members individually. [The delegate] thought that the intention was to confine such counteraction to compensatory action and not to include punitive action”.⁹⁷

At that same meeting, the sub-committee deliberated a UK proposal to make it explicitly clear that members could resort to nullification or impairment procedures for non-violations under

⁹² U.N. Econ. and Soc. Council, Rep. of the Second Session of the Preparatory Comm. of the U.N. Conf. on Trade and Employment, WTO Archives E/PC/T/186, (Sep. 10, 1947), at 53, https://www.wto.org/gatt_docs/English/SULPDF/92290240.pdf.

⁹³ *Press Brief: Fiftieth Anniversary of the Multilateral Trading System*, WTO, https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm.

⁹⁴ U.N. Conf. on Trade and Employment, Joint Sub-Committee of Committees V and VI, Draft Report of the Working Party, GATT Doc. E/Conf.2/C.5&6/W.3 (Jan. 14, 1948), <https://docs.wto.org/gattdocs/q/UN/ECONF2/C5-6W3.PDF>.

⁹⁵ United Nations Conference on Trade & Employment, Sixth Committee: Organization, Amendment to Article 94 Proposed by the United Kingdom Delegation, E/CONF.2/C.6/W.48 (Jan. 16, 1948), at 1, <https://docs.wto.org/gattdocs/q/UN/ECONF2/C6-W123.PDF>.

⁹⁶ *Id.* at 2.

⁹⁷ United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 & E/CONF.2/C.6/W.60/Corr.1 (Jan. 20, 1948), at 3, <https://docs.wto.org/gattdocs/q/UN/ECONF2/C6-W60.PDF>.

the Article. In response, the U.S. delegate argued that such a reference was “unnecessary” given the text of Article 89(b).⁹⁸ The UK then agreed with the United States, and the sub-committee charged with evaluating Article 89 later confirmed that Article 89(b) “would apply to the situation of action taken by a Member[,] such as action pursuant to Article 94 of the Charter”.⁹⁹

In later U.S. submissions, the United States would argue that these discussions again “demonstrate[] [that] the drafters of the security exception that became GATT 1994 XXI(b) made several intentional choices that make clear that this provision is self-judging”.¹⁰⁰ However, the United States ignores statements by others like the UK, which as noted above made clear that its proposed edit was not intended to permit or condemn “unilateral economic sanctions”.

A month later, on March 24, 1948, the participating delegations passed the ITO Charter in The Final Act of the UN Conference on Trade and Employment.¹⁰¹ The security exception in Article 99(1) (formerly Article 94) read:

Article 99(1)

1. Nothing in this Charter shall be construed

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

(b) to prevent a Member from taking, either singly or with other States, any action which it considers necessary for the protection of its essential security interests, where such action

(i) relates to fissionable materials or to the materials from which they are derived, or

(ii) relates to the traffic in arms, ammunition or implements of war, or to traffic in other goods and materials carried on directly or indirectly for the purpose of supplying a military establishment of the Member or of any country; or

(iii) is taken in time of war or other emergency in international relations.

C. *The Passage of the GATT 1947*

⁹⁸ Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions*, 41 MICH. J. INT’L L. 109, 182 (2020).

⁹⁹ United Nations Conference on Trade & Employment, Sixth Committee, Rep. of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/Conf.2/C.6/W.30 (Jan. 9, 1948), at 2, <https://docs.wto.org/gattdocs/q/UN/ECONF2/C6-W30.PDF>.

¹⁰⁰ U.S. First Written Submission, *US – Steel and Aluminum Products (Norway)*, para. 77.

¹⁰¹ UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT, FINAL ACT AND RELATED DOCUMENTS (24 March 1948), https://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

Unfortunately for the ITO, the U.S. Congress refused to ratify the ITO Charter, despite the U.S. Administration having signed it.¹⁰² After repeated failed attempts and mounting pressure from the business community, President Truman withdrew his efforts to ratify the ITO Charter and, absent its main architect, the ITO was never established.¹⁰³

However, Article XXI had already found a home elsewhere. Operating on a parallel track to the ITO negotiations were discussions to establish the GATT. The GATT negotiators expressly adopted the language of the ITO security exception, with the wording of what was to become Article XXI of the GATT 1947, which was nearly identical to the draft Article 94 presented at the Geneva Round on July 24, 1947.¹⁰⁴

The resulting agreement and tariff reductions were finalized on October 30, 1947 and came into force for most countries on January 1, 1948.¹⁰⁵ The final GATT 1947 security exception has not been amended since.

D. *The Uruguay Round*

None of the subsequent negotiations between the Havana and Uruguay Rounds discussed changes to Article XXI, or whether it was self-judging, in any meaningful depth. During the Uruguay Round, while there was limited discussion of the reviewability of Article XXI, the drafters ultimately decided not to amend its text.

Specifically, some delegations expressed dissatisfaction with the breadth of Article XXI. Argentina, for example, expressed concern that “there is no restriction on the unilateral interpretation of the contracting party invoking [Article XXI], which creates a legal gap that will have to be studied and resolved during the current round of Negotiations”.¹⁰⁶ Nicaragua brought forward a proposal that would have limited Member discretion in invoking the security exception, but it was rejected. The United States has asserted that the rejection of Argentina’s and Nicaragua’s proposals during the Uruguay Round support its view of a consensus that Article XXI was self-judging. However, the very existence of those proposals, which expressly rejected Members’ rights to unilaterally invoke Article XXI, suggests that the matter was very much still open for debate. Indeed, through these discussions, Members were attempting to achieve greater clarity on the limitations of Members’ discretion under Article XXI.

In sum, the totality of the negotiating history does not favor either the U.S. assertion that there was a general understanding that Article XXI was self-judging at its original adoption, or its assertion that such a consensus further solidified over time. As discussed above, the majority of the statements the United States has pointed to that expressly mention the self-judging nature of Article XXI were internal documents or statements made by U.S. officials themselves. This alone does not demonstrate consensus by the negotiating parties that Article XXI fell out of the

¹⁰² *Special Message to the Congress Transmitting the Charter for the International Trade Organization*, (Apr. 28, 1949), <https://www.trumanlibrary.gov/library/public-papers/88/special-message-congress-transmitting-charter-international-trade>.

¹⁰³ Richard Toye, *Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947-1948*, 25 INT’L HIST. REV. 282 (2003).

¹⁰⁴ Panel Report, *Russia – Traffic in Transit*, fn. 166.

¹⁰⁵ D. A. Irwin, *The GATT’s contribution to economic recovery in post-war Western Europe*, pp. 131-132, <https://www.federalreserve.gov/pubs/ifdp/1993/442/ifdp442.pdf>.

¹⁰⁶ Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988), at 1.

jurisdiction of panel review. Furthermore, the United States has relied heavily on its exchange with the Netherlands during the Geneva round as evidence of this general “understanding”, and in particular the lack of delegates’ opposition to the U.S. delegate’s statement.¹⁰⁷ Once again, as mentioned above, the United States is attempting to improperly equate the availability of a NVNI remedy with the issue of non-justiciability, when nothing in the text of the WTO agreements equates these two concepts or requires the use of NVNI remedies when an issue is deemed non-justiciable. Further, silence does not equate to acquiescence. The U.S. statements in that exchange only affirm that Members have the right to determine its own security interests, *not* that such determinations would by themselves fall within one of the enumerated conditions in Article XXI, let alone that such determinations would by definition fall outside of the enumerated conditions in Article XXI.

IV. State Practice and GATT/WTO Jurisprudence Regarding Article XXI Does Not Support the Conclusion that the Provision is Entirely Self-Judging

As described above, there is no clear evidence of any general “understanding” by the time of the GATT 1947’s passage, nor up to the Uruguay Round, that Article XXI(b) is wholly self-judging. While it is true that the United States appears to have been largely consistent in its position post-passage of the GATT 1947, that has not been the case for other Members. Accordingly, this section traces each major dispute that has invoked Article XXI(b) and/or questioned its enforceability, with a particular focus on how Members’ positions regarding the exception have differed or evolved through those disputes. Through this evaluation, the lack of the general “understanding” asserted by the United States becomes even more clear. Indeed, as far back as the mid-1980s, Members in GATT and WTO disputes began voicing direct opposition to the argument that Article XXI(b) was wholly non-justiciable.

A. The United States Export Measures Dispute (1949)

In 1949, Czechoslovakia challenged its exclusion from the Marshall Plan as a most-favoured nation (“MFN”) violation under Article I of the GATT 1947. Eastern European countries that were not a part of the Plan were subject to sweeping export controls on a number of goods that were not imposed on countries participating in the Plan. In defending the Marshall Plan, the United States claimed that the measure was necessary to protect its essential security interests under Article XXI. For its part, the head of the Czech delegation warned that such an expansive definition would mean that “practically everything may be a possible element of war,” which could “change the face of civilization” and stretch a country’s war power “until it covers the whole nation”.¹⁰⁸

In June 1949, the GATT Council met to discuss the dispute. In framing the decision before the Contracting Parties, the Chairman of the Council stated that Czechoslovakia’s desire to decide whether the U.S. measures conformed to GATT Article I “was not appropriately put.” To the Chairman, the United States had defended its actions under Article XXI, which “embodied

¹⁰⁷ See, e.g., U.S. Third Party Submission, *Saudi Arabia – IPRs*, para. 26; U.S. First Written Submission, *U.S. – Origin Marking (Hong Kong)*, paras. 89-90, 93-94; U.S. First Written Submission, *U.S. – Steel and Aluminum Products (Norway)*, paras. 65-66, 69-70.

¹⁰⁸ Statement by the Head of the Czechoslovak Delegation Mr. Zdenk Augenthaler to Item 14 of Agenda, Request of the Government of Czechoslovakia for a Decision Under Article XXIII as to Whether or Not the Government of the United States of America Has Failed to Carry Out Its Obligations Under the Agreement Through Its Administration of the Issue of Export Licenses, CP.3/33 (May 30, 1949) (quoting Willard L. Thorp for the United States), at 6, 12, <http://www.wto.org/gatt-docs/English/SULPDF/90320183.pdf>.

exceptions” to Article I. Instead, as the Chairman put it, the question should be whether the United States “had failed to carry out its obligations” under the GATT 1947.¹⁰⁹ With the exception of Czechoslovakia, seventeen of the twenty-one present Contracting Parties voted against referring the matter to a panel to decide whether the U.S. export controls violated its GATT obligations. Czechoslovakia voted for referral to a panel; India, Lebanon, and Syria abstained.¹¹⁰

Although the Contracting Parties determined not to refer the matter to a panel, the discussion and the vote itself operated to confirm a set of norms surrounding the invocation of the exception. These norms happened to align with the U.S. position here, but their mere existence and operation confirms that U.S. discretion to act was not absolute. This is confirmed by the UK delegate, who stated: “[S]ince the question clearly concerned Article XXI, the United States action would seem to be justified because every country must have the last resort on questions relating to its own security. On the other hand, the Contracting Parties should be cautious not to take any step which might have the effect of undermining the General Agreement”.¹¹¹

B. Portugal’s Accession to the GATT (1961)

The interpretation of Article XXI was not raised again until 1961, when the GATT Contracting Parties considered Portugal’s draft GATT protocol of accession. During that meeting, Ghana’s representative stated, “as all contracting parties were aware, the Government of Ghana maintained a ban on goods coming into Ghana from Portugal”.¹¹² The representative justified the import ban on the basis of Article XXI, citing the pressure an import ban may place on Portugal as an effective means to encourage resolution to the conflict in Angola, which was “a constant threat to the peace of the African continent”.¹¹³ He further asserted that “under this Article each contracting party was the sole judge of what was necessary in its essential security interests. There could therefore be no objection to Ghana regarding the boycott of goods as justified by its security interests”.¹¹⁴ The Chairman noted Ghana’s statement, and no other comments in reaction to Ghana’s statement were registered.¹¹⁵

C. United Arab Republic’s Accession to the GATT (1970)

During a February 25, 1970 meeting discussing the United Arab Republic’s accession to the GATT, some parties registered concerns over the Republic’s boycott of Israel. In response, the United Arab Republic’s representative noted that the boycott was part of a “major political

¹⁰⁹ GATT Council, Summary Record of the Twenty-Second Meeting, CP.3/SR.22 (June 8, 1949), at 9, http://www.wto.org/gatt_docs/English/SULPDF/90060100.pdf.

¹¹⁰ *Id.*

¹¹¹ GATT Council, Summary Record of the Twenty-Second Meeting, CP.3/SR.22 (June 8, 1949), at 7-8, http://www.wto.org/gatt_docs/English/SULPDF/90060100.pdf.

¹¹² Summary Record of the Twelfth Session, SR.19/12 (Dec. 21, 1961), at 196, <https://docs.wto.org/gattdocs/q/GG/SR/19-12.PDF>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

issue known as the Middle East problem. . . . In view of the political character of this issue, the United Arab Republic did not wish to discuss it within GATT”.¹¹⁶

The meeting notes state further that “[s]everal members of the Working Party”, without naming which ones, “supported the views expressed by the representative of the United Arab Republic that the boycott measures were of an exceptional and temporary character and that their background was political and not commercial”.¹¹⁷ The representative of Israel further agreed that “she would not reply to the political issues raised, since these were being discussed in the competent organs of the United Nations”.¹¹⁸

While Article XXI was not expressly mentioned in the meeting, the United States has asserted before WTO panels that the United Arab Republic’s argument that the boycott was a political, rather than commercial issue and was thus outside the purview of the GATT “indicate[d] further that the GATT contracting parties (now WTO members) viewed Article XXI as self-judging”.¹¹⁹ However, the involvement of the UN in reviewing the political aspects of the dispute is consistent with the ideas in early drafts of Article XXI, which subjected states’ actions to review by at least some international body, through which the norms in the text could be interpreted and applied.

D. *Sweden’s Global Import Quota System for Certain Footwear (1975)*

In November 1975, Sweden imposed an import quota system for certain footwear, stating that the measure had been taken in conformity with Article XXI because the “decrease in domestic production has become a critical threat to the emergency planning of Sweden’s economic defense as an integral part of the country’s security policy”.¹²⁰ At a GATT Council meeting on November 10, 1975 to discuss the new requirements, several parties registered their concern with Sweden’s invocation of Article XXI. The meeting notes from the Council discussion stated that:

Many representatives expressed their concern at the Swedish decision taken at a time of high unemployment in their own countries. They noted that no detailed economic justification for the measures had been given and pointed to the need at the present time for avoiding all restrictions on imports as far as possible. They expressed doubts as to the justification of these measures under the General Agreement. While they had noted that the measures would be of a temporary nature, they noted that no provision was made for a terminal date.¹²¹

Sweden notified the termination of the quotas in July 1977.¹²² The negative reaction to Sweden’s “action” by the GATT Council again demonstrate the operation of normative

¹¹⁶ Report by the Working Party on Accession of the United Arab Republic, L/3362 (Feb. 25, 1970), at para. 22

¹¹⁷ *Id.* at para. 23.

¹¹⁸ *Id.* at para. 24.

¹¹⁹ U.S. First Written Submission, *US – Aluminum and Steel Products (Norway)*, para. 109.

¹²⁰ Sweden – Import Restrictions on Certain Footwear, L/4250 (Nov. 17, 1975), at 3, <https://docs.wto.org/gattdocs/q/GG/L4399/4250.PDF>.

¹²¹ GATT Council, Minutes of Meeting on November 10, 1975, C/M/109 (Nov. 10, 1975), at 8-9, <https://docs.wto.org/gattdocs/q/GG/C/M109.PDF>.

¹²² Sweden – Import Restrictions on Certain Footwear, L/4250/Add.1 (Mar. 15, 1977) at 1, <https://docs.wto.org/gattdocs/q/GG/L4399/4250A1.PDF>.

influence exercised by Members in the GATT Council absent panel proceedings. It does not require a conclusion that the exception is non-justiciable.

E. The Falklands War Dispute (1982)

As part of its response to Argentina's invasion of the Falkland Islands in 1982, the UK, along with the European Community (EC), Canada, and Australia, imposed a trade embargo against Argentina. Argentina then challenged the embargo under the GATT 1947, and in response the UK invoked Article XXI. At two GATT Council meetings on May 7 and August 10, 1982, the parties made several statements regarding the applicability of Article XXI.

Argentina, Brazil, Cuba, Poland, Uruguay, Colombia, Dominican Republic, Ecuador, Spain, and Pakistan all expressly or impliedly registered an opposition to a self-judging interpretation of Article XXI. In each of their statements, the parties either expressly rejected a self-judging interpretation of Article XXI or stated that there had been no proper justification for the invocation of Article XXI. The latter argument could be understood to imply that, to those parties, a Party's mere invocation of the exception does not automatically justify its measures.

In particular, at the August 10 meeting, Argentina's representative sharply rejected the measures and stated:

In his opinion there were no trade restrictions which could be applied without their being notified, discussed and justified, and he believed that the contracting parties concerned had made a wrong interpretation of Article XXI.¹²³

The representative from Brazil, meanwhile, stated:

that each contracting party had the right to define its essential security interests, but he felt that some justification should in fact be given when it was apparent that no essential security interests were involved. He considered that the Council should reflect more deeply about the interpretation of Article XXI as a contribution to the preparations for the session at ministerial level, and he raised in this connection the question of whether other natural rights were reflected in other Articles of the General Agreement, and whether actions taken under Article XXI were outside the scope of Article XXIII.¹²⁴

During the meeting, the United States, EC, Canada, Australia, UK, New Zealand, Singapore, Hungary, and the Philippines all voiced support for a self-judging interpretation of Article XXI or stated outright that the GATT Council had no competency to adjudicate the matter. In particular, the United States delegate stated at the May 7 meeting:

[The] GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis. This was wise . . . since no country could participate in GATT if in doing so it gave up the possibility of using any measures, other than military, to protect its security interests. . . . [F]orcing the GATT . . . to play a role for which it was

¹²³ GATT Council, Minutes of Meeting, C/M/159 (Aug. 10, 1982), at 15, <https://docs.wto.org/gattdocs/q/GG/C/M159.PDF>

¹²⁴ GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 5, 12, <https://docs.wto.org/gattdocs/q/GG/C/M157.PDF>.

never intended, could seriously undermine its utility, benefit and promise for all contracting parties.¹²⁵

At the end of the discussion, the Chairman noted that “there were differing views as to whether the trade measures in question violated GATT obligations, as to whether the measures were based on inherent or natural rights and whether justification, notification and/or approval were necessary”.¹²⁶

While no dispute was brought, the GATT Council in November 1982 adopted a Decision recognizing that measures taken for security reasons “could constitute, in certain circumstances, an element of disruption and uncertainty for international trade”. The Decision additionally stated that the security exception “constitute[s] an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved” and that “[w]hen action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement”.¹²⁷ While the Decision did not expressly touch on the justiciability of the security exception under Article XXI, some have argued that this language suggests that the Parties could still resort to the GATT’s dispute resolution procedures “even if article XXI GATT is invoked”.¹²⁸

F. The U.S.-Nicaragua Embargo Dispute (1985)

When the United States imposed a trade embargo on Nicaragua to punish the Sandinista government’s support for communism, the United States defended the measure under Article XXI and argued that the Nicaraguan government’s policies undermined U.S. essential security interests. At a GATT Council meeting on June 28, 1985, several statements were made regarding whether Article XXI was self-judging. Compared to the discussion concerning the Falkland Islands dispute just three years prior, more parties voiced direct opposition to the self-judging interpretation of Article XXI.

In the face of that opposition, the United States conceded to the establishment of a GATT panel on the condition that review of Article XXI was left out of its terms of reference.¹²⁹ While noting that its scope did not include a review of the U.S. invocation of Article XXI, the GATT panel raised some “general” questions about the proper application of the security exception and noted that panels must have some jurisdiction over the question of its invocation.¹³⁰ It also observed that it was incumbent on “each contracting party, whenever it made use of its rights

¹²⁵ GATT Council, Minutes of Meeting Held in the Centre William Rappard on May 7, 1982, C/M/157(June 22, 1982), at 10-11, http://www.wto.org/gatt_docs/english/sulpdf190440042.pdf.

¹²⁶ GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 12, <https://docs.wto.org/gattdocs/q/GG/C/M157.PDF>.

¹²⁷ GATT Council, Decision Concerning Article XXI of the General Agreement, L/5426 (Dec. 2, 1982), http://www.wto.org/gatt_docs/English/SULPDF/91000212.pdf.

¹²⁸ Stephan Schill and Robyn Briese, “*If the State Considers*”: *Self-Judging Clauses in International Dispute Settlement*, 13 Max Planck UNYB 61, 101 (2009), https://www.mpil.de/files/pdf2/03_schillbriese.pdf.

¹²⁹ GATT Panel Report, *United States – Trade Measures Affecting Nicaragua*.

¹³⁰ *Id.* at para. 5.17.

under Article XXI, [to] carefully weigh[s] its security needs against the need to maintain stable trade relations”.¹³¹ The United States blocked the adoption of the panel report.¹³²

In reaction to the report, the United States delegate stated:

It was not for GATT to approve or disapprove the judgment made by the United States as to what was necessary to protect its national security interests; GATT was a trade organization, and had no competence to judge such matters. . . . GATT’s effectiveness in addressing trade issues would only be weakened if it became a forum for debating political and security issues.¹³³

The report was never adopted.

Regarding the criticism registered against the U.S. actions at the 28 June meeting, Cuba, Brazil, Chile, Argentina, Spain, Sweden, Switzerland, India, Peru, Poland, Hungary, Czechoslovakia, and China all expressly or impliedly voiced opposition to a self-judging interpretation of Article XXI. For example, while Sweden’s representative stated at the 28 June meeting that “it had to be up to each country to define its essential security interests under Article XXI,”¹³⁴ after the publication of the panel report on the dispute Sweden clarified that “panels should be able to examine all relevant GATT Articles, including Article XXI. . . . To restrict a panel’s examination of measures taken in the context of Article XXI was to risk an erosion of faith in GATT’s rules”.¹³⁵

Meanwhile, the United States, Australia, Canada, EC, Iceland, Portugal, Finland, Norway, Egypt, and Japan voiced support for a self-judging interpretation of Article XXI or stated outright that the GATT Council had no competency to adjudicate the matter. However, many of those countries also threw into doubt the wisdom of the U.S. measures even as they agreed with its interpretation of Article XXI.¹³⁶

G. The EC-Yugoslavia Dispute (1991)

In November 1991, the EC imposed trade measures against Yugoslavia. In justifying its measures, the EC stated, “These measures are taken by the European Community upon consideration of its essential security interests and based on GATT Article XXI”.¹³⁷ Further measures were imposed on December 2, 1991, and other economic sanctions or withdrawal of

¹³¹ Panel Report, *United States-Trade Measures Affecting Nicaragua*, para. 5.16.

¹³² GATT Council, Minutes of Meeting Held in the Centre William Rappard on Oct. 10, 1985, C/M/192 (Oct. 24, 1985), at 11, <http://www.wto.org/gatt-docs/English/SULPDF/91170093.pdf>

¹³³ GATT Council, Minutes of Meeting Held in the Centre William Rappard on May 29, 1985, C/M/188 (June 28, 1985), at 5, http://www.wto.org/gatt_docs/English/SULPDF/91150029.pdf.

¹³⁴ GATT Council, Minutes of Meeting of May 29, 1985, C/M/188 (June 28, 1985), at 10, <https://docs.wto.org/gattdocs/q/GG/C/M188.PDF>.

¹³⁵ GATT Council, Minutes of Meeting of November 5-6, 1986, C/M/204 (Nov. 19, 1986), at 12, <https://docs.wto.org/gattdocs/q/GG/C/M204.PDF>.

¹³⁶ GATT Council, Minutes of Meeting of May 29, 1985, C/M/188 (June 28, 1985), <https://docs.wto.org/gattdocs/q/GG/C/M188.PDF>.

¹³⁷ Communication from the European Communities, Trade Measures Taken By the European Community Against the Socialist Federal Republic of Yugoslavia, L/6948 (Dec. 2, 1991), at

preferential benefits were taken by Australia, Austria, Canada, Finland, Japan, New Zealand, Norway, Sweden, Switzerland, and the United States.

In response, Yugoslavia stated in a communication dated February 6, 1992 that “[t]he justification of the measures in question cannot be found in Article XXI. The situation in Yugoslavia is a specific one and does not correspond to the notion and meaning of Article XXI(b) and (c).”¹³⁸ Yugoslavia then requested the establishment of a GATT panel to determine whether the EC had properly invoked Article XXI. At a meeting on April 10, 1992, the GATT Council decided to grant the request to establish a panel. While many countries made statements supporting Yugoslavia’s right to establish a panel, they overwhelmingly urged the resolution of the dispute through the ongoing political process. None commented substantively on the justiciability of Article XXI.¹³⁹ The representative of the United States for example, stated, “[a]ny contracting party had the right to request a panel. However, it was clear that the problems that had given rise to the Community’s measures would not be capable of resolution by the Council”.¹⁴⁰ The representative from Canada similarly stated, “like others [sic], Canada believed that under the April 1989 rules Yugoslavia had a right to the establishment of a panel at the present meeting if it so wished. However, some disputes did not readily lend themselves to a resolution through the panel process”.¹⁴¹

While the panel was established, its work was suspended with the dissolution of Yugoslavia in 1992 and a report was never circulated. However, Canada’s position here is telling in that it agreed that panel review was possible (even if not wise).

H. *The U.S.-Cuba Sanctions Dispute (1996)*

In 1996, the United States imposed sweeping sanctions against both Cuba and its trading partners after Cuba shot down two U.S. civilian planes. Frustrated by the disruption to its trade with Cuba, the EC brought a complaint in the WTO, signalling a major shift in its position since the Falklands dispute against the self-judging nature of the exception. In response, the United States delegate stated at a meeting of the Dispute Settlement Body (DSB) on November 26, 1996 that “the United States would invite the [EC] to reflect on the fact that certain measures . . . had been expressly justified by the United States under the GATT 1947 as measures taken in pursuit of [its] essential security interests.”¹⁴² It further reiterated its position that, as under the GATT regime, the WTO was not competent to adjudicate questions of “foreign and security policy”.¹⁴³ As with its dispute with Nicaragua, dissent against the U.S. position grew louder. However, most statements were critical of the measure without addressing the issue of whether Article XXI is justiciable. At the November 1996 DSB meeting, several Members registered strong complaints about the U.S. measure, including

¹³⁸ EEC – Trade Measures Taken for Non-Economic Reasons, Recourse to Article XXIII:2 by Yugoslavia, DS27/2 (Feb. 6, 1992), at 1-2, <https://docs.wto.org/gattdocs/q/GG/DS/27-2.PDF>.

¹³⁹ GATT Council, Minutes of Meeting of April 10, 1992, C/M/255 (Apr. 10, 1992), at 14-18, <https://docs.wto.org/gattdocs/q/GG/C/M255.PDF>.

¹⁴⁰ *Id.* at 15, <https://docs.wto.org/gattdocs/q/GG/C/M255.PDF>.

¹⁴¹ GATT Council, Minutes of Meeting of April 10, 1992, C/M/255 (Apr. 10, 1992), at 15, <https://docs.wto.org/gattdocs/q/GG/C/M255.PDF>.

¹⁴² Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on October 16, 1996, WT/DSB/M/24 (Nov. 26, 1996), at 7, <http://www.worldtradelaw.net/dsbminutes/m26.pdf>.

¹⁴³ Andrew D. Mitchell, *Sanctions and the World Trade Organization*, in RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW (Larissa van den Herik ed.) 298 (2017).

Australia, the Rio Group (which included Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay, and Venezuela), Canada, India, and Switzerland.

Although a panel was established (which the United States threatened to boycott), its work was suspended after the United States and EC reached an agreement.¹⁴⁴

In sum, as illustrated in this section, ever since the Czechoslovakia dispute in 1961, at least some Members have continuously believed that questions over Article XXI's application should be referred to a GATT panel for review. Even among those who did not support panel proceedings in these cases directly participated in a process through which they conveyed norms about the scope of the exception. By the U.S.-EU Nicaragua dispute in 1985, Members were expressly rejecting a self-judging interpretation of Article XXI and asserting the justiciability of its invocation, in opposition to the U.S. position. In fact, since nearly the beginning of the GATT 1947 regime, at least some members have expressed their belief that questions of Article XXI's invocation should be subject to panel review.

I. *Russia – Traffic in Transit (DS512)*

In keeping with this trend by Members away from a wholly self-judging interpretation of Article XXI, recent adjudication by WTO panels have uniformly rejected the U.S. argument that Article XXI is non-justiciable. Since 2019, several disputes have now directly addressed the question of Article XXI's justiciability, and in each one the panel stated that it is within its jurisdiction to review whether Members' invocation of Article XXI properly falls within one of subparagraphs (i)-(iii).¹⁴⁵

Russia – Traffic in Transit presented the first opportunity for a WTO panel to directly evaluate the question of Article XXI's justiciability. On August 7, 2014, amid deteriorating relations between Russia and Ukraine, Russia imposed restrictions in connection with the transit of goods from Europe subject to an import ban. Specifically, Russia prohibited the transit of these imported goods through Belarus and only permitted their transit across Russia through designated checkpoints.¹⁴⁶ Ukraine challenged the transit measures under, *inter alia*, Articles V:2-V:5 and Articles X:1-X:3 of the GATT 1994, as well as paragraphs 2, 1426, and 1427 of

¹⁴⁴ *Id.*

¹⁴⁵ In a panel report circulated in August 2023 in the dispute *China – Additional Duties (US)* (DS558), the panel found that the same Section 232 tariffs on aluminum and steel at issue in the *US – Steel and Aluminum Products* disputes had “national security objectives” and “were sought, taken, or maintained pursuant to Article XXI of the GATT 1994”. Panel Report, *China – Additional Duties (US)*, para. 7.116. Upon the release of the panel report, the Office of the U.S. Trade Representative (“USTR”) applauded the report, stating that the panel “recogniz[ed] that the U.S. Section 232 actions on steel and aluminum are security measures”. See *Statement from USTR Spokesperson Sam Michel on Today's WTO Panel Ruling*, USTR (Aug. 16, 2023), [https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/august/statement-ustr-spokesperson-sam-michel-todays-wto-panel-ruling#:~:text=The%20United%20States%20is%20pleased,with%20sham%20%E2%80%9Csafeguard%E2%80%9D%20tariffs](https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/august/statement-ustr-spokesperson-sam-michel-todays-wto-panel-ruling#:~:text=The%20United%20States%20is%20pleased,with%20sham%20%E2%80%9Csafeguard%E2%80%9D%20tariffs.). However, this interpretation is incorrect. The panel had merely stated that the Section 232 tariffs were designed with national security objectives as the United States had defined them, *not* as what would be considered permissible under Article XXI. Indeed, the panel later concurred with the prior panel's conclusion in *US – Steel and Aluminum Products (China)*, which found that the U.S. measures were not “taken in time of war or other emergency in international relations” and were thus “not justified under Article XXI(b)(iii) of the GATT 1994”. See Panel Report, *US – Steel and Aluminum Products (China)*, para. 7.149.

¹⁴⁶ Panel Report, *Russia – Traffic in Transit*, para. 7.10.

Russia's Working Party Report.¹⁴⁷ Russia in turn invoked Article XXI(b)(iii) and requested that the panel “for lack of jurisdiction, [] limit its findings to recognizing that Russia has invoked a provision of Article XXI of the GATT 1994, without engaging further to evaluate the merits of Ukraine's claims”.¹⁴⁸

The United States joined the dispute as a third party. In its submission in support of Russia's argument, the United States claimed that the text, context, object and purpose, negotiating history, and state practice all supported a wholly self-judging interpretation of Article XXI. The panel disagreed and concluded that “Russia's invocation of Article XXI(b)(iii) is within the Panel's terms of reference for the purposes of the DSU”. In its textual interpretation of the provision, the panel found that “the adjectival clause ‘which it considers’ in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in subparagraph (iii). Rather, for action to fall within the scope of Article XXI(b), it must *objectively* be found to meet the requirements in one of the enumerated subparagraphs of that provision.”¹⁴⁹ The panel further found that its textual interpretation was supported by the negotiating history, concluding that the negotiations struck a “balance” in the security exception, by which “Members would have ‘some latitude’ to determine what their essential security interests are, and the necessity of action to protect those interests, while potential abuse of the exceptions would be curtailed by limiting the circumstances in which the exceptions could be invoked to those specified in the subparagraphs of Article XXI(b).” In light of this balance and the limitations imposed, “the security exceptions would remain subject to” dispute settlement.¹⁵⁰

J. *Saudi Arabia – IPRs (DS567)*

The dispute concerned Saudi Arabia's decision, along with other Gulf allies, to sever all diplomatic, economic, and political relations with Qatar in June 2017. Along with a variety of other measures, Saudi Arabia blocked access within its territory to beIN, a Qatari sports broadcaster. Days later, the Saudi Arabian government issued a Circular stating that beIN was no longer licensed to distribute media content and could not operate in Saudi Arabia. Qatar challenged the measure under the TRIPS Agreement. Saudi Arabia in turn requested that the Panel find it had invoked the security exception under Article 73.

The United States joined the dispute as a third party and argued that, given that its text mirrors that of Article XXI(b) of the GATT 1994, Article 73 of the TRIPS Agreement too was self-judging. The U.S. arguments did not differ substantively from those it offered in *Russia – Traffic in Transit*.

Citing the panel report in *Russia – Traffic in Transit*, the panel disagreed with the United States and found that it had jurisdiction to assess whether Article 73 had been properly invoked.¹⁵¹ “Guided” by the previous panel, the panel found that it may assess under invocations of Article XXI(b)(iii): (i) whether a “war or other emergency in international relations” existed; (ii) whether the invoking Member's actions were “taken in time of” that war or other emergency; (iii) whether “the invoking Member has articulated its relevant ‘essential security interests’ sufficiently to enable an assessment of whether there is any link between those actions and the

¹⁴⁷ *Id.* at para. 3.1.

¹⁴⁸ *Id.* at para. 3.2.

¹⁴⁹ *Id.* at para. 7.82. Emphasis added.

¹⁵⁰ *Id.* at para. 7.98.

¹⁵¹ Panel Report, *Saudi Arabia – IPRs*, para. 7.241.

protection of its essential security interests”; and (iv) “whether the relevant actions are so remote from, or unrelated to, the ‘emergency in international relations’ as to make it implausible that the invoking Member considers those actions to be necessary for the protection of its essential security interests arising out of the emergency.”¹⁵² In doing so, the panel stretched its jurisdiction beyond an evaluation of whether the Member had properly invoked one of the subparagraphs. Under the panel’s interpretation here, panels also had jurisdiction to evaluate whether Members had “sufficiently” articulated their “essential security interests” in the chapeau of Article XXI(b), and whether its actions were plausibly related to that war or emergency.

K. *US – Steel and Aluminum Products (DS544, 552, 556, 564)*

The dispute concerned U.S. additional duties on steel and aluminum imports. On March 19, 2018, the United States Administration acting under the authority in Section 232 of the Trade Expansion Act of 1962 imposed tariffs on certain steel and aluminum imports, citing the results of an investigation showing that the displacement of domestic steel by imported goods was “weakening our internal economy” and thus those imports “threaten to impair the national security”.¹⁵³ In their complaints, China, Norway, Switzerland, and Türkiye all challenged the measure under, *inter alia*, the Agreement on Safeguards, and Articles I:1, II:1(a) and (b), X:3(a), XIX:1(a), and XIX:2 of the GATT 1994.¹⁵⁴ Norway, Switzerland, and Türkiye further brought a challenge under XI:1 of the GATT 1994, and Switzerland also brought a challenge under XVI:4 of the WTO Agreement.¹⁵⁵ The United States in turn requested that the panels find that it had invoked its essential security interests under Article XXI(b).¹⁵⁶

In its submission to the panels, the United States again made several arguments based on the text, context, object and purpose, negotiating history, and state practice regarding Article XXI, none of which had meaningfully changed from its prior arguments. However, it did offer a response to the panel’s finding in *Russia – Traffic in Transit* as it relates to its examination of the negotiating history, arguing that the panel erred in its interpretation. The United States asserted that when viewed “as a whole and in context . . . [the documents] further confirm that Article XXI(b)” was understood by the majority of the U.S. delegation to be “self-judging”.¹⁵⁷

¹⁵² *Id.* at para. 7.242.

¹⁵³ THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY: AN INVESTIGATION CONCLUDED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED at 4-5 (Jan. 11, 2018), <https://www.bis.doc.gov/index.php/documents/steel/2224-the-effect-of-imports-of-steel-on-the-national-security-with-redactions-20180111/file>.

¹⁵⁴ Panel Report, *US – Steel and Aluminum Products (Türkiye)*, paras. 3.1-3.2; Panel Report, *US – Steel and Aluminum Products (Switzerland)*, paras. 3.1-3.2; Panel Report, *US – Steel and Aluminum Products (Norway)*, para. 3.1; Panel Report, *US – Steel and Aluminum Products (China)*, para. 3.1.

¹⁵⁵ *Id.*

¹⁵⁶ Panel Report, *US – Steel and Aluminum Products (Türkiye)*, para. 3.3; Panel Report, *US – Steel and Aluminum Products (Switzerland)*, para. 3.3; Panel Report, *US – Steel and Aluminum Products (Norway)*, para. 3.2; Panel Report, *US – Steel and Aluminum Products (China)*, para. 3.2.

¹⁵⁷ U.S. First Written Submission, *US – Steel and Aluminum Products (Norway)*, para. 88; U.S. First Written Submission, *US – Steel and Aluminum Products (China)*, para. 82; U.S. First Written Submission, *US – Steel and Aluminum Products (Switzerland)*, para. 82; U.S. First Written Submission, *US – Steel and Aluminum Products (Türkiye)*, para. 82.

In each case, the panel disagreed with the U.S. argument that Article XXI is self-judging¹⁵⁸ and found that, once again, the text, context, object and purpose, negotiating history, and state practice did not, as the United States suggested, conclusively demonstrate that the negotiating parties considered the security exception to be non-justiciable. The panel in the Norway dispute found that, in all the materials and arguments offered by the United States, it “[did] not find any clear indication in these materials of the ‘self-judging nature’ or ‘non-justiciability’ of Article XXI(b) of the GATT 1994.” Rather, the panel found the “materials to support the general conclusion that the terms of Article XXI(b) of the GATT 1994 establish a right to take action for the protection of essential security interests in the conditions and circumstances described in the three subparagraphs.”¹⁵⁹ For that reason, the panel found that it had the jurisdiction to evaluate whether the U.S. tariffs “were taken under the circumstances described in the subparagraphs of Article XXI(b)(iii) of the GATT 1994”, following the approach of the panel in *Russia – Traffic in Transit*.¹⁶⁰

L. *US – Origin Marking (Hong Kong, China) (DS597)*

In August 2020, U.S. Customs and Border Protection Agency published a requirement that imported goods produced in Hong Kong must be marked to indicate “China” as their origin.¹⁶¹ Hong Kong challenged the measure under, *inter alia*, Articles 2(c) and 2(d) of the Agreement on Rules of Origin (ARO), Article 2.1 of the Agreement on Technical Barriers to Trade (“TBT Agreement”), and Articles I:1 and IX:1 of the GATT 1994.¹⁶² The United States in turn requested that “the Panel find that the United States has invoked its essential security interests under Article XXI(b) of the GATT 1994 and so report to the DSB”.¹⁶³ The United States justified its invocation of Article XXI(b) in this instance by citing the deteriorating relationship between it and China, and China’s increasing control over Hong Kong. As with the two disputes before it, none of the U.S. arguments significantly diverged from what it had previously asserted in *Russia – Traffic in Transit*.

And as with all panels before it, the panel disagreed with the U.S. argument that Article XXI is self-judging, finding that “Article XXI(b) is not entirely self-judging insofar as the unilateral determination granted to the invoking Member through the phrase ‘which it considers’ in the chapeau of that provision does not extend to the subparagraphs. Instead, the subparagraphs are subject to review by a panel”.¹⁶⁴

V. **Implications of the U.S. Position**

As the above analysis establishes, the United States’ position that Article XXI of the GATT 1994 is and has always been self-judging, and thus not subject to WTO review, is untenable

¹⁵⁸ Panel Report, *US – Steel and Aluminum Products (Türkiye)*, para. 7.143; Panel Report, *US – Steel and Aluminum Products (Switzerland)*, para. 7.146; Panel Report, *US – Steel and Aluminum Products (Norway)*, para. 7.116; Panel Report, *US – Steel and Aluminum Products (China)*, para. 7.128.

¹⁵⁹ Panel Report, *US – Steel and Aluminum Products (Norway)*, para. 7.115.

¹⁶⁰ *Id.* at para. 7.124.

¹⁶¹ Department of Homeland Security, U.S. Customs and Border Protection [CBP Dec. 20-15], Country of Origin Marking of Products of Hong Kong, 85 Fed. Reg. 48551 (11 August 2020), (11 August Federal Register Notice).

¹⁶² Panel Report, *US – Origin Marking (Hong Kong, China)*, para. 3.1.

¹⁶³ *Id.* at para. 3.2.

¹⁶⁴ U.S. First Written Submission, *US – Origin Marking (Hong Kong, China)*, para. 7.185.

from both a legal and factual point of view. It is untenable legally because the text of Article XXI simply does not support a reading that a mere unilateral invocation of “essential security interests” would necessitate permitting the invoking Member to continue its otherwise WTO violative action, and there continues to be no GATT or WTO panel report supporting such an interpretation. It is untenable factually as a careful review of the negotiating history of Article XXI and related state practice do not support the view that all Members at the time Article XXI was negotiated (or at any time before or after those negotiations) agreed by consensus that this provision is self-judging and thus outside the scope of review of the WTO, as continuously claimed by the United States and some U.S. scholars and practitioners.

Despite the lack of legal and historical support for its position, the United States has continued to push for a self-judging interpretation of Article XXI. Furthermore, the United States has reportedly asserted that it will only contemplate engaging in formal negotiations on WTO reform if all other members adopt — through an authoritative interpretation under Article IX of the 1994 Marrakesh Agreement — that Article XXI is self-judging, regardless of what the text of Article XXI says.¹⁶⁵ At the December 2022 World Economic Forum, U.S. trade representative Ambassador Katherine Tai went as far as to state that the WTO was “getting itself on very, very thin ice” after the latest panel once again rejected the argument that Article XXI was nonjusticiable.¹⁶⁶

While the United States’ willingness to reengage fellow WTO Members to try to “reform” the dispute settlement mechanism is encouraging, the United States cannot hinge the outcome of these discussions on its self-judging position in contravention to the facts and the law. This is unhelpful and will not assist the WTO in reaching a solution to the current existential crisis and its faltering dispute settlement mechanism, the “crown jewel” of the organization.

A. *Pressure to Support a Self-Judging Provision*

First, it is concerning that the United States appear to be seeking support from other Members for its position not by reasoning or logic, but through political and diplomatic pressure. The United States has intimated that the other WTO Members must agree with its position that Article XXI is self-judging as a requirement to reach a resolution in the dispute settlement reform.¹⁶⁷

Such pressure is unhelpful and will not bring about a win-win resolution. As described above, many Members in the past (including the United States itself) and presently have vocalized the concern with a self-judging exception, which could lead to overuse, misuse, and, ultimately, the dispute settlement system’s obsolescence. There must be a way to determine what is real “essential security” and what is merely an excuse to avoid one’s WTO obligations. Denying the WTO system an ability to enforce its rules by opening such a loophole would lead to an outcome that even the United States would not seem to want. Under the United States’ interpretation, for example, export bans by China for critical rare earths and government-led

¹⁶⁵ Statements by the United States at the Meeting of the WTO Dispute Settlement Body in January 27, 2023, https://www.worldtradelaw.net/document.php?id=dsbstatements/Jan27.23.DSB_.Stmt_.as_.deliv_.fin_-1.pdf&mode=download#page=1.

¹⁶⁶ Katherine Tai: The WTO is ‘on thin ice’ in challenging national security–based trade decisions, COUNCIL FOREIGN RELATIONS (Jan. 24, 2023), <https://www.youtube.com/watch?v=DpCp86axySE>.

¹⁶⁷ *Statement from USTR Spokesperson Sam Michel on Today’s WTO Panel Ruling*, USTR (Aug. 16, 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/august/statement-ustr-spokesperson-sam-michel-todays-wto-panel-ruling>.

industrial policies through which the United States claims China has achieved global dominance¹⁶⁸ would be fully sanctioned under multilateral trade rules so long as China asserted that considers such measures necessary for the protection of its essential security interests. The United States would also be barred from seeking recourse for other measures that it has criticized as being discriminatory, including digital services taxes,¹⁶⁹ and Mexico's ban on genetically modified corn, which the United States has challenged under the U.S.-Mexico-Canada Agreement.¹⁷⁰

Indeed, self-judging provisions in the WTO have long been troubling, to the point that even the United States itself has fought against them. Take for instance the WTO practice that allows Members to self-judge their development status. The United States has long warned against the harms of allowing countries to self-designate and receive the advantages of “developing country” status at the WTO, calling on USTR to “use all available means to secure changes at the WTO that would prevent self-declared developing countries from availing themselves” of flexibilities in WTO rules and negotiations that are not justified by appropriate economic and other indicators.”¹⁷¹ Thus, the United States was concerned about countries, through a self-declared status, receiving advantages that such status conferred when the factual circumstances did not warrant such treatment. Making the essential security exception self-judging will result in the same problem.

B. *Interpretation through Article IX:2 of the Marrakesh Agreement*

The United States has floated the possibility that the WTO Members could agree to an authoritative interpretation of GATT Article XXI that is different from what prior WTO and GATT panels have found. It has proposed that, through the use of Article IX:2 of the Marrakesh Agreement, three-fourths of the Members can vote to accept the U.S. view that the “essential security” exception is self-judging. Article IX:2 states:

The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

¹⁶⁸ Evelyn Cheng, *China's rare earth dominance makes U.S. supply chains vulnerable, trade representative says*, CNBC (Aug. 26, 2023), <https://www.cnbc.com/2023/08/27/ustr-china-rare-earths-dominance-makes-us-supply-chains-vulnerable.html>.

¹⁶⁹ David Lawder, *USTR says Austria, Spain, UK digital taxes discriminate against U.S. firms*, REUTERS (Jan. 14, 2021), <https://www.reuters.com/article/us-usa-trade-digital-tax/ustr-says-austria-spain-uk-digital-taxes-discriminate-against-u-s-firms-idUSKBN29J2AZ>.

¹⁷⁰ *United States Requests USMCA Dispute Settlement Consultations on Mexico's Agricultural Biotechnology Measures*, USTR (Jun. 2, 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/june/united-states-requests-usmca-dispute-settlement-consultations-mexicos-agricultural-biotechnology>.

¹⁷¹ *Memorandum on Reforming Developing-Country Status in the World Trade Organization*, THE WHITE HOUSE (Jul. 26, 2019), <https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-reforming-developing-country-status-world-trade-organization/>.

Article X, in turn provides that WTO Members “may initiate a proposal to amend the provisions of this Agreement or the [WTO agreements] by submitting such proposal to the Ministerial Conference.”¹⁷² Amendments to Article IX further requires acceptance by *all* WTO Members.¹⁷³ Articles IX and X of the WTO Agreement thus clearly distinguish between *authoritative interpretations* of existing text and an *amendment* to such text, and further warn against conflating the two.

Thus, the trouble with the United States’ proposal to rely on Article IX is that this provision would still require the authoritative interpretation to abide by the rule of treaty interpretation in public international law as set forth in Articles 31 and 32 of the Vienna Convention on the Laws of Treaty (VCLT). However, as illustrated in Sections III and IV above, neither the ordinary meaning nor the preparatory work (or state practice) support the interpretation of the treaty text espoused by the United States, and thus, would “undermine the amendment provisions in Article X” as prohibited by the WTO Agreement.

To be sure, the United States has the right to “initiate a proposal to amend” Article XXI such that the text would support a self-judging interpretation. And in fact, if the United States seeks to adopt an interpretation that Article XXI is self-judging and non-justiciable, this might be the only option available to the United States in light of the text and negotiating history of the provision. This would require the consent of *all* WTO Members (as opposed to three-fourths of the membership) – which the United States should obtain through negotiations and genuine engagement, rather than political and diplomatic pressure.

C. *Compensation for Invoking a Self-Judging Article XXI*

Finally, it is worth mentioning that some have suggested (and the United States itself has as well in the past during the GATT negotiations) that a possible way forward, so as to appease those concerned about the misuse or overuse of a self-judging “essential security” exception, is to permit any Member to continue with its self-proclaimed “essential security” action, but then that Member must be subject to compensation negotiations, where the aggrieved Member could take retaliatory trade measures where trade compensation could not be agreed.¹⁷⁴

We do not think this is a viable solution. This idea has been discussed during the negotiations of Article XXI, and the WTO agreements currently utilize such a compensation mechanism in three places: (1) In dispute settlement when the losing party cannot bring its measure into compliance, and opt instead to pay compensation (DSU Article 22); (2) when there is a finding of non-violation of nullification or impairment (NVNI), and while the respondent need not withdraw its NVNI measure, it would need to pay a “mutually satisfactory adjustment” (see DSU Article 26); and (3) when a Member needs to unilaterally modify any of its market access schedules (*see e.g.*, GATT Article XXVIII). The outcomes provided in each of these instances provide a less-than-ideal secondary resolution when conformity with the agreed-upon WTO rules is not available or not applicable.

In terms of Article 22 of the DSU, compensation is offered as an alternative approach “[i]f the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance ... or otherwise comply with the recommendations and rulings” of

¹⁷² WTO Agreement Article X:1.

¹⁷³ WTO Agreement Article X:2 (emphasis added).

¹⁷⁴ Maruyama and Wolff, *supra* note 5 at 19-20.

the DSB. Thus, Article 22 recognizes that compensation is not an equivalent resolution to bringing a WTO-inconsistent measure into compliance.

The compensation option presented under Article 26 fares no better—Article 26 relates to NVNI claims described in Article XXIII:1(b) of the GATT 1994, which provides for “the application by another contracting party of any measure, whether or not it conflicts with the provisions of [the GATT].” Article XXIII:1(b) is distinct from Article XXIII:1(a), which covers “the failure of another contracting party to carry out its obligations under [the GATT],” and therefore, must be read to cover situations where there is nullification or impairment of benefits *despite there being no violation of the GATT 1994*. The compensation provision under Article 26 is thus not appropriate for a claim under Article XXI, which *does* involve a violation of a Member’s obligations under the GATT, especially if the DSB is not given opportunity to adjudicate over whether the measure is properly justified under the claimed exception.

Finally, the compensation provision under Article XXVIII of the GATT 1994 also does not provide a basis to apply such mechanism to Article XXI claims. Article XXVIII provides a narrow basis for a WTO Member to modify its existing obligations under the GATT 1994, and for other Members aggrieved by such modifications to seek compensation with the aim of “maintain[ing] a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to [negotiations to modify or withdraw a concession].”¹⁷⁵ It does not allow a Member to bypass or otherwise avoid scrutiny for actions that might be inconsistent with its obligations.

In short, such solutions have not been ideal when they were utilized in the WTO, and there is nothing that suggests that they would work in an Article XXI self-judging situation as well. At its core, the primary objective of dispute settlement is to “secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.”¹⁷⁶ In fact, “[t]he provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement.”¹⁷⁷ A mechanism in which the default resolution to an Article XXI claim is compensation, regardless of whether a measure is properly justified under the exception, contravenes the very objective of the DSU and cannot be a permanent and viable approach to all claims under Article XXI. As a practical matter, it is also more likely that Members invoking Article XXI will claim little to no adjustment needed, which will only lead to more disputes about the proper level of the adjustment. This would end up leading only to more disputes with a less ideal outcome available to Members, taxing the system more. Furthermore, if (and when) a Member refuses to pay, this would further undermine the viability of the WTO. In conclusion, such a solution would not deter misuse or overuse of the “essential security” exception but would just usher in a slower death of the WTO.

VI. Conclusion

While U.S. concerns about the treatment of national security issues by the WTO is valid and should be discussed, it may be unwise to pressure Members to adopt an erroneous interpretation as a precondition to accepting any resolution to the WTO dispute settlement problem. As

¹⁷⁵ GATT Article XXVIII:2.

¹⁷⁶ DSU Article 3.7.

¹⁷⁷ *Id.*

demonstrated in this article, the U.S. interpretation of GATT Article XXI as wholly self-judging is unsupported by the text, context, object and purpose, and negotiating history of Article XXI, as well as state practice. Following such an interpretation would give countries license to evade their WTO obligations under the guise of national security, a clearly undesirable outcome for all Members. Instead, WTO Members should continue to engage constructively and inclusively to consider solutions that are either supported by existing text of GATT Article XXI, or that can lead to successful renegotiations of the existing text.

* * * * *