ARTICLES

THE 2022 U.S. STEEL/ALUMINUM TARIFF RULING: A LEGAL RECKONING FOR THE UNITED STATES AND THE WTO OVER THE NATIONAL SECURITY EXCEPTION IN INTERNATIONAL LAW

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On December 9, 2022, the World Trade Organization (WTO) issued landmark rulings against the United States in four cases brought by China, Switzerland, Norway, and Turkey involving the U.S. imposition and maintenance of restrictive trade measures on steel and aluminum imports dating back to 2018. The major effect of the rulings was to quash the idea that a WTO member had unfettered discretion to invoke the national security exception under Article XXI(b) of the General Agreement on Tariffs and Trade (GATT 1994) whenever it suits its interests. The recent decisions build upon important WTO precedents addressing the applicability of the national security exception under international trade rules by providing more clarity and scope to the language contained within Article XXI(b)(iii), how and when Article XXI(b)(iii) should be applied in a given scenario, and who ultimately has the authority to make these determinations—the Member State or a WTO dispute resolution panel. The WTO held that though a WTO member reserves the right to determine what is in its national security interests, a WTO Member's subjective assessment as to when to invoke the national security exception can be reviewed by an international judicial body through an objective review of the circumstances. The December 9 rulings underscore the important principle that

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the goal of trade liberalization will triumph over protectionism in instances where states seek to abuse trade rules under the guise of national security to score political points at home. The rulings also mark a critical turning point in the relationship between the United States and the WTO centered on the issue of national security that places the entire rules-based trading system at risk.

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"*It is called Buyers' Remorse – 'We made the rules, we know what they mean and they should not apply to us'* . . . ."

—An Anonymous U.S. Trade Official in Geneva[1]

INTRODUCTION

On December 9, 2022, a World Trade Organization (WTO) dispute settlement panel issued landmark decisions in four high-profile cases brought by China, Norway, Switzerland and Turkey against the United

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1. Priti Patnaik, *Why Has the US Launched an Offensive Against WTO's Dispute Settlement System?*, WIRE (Oct. 27, 2017), https://thewire.in/external-affairs/us-launched-offensive-wtos-dispute-settlement-system [https://perma.cc/V42K-ZDRH].

States declaring a Trump-era hike in tariffs on imports of steel and aluminum to violate WTO rules.[2] The panel ordered the United States to remove the tariff measures despite the U.S. finding such measures necessary for national security reasons pursuant to Article XXI(b)(iii) of the 1994 General Agreement on Tariffs and Trade (GATT 1994).[3] The Biden Administration rejected the decision as "flawed" and appealed to the WTO Appellate Body.[4] However, the U.S. decision to block the appontment of appellate judges for the past several years has rendered the WTO Appellate Body ineffective.[5] The WTO ruling is one of the most important decisions impacting the multilateral trade system in years as it marks a significant turning point in the relationship between the United States and the WTO. The ruling also demonstrates their disagreement over the question of whether national sovereignty trumps the rule of law in trade matters where the national security clause is invoked.

The issue of who is responsible for determining whether an import threatens national security is at the heart of the dispute. The United States' position is that national security is a sensitive area of national concern, and the WTO, therefore, should defer to a member state's judgment on the matter.[6] The complainant countries, however, argued that even though WTO members have the right to act on the need to

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2. Panel Report, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS544/R (Dec. 9. 2022) (China) [hereinafter WTO Steel Case]; Panel Report, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS552/R (Dec. 9. 2022) (Norway); Panel Report, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS556/R (Dec. 9. 2022) (Switzerland); Panel Report, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS564/R (Dec. 9. 2022) (Turkey). Since all panel reports share the same Article XXI holding, this Article will use the Chinese panel report throughout as representative of all decisions.

3. WTO Steel Case, *supra* note 2, ¶¶ 8.1(e), 8.3.

4. *Panels Established to Review EU Complaints Regarding Chinese Trade Measures*, WTO (Jan. 27, 2023), https://www.wto.org/english/news_e/news23_e/dsb_27jan23_e.htm [https://perma.cc/9HBU-YMP6]; Doug Palmer, *WTO Says Trump's Steel Tariffs Violated Global Trade Rules*, POLITICO (Dec. 9, 2022, 12:58 PM), https://www.politico.com/news/2022/12/09/wto-ruling-trump-tariffs-violate-rules-00073282 [https://perma.cc/8VL8-4A8J].

5. Emma Farge & Philip Blenkinsop, *Trump Metal Tariffs Ruled in Breach of Global Rules by WTO*, REUTERS (Dec. 9, 2022, 1:59 PM), https://www.reuters.com/world/wto-finds-us-metals-import-tariffs-imposed-by-trump-were-not-justified-2022-12-09 [https://perma.cc/B84G-BL7W].

6. Palmer, *supra* note 4, (discussing how the United States has a longstanding view that these decisions should be "self-judging").

protect national security, the members also must meet certain minimum requirements that pass muster with the WTO.[7] The WTO panel determined in *United States—Certain Measures on Steel and Aluminium Products* that it has the power to review such measures and adjudicate any dispute where the national security exception under WTO rules is invoked.[8]

This Article examines the implications of the WTO's decision in the recent U.S. steel/aluminum tariff case and the use of the national security exception to justify the Trump Administration imposing import levies on steel and aluminum imports in 2018. Part I discusses the origins of the national security exception under WTO rules and the outcomes of two recent WTO cases involving the use of this exception by Russia and Saudi Arabia to justify the imposition of restrictive trade measures against third parties. Part II analyzes the background to the steel and aluminum tariff issue in the United States leading up to the Trump-era steel/aluminum dispute by focusing on two prior WTO cases where the panels ruled that similar measures imposed by the Bush and Obama Administrations violated WTO rules. This Part also examines the legal and political fallout from the December 9 decision thus far and its implications for the United States, its relationship with the WTO, and the future of the multilateral trade system as a whole. Lastly, this Article concludes by arguing that the panel's recent decisions may change the calculus for states which have been willing to work within the rules-based system knowing that the national security exception is available when challenges or threats to security arise. Those states which fought for a system where both trade liberalization and national sovereignty could co-exist may feel that recent WTO decisions attempting to strike a balance on the national security question ended up striking at the heart of the WTO system—the dispute settlement system—instead. Consequently, this may cause some member states to withdraw from the system, seek to reform it, or simply choose not to comply with WTO rulings when it is convenient.

I. THE NATIONAL SECURITY EXCEPTION IN INTERNATIONAL TRADE: ORIGINS AND EARLY INTERPRETATIONS

A. *The Meaning and Intent Behind the National Security Exception*

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7. *See infra* Section II.B.
8. *See infra* Section II.B.

under GATT Rules

The national security exception is found in Article XXI of the original General Agreement on Tariffs and Trade (GATT 1947), which was signed by the twenty-three founding members and entered into force in 1947.[9] Article XXI states as follows:

> Nothing in this Agreement shall be construed
>
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
>
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) taken in time of war or other emergency in international relations; or
>
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[10]

Article XXI is referred to as the "nuclear option" and the "third rail" by lawyers in international trade circles.[11] This exception can be found in other WTO agreements that entered into force in 1995, including the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and in many regional trade agreements such as the United States-Mexico-Canada Agreement (USMCA) and the Dominican

9. The GATT 1994 is incorporated in Annex 1A of the WTO Agreement. It incorporates by reference the provisions of the GATT 1947, a legally distinct international trade agreement applied provisionally from 1948 to 1995.

10. General Agreement on Tariffs and Trade, art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

11. *See* Matthew Kahn, *Pretextual Protectionism? The Perils of Invoking the WTO National Security Exception*, LAWFARE (July 21, 2017, 2:51 PM), https://www.lawfareblog.com/pretextual-protectionism-perils-invoking-wto-national-security-exception [https://perma.cc/J7UT-8RLC] (explaining that use of the exception is thought to have serious and far-reaching consequences).

Republic-Central America-United States Free Trade Agreement (CAFTA-DR).[12]

The intent behind the national security exception in the original GATT was to strike a balance between the goals of liberalizing trade and allowing states the flexibility to protect their essential security interests when it was "necessary" to do so.[13] According to an American official during the 1947 GATT Preparatory Committee negotiations:

> It is really a question of a balance. . . . 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.[14]

Thus, the U.S. view in 1947 was that there is no absolute exception available under Article XXI(b), but there may be instances in which the use of the exception is justified to protect legitimate national security interests. In other words, the exception should not be invoked based upon specious national security arguments to circumvent trade commitments or rules. The Chairman of the Preparatory Committee stated that the "spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuses of this kind."[15]

Who then was in the best position to determine whether the exception should apply? If the exception was meant to be self-judging, what was to prevent a country from using the exception to justify any restrictive trade measures imposed against the other members of the

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12. General Agreement on Trade in Service art. XIV *bis*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS]; Agreement on Trade-Related Aspects of Intellectual Property Rights art. 73, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]; United States-Canada-Mexico Agreement art. 32.2, Nov. 30, 2018, 134 Stat. 11; Dominican Republic-Central America-United States Free Trade Agreement art. 21.2, Aug. 5, 2004, 119 Stat. 462.

13. *See* James Bacchus, *The Black Hole of National Security: Striking the Right Balance for the National Security Exception in International Trade*, CATO INST.: POL'Y ANALYSIS 3 (Nov. 9, 2022) (quoting GATT Article XXI).

14. U.N. Econ. & Soc. Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report: Thirty-Third Meeting of Commission A, at 21, U.N. Doc. E/PC/T/A/PV/33 (July 24, 1947) [hereinafter GATT 1947 Preparatory Conference].

15. WTO, ANALYTICAL INDEX OF THE GATT 600 (1994) [hereinafter GATT ANALYTICAL INDEX].

GATT at any time? If a panel of international judges was to make this determination, would such a review intrude upon the sovereignty and expertise of the state which is better situated to assess when a national security threat to its interests is at hand? An interpretation of Article XXI that would allow an international tribunal to review a GATT party's use of the exception would be seen as interfering with that party's sovereignty if the panel substituted its judgment for that of the party. Accordingly, the stage was set for an inevitable conflict between the principles of national sovereignty and trade liberalization in international relations.

As a result of this dilemma, the national security exception was rarely invoked under the GATT/WTO system between 1947 and 2018. GATT contracting parties and WTO members, for the most part, pursued negotiations and consultations when feasible to resolve disputes or, instead, stuck to economic arguments and rules rather than invoke the national security exception in cases brought before the dispute settlement body.

Nevertheless, there were a few instances in which parties invoked the national security exception to justify trade embargoes or sanctions against a GATT/WTO trade partner prior to 2018. For example, in a 1949 GATT dispute settlement case involving the imposition of U.S. export licensing controls against Czechoslovakia, the United States invoked Articles XXI(b)(i) and XXI(a) to justify such measures.[16] The United States stated that its export licensing controls applied only to a small group of exports that could be used for military purposes.[17] However, the United States also alluded to the importance of striking a balance between national security and trade liberalization, stating that "every Contracting Party should be cautious not to take any step which might have the effect of undermining the General Agreement."[18] The complaint was eventually rejected by an overwhelming majority of GATT contracting parties.[19]

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16. *See* GATT, *Reply by the Vice-Chairman of the United States Delegation, Mr. John W. Evans, to the Speech by the Head of the Czechoslovak Delegation Under Item 14 on the Agenda*, at 3, 8, GATT/CP.3/38 (June 2, 1949).

17. *Id.* at 11.

18. GATT, *Corrigendum to the Summary Record of the Twenty-Second Meeting*, GATT/CP.3/SR.22/Corr.1 (June 20, 1949).

19. The complaint was rejected by a roll call vote of 17–1, with three abstentions. GATT, *Summary Record of the Twenty-Second Meeting*, at 9, GATT/CP.3/SR.22 (June 8, 1949).

In 1961, Ghana invoked Article XXI(b)(iii) of the GATT to justify a boycott of Portuguese goods stemming from a conflict in Angola.[20] The Ghanaian Government described the situation in Angola as "a constant threat to the peace of the African continent and that any action which, by bringing pressure to bear on the Portuguese Government, might lead to a lessening of this danger"[21] was justified. Ghana argued that "each contracting party was the sole judge of what was necessary in its essential security interest" and, therefore, there could be "no objection to Ghana regarding the boycott of goods as justified by security interests."[22] The boycott was eventually lifted more than a decade later after the conflict in Angola ended, however, there was never a GATT ruling on Article XXI.[23]

In 1975, Sweden invoked Article XXI(b)(iii) to justify an import ban on certain types of footwear.[24] The Swedish Government argued that such measures were necessary because low domestic production during the 1960s and 1970s constituted "a threat to the planning of Sweden's economic defence in situations of emergency as an integral part of its security policy,"[25] and the situation had reached a critical point threatening the country's ability to "secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations."[26] This policy, Sweden asserted, required "the maintenance of a minimum domestic production

20. *See* Riyaz Dattu & John Boscariol, *GATT Article XXI, Helms-Burton and the Continuing Abuse of the National Security Exception*, 28 CANADIAN BUS. L.J. 198, 204 (1997). Angola's War of Independence (1961–1974) was a multifaction struggle to wrest control of the country from Portugal during a time of liberation movements and decolonization. The war ended in 1974 following a leftist military coup in Portugal in which the leftist regime that came to power ordered the cessation of military action in its colonies and declared its intention to grant these colonies their independence. *See generally Angola: War of Independence*, WORLD PEACE FOUND.: MASS ATROCITY ENDINGS (Aug. 7, 2015), https://sites.tufts.edu/atrocityendings/2015/08/07/angola-war-of-independence-post-war-consolidation [https://perma.cc/JJK9-HV85].

21. GATT ANALYTICAL INDEX, *supra* note 15, at 600.

22. *Id.*

23. *See* Dattu & Boscariol, *supra* note 20; *see also* Kahn, *supra* note 11.

24. The Swedish Government imposed an import quota system from all sources for leather shoes, plastic shoes, and rubber boots. GATT Council, *Minutes of Meeting Held in the Palais des Nations, Geneva, on 31 October 1975*, at 8, GATT Doc. C/M/109 (Nov. 10, 1975); *see also* Dattu & Boscariol, *supra* note 23, at 204–05.

25. GATT Doc. C/M/109, *supra* note 24, at 8.

26. GATT Council, *Sweden – Import Restrictions on Certain Footwear*, at 3, GATT Doc. L/4250 (Nov. 17, 1975).

capacity in vital industries."[27] Other GATT contracting parties criticized the Swedish action as a pretext for protecting its footwear industry, arguing that Sweden had failed to provide a "detailed economic justification" for the import ban and that the ban was imposed "at a time of high unemployment."[28] Sweden eventually withdrew the measures in response to political pressure.[29]

The use of GATT Article XXI again occurred in 1982 during the Falklands/Malvinas conflict off the coast of Argentina. The European Economic Community ("EEC"), Canada, and Australia, in support of the United Kingdom, imposed an import ban on products from Argentina, invoking the national security exception as a justification for the measures under Article XXI(b)(iii).[30] During a GATT General Council discussion on the matter, the EEC representative stated:

> [T]he EEC and its member States had taken certain measures on the basis of their inherent rights, of which Article XXI of the General Agreement was a reflection. The exercise of these rights constituted a general exception, and required neither notification, justification, nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement. . . . [I]n effect, this procedure showed that every contracting party was – in the last resort – the judge of its exercise of these rights.[31]

The U.S. representative, at a later meeting, also stated that "[t]he General Agreement left to each contracting party the judgement as to what it considered to be necessary to protect its security interests. The [Contracting Parties] had no power to question that judgement."[32]

Argentina argued that such measures violated GATT Articles I:1, II, XI:1, XIII, and Part IV.[33] The Argentinian representative noted that

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27. GATT Doc. C/M/109, *supra* note 24, at 8.

28. *Id.* at 9; *see also* Tania Voon, *The Security Exception in WTO Law: Entering a New Era*, WASH. INT'L TRADE ASS'N (Feb. 4, 2019), https://www.wita.org/atp-research/the-security-exception-in-wto-law-entering-a-new-era [https://perma.cc/DZB7-MV7G].

29. Voon, *supra* note 28.

30. *See* Paul Lewis, *E.E.C. to Embargo Argentine Imports*, N.Y. TIMES (Apr. 15, 1982), https://www.nytimes.com/1982/04/15/business/eec-to-embargo-argentine-imports.html [https://perma.cc/25SD-EUMA]; GATT ANALYTICAL INDEX, *supra* note 15, at 603.

31. GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 7 May 1982*, at 10, GATT Doc. C/M/157 (June 22, 1982).

32. *See* GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 29–30 June 1982*, at 19, GATT Doc. C/M/159 (Aug. 10, 1982).

33. GATT Council, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, at 1-2, GATT Doc. L/5317 (Apr. 30, 1982).

"there were no trade restrictions which could be applied without . . . being notified, discussed and justified."[34] Although the measures were removed quickly thereafter, Argentina sought an interpretation of Article XXI by the GATT Council, which led to the inclusion of Paragraph 7(iii) in the Ministerial declaration of November 1982.[35] Paragraph 7(iii) stated that "the contracting parties undertake, individually and jointly: . . . (iii) to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement."[36] No determination was made in this matter as to whether the national security exception was meant to be self-judging.

In a subsequent case involving the United States and Nicaragua during the 1980s, the U.S. Government imposed an import/export ban against Nicaragua as part of an effort to undermine the Sandinista Government and counter the rise of communism in Central America.[37] The U.S. Government claimed that the trade ban was necessary under Article XXI(b)(iii) for the protection of its own "essential national security interests."[38] Nicaragua filed a complaint against the United States under the GATT, alleging that these measures violated GATT Articles I, II, V, XI, XIII, and Part IV.[39] A dispute settlement panel was established to examine the measures; however, the United States was successful in arguing for the terms of reference, which stated that "the Panel cannot examine or judge the validity of or motivation for the invocation of Article XXI:(b)(iii) by the United States."[40] Nicaragua argued that the text of Article XXI made it clear that contracting parties were competent to judge whether a situation of "war or other emergency in international relations" existed and, therefore, the panel should examine this issue.[41] Though the panel was critical of the U.S. measures, it held that by its mandate and with due respect for the process, it was precluded from examining the United States'

34. GATT Doc. C/M/159, *supra* note 32, at 15.

35. *See id.*

36. GATT, *Ministerial Declaration*, ¶ 7(iii), GATT Doc. L/5424 (Nov. 29, 1982).

37. S. Gabriel & V.M. Satish, *US Intervention in Nicaragua: A Success or Failure?*, 51 INDIAN J. POL. SCI. 565, 572, 574–75 (1990).

38. GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 17–19 July 1985*, at 41, 46, GATT Doc. C/M/191 (Sept. 11, 1985).

39. Panel Report, *United States—Trade Measures Affecting Nicaragua*, ¶ 4.3, GATT Doc. L/6053 (Oct. 13, 1986) (unadopted).

40. *Id.* ¶ 1.4 (internal citation omitted).

41. *Id.* ¶¶ 4.5, 4.7; GATT Doc. C/M/191, *supra* note 38, at 41–46.

invocation of Article XXI and thus whether it was compying with its obligations under the GATT.[42] The measures were eventually lifted in 1990 after the Cold War ended and the U.S. Government announced that the conditions that necessitated the action under Article XXI had ceased to exist.[43] The lesson that emerged from this case, however, was that the GATT panel would not exceed its mandate, unless authorized to do so, in deciding whether to review a contracting party's decision to invoke Article XXI.

In 1995, the WTO was established, officially replacing the GATT as the multilateral trade entity responsible for overseeing trade negotiations and resolving disputes among its members. The original GATT was incorporated into the new framework along with agreements on services (GATS), intellectual property (TRIPS), investment (Agreement on Trade Related Investment Measures or TRIMS), and a revised dispute settlement framework. One of the most important changes to the dispute settlement system was the introduction of the "reverse-consensus rule."[44] This rule meant that any party who lost a dispute before the new Dispute Settlement Body would have to obtain a consensus among all members, including the prevailing party, to overturn a panel decision.[45] Under the previous GATT dispute settlement system, known as the "positive-consensus rule," a losing party had the power to veto an adverse decision, which made the dispute settlement system less effective and less reliable.[46] Many disputes were never brought before the GATT because the complainant believed the respondent would simply veto an adverse decision.[47] Since the creation of the "reverse-consensus rule," the United States has become more critical of the WTO as an institution, mainly because it lost its ability to veto WTO dispute settlement panel decisions adverse to its interests.[48]

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42. *United States – Trade Measures Affecting Nicaragua*, *supra* note 39, ¶¶ 5.3, 5.6.

43. *See* GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 3 April 1990*, at 31, GATT Doc. C/M/240 (May 4, 1990).

44. *See* Wenwei Guan, *Consensus Yet Not Consented: A Critique of the WTO Decision-Making by Consensus*, 17 J. INT'L ECON. L. 77, 88 (2014).

45. Patnaik, *supra* note 1.

46. *See* Guan, *supra* note 44, at 88 (noting the creation of the Appellate Body to address the "quasi-automatic adoption of panel reports" caused by the reverse consensus rule).

47. *Historic Development of the WTO Dispute Settlement System*, WTO, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm [https://perma.cc/BUE6-5XXQ].

48. *See* Patnaik, *supra* note 1**Error! Bookmark not defined.**.

Shortly after the establishment of the WTO, the United States, once again, sought to test the national security exception under Article XXI(b) in connection with its longstanding trade embargo against Cuba.[49] The Clinton Administration passed the Helms-Burton Act of 1996[50] which authorized U.S. citizens to bring civil lawsuits against foreign companies that dealt in property that Cuba had expropriated during the Cuban Revolution of 1959.[51] At the time, the Clinton Administration maintained that the Act was "entirely consistent" with WTO rules and justified because President Fidel Castro posed a threat to U.S. security interests as long as he stayed in power.[52] U.S. Trade Representative Mickey Kantor stated that the "United States reserved the right to protect its security interests and to bar from entry people who have committed crimes of moral turpitude under United States laws."[53] Title III of the Act has a broad extraterritorial reach applying to any individuals or businesses "trafficking" in such property.[54] It gives U.S. nationals whose property was confiscated by the Cuban Government a private right of action to recover damages equal to the value of the property in U.S. courts.[55]

The European Union (EU) responded to the Helms-Burton Act by enacting "blocking statutes" and filing a WTO complaint against the United States to determine whether the Act was consistent with U.S. obligations under the WTO Agreements.[56] A dispute settlement panel

49. The United States has maintained a comprehensive trade embargo against Cuba since 1962. The embargo was approved with a fairly broad interpretation of what constitutes the "essential security interests" of the United States. *See* Dattu & Boscariol, *supra* note 20, at 208-09. The embargo is the longest in U.S. history. *See generally* William M. LeoGrande, *A Policy Long Past Its Expiration Date: US Economic Sanctions Against Cuba*, 82 SOC. RSCH. INT'L Q. 939 (2015).

50. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. §§ 6021–91.

51. § 6082(a)(1)(A).

52. *See* Richard W. Stevenson, *Canada, Backed by Mexico, Protests to U.S. on Cuba Sanctions*, N.Y. TIMES (Mar. 14, 1996), https://www.nytimes.com/1996/03/14/world/canada-backed-by-mexico-protests-to-us-on-cuba-sanctions.html [https://perma.cc/3JNW-N9B7].

53. *See id.* (quoting Mickey Kantor, U.S. Trade Representative).

54. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. § 6082(a)(1)(A).

55. *Id.*

56. Request for Consultations by the European Communities, *United States—The Cuban Liberty and Democratic Solidarity Act*, WTO Doc. WT/DS38/1 (May 13, 1996); *see also* Jürgen Huber, *The Helms-Burton Blocking Statute of the European Union*, 20 FORDHAM

was established in 1996 to review the case.[57] Subsequently, the work of the panel was suspended so that the parties could pursue negotiations.[58] The enforcement of Title III was then suspended in 1997 after the United States and the EU reached an agreement.[59] This suspension was extended every six months until 2019 when the Trump Administration decided not to renew it.[60] Since then, the EU has been contemplating the prospect of reactivating its complaint against the United States, but no action has been taken. In a letter to Secretary of State Mike Pompeo, the EU stated:

> We are writing to respectfully call on the U.S. to adhere to the terms of our agreement and to maintain a full waiver of Title III for EU companies and citizens . . . . Failing this, the EU will be obliged to use all means at its disposal, including in cooperation with other international partners, to protect its interests.[61]

The United States, so far, has never had to invoke Article XXI(b) to justify the imposition of extraterritorial trade measures against third parties under the Helms-Burton Act. If the EU's WTO complaint is renewed, the United States will have to enunciate a valid national security rationale in support of the Act. This will require a showing that tensions with Cuba constitute an "emergency in international

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INT'L L.J. 699, 701–03 (1997). The EU Commission enacted Regulation 2271/96 prohibiting the enforcement of U.S. court judgments relating to Title III within the EU and authorizing EU nationals or companies that have suffered damages as a result of the Helms-Burton Act to countersue the responsible U.S. party in EU courts. Council Regulation 2271/96 of Nov. 22, 1996, Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, art. 6, 1996 O.J. (L 309) 1, 2–3 (EC); *see also* Huber, *supra*, at 701–03 (analyzing the EU blocking statute).

57. *See DS38: United States—The Cuban Liberty and Democratic Solidarity Act*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds38_e.htm [https://perma.cc/Y7KJ-CVC4].

58. Communication from the Chairman of the Panel, *United States—The Cuban Liberty and Democratic Solidarity Act*, WTO Doc. WT/DS38/5 (Apr. 25, 1997). Authority for the panel lapsed on April 22, 1998. Lapse of the Authority for Establishment of the Panel, *United States—The Cuban Liberty and Democratic Solidarity Act*, WTO Doc. WT/DS38/6 (Apr. 22, 1998).

59. James Bennet, *To Clear Air with Europe, U.S. Waives Some Sanctions*, N.Y. TIMES (May 19, 1998), https://www.nytimes.com/1998/05/19/world/to-clear-air-with-europe-us-waives-some-sanctions.html [https://perma.cc/BH8S-GESP].

60. *See* Zachary Cohen & Jennifer Hansler, *Trump Expected to Become First President to Target Cuba with this Controversial Policy*, CNN (Apr. 16, 2019, 8:52 PM), https://www.cnn.com/2019/04/16/politics/us-cuba-title-iii-venezuela/index.html [https://perma.cc/Q5SZ-26DG].

61. *Id.*

relations" and that Cuba poses an immediate threat to the "essential security interests" of the United States.[62] Alternatively, it will require a showing that third country investors pose a threat to the "essential security interests" of the United States.[63] With the recent passing of Fidel Castro, however, the best arguments available to the United States are rather weak: (1) that Cuba has been supplying Venezuela with military assistance against U.S. strategic interests in the region, or (2) that the Cuban Government was responsible for causing American officials to become sick from an unexplained illness known as the "Havana Syndrome."[64]

The key language in Article XXI that has been the focus of much debate over the national security exception is found in section (b) and involves the phrases "necessary for the protection of its essential security interests" and "taken in time of war or other emergency in international relations."[65] Historically, states such as the United States who have sought to justify the application of restrictive trade measures under Article XXI contend that section (b) should be interpreted to mean that only the party invoking the exception can determine whether the measures taken are in its essential security interests.[66] In other words, it would be inappropriate for an international panel or tribunal to review whether a measure was consistent with the national security interests of a sovereign state and, therefore, the panel or tribunal should defer to the state's judgment on the matter. The counterargument, however, made by the EU, Japan, and most other WTO members suggests that international tribunals are charged with the task of interpreting and enforcing international law, and as with any treaty provision or exception, they should have the authority to determine whether the national security exception is applicable to a

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62. *See* GATT, *supra* note 10, arts. XXI(b), (b)(iii).

63. *See id.* art. XXI(b).

64. In 2016, U.S. officials at the embassy in Havana fell sick from an unexplained condition, causing debilitating symptoms, known as "Havana Syndrome." The U.S. government has been investigating the cause of the illness, although it is unlikely that Cuba was responsible. UPDATED ASSESSMENT OF ANOMALOUS HEALTH INCIDENTS, NAT'L INTEL. COUNCIL 1 (Mar. 1, 2023), https://www.dni.gov/files/ODNI/documents/assessments/Updated_Assessment_of_Anomalous_Health_Incidents.pdf [https://perma.cc/Z7EQ-8FBE].

65. *See* GATT, *supra* note 10, arts. XXI(b), (b)(iii).

66. *See* Jacob Gladysz, Note, *The National Security Exception in WTO Law: Emerging Jurisprudence and Future Direction*, 52 GEO. J. INT'L L. 835, 840–41 (2021).

given set of facts. The following WTO cases were the first attempts by the dispute settlement body to resolve this dilemma.

B. WTO Precedents Involving the National Security Exception

Prior to the U.S. steel/aluminum case, there were two decisions issued by dispute settlement panels involving restrictive measures taken by a member state for the purpose of protecting its national security.[67]

1. Ukraine v. Russia Traffic in Transit Dispute

On April 5, 2019, a WTO dispute panel issued a ruling on the national security exception under Article XXI(b) for the first time in the case *Russia—Measures Concerning Traffic in Transit*.[68] The parties to that dispute were Ukraine and Russia, and the dispute arose due to measures imposed by Russia in 2014 and 2016 barring the transit of goods through the territory of Russia during a time of increased tension with Ukraine.[69] Specifically, the Russian measures prohibited the transit of goods from Ukraine through Russia to Kazakhstan, the Kyrgyz Republic and other countries bordering Russia unless the countries obtained a derogation from the Russian authorities.[70] In 2017, Ukraine challenged the measures as contrary to Article V of the GATT 1994 (which protects freedom of transit of goods across borders), Article X (requiring transparency and uniform application of trade measures), and Russia's commitments to comply with trade rules in its WTO Accession Protocol.[71] Nine other WTO members, including the EU, joined Ukraine in challenging the Russian measures before the WTO.[72]

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67. *See generally* William Alan Reinsch & Jack Caporal, *The WTO's First Ruling on National Security: What Does It Mean for the United States?*, CTR. FOR STRATEGIC & INT'L STUD. (Apr. 5, 2019), https://www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states [https://perma.cc/8KKK-ACDD].

68. Panel Report, *Russia—Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019) [hereinafter Russia Transit Panel Report].

69. *Id.* ¶ 7.1. The tension stemmed mainly from Ukraine's decision to seek closer integration with the European Union as evidenced by the signing of the Ukraine-EU Association Agreement and Russia's occupation of Crimea in 2014. *Id.* ¶¶ 7.7-7.8.

70. *Id.* ¶ 7.1 (explaining that transit restrictions also applied to traffic in transit by road or rail from Ukraine to Mongolia, Tajikistan, Turkmenistan, and Uzbekistan).

71. *Id.* ¶ 7.2.

72. *Id.* ¶¶ 7.35-7.50.

Russia invoked the national security exception under Article XXI(b)(iii) of the GATT 1994 as its primary justification for the transit ban.[73] The Russian argument was two-fold. The first defense centered on the issue of justiciability. Russia took the position that the article in question was non-justiciable because Article XXI was "self-judging" and only the Russian Government could determine what measures were necessary to protect its national security.[74] A WTO Member's subjective assessment cannot be "doubted or re-evaluated by any other party" or judicial bodies as the measures in question are not ordinary trade measures regularly assessed by WTO panels.[75] Russia asserted that the WTO panel lacked jurisdiction to evaluate the merits of Ukraine's claims once Article XXI was invoked, and, therefore, the case should be dismissed.[76] The Russian position was supported by the United States as well, who argued that Russia did not have to provide any factual evidence in support of its use of the national security exception for adopting transit measures against Ukraine.[77]

The second Russian argument focused on the specific language of Article XXI(b)(iii). Russia asserted that it considered the measures taken necessary for the protection of its "essential security interests" within the meaning of GATT Article XXI(b)(iii).[78] Specifically, it argued that the ban on transit across its territory was taken as a result of the "emergency in international relations" caused by the signing of the EU-Ukraine Association Agreement in 2014 and the conflict in Crimea that presented threats to Russia's "essential security interests."[79] This was the first time that a WTO dispute settlement panel

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73. *Id.* ¶ 7.28. Russia chose not to rebut Ukraine's specific claims of inconsistency with Articles V and X of GATT 1994, or its claim regarding Russia's commitment to its Accession Protocol. *See id.* ¶¶ 7.27-7.30

74. *Id.* ¶¶ 7.28-7.29; Charlene Barshefsky, David J. Ross & Stephanie Hartmann, *WTO Issues Groundbreaking Decision on GATT National Security Exception*, WILMERHALE (Apr. 9, 2019), https://www.wilmerhale.com/insights/client-alerts/20190409-wto-issues-groundbreaking-decision-on-gatt-national-security-exception [https://perma.cc/YK3X-ZXKW].

75. Russia Transit Panel Report, *supra* note 68, ¶ 7.29.

76. *Id.* ¶¶ 3.2, 7.30.

77. *Id.* ¶ 7.51; *see also* Iryna Bogdanova, *The WTO Panel Ruling on the National Security Exception: Has the Panel 'Cut' the Baby in Half?*, EUR. J. INT'L L.: TALK! (Apr. 12, 2019), https://www.ejiltalk.org/the-wto-panel-ruling-on-the-national-security-exception-has-the-panel-cut-the-baby-in-half [https://perma.cc/86JL-XSDE].

78. Russia Transit Panel Report, *supra* note 68, ¶¶ 7.4, 7.27-7.28.

79. *Id.* ¶ 7.4.

was asked to interpret Article XXI of GATT 1994, or the equivalent provisions in the GATS and TRIPS Agreements.[80]

Ukraine contended that the Russian interpretation of Article XXI(b)(iii) was incorrect. Though it is for the invoking Member to decide what action it considers necessary for the protection of its essential security interests, this does not mean that the Member enjoys "total discretion."[81] Otherwise, there would have been no reason to include separate paragraphs in Article XXI and to distinguish between different types of security interests that can be invoked to justify a restrictive trade measure inconsistent with GATT 1994.[82] Ukraine asserted that if Article XXI were non-justiciable, it would imply that the invoking Member, rather than a panel, would decide the outcome of a dispute involving a measure that is WTO inconsistent, which would make Article 23.1 of the Dispute Settlement Understanding (DSU) a moot point.[83]

The WTO panel disagreed with the Russian position on justiciability but ultimately found the Russian actions consistent with Article XXI(b)(iii).[84] Regarding the question of justiciability, the panel asserted that it possesses "inherent jurisdiction" which derives from the exercise of its adjudicative function, and that Russia's invocation of Article XXI(b) of the GATT 1994 is within the panel's "terms of reference" for the purposes of the DSU.[85] The panel, though, viewed the clause "which it considers necessary" in the chapeau of Article

80. *See* GATT, *supra* note**Error! Bookmark not defined.** 10, art. XXI; GATS, *supra* note 12, art. XIV *bis*; TRIPS Agreement, *supra* note 12, art. 73.

81. Russia Transit Panel Report, *supra* note 70, ¶ 7.33.

82. *Id.*

83. *Id.* ¶ 7.31. Under Article 23.1 of the DSU, WTO members are obligated to redress a violation of the rules or other nullification of benefits only by recourse to the rules and procedures of the DSU, and not through unilateral action. Article 23.1 provides that the WTO dispute settlement system is the exclusive forum for the resolution of such disputes. Article 23.2 of the DSU prohibits certain unilateral action by a WTO member, such as (i) determining whether a violation has occurred; (ii) determining the duration of the reasonable period of time for implementation of restrictive trade measures; (iii) and deciding to suspend concessions and determining the level thereof. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 23, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401; *Recourse to the DSU for Violations of the Covered Agreements*, WTO, https://www.wto.org/english/tratop_e/dispu_e/repertory_e/r0_e.htm [https://perma.cc/6S9S-98QG].

84. Russia Transit Panel Report, *supra* note 68, ¶¶ 7.103-7.104, 7.123.

85. *Id.* ¶¶ 7.53, 7.55.

XXI(b) to be important in assessing whether a member state retained the sovereign right to *subjectively* determine what is "necessary for the protection of its essential security interests."[86] However, the panel took the view that the applicability of the national security exception requires an *objective* review by neutral adjudicators to determine whether the requirements under Article XXI(b) are satisfied.[87] Otherwise, Article XXI(b) would be more prone to abuse by allowing a member state to *subjectively* determine whether illegal measures imposed on its trading partners are justified under the national security exception. This latter interpretation of the rule would likely result in more self-serving outcomes, effectively depriving the requirements of Article XXI(b)(iii) of any useful effect.

The panel also considered the negotiating history of the original GATT 1947 in examining whether Article XXI(b) was meant to be self-judging.[88] During the negotiations to establish an International Trade Organization (ITO) and the GATT 1947, the question arose as to whether such authority should be limited to the necessity of the measure and should not extend to the determination of other elements of the provision.[89] The U.S. delegate advocated that:

> "it would be far better to abandon all work on the [ITO] Charter" than to place a provision in it that would, "under the simple pretext that the action was taken to protect the national security of the particular country, provide a legal escape from compliance with the provisions of the Charter."[90]

Though the effort to establish an ITO failed (due to Congress's refusal to ratify the Havana Charter), the GATT contracting parties succeeded in reaching a trade deal, which included the national security exception in its current form under Article XXI.[91] Given this

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86. *Id.* ¶¶ 7.62-7.63, 7.66, 7.101.

87. *Id.* ¶ 7.82.

88. *See id.* ¶ 7.84.

89. *Id.* ¶¶ 7.89-7.90. At the time, the Preparatory Committee of the United Nations Conference on Trade and Employment was drafting the Havana Charter for an International Trade Organization, referred to as the ITO Charter or Havana Charter, which was closely intertwined with the GATT but had separate negotiating processes. Roy Santana, *70th Anniversary of the GATT: Stalin, the Marshall Plan, and the Provisional Application of the GATT 1947*, 9 TRADE, L. & DEV. 1, 3 (2017).

90. Russia Transit Panel Report, *supra* note 68, ¶ 7.90.

91. On December 1, 1994, Congress approved GATT under Fast Track negotiating authority granted to the president. Fast Track authority limits public debate on a trade agreement by not allowing amendments to the agreement. Congress

history, the WTO panel's view of the intent of the GATT contracting parties was that Article XXI was non-self-judging.[92]

The panel determined that actions taken under Article XXI(b)(iii) can be objectively reviewed to determine whether such measures are "necessary for the protection of [Russia's] essential security interests" and linked to the national security interest alleged by Russia in the dispute.[93] The panel interpreted the phrase "essential security interests" narrowly as relating to "the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally."[94] The panel found, pursuant to section XXI(b)(iii), that there was, in fact, an "emergency" situation involving Ukraine and Russia at the time defined as "a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state."[95] Therefore, the measures taken by Russia were plausible and came within the scope of Article XXI(b)(iii).[96] At the same time, the panel also noted that ordinary "political or economic differences" between WTO members would not be sufficient to constitute a situation contemplated in Article XXI(b)(iii).[97]

The panel's ruling provided clarity to long-standing questions concerning justiciability and the meaning of "emergency" and "essential security interests" under Article XXI(b)(iii). It set the stage for future disputes involving the use of the national exception in international trade. Moreover, the decision held that the "obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994."[98] Thus, it is important that WTO members invoking the national security exception ensure there is a link between the measures applied and the essential security interests these measure purport to protect. As the panel described, the trade restrictive measures for which a

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has the option to accept or reject the agreement in its entirety, but no authority to amend it. Any attempt to amend the agreement would have meant reopening the negotiations, which would have likely killed the agreement.

92. *Id.* ¶ 7.102.
93. *See id.* ¶ 7.132.
94. *Id.* ¶ 7.130.
95. *Id.* ¶¶ 7.111, 7.125.
96. *Id.* ¶ 7.126.
97. *Id.* ¶ 7.75.
98. *Id.* ¶ 7.133.

national security exception is made must "meet a minimum requirement of plausibility in relation to the proffered essential security interests."[99]

The Dispute Settlement Body adopted the panel's ruling on April 26, 2019, and Ukraine did not appeal the decision.[100] The *Russia—Measures Concerning Traffic in Transit* decision sent an important signal to the international community that the principle of national sovereignty would not take a back seat to multilateral trade rules and processes when a member's national security interests were at issue in a dispute. Though a dispute settlement panel ruling is only binding on the parties to that dispute, WTO members in the wake of this decision were prompted to rethink whether they can unilaterally invoke the national security exception without attracting WTO scrutiny. The decision has reverberated far beyond Russia's expectations when it first invoked Article XXI(b)(iii) in its dispute with Ukraine and has provided guidance to future dispute settlement panels on how to review similar cases. The next case brought by Qatar against Saudi Arabia would test this approach and set the stage for the high-profile steel/aluminum tariff dispute brought by China, Norway, Switzerland, and Turkey against the United States.

2. Qatar v. Saudi Arabia Copyright Piracy Dispute

In 2017, Saudi Arabia, the United Arab Emirates (UAE), Bahrain, and Egypt severed relations with and imposed a "scheme of coercive economic measures" against Qatar, claiming that Qatar was supporting terrorism and aiding Iran.[101] According to the Saudi Government, "the security situation in many countries in the [MENA] region has been unstable, with wars, terrorism, and instability prevailing in many places for many different reasons, causing a devastating effect on human life and on the stability of national governments and multiple crises in international relations."[102] The Saudi Government introduced "anti-sympathy" measures that cut off all contact to the Saudi Kingdom by

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99. *Id.* ¶ 7.138.

100. *See* Action by the Dispute Settlement Body, *Russia – Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/7 (Apr. 26, 2019).

101. Panel Report, *Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights*, ¶¶ 2.18-2.29, WTO Doc. WT/DS567/R (June 16, 2020) [hereinafter Saudi Arabia Panel Report]; *see also* Gladysz, *supra* note **Error! Bookmark not defined.**, at 846.

102. Saudi Arabia Panel Report, *supra* note 101, ¶ 2.19 (alteration in original) (citation omitted).

Qatari citizens and businesses.[103] These measures subjected lawyers based in Saudi Arabia to legal jeopardy if they provided assistance to Qatari nationals, which, in turn, prevented access to Saudi courts, administrative tribunals and law firms by Qatari citizens seeking protection of their intellectual property rights.[104]

Most of the impact of these measures was felt by Qatari companies that were banned from doing business in Saudi Arabia. One Qatari company, a global sports and entertainment company named beIN Media Group LLC (beIN), was granted exclusive licenses to broadcast major sporting events in Saudi Arabia such as the FIFA World Cup and the U.S. Open Tennis Championships.[105] After Saudi Arabia severed relations with Qatar on June 5, 2017, the Saudi Ministry of Culture and Information blocked access to beIN's website in Saudi Arabia.[106] As a consequence of the ban, a Saudi company, beoutQ, began distributing and streaming pirated content created by beIN in Saudi Arabia.[107] The "anti-sympathy" measures prohibited beIN from retaining legal counsel in Saudi Arabia and bringing copyright infringement suits against beoutQ.[108]

Qatar filed a complaint against Saudi Arabia in the WTO in 2018, alleging violations of Saudi Arabia's obligations under Articles 3.1 (national treatment), 4 (most favorable nation [MFN] treatment), 9 (copyright protection in relation to the Berne Convention), 14.3 (protection of performers, sound recordings and broadcasting), 16.1 (rights conferred), 41.1 (domestic enforcement measures), 42 (civil judicial procedures) and 61 (criminal judicial procedures and penalties) of the TRIPS Agreement.[109] Qatar specifically claimed that

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103. *Id.* ¶ 2.47.

104. *Id.*

105. *Id.* ¶¶ 2.30-2.31.

106. *Id.* ¶ 2.36.

107. *Id.* ¶¶ 2.40, 2.44-2.45. The pirated content included sports content, popular movies, television programs in English and other foreign languages. The beoutQ company also promoted its pirated content on social media platforms and circulated an anti-bein cartoon encouraging Saudi citizens and beIN's licensors to to replace beIN with beoutQ. *Id.* ¶ 2.45.

108. *Id.* ¶ 2.47.

109. Request for Consultations by Qatar, *Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights*, ¶ 13, WTO Doc. WT/DS567/1 (Oct. 4, 2018). Qatar alleged violations of Article 41.1, obligating members to ensure that domestic enforcement measures and procedures are available under their law to prevent infringement of intellectual property rights; Article 42, obligating members to "make

Saudi Arabia failed to make available to Qatari nationals enforcement and civil jurisdiction procedures under Articles 41 and 42 of the TRIPS Agreement due to the "anti-sympathy measures," and it failed to apply criminal procedures and penalties against beoutQ due to the copyright piracy of beIN's content on a commercial scale.[110]

Saudi Arabia defended its actions by invoking the national security exception under the TRIPs Agreement.[111] Article 73(b)(iii) of the TRIPS Agreement permits a WTO member to take any action which it considers necessary for the protection of its "essential security interests" where there was an existence of a "war or other emergency in international relations."[112] Saudi Arabia submitted that the "relevant action for purposes of this dispute is its decision to sever diplomatic relations with Qatar."[113] Saudi Arabia, unlike Russia in the traffic in transit case, did not focus on the issues of jurisdiction or justiciability under Article 73(b)(iii), but claimed instead that this was "not a trade dispute at all" because it dealt with "political, geopolitical, and essential security" matters only.[114] Saudi Arabia's view was that political disputes of this sort should not be brought to the WTO disguised as trade disputes, and that such disputes should be resolved through bilateral or regional dialogue.[115]

The WTO dispute panel cited the *Russia—Traffic in Transit* case in its analysis, enunciating the four-part test to determine whether the national security exception applied to the facts of this dispute under Article 73(b)(iii).[116] The test assessed the following:

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available to right holders civil judicial procedures concerning the enforcement of intellectual property rights"; and Article 61, obligating members to provide for criminal procedures and penalties to be applied at least in willful trademark counterfeiting or copyright piracy on a commercial scale. *Id.*; Saudi Arabia Panel Report, *supra* note 101, ¶ 3.1(c).

110. Saudi Arabia Panel Report, *supra* note 101, ¶ 3.1. Qatar also claimed that the Saudi measures prevented beIN's corporate partners in third countries from pursuing IP rights against beoutQ. Michael Woods & Gordon LaFortune, *WTO National Security Exception – Strike Two!*, SLAW (Nov. 20, 2020), https://www.slaw.ca/2020/11/20/wto-national-security-exception-strike-two [https://perma.cc/4TZP-YUZH].

111. Report of the Panel (Addendum), *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, ¶ 88, WTO Doc. WT/DS567/R/Add.1 (June 16, 2020) [hereinafter Addendum to Saudi Arabia Panel Report].

112. TRIPS Agreement, *supra* note 12, art. 73(b), (b)(iii).

113. Addendum to Saudi Arabia Panel Report, *supra* note 111, ¶ 88.

114. Saudi Arabia Panel Report, *supra* note 103, ¶ 7.13.

115. *Id.* ¶ 7.14.

116. *Id.* ¶¶ 7.241-7.242.

> (a) whether the existence of a "war or other emergency in international relations" has been established [per Article 73(b)(iii)];
>
> (b) whether the relevant actions were "taken in time of" that war or other emergency in international relations;
>
> (c) 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 protection of its essential security interests; and
>
> (d) 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.[117]

The WTO panel addressed each aspect of the test. Regarding the first prong, the panel determined that Saudi Arabia's severance of diplomatic and commercial relations with Qatar was sufficient to constitute an "emergency in international relations."[118] The panel stated that "'a situation . . . of heightened tension or crisis' exists in the circumstances in this dispute, and is related to Saudi Arabia's 'defence or military interests, or maintenance of law and public order interests' (i.e. essential security interests), sufficient to establish the existence of an 'emergency in international relations.'"[119] In regard to the second prong, the panel found that the "anti-sympathy measures" and non-application of criminal procedures and penalties existing since the severance of relations were taken during the emergency in international relations.[120] Third, the panel concluded that Saudi Arabia's articulation of its "essential security interests"—namely, the protection of its territory and its population "from the dangers of terrorism and extremism" and the maintenance of law and public order internally—was plausibly connected to the measures imposed.[121] The panel stated that "it is left, in general, to every Member to define what it considers to be its essential security interests."[122]

The panel, however, noted the importance of the "good faith" principle in international law, stating that a WTO member did not

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117. *Id.* ¶ 7.242.
118. *Id.* ¶ 7.257.
119. *Id.* (quoting Russia Transit Panel Report, *supra* note 68, ¶ 7.76).
120. *Id.* ¶ 7.278.
121. *Id.* ¶ 7.280.
122. *Id.* ¶ 7.249 (quoting Russia Transit Panel Report, *supra* note 68, ¶ 7.131).

have *carte blanche* to invoke the national security exception in any situation in its discretion.[123] Quoting the *Russia—Traffic in Transit* report, the panel explained that "the discretion of a Member to designate particular concerns as 'essential security interests' is limited by its obligation to interpret and apply" the national security exception in good faith.[124] This "obligation of good faith," the panel added, "requires that Members not use the security exception as a means to circumvent their WTO obligations."[125] The panel concluded that "[i]t is therefore incumbent on the invoking Member to articulate the essential security interests."[126]

Regarding the fourth prong, though the panel found that the "anti-sympathy measures" were plausibly linked to the goal of preventing Qatari nationals from entering its territory, the non-application of criminal procedures and penalties to beoutQ were not plausible measures to protect its essential security interests.[127] Such measures, which also affected various third-party rights holders, were "remote from" or "unrelated" to" the claimed emergency and, therefore, could not be justified under any national security rationale.[128] Accordingly, the panel rejected Saudi Arabia's use of the national security defense under Article 73(b)(iii) with respect to the non-application of criminal procedures and penalties to beoutQ.[129]

Accordingly, the panel ruled against Saudi Arabia for violating Article 61 of TRIPS by failing to provide criminal enforcement and procedures for copyright piracy against beIN's content.[130] It held that Saudi Arabia was not justified in asserting the national security exception under Article 73(b)(iii) as the basis for this particular action.[131] However, the panel concluded that Saudi Arabia was justified under the national security exception in taking measures inconsistent

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123. *Id.* ¶ 7.250 (quoting Russia Transit Panel Report, *supra* note 68, ¶ 7.132).
124. *Id.* (quoting Russia Transit Panel Report, *supra* note 68, ¶ 7.132).
125. *Id.* (citing Russia Transit Panel Report, *supra* note 68, ¶ 7.133).
126. *Id.* (quoting Russia Transit Panel Report, *supra* note 68, ¶ 7.138) (alteration in original).
127. *Id.* ¶¶ 7.289-93.
128. *Id.* ¶ 7.293.
129. *Id.* ¶ 8.1(c)(ii).
130. *Id.*; *see also Qatar Wins Historic WTO Ruling Against Saudi BeoutQ Piracy*, QATAR TRIB. (June 17, 2020), https://www.qatar-tribune.com/article/191704/FIRSTPAGE/Qatar-wins-historic-WTO-ruling-against-Saudi-beoutQ-piracy [https://perma.cc/4BLA-73AD].
131. Saudi Arabia Panel Report, *supra* note 104, ¶ 8.1(c)(ii).

with Articles 41.1 and 42 of the TRIPS Agreement that prevented beIN from obtaining Saudi legal counsel to enforce its intellectual property rights through civil enforcement procedures before Saudi courts and tribunals.[132]

The *Saudi Arabia—Copyright* case was the first time that a WTO panel rejected the national security rationale claim in a disputed case. The WTO panel showed that it will not support a member's use of the national security argument to justify a violation of trade rules in every scenario. The panel's decision also solidified the notion that a tribunal of international adjudicators does have the authority and jurisdiction to rule on the applicability of the national security exception when a violation of trade rules exists. Thus, WTO members, like the United States, who argue that the national security exception is a "self-judging" principle were put on notice that unilateral discretion will not trump trade liberalization in every instance where "national security" is invoked. This interpretation of the limits to invoking the national security exception, however, has come at a price for the international trade system, based upon the reaction of some members to these landmark WTO decisions. The U.S. Government, for instance, continues to block the reappointment of judges to the WTO's Appellate Body, which has the final word on all panel decisions.[133] The reason given by one U.S. trade official is that the WTO Appellate Body "consistently over-stepped its authority by reviewing and reversing factual findings by trade arbitration panels, and by interpreting WTO members' domestic laws."[134] This obstructionist tactic has paralyzed the WTO's dispute settlement mechanism and created serious uncertainty

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132. *Id.* ¶ 8.1(c)(i).

133. Tom Miles, *U.S. Blocks WTO Judge Reappointment as Dispute Settlement Crisis Looms*, REUTERS (Aug. 27, 2018, 8:54 AM), https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN1LC19O [https://perma.cc/HTH3-QMFL]. There are normally seven WTO appellate judges. During the Trump Administration, the United States blocked all appointments to the appeals chamber as existing judges' terms ended. The WTO Appellate Body ceased functioning in 2019 as a result of the U.S. veto of judges. President Biden has continued this policy and has vowed to continue the policy unless the WTO Dispute Settlement Body undertakes substantial reforms. *Id.*; Michael Stumo, *Biden Administration Says No to WTO Appellate Body Restart*, COAL. FOR A PROSPEROUS AM. (Feb. 22, 2021), https://prosperousamerica.org/biden-admin-says-no-to-wto-appellate-body-restart [https://perma.cc/6HYG-BBC3].

134. Miles, *supra* note 133.

in international trade relations.[135] Hence, the *Russia—Traffic in Transit* case and the *Saudi Arabia—Copyright* case set the stage for a reckoning with the United States over the national security exception in the WTO.

II. THE TRUMP-ERA STEEL/ALUMINUM TARIFF DISPUTE AND THE NATIONAL SECURITY EXCEPTION

A. *Setting the Stage for the 2018-2022 U.S. Steel/Aluminum Dispute: Lessons from the Bush and Obama Administrations*

For the past two decades, the steel and aluminum industries in the United States have been under heavy pressure due to increasing foreign competition and rising costs.[136] These industry struggles have impacted employment levels in several Midwestern states, including Pennsylvania, Ohio, Wisconsin, Michigan, and West Virginia, and have become a major focal point in U.S. presidential elections.[137] Donald Trump was elected President in 2016 partly because he carried these states, promising a "new dawn" for U.S. steel and aluminum manufacturers.[138] His strategy centered on protecting these industries by imposing a twenty-five percent tariff on steel imports and a ten percent tariff on aluminum imports (with exemptions for Canada and Mexico) under Section 232 of the Trade Expansion Act of 1962,[139] a Kennedy-era act that allows the executive branch to restrict imports of

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135. *See* Doug Palmer, *Lighthizer: No One Misses WTO Appellate Body*, POLITICO (Dec. 10, 2020, 11:32 AM), https://www.politico.com/news/2020/12/10/lighthizer-wto-appellate-judges-444290 [https://perma.cc/R9QK-UQST].

136. *See generally* Benn Steil & Benjamin Della Rocca, *Unalloyed Failure: The Lessons of Trump's Disastrous Steel Tariffs*, FOREIGN AFFS. (May 7, 2021), https://www.foreignaffairs.com/articles/united-states/2021-05-07/trump-disastrous-steel-tariffs [https://perma.cc/S5ES-PB6U] (explaining how President Trump's steel tariffs exacerbated the problems of foreign competition and rising domestic costs in the U.S. steel industry).

137. *See* Rajesh Kumar Singh, *Trump Steel Tariffs Bring Job Losses to Swing State Michigan*, REUTERS (Oct. 9, 2020, 7:07 AM), https://www.reuters.com/article/us-usa-election-steel-insight/trump-steel-tariffs-bring-job-losses-to-swing-state-michigan-idUSKBN26U161 [https://perma.cc/6MC8-FV8M].

138. *Id.*

139. 19 U.S.C. § 1862.

products into the country if these products pose a threat to national security.[140]

The rationale for these tariffs differed from similar tariff measures imposed on steel and aluminum imports by previous presidents and elevated the discussion and tension within the WTO concerning the use of the national security exception under Article XXI(b) to a new level.Under previous Administrations, steel tariffs were imposed based on an economic rationale and justified under the Safeguards provisions found in the GATT 1994. President George W. Bush in 2002 imposed steel tariffs of up to thirty percent on imports purportedly to protect domestic producers from low-cost foreign imports.[141] These tariffs were controversial at the time because the global trade community was in the middle of the Doha Round of WTO trade negotiations trying to strike a major new trade deal.[142] The EU, Japan, South Korea, China, Switzerland, Norway, New Zealand, and Brazil filed complaints against the United States for violating its WTO commitments, seeking the removal of the tariffs on various legal grounds, including violations of Article XIX of GATT 1994 and the Agreement on Safeguards.[143] On July 11, 2003, a WTO panel ruled against the United States, finding that the U.S. safeguard measures

140. § 1862(c); Singh, *supra* note 139; Jeff Cox, *Trump Signs Steel and Aluminum Tariffs that Exempt Canada and Mexico and Leave Door Open to Other Countries*, CNBC (Mar. 8, 2018, 5:53 PM), https://www.cnbc.com/2018/03/08/trump-signs-tariffs-that-exempt-canada-and-mexico-open-door-to-others.html [https://perma.cc/7XP8-V7WF].

141. The steel tariffs ranged from eight percent to thirty percent on certain steel imports from all countries except Canada, Mexico, Israel, and Jordan. *See* Erica York, *Lessons from the 2002 Bush Steel Tariffs*, TAX FOUND. (Mar. 12, 2018), https://taxfoundation.org/lessons-2002-bush-steel-tariffs [https://perma.cc/3QYF-EYYN].

142. *George W. Bush Tried Steel Tariffs. It Didn't Work*, CONVERSATION (Apr. 4, 2018, 11:47 AM), https://theconversation.com/george-w-bush-tried-steel-tariffs-it-didnt-work-92904 [https://perma.cc/FEF5-J3RK].

143. Request for Consultations by the European Communities, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS248/1 (Mar. 13, 2002). Following the EU's complaint, the other countries requested to join the consultations. *DS248: United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds248_e.htm [https://perma.cc/J978-HZU9].

were inconsistent with WTO rules.[144] The United States appealed the ruling, and the WTO Appellate Body upheld nearly all of the panel's conclusions.[145] The United States was given a deadline of December 15, 2003 to withdraw the measures, and the United States waited until the last possible minute to comply.[146] The dispute reached the brink with the EU, who threatened to retaliate before the Bush Administration withdrew the tariffs.[147] In the end, the steel tariffs bought President Bush valuable time to allow the steel industry to restructure while exploiting the lag-period in the WTO's dispute settlement timeframe.[148] The controversy "also eroded the goodwill that countries felt for the United States" after the September 11, 2001 terrorist attacks on New York City and Washington, D.C. and helped shape President Bush's reputation as a "cowboy unilateralist who cared little about" the WTO system and international law.[149]

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144. Panel Reports, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, at A-1 to H-1, WTO Docs. WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R (adopted Dec. 10, 2003).

145. Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶¶ 513–14, WTO Docs. WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R (adopted Dec. 10, 2003).

146. Brian Knowlton, *Bush Rescinds Tariffs on Steel Imports, Averting Trade War*, N.Y. TIMES (Dec. 4, 2003), https://www.nytimes.com/2003/12/04/national/bush-rescinds-tariffs-on-steel-imports-averting-trade-war.html [https://perma.cc/8ETD-24F8].

147. The EU threatened to retaliate against $2.2 billion worth of U.S. goods unless the United States withdrew the steel tariffs. John Roberts, *Bush Drops Steel Tariffs*, CBS NEWS (Dec. 1, 2003, 11:00 AM), https://www.cbsnews.com/news/bush-drops-steel-tariffs-01-12-2003 [https://perma.cc/32KX-Z9L5]. The EU had drawn up a list of U.S. products targeted with higher import duties and submitted that list to the White House. The EU list included fruit juices from Florida, t-shirts from South Carolina, and apples from Washington, all of which were important swing states in the upcoming presidential election. *See* Council Regulation 1031/2002 of June 13, 2002, Establishing Additional Customs Duties on Imports of Certain Products Originating in the United States of America, 2002 O.J. (L 157) 8, 8-14; *see also* Klint W. Alexander & Bryan J. Soukup, *Obama's First Trade War: The US-Mexico Cross-Border Trucking Dispute and the Implications of Strategic Cross-Sector Retaliation on US Compliance Under NAFTA*, 28 BERKELEY J. INT'L L. 313, 328–29 (2010) (detailing the effectiveness of the EU's strategy).

148. Roberts, *supra* note 147.

149. Doug Palmer, *Why Steel Tariffs Failed When Bush Was President*, POLITICO (Mar. 7, 2018, 6:20 PM), https://www.politico.com/story/2018/03/07/steel-tariffs-trump-bush-391426 [https://perma.cc/V2Z3-745Q].

In 2008, President Obama revived the steel tariff controversy when his administration imposed countervailing duties on a range of products imported from China, including steel sinks, wiring strand, and aluminum extrusions.[150] China filed a complaint with the WTO in 2012 challenging the measures under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement).[151] China requested that the panel find the U.S. Department of Commerce acted inconsistently with the obligations set forth in the SCM Agreement when it initiated countervailing duty investigations and made final determinations to impose anti-subsidy measures against 22 products imported from China.[152] Two years later, the WTO ruled in China's favor.[153]

The WTO panel concluded that the United States had not correctly used third country prices to assess the subsidies, but it supported the U.S. position that Chinese exporters were receiving subsidies from Chinese "public bodies."[154] The United States refused to withdraw the measures, claiming that China receives more lenient treatment from the WTO for subsidizing and dumping its goods on foreign markets.[155] China again asked the WTO for relief, and in 2020, the WTO granted China $645 million in compensatory tariffs.[156] China criticized the United States for being a "'repeat abuser' of trade remedy measures."[157]

It is important to note that the United States did not invoke the national security exception under GATT Article XXI in either the Bush-era or Obama-era tariff disputes involving steel and aluminum

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150. Tom Miles, *China Partially Wins WTO Case Over Obama-Era U.S. Tariffs*, REUTERS (Mar. 21, 2018, 11:32 AM), https://www.reuters.com/article/us-usa-china-trade-wto/china-partially-wins-wto-case-over-obama-era-u-s-tariffs-idUSKBN1GX28D [https://perma.cc/48VR-AASB]. China challenged U.S. anti-subsidy tariffs imposed on 22 Chinese products. The products included solar panels, wind turbines, thermal and coated paper, tow-behind lawn groomers, kitchen shelving, steel sinks, citric acid, magnesia carbon bricks, pressure pipe, line pipe, seamless pipe, steel cylinders, drill pipe, oil country tubular goods, wire strand, and aluminum extrusions. *Id.*

151. Request for Consultations by China, *United States—Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/1 (May 30, 2012).

152. *Id.* at 2.

153. Panel Report, *United States—Countervailing Duty Measures on Certain Products from China*, ¶¶ 8.1-8.3, WTO Doc. WT/DS437/R (adopted Jan. 16, 2015).

154. *Id.*

155. *See WTO Lets China Impose Tariffs on U.S. in Obama-Era Case*, REUTERS (Jan. 27, 2022, 3:52 AM), https://www.reuters.com/business/wto-gives-china-right-impose-tariffs-645-mln-us-goods-2022-01-26 [https://perma.cc/9ACT-Y734].

156. *Id.*

157. Miles, *supra* note 150.

products. Both administrations relied on economic justifications provided in the Safeguards Agreement and the SCM Agreement, respectively, to make their case for imposing tariff measures. It was not common practice for WTO members to invoke the national security exception in defense of tariff hikes and other restrictive trade measures until Russia asserted its claim in defense of its transit ban against Ukraine in 2014.[158] The Trump Administration, which came to power in 2016 and was influenced by President Vladimir Putin, took note of this Russian use of the exception and applied it in the next steel dispute with its trade partners.

B. United States—Certain Measures on Steel and Aluminium Products: A Landmark Decision

In *United States—Certain Measures on Steel and Aluminium Products*, a WTO dispute settlement panel reviewed a series of complaints brought against the United States where the central issue was the national security exception under GATT Article XXI(b).[159] The dispute concerned the imposition of new tariff levies on steel and aluminum imports in 2018 by the Trump Administration pursuant to Section 232 of the Trade Expansion Act of 1962.[160] The tariff levies were part of President Trump's "America First" vision to shift U.S. economic policy away from interdependence and multilateral cooperation to a more unilateralist, self-interested approach in international relations.[161] Though the levies were only a small piece of this strategy, Trump's invocation of the national security exception under GATT Article XXI(b) to justify the measures was a major change in U.S. trade policy that prompted criticism around the world. According to Trump, "[a]

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158. *See supra* Section II.B.1.

159. *See* WTO Steel Case, *supra* note 2, ¶ 3.3.

160. *Id.* ¶ 1.1; *see also* Scott Horsley, *Trump Formally Orders Tariffs on Steel, Aluminum Imports*, NPR (Mar. 8, 2018, 4:47 PM), https://www.npr.org/2018/03/08/591744195/trump-expected-to-formally-order-tariffs-on-steel-aluminum-imports [https://perma.cc/BZY4-NPW8].

161. *See* Bill Neely, *Trump's 'America First' Policy Has Isolated U.S. from World Leaders*, NBC NEWS (Dec. 29, 2017, 5:09 AM), https://www.nbcnews.com/news/world/analysis-trump-s-america-first-foreign-policy-isolates-u-s-n833046 [https://perma.cc/X4SK-CZJT] (outlining the impact of Trump's "America First" approach within various geopolitical arenas). *See generally* Lily Rothman, *The Long History Behind Donald Trump's 'America First' Foreign Policy*, TIME (Mar. 28, 2016, 6:14 PM), https://time.com/4273812/america-first-donald-trump-history [https://perma.cc/CXA6-UBNE] (tracing the historical predecessors of Trump's "America First" isolationist attitude towards foreign policy).

strong steel and aluminum industry are vital to our national security, absolutely vital."[162] However, the U.S. Department of Defense questioned this rationale in a widely disseminated memo, stating that the tariffs were not necessary for national security and that military demand for steel and aluminum each only represented about three percent of U.S. production.[163]

In response to the Trump tariff measures, China, the EU, India, Norway, Turkey, Switzerland, and Russia filed complaints against the United States with the WTO.[164] China's Ministry of Commerce stated that the U.S. "initiation of a trade war has no international legal basis at all" and that "[t]he . . . tariffs are typical unilateralism, protectionism and trade bullying."[165] Mexico and Canada also filed complaints initially but were subsequently exempted from the tariff measures in order to win their support for the U.S.-Mexico-Canada Agreement, which replaced the North American Free Trade Agreement (NAFTA).[166] The complainants asserted that the U.S. tariff levies were "safeguard" measures under the WTO Safeguards Agreement and were not consistent with the rules.[167] They also claimed that the United States had exceeded the maximum import tariffs allowed by the WTO

162. Horsley, *supra* note 160.

163. *See* John Brinkley, *Trump's National Security Tariffs Have Nothing to Do With National Security*, FORBES (Mar. 12, 2018, 11:41 AM), https://www.forbes.com/sites/johnbrinkley/2018/03/12/trumps-national-security-tariffs-have-nothing-to-do-with-national-security/?sh=76909e17706c [https://perma.cc/7LMZ-Y5QP].

164. Request for Consultations by China, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS544/1 (Apr. 9, 2018); Request for Consultations by Turkey, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS564/1 (Aug. 20, 2018); Request for Consultations by Switzerland, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS556/1 (July 12, 2018); Request for Consultations by Norway, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS552/1 (June 19, 2018); Request for Consultations by the European Union, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS548/1 (June 6, 2018); Request for Consultations by India, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS547/1 (May 23, 2018); Request for Consultations by the Russian Federation, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS554/1 (July 2, 2018).

165. *Beijing Complains to WTO over Trump Tariffs, While US Hits Back at Allies, China on Metal Duties*, STRAITS TIMES (July 17, 2018, 3:22 PM), https://www.straitstimes.com/asia/east-asia/beijing-complains-to-wto-over-trump-tariffs-while-us-hits-back-at-allies-china-on [https://perma.cc/TP89-7WBZ].

166. *See* Palmer, *supra* note 4.

167. WTO Steel Case, *supra* note 2, ¶ 3.1.

under its bound rates for steel and aluminum products and that the tariffs were not being applied consistently to all suppliers, thus violating the MFN principle.[168] Several complainants imposed retaliatory tariffs against the United States on approximately $23 billion worth of U.S. goods consistent with WTO rules pending the outcome of the disputes.[169] The United States responded in kind with tit-for-tat formal challenges of its own to these retaliatory measures.[170]

The United States invoked Article XXI(b) of the GATT 1994 in support of the measures, arguing that such measures are "necessary for the protection of its essential security interests."[171] The U.S. Government claimed specifically that the tariffs are critical to helping rebuild its steel and aluminum industries and maintaining its defense base.[172] It also argued that such measures were "taken in time of war or other emergency in international relations" pursuant to Article XXI(b)(iii).[173] The Trump Administration also reiterated its position expressed in the *Russia* and *Saudi Arabia* cases that the applicability of the national security exception is for countries themselves to judge and not something that a three-judge panel of international adjudicators sitting in Geneva should decide.[174] The complainants argued, in turn, that there was no "plausible" national security rationale for the imposition of the tariff measures.[175] This was the first time the trade community was confronted with the Article XXI(b)(iii) exception as

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168. *Id.* ¶ 7.23.

169. *See* STRAITS TIMES, *supra* note 165.

170. The United States initiated formal complaints against China, the EU, Canada, Mexico, and Turkey following the imposition of retaliatory measures by these countries shortly after the steel and aluminum dispute arose. *Id.* Canada and Mexico were later exempted from the U.S. tariff measures and these complaints were dropped. Palmer, *supra* note 4.

171. WTO Steel Case, *supra* note 3, ¶ 7.102.

172. *Id.* ¶ 2.13. The U.S. Secretary of Commerce determined in 2017 that steel and aluminum imports from third countries, especially China, were "weakening [the] internal economy" of the United States and, therefore, "threaten[ing] to impair" its national security. The investigation showed that rising levels of foreign steel and aluminum imports had placed domestic industries at substantial risk affecting their capacity to produce steel and aluminum for critical infrastructure and national defense, especially in times of national emergencies. The Commerce Department recommended corrective actions against imports in the form of tariffs and quotas with a view to improve domestic capacity utilization and stabilize U.S. production at the level required for its security needs. *Id.* ¶¶ 2.13-2.17.

173. *Id.* ¶ 7.144.

174. *Id.* ¶ 7.106.

175. *Id.* ¶ 7.107

the rationale used by the United States to justify the imposition of steel and aluminum levies.[176]

On December 9, 2022, the WTO panel issued its rulings in the cases brought by China, Norway, Turkey, and Switzerland.[177] The WTO panel found in each of the cases that the U.S. duties on steel and aluminum were inconsistent with Article II:1 of the GATT 1994 as these duties exceeded the bound tariff rates in the U.S. Schedule of Concessions.[178] These bound rates were negotiated and agreed to by the United States during previous GATT rounds of tariff negotiations. The panel also concluded that exemptions from the tariff hikes granted to certain countries were a violation of the MFN principle under Article I:1 of the GATT 1994.[179] The panel declined to make findings in regard to the claims under Article X:3(a) of the GATT 1994.[180]

The panel then turned to the Article XXI(b) arguments made by the United States in defense of the measures. The panel first addressed the question presented in the two prior WTO decisions concerning whether an international panel has the jurisdiction and authority to review a WTO member's invocation of the national security exception.[181] According to the panel:

> The Panel does not consider that Article XXI(b) of the GATT 1994 is "self-judging" or "non-justiciable" in the sense argued by the United States, nor that the provision contains "a single relative clause" that wholly reserves the conditions and circumstances of the subparagraphs to the judgment of the invoking Member.[182]

The panel determined that "it [was] required" under the DSU to address the U.S. invocation of Article XXI(b) "in accordance with the terms of the provision itself and within an objective assessment of the

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176. *See* Reinsch & Caporal, *supra* note 67. The two main criticisms of the repeated use of steel and aluminum tariff hikes by the United States are that such measures serve as leverage for the United States in trade negotiations and are also targeted at steel producing states such as Pennsylvania, Ohio, and West Virginia to curry favor with voters prior to important elections. *See supra* Section III.A.

177. *See supra* note 2 and accompanying text. Cases filed by Russia and India are still pending, and the EU and U.S. agreed to resolve their dispute through arbitration. Recourse to Article 25 of the DSU, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS548/19 (Jan. 21, 2022).

178. WTO Steel Case, *supra* note 3, ¶ 8.1(a).

179. *Id.* ¶ 8.1(b).

180. *Id.* ¶ 8.1(c).

181. *Id* ¶¶ 7.106-7.128.

182. *Id.* ¶ 7.128.

relevant measures and claims."[183] Thus, the longstanding question of whether the national security exception was "nonjusticiable" or "self-judging" was finally settled by the panel's decision.

Second, the panel examined whether the measures found to be inconsistent with GATT 1994 rules were taken under the conditions and circumstances described in Article XXI(b)(iii)—the national security exception—of the GATT 1994. According to the panel, an "emergency in international relations" under Article XXI(b)(iii) refers to "situations of a certain gravity or severity and international tensions that are of a critical or serious nature in terms of their impact on the conduct of international relations."[184] The panel found that the measures at issue were not "taken in time of war or other emergency in international relations" within the meaning of Article XXI(b)(iii).[185] Moreover, the panel concluded that the analysis of the U.S. Department of Commerce, pursuant to its investigation, which led to the imposition of the steel and aluminum import levies "[did] not purport to identify or address the existence of an 'emergency in international relations' within the meaning of Article XXI(b)(iii) of the GATT 1994."[186] Thus, the measures were not justified under the national security exception.[187]

In the end, the panel concluded that the measures imposed by the United States were inconsistent with its WTO obligations and, pursuant to Article 19.1 of the DSU, it was recommended that the United States bring its WTO-inconsistent measures into conformity with its obligations under GATT 1994 or risk retaliatory tariffs by the countries who brought the complaints.[188]

The U.S. Government's initial response to the panel decisions was uncooperative and combative. The Biden Administration stated that it rejected the panel's conclusions and that it does not intend to remove

183. *Id.* ¶¶ 7.108, 7.125.
184. *Id.* ¶ 7.147.
185. *Id.* ¶ 7.149.
186. *Id.* ¶ 7.143.
187. *Id.* ¶ 8.1(e).
188. *Id* ¶¶ 8.1-8.3.; *see also* Mica Soellner, *WTO Rules Trump's Steel Tariffs Violated Global Trade Rules,* WASH. TIMES (Dec. 10, 2022), https://www.washingtontimes.com/news/2022/dec/10/wto-rules-donald-trumps-steel-tariffs-violated-glo [https://perma.cc/RM3R-7JN9].

the tariffs.[189] According to Office of the U.S. Trade Representative, "the United States would not 'stand idly by' while Chinese overcapacity posed a threat to its steel and aluminum sectors."[190] Moreover, US officials expressed their frustration with the WTO's position on the question of justiciability in disputes involving the national security exception:

> The United States has held the clear and unequivocal position, for over 70 years, that issues of national security cannot be reviewed in WTO dispute settlement and the WTO has no authority to second guess the ability of a WTO member to respond to a wide range of threats to its security.[191]

Furthermore, and perhaps most troubling, the White House criticized the WTO as an institution, stating that the outcomes of these panel reports "only reinforce the need to fundamentally reform the WTO dispute settlement system."[192] At present, the United States has refused to support the appointment of WTO appellate judges as an initial step towards effectuating this reform.[193]

C. The Implications of the WTO Panel Decision and the Road Ahead

The implications of the WTO panel decision(s) in the U.S. steel and aluminum case are significant for the national security exception and the WTO-led trade system as a whole. First, the concern that a ruling in favor of the U.S. view of the national security exception is now removed. The WTO panel decision has solidified the idea that the invocation of the national security exception under Article XXI(b) is not a subjective, self-judging right, nor is it nonjusticiable.[194] All three recent WTO tribunals addressing this question have held that the authority to interpret the applicability of Article XXI(b) to a given set of disputed trade measures resides with the three-judge panel established by the DSB to review the case, and the review is an objective

189. *See* Natalie Sherman & Jonathan Josephs, *WTO Says Trump's US Steel Tariffs Broke Global Trade Rules*, BBC (Dec. 9, 2022), https://www.bbc.com/news/business-63920063 [https://perma.cc/CU3W-F49X].

190. Emma Farge & Philip Blenkinsop, *Trump Metal Tariffs Ruled in Breach of Global Rules by WTO*, REUTERS (Dec. 9, 2022, 1:59 PM), https://www.reuters.com/world/wto-finds-us-metals-import-tariffs-imposed-by-trump-were-not-justified-2022-12-09 [https://perma.cc/4SA3-BQRD].

191. Sherman & Josephs, *supra* note 189; Palmer, *supra* note 4.

192. Sherman & Josephs, *supra* note 189.

193. *See supra* notes 133-35 and accompanying text.

194. *See* WTO Steel Case, *supra* note 3, ¶ 7.128.

one.[195] Though these decisions are not binding on future disputes, the understanding of this idea is now firmly established in international trade law.

Second, the concern over the importance of national sovereignty as a core principle in international law may be diminished, but it is not lost, in the WTO's analysis. A WTO member still retains the power and authority to take "any action which it considers necessary for the protection of its essential security interests" as long as it does so "in good faith" and pursuant to the required limitations outline in the subheadings of Article XXI(b).[196] The three precedents do not call into question the right of WTO members to invoke Article XXI(b) or take measures to protect national security with broad discretion, but they do have to satisfy certain minimum requirements that are subject to review by a WTO panel.[197] If there is a "war" or other "emergency in international relations," then there is no question that WTO members can take trade measures to protect what they define to be in their national security interests.[198] Regarding the phrase "emergency in international relations," the WTO has only just begun to define it, leaving the door open for states to take action on this basis when necessary. Pandemics, for example, may be included as qualifying events under Article XXI(b)(iii) in the future, even though there are other safeguard provisions in the WTO agreements that deal with health scares.[199] However, if measures are taken for political, economic, social, environmental, or health-related reasons, then the member should look to other exceptions in the GATT/WTO agreements (i.e., Article XX of the GATT 1994) to justify their actions.[200] The framers of the GATT/WTO system never intended

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195. *See id.*; Russia Transit Panel Report, *supra* note 68, ¶ 7.82; Saudi Arabia Panel Report, *supra* note 103, ¶ 7.250.

196. *See* GATT, *supra* note , art. XXI(b); Saudi Arabia Panel Report, *supra* note 103, ¶ 7.250.

197. *See* Saudi Arabia Panel Report, *supra* note 103, ¶ 7.242 (outlining four-part test).

198. *See, e.g.*, Russia Transit Panel Report, *supra* note 68, ¶¶ 7.111, 7.125; Saudi Arabia Panel Report, *supra* note 103, ¶ 7.257.

199. *E.g.,* GATT, *supra* note 10, art. XX(a).

200. *Id.* art. XX. According to one legal writer, GATT Article XX acts as "a safety valve, an insurance mechanism, or an adjustment policy" which allows WTO members to balance their policy goals with trade liberalization. Andrew Amos, *A Critical Assessment of the Application of Article XX of the General Agreement on Tariffs and Trade*, NEW JURIST (Oct. 18, 2015), https://newjurist.com/the-application-of-article-xx-of-the-general-agreement-on-tariffs-and-trade.html [https://perma.cc/X3C3-MTLQ].

Article XXI to serve as a blanket exception for any member state to do what it wants.[201] Accordingly, the ruling against the United States does not undermine national sovereignty or discredit the WTO on this point, and it will not likely result in its members withdrawing from the framework since the principle is still preserved within the system.

Third, the U.S. Government has a credibility problem in the wake of this dispute, which is causing damage to the WTO system and the rule of law in international affairs. Its reputation has been damaged significantly by the unilateral imposition of restrictive trade measures since 2018, its misuse of the national security exception, the blocking of WTO Appellate judges, and the Biden Administration's statements criticizing the WTO in the aftermath of the latest steel tariff decision. Norway's Minister of Foreign Affairs, Ine Erikson Soereide, expressed what many were thinking shortly after the tariff measures were imposed by the United States, that the Trump Administration's "disregard for WTO rules weakens the credibility of the United States in international trade, and risks undermining the rules based multilateral trading system."[202] The U.S. "obligation of good faith" has been called into question as the world interprets its use of the national security exception as a means of circumventing its obligations under international law. This credibility problem on the trade front has been further exacerbated by new concerns over the Biden Administration's passage of the Infrastructure Investment and Jobs Act[203] (IIJA), the Inflation Reduction Act[204] (IRA), and the new subsidy program for green technologies, all of which consist of measures that arguably contravene WTO rules.[205] The IIJA's "Build America, Buy America" provisions—aimed at strengthening "Made in America" requirements to ensure that federally funded infrastructure projects use American-made iron, steel, construction materials, and manufactured

201. *See supra* notes 88-92 and accompanying text.

202. *Norway Files Complaint with WTO Over Trump Aluminium and Steel Tariffs*, ALUMINIUM INSIDER (June 14, 2018), https://aluminiuminsider.com/norway-files-complaint-with-wto-over-trump-aluminium-and-steel-tariffs [https://perma.cc/5BH7-8GKD].

203. Pub. L. No. 117-58, 135 Stat. 429 (2021).

204. Pub. L. No. 117-169, 136 Stat. 1818 (2022).

205. *See* Andy Bounds, *EU Accuses US of Breaking WTO Rules with Green Energy Incentives*, FIN. TIMES (Nov. 6, 2022), https://www.ft.com/content/de1ec769-a76c-474a-927c-b7e5aeff7d9e [https://perma.cc/QD5X-U7G9]. The infrastructure bill contains a "Buy America" provision, but there are also provisions for a waiver system and other cost thresholds which could smooth the way for foreign imports.

products—have raised concerns in trade circles regarding the implementation of domestic procurement preferences.[206] Moreover, the EU has criticized the IRA's $369 billion package of subsidies and tax credits for American producers of green technology as clearly discriminatory and inconsistent with WTO rules.[207] The Biden Administration has a long way to go to recover from the Trump Administration's actions and to restore confidence in the United States within the WTO system.

Finally, it is an overstatement for scholars and legal analysts to claim that the WTO system is dead or in jeopardy due to this most recent dispute involving the national security exception. Scholars have been saying for years that globalists would rue the day when the WTO decided the U.S. steel/aluminum tariff case. Edward Alden, a scholar at the Council on Foreign Relations, wrote in a blog post shortly after the Trump steel and aluminum tariff measures were imposed:

> [S]omething important and valuable was lost . . . with Donald Trump's White House tariff proclamation. The WTO was a lovely promise of a more rational, predictable, and fairer global economic order. Its death should be mourned.[208]

Invoking Thucydides, he then added, "[t]he world will now revert to the historical norm in which the strong do what they can and the weak suffer what they must. That has long been the reality of international politics."[209] Jim Bacchus of the Cato Institute and Chad Brown of the Peterson Institute for International Economics were less dramatic though just as concerned about the possible unraveling of the WTO dispute settlement framework, arguing that countries are now more likely to invoke the national security exception in today's climate of increasing global tensions, creating a "black hole" of endless cases in the system.[210] It is fair to say that the WTO's most recent ruling against the United States strikes at the heart of the WTO dispute settlement

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206. *See, e.g.*, Jean Heilman Grier, *"Buy America" in Infrastructure Act: Trade Agreements*, PERSPS. ON TRADE (Jan. 20, 2022), https://trade.djaghe.com/?p=7265 [https://perma.cc/65K6-2HQW].

207. Andy Bounds, *EU Accuses US of Breaking WTO Rules with Green Energy Incentives*, FIN. TIMES (Nov. 6, 2022), https://www.ft.com/content/de1ec769-a76c-474a-927c-b7e5aeff7d9e [https://perma.cc/MX2Y-VPQ6].

208. Edward Alden, *Trump, China, and Steel Tariffs: The Day the WTO Died*, COUNCIL ON FOREIGN RELS. (Mar. 9, 2018, 12:00 PM), https://www.cfr.org/blog/trump-china-and-steel-tariffs-day-wto-died [https://perma.cc/S6QZ-92UR].

209. *Id.*

210. *See* Sherman & Josephs, *supra* note 189; Bacchus, *supra* note 13.

system, but the "crown jewel" of the institution (as the dispute settlement system is often called) is not at risk of collapsing yet.

Though the WTO dispute settlement process may be at an impasse or due for some reform, matters within the WTO framework have not yet reached a tipping point. The member states still stand more to gain by remaining within the Geneva-based framework than outside of it as the current system provides more stability and certainty than any other alternative. This is evidenced by the fact that the United States, despite its bluster about rejecting the panel's decision, has already taken steps to negotiate with some of the complainants in the dispute—the EU, Japan, and the United Kingdom—and remove some of the Trump-era tariff measures.[211] Moreover, it has been working with the EU on a new plan to shape the global steel and aluminum markets in a more sustainable direction environmentally.[212] Furthermore, it is not in the self-interest of the United States (or any other member) to abandon or discredit the WTO. The United States has won far more cases before the Dispute Settlement Body than it has lost since 1995, and in most of these disputes, the losing party has complied with the panel's decision.[213] The WTO is here to stay and the strong and the weak will continue to be better off working within the system rather than going it alone.

CONCLUSION

The WTO's December 9, 2022, landmark ruling against the United States in its steel/aluminum tariff dispute with China and other trade partners is a turning point for the rules-based global trading system, but not the end. The decision builds upon the recent *Russia—Traffic in Transit* and *Saudi Arabia—Copyright Piracy* precedents, where a WTO

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211. *See* Peter Buxbaum, *Revealed: Biden's Steel Tariff Policy*, AM. J. TRANSP. (Mar. 14, 2022), https://ajot.com/premium/ajot-revealed-bidens-steel-tariff-policy [https://perma.cc/2LPB-5DCH]; Doug Palmer, *U.S., U.K. Reach Deal to End Steel Tariff Dispute*, POLITICO (Mar. 22, 2022, 7:01 PM), https://www.politico.com/news/2022/03/22/u-s-u-k-deal-end-steel-tariff-00019445 [https://perma.cc/U9M3-WAN6].

212. The United States and EU have been negotiating a new Global Sustainable Steel Arrangement to "decarbonize the steel and aluminum industries by establishing new standards for carbon intensity." Buxbaum, *supra* note 211.

213. The United States has won about eighty-seven percent of the cases that it has brought against other countries since the WTO's founding. It has lost about seventy-five percent of the cases other countries have brought against the United States. *See* STRAITS TIMES, *supra* note 165.

Member invoked the national security exception under Article XXI(b)(iii) of the GATT 1994 to justify the imposition of restrictive trade measures, in important ways. First, it solidifies the WTO's answer to the question as to whether the national security exception under Article XXI(b)(iii) is self-judging or not under WTO rules. The dispute settlement panel held that though a WTO member reserves the right to determine what is in its national security interests, a WTO Member's subjective assessment as to when to invoke the national security exception can be doubted or re-evaluated by an international judicial body through an objective review of the circumstances. Second, the December 9 decision, and its two precedents, provided further clarity and scope to the language contained within Article XXI(b)(iii) and how it should be applied in a given scenario. For example, the phrase "taken in time of war or other emergency in international relations" does not permit the imposition of restrictive measures for ordinary "political or economic differences" between WTO members. Lastly, the WTO steel/aluminum tariff decision put an end to the argument that a WTO member had unfettered discretion to invoke the national security exception under Article XXI(b) whenever it suits its interests. The Trump Administration's brazen attempt to abuse trade rules under the guise of national security to score political points with steel industries in swing states ultimately backfired on the Administration by elevating the current crisis of confidence between the United States and the WTO. Though it is not the end of the WTO, the December 9 ruling, based upon the Biden Administration's initial reaction, marks a critical turning point in the relationship between the United States and WTO that places the entire rules-based trading system at risk with potentially serious consequences for the global economy. Some would call it "Buyers' Remorse."[214] Others would call it "The Reckoning."

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214. *See supra* note 1 and accompanying text.