

2024

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

Stephen Kho

Akin Gump Strauss Hauer & Feld, LLP, skho@akingump.com

Yujin McNamara

Akin Gump Strauss Hauer & Feld, LLP, ymcnamara@akingump.com

Sarah Kirwin

Akin Gump Strauss Hauer & Feld, LLP, skirwin@akingump.com

Brooke Davies

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/auilr>



Part of the [International Trade Law Commons](#)

Recommended Citation

Kho, Stephen; McNamara, Yujin; Kirwin, Sarah; and Davies, Brooke (2024) "The Conundrum of the Essential Security Exception: Can the WTO Resolve the GATT Article XXI Crisis and Save the Dispute Settlement Mechanism?," *American University International Law Review*. Vol. 40: Iss. 1, Article 5. Available at: <https://digitalcommons.wcl.american.edu/auilr/vol40/iss1/5>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

THE CONUNDRUM OF THE ESSENTIAL SECURITY EXCEPTION: CAN THE WTO RESOLVE THE GATT ARTICLE XXI CRISIS AND SAVE THE DISPUTE SETTLEMENT MECHANISM?

STEPHEN S. KHO^{*}, YUJIN K. MCNAMARA^{**},
SARAH B.W. KIRWIN^{***} & BROOKE DAVIES^{****}

The continued blocking of Appellate Body members to the World Trade Organization's dispute settlement mechanism has thrown the multilateral trading system's most important governing body into an existential crisis. As a precondition for resuming the WTO's dispute settlement functions, the United States has insisted that WTO Members

* Stephen Kho is a partner in the International Trade practice at the law firm Akin Gump Strauss Hauer & Feld LLP (“Akin”), based in Washington, DC. Prior to joining Akin, Mr. Kho served for nearly ten years as associate general counsel and acting chief counsel for China matters at the U.S. Trade Representative, and he spent three years as legal advisor to the U.S. Mission to the World Trade Organization (“WTO”) in Geneva, Switzerland.

** Yujin K. McNamara is also a partner in Akin’s International Trade practice, based in Washington, DC. Ms. McNamara represents clients in trade litigation before U.S. agencies and international organizations and advises companies and sovereign entities on U.S. law and policy affecting international trade and business.

*** Sarah Kirwin is a counsel in Akin’s International Trade practice, also based in Washington, DC. Ms. Kirwin counsels companies on matters at the intersection of trade policy and customs compliance and represents companies and sovereign government in trade and investment disputes in various international fora.

**** Brooke Davies is a legal, markets, and operations officer at CarbonPool, a climate-focused carbon credit insurance firm. Prior to joining CarbonPool, and during the writing of this article, Ms. Davies was an associate in Akin’s International Trade practice, based on Geneva, Switzerland. Disclaimer: The views and opinions expressed in this article are those of the authors only and do not represent the views of Akin or CarbonPool or any other attorneys or employees of Akin or CarbonPool.

The authors extend sincere thanks to Rachel Polan, also a Geneva-based associate in Akin’s International Trade practice, for her invaluable contributions to this article.

agree that the “essential security exception” under Article XXI(b) of the General Agreement on Tariffs and Trade of 1994 is wholly self-judging and thus nonjusticiable. This article argues that the U.S. position is unsupported by the text, context, object and purpose, and negotiating history of Article XXI. Moreover, the U.S. position poses dangerous consequences to the future relevance and legitimacy of the rules-based trading system. Continued insistence of Article XXI’s nonjusticiability by the United States would thus be misguided, and indeed risks only worsening the current crisis.

I. INTRODUCTION	129
II. THE TEXT, CONTEXT, AND OBJECT AND PURPOSE OF GATT ARTICLE XXI(B) DOES NOT SUPPORT THE CONCLUSION THAT THE PROVISION IS ENTIRELY SELF-JUDGING	134
III. THE NEGOTIATING HISTORY OF ARTICLE XXI DOES NOT SUPPORT THE CONCLUSION THAT THE PROVISION IS ENTIRELY SELF-JUDGING.....	140
A. THE EVOLVING U.S. POSITION PRE-ITO NEGOTIATIONS (MAY–SEPTEMBER 1946).....	143
B. THE ITO NEGOTIATIONS (OCTOBER 1946–MARCH 1948).....	147
1. The London Round (October–November 1946) ...	147
2. The New York Round (January–February 1947) ..	148
3. The Geneva Round (July–August 1947)	152
4. The Havana Round (November 1947–March 1948).....	162
C. THE PASSAGE OF THE GATT 1947	165
D. THE URUGUAY ROUND.....	166
IV. STATE PRACTICE AND GATT/WTO JURISPRUDENCE REGARDING ARTICLE XXI DOES NOT SUPPORT THE CONCLUSION THAT THE PROVISION IS ENTIRELY SELF-JUDGING	168
A. THE UNITED STATES EXPORT MEASURES DISPUTE (1949).....	168
B. PORTUGAL’S ACCESSION TO THE GATT (1961)	170
C. UNITED ARAB REPUBLIC’S ACCESSION TO THE GATT (1970).....	170

D. SWEDEN’S GLOBAL IMPORT QUOTA SYSTEM FOR CERTAIN FOOTWEAR (1975).....	171
E. THE FALKLANDS WAR DISPUTE (1982).....	172
F. THE U.S.-NICARAGUA EMBARGO DISPUTE (1985).....	175
G. THE EC-YUGOSLAVIA DISPUTE (1991).....	177
H. THE U.S.-CUBA SANCTIONS DISPUTE (1996).....	178
I. RUSSIA – TRAFFIC IN TRANSIT (DS512).....	180
J. SAUDI ARABIA – IPRs (DS567).....	182
K. U.S. – STEEL AND ALUMINUM PRODUCTS (DS544, 552, 556, 564).....	183
L. U.S. – ORIGIN MARKING (HONG KONG, CHINA) (DS597).....	186
V. IMPLICATIONS OF THE U.S. POSITION.....	187
A. PRESSURE TO SUPPORT A SELF-JUDGING PROVISION....	189
B. INTERPRETATION THROUGH ARTICLE IX:2 OF THE MARRAKESH AGREEMENT.....	191
C. COMPENSATION FOR INVOKING A SELF-JUDGING ARTICLE XXI.....	192
VI. CONCLUSION	195

I. INTRODUCTION

The World Trade Organization (WTO) is in an existential crisis. Ever since the United States began blocking the appointment of new Appellate Body members, the WTO’s dispute settlement mechanism began to slowly break down.¹ And as the Appellate Body lost its ability to function, some WTO Members realized that they were now empowered to appeal disputes they had lost at the panel level “into the void,” thereby preventing resolution. This, in turn, resulted in the filing of fewer disputes as Members instead started taking trade matters into their own hands. At the same time, Members began to more freely ignore their WTO obligations, knowing that if challenged, they could simply appeal adverse decisions “into the void” while still

1. See Jean-Marie Paugam, Deputy Director-General, World Trade Org., Address to the European Economic and Social Committee (Oct. 20, 2021), https://www.wto.org/english/news_e/news21_e/ddgjp_20oct21_e.htm (attributing the erosion of the dispute process to Appellate Body blocking renewals).

boasting their compliance with WTO rules because the dispute settlement mechanism would not have rendered a final decision based on a procedural technicality.

Some WTO Members are now actively attempting to resuscitate the faltering dispute settlement system. Over the past year, efforts to negotiate a solution to the Appellate Body impasse have intensified among some Members, so much so that WTO Director-General Ngozi Okonjo-Iweala had suggested that dispute settlement reform was a “key priority” of the Thirteenth WTO Ministerial Conference.² At the end of the Conference, however, no resolution was reached, although the Members did adopt a Ministerial Decision that declared a goal of “having a fully and well-functioning dispute settlement system accessible to all Members by 2024.”³

However, this is easier said than done. Despite recent progress in the reform discussions, a key sticking point in the negotiations has been the justiciability of Article XXI(b) of the General Agreement on Tariffs and Trade of 1994 (GATT).⁴ Article XXI(b) is an exception that allows WTO Members to legally deviate from their trade obligations when necessary for the protection of their “essential security interests.”⁵ As with the Appellate Body impasse, the United States stands largely alone in taking a hard-line position that Article XXI(b) must be wholly self-judging and thus nonjusticiable under the WTO.⁶ In the view of the United States, Members may unilaterally

2. *DG Okonjo-Iweala to G20: Time to Roll Up Our Sleeves and Deliver at MC13*, WORLD TRADE ORG. (Aug. 24, 2024), https://www.wto.org/english/news_e/news23_e/dgno_24aug23_e.htm.

3. World Trade Org., *Dispute Settlement Reform: Ministerial Decision Adopted on 2 March 2024*, WTO Doc. WT/MIN(24)/37WT/L/1192, (Mar. 4, 2024).

4. Katherine Tai, Ambassador, Off. U.S. Trade Rep., *Remarks to the Center for Strategic and International Studies* (Sept. 22, 2023).

5. Equivalent provisions to Art. XXI(b) can be found in the more recently adopted Art. XIV *bis* of the General Agreement on Trade in Services (GATS) and Art. 73 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement). For simplicity, this article will refer only to Art. XXI, though the discussion applies equally. General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

6. See Press Release, Off. U.S. Trade Rep., *Statements by the United States at the Meeting of the WTO Dispute Settlement Body* (Jan. 27, 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/january/statements-united-states-meeting-wto-dispute-settlement-body> (discussing the

determine for themselves whether their actions are taken for purposes of their essential security interests, or, in other words, whether they self-qualify to use the Article XXI(b) exception to justify what would otherwise be a WTO violation.⁷

Most other WTO Members, and all WTO panels that have considered this question, have disagreed with the United States. They assert that Article XXI(b) is not wholly self-judging, and at least some form of review is warranted by the WTO when a Member attempts to invoke Article XXI(b).⁸ Under this view, for example, a WTO panel should be able to consider factors like the timing or subject matter of the action to determine whether that action falls within the basic scope of the criteria outlined in Article XXI(b).⁹

United States' staunch position).

7. Communication from the United States, *United States – Certain Measures on Steel and Aluminum Products (European Union)*, ¶ 2, WTO Doc. WT/DS548/13 (July 6, 2018) (“Issues of national security are political matters not susceptible for review or capable of resolution by WTO dispute settlement. Every Member of the WTO retains the authority to determine for itself those matters that it considers necessary to the protection of its essential security interests, as is reflected in the text of Article XXI.”).

8. ANALYTICAL INDEX: GATT 1994 484–88 (World Trade Org. 2024) (highlighting the Panel’s findings for support for different interpretations).

9. Warren Maruyama & Alan Wm. Wolff, *Saving the WTO from the National Security Exception*, 14–15 (Peterson Inst. Int’l Econ. Working Paper No. 23–2 (2023)), <https://www.piie.com/sites/default/files/2023-05/wp23-2.pdf>; see, e.g., Panel Report, *Russia – Measures Concerning Traffic in Transit*, ¶ 7.110, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019); Addendum, *Russia – Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/Add. 1 (Apr. 26, 2019); Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, ¶¶ 7.241–42, WTO Doc. WT/DS567/R (circulated June 16, 2020); Addendum, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/Add. 1 (June 16, 2020); Panel Report, *United States – Origin Marking Requirement*, ¶ 7.185, WTO Doc. WT/DS597/R (circulated Dec. 21, 2022); Addendum, *United States – Origin Marking Requirement*, WTO Doc. WT/DS597/Add. 1 (Dec. 21, 2022); Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Turkey)*, ¶¶ 7.143–44, WTO Doc. WT/DS564/R (circulated Dec. 9, 2022); Addendum, *United States – Certain Measures on Steel and Aluminum Products (Turkey)*, WTO Doc. WT/DS564/Add. 1 (Dec. 9, 2022); Supplement, *United States – Certain Measures on Steel and Aluminum Products (Turkey)*, WTO Doc. WT/DS564/Suppl. 1 (Dec. 9, 2022); Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Switzerland)*, ¶¶ 7.146–47, WTO Doc. WT/DS556/R (circulated Dec. 9, 2022); Addendum, *United States – Certain Measures on Steel and Aluminum Products (Switzerland)*, WTO Doc. WT/DS556/Add. 1 (Dec. 9, 2022); Supplement, *United States – Certain Measures*

These views are fundamentally at odds with each other. Despite clearly being in the minority,¹⁰ the United States has continued to assert the nonjusticiability of Article XXI(b), including in a recently initiated dispute by China concerning the October 2022 U.S. export control measures that restrict Chinese firms' access to advanced semiconductor technology.¹¹ More importantly, the United States has now taken the position that it will not support WTO dispute settlement reform until the question of Article XXI(b)'s justiciability is resolved in its favor.¹² It is even more concerning that the United States seems to be taking a heavy-handed position that all other WTO Members must agree that the "essential security" exception is self-judging as a precondition for the United States to agree to resolve the other issues surrounding the WTO dispute settlement mechanism's functionality and relevance.¹³

Given the current conundrum, this article argues that continued

on Steel and Aluminum Products (Switzerland), WTO Doc. WT/DS556/Suppl. 1 (Dec. 9, 2022); Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, ¶¶ 7.116–17, WTO Doc. WT/DS552/R (circulated Dec. 9, 2022); Addendum, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, WTO Doc. WT/DS552/Add. 1 (Dec. 9, 2022); Supplement, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, WTO Doc. WT/DS552/Suppl. 1 (Dec. 9, 2022); Panel Report, *United States – Certain Measures on Steel and Aluminum Products (China)*, ¶¶ 7.128–29, WTO Doc. WT/DS544/R (circulated Dec. 9, 2022); Addendum, *United States – Certain Measures on Steel and Aluminum Products (China)*, WTO Doc. WT/DS544/Add. 1 (Dec. 9, 2022); Supplement, *United States – Certain Measures on Steel and Aluminum Products (China)*, WTO Doc. WT/DS544/Suppl. 1 (Dec. 9, 2022).

10. Sarah Anne Aarup, *Reform or Die? If the U.S. Gets Its Way, the WTO Might Do Both*, POLITICO (May 9, 2023), <https://www.politico.eu/article/reform-die-usa-washington-world-trade-organization-wto-ngozi-okonjo-iweala-joe-biden> (citing one trade diplomat stating that the discussions surrounding WTO reform can be characterized as the "U.S. against the rest").

11. Arjun Kharpal, *China Brings WTO Case Against U.S. and Its Sweeping Chip Export Curbs as Tech Tensions Escalate*, CNBC (Dec. 13, 2022), <https://www.cnbc.com/2022/12/13/china-brings-wto-case-against-us-chip-export-restrictions.html> (citing a USTR spokesperson who stated that "the WTO is not the appropriate forum to discuss issues related to national security").

12. See Press Release, Off. U.S. Trade Rep., Statement from USTR Spokesperson Sam Michel on Today's WTO Panel Ruling (Aug. 16, 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/august/statement-ustr-spokesperson-sam-michel-todays-wto-panel-ruling> (noting the U.S. concerns and qualms preceding reform).

13. See *id.*

insistence by the United States of Article XXI(b)'s nonjusticiability would be misguided. First, the text, context, object and purpose, as well as the negotiating history of Article XXI(b), all point to the conclusion that there exists some space for review of an invocation of Article XXI(b) by WTO panels, even if limited.¹⁴ Thus, the U.S. position appears incorrect on a purely legal basis. Second, continued U.S. posturing on the self-judging nature of Article XXI(b) will only lead to more WTO Members adopting the same position. While this may be the United States' objective, counterintuitively, the result would be to create an increasingly large loophole through which additional adherents of the view could justify by fiat any measure for which they wish to avoid WTO scrutiny, leading ultimately to the irrelevance of the WTO system as a whole. Third, insisting on a particular outcome regarding the interpretation of Article XXI(b), especially when that outcome is simply not legally supported, would run counter to the very principles the United States has defended globally up to this point, i.e., the importance of the rule of law over strong-arm tactics, the social and economic benefits of collaboration among the global trading community, and the stability and longevity of the multilateral trading system as a means to negotiate and peacefully resolve economic disagreements.

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

14. See WTO ANALYTICAL INDEX: GATT 1994, *supra* note 8, at 484–88.

II. THE TEXT, CONTEXT, AND OBJECT AND PURPOSE OF GATT ARTICLE XXI(B) DOES NOT SUPPORT THE CONCLUSION THAT THE PROVISION IS ENTIRELY SELF-JUDGING

WTO panels must interpret the WTO agreements in accordance with the customary rules of interpretation of public international law.¹⁵ Therefore, this evaluation of Article XXI(b) must begin with an assessment of the text and context of this provision, as well as the object and purpose of the GATT with respect to this provision. As explained below, and consistent with all prior GATT-era and WTO-era panel rulings, these interpretive rules do not support a wholly self-judging interpretation of Article XXI(b).¹⁶ While Article XXI(b) does give Members broad discretion to implement measures necessary to protect their essential security interests, Article XXI(b) does not consign WTO panels to simply act as a rubber stamp for such unilateral and unfettered actions. Rather, a balance must be struck between preserving Members' rights to protect their security interests, while maintaining the integrity and durability of a rules-based trading system that can outlast the whims of any Member. GATT Article XXI states:

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

15. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 3, 150 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms in their context and in the light of its object and purpose."); see Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, at 17, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) (quoting verbatim the general rule of interpretation from art. 31 and stating the general rule is relied upon by all participants).

16. See WTO ANALYTICAL INDEX: GATT 1994, *supra* note 8, at 484–88.

(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.¹⁷

As explicitly stated, Article XXI(b) permits a Member to take “any action” that “it considers necessary for the protection of its essential security interests.”¹⁸ The term “any” conveys the broad scope of acceptable actions by a Member. For example, the Appellate Body has stated that the term “any” in the context of “any measure” refers to “measures of all types” and that the text does not distinguish between, or exclude, certain types of measures.¹⁹ The phrase “to prevent a Member from taking any action,” considered in the context of the introductory clause of Article XXI(b), makes clear that no provision of the WTO agreements can prevent or discourage the invoking Member from taking any type of act whatsoever that satisfies the conditions in the remainder of the relevant provision.

Further, the use of the term “it considers” confirms that the determination of whether a Member faces a security threat, and what actions it should take to confront that threat, rest solely with the Member in question. The pronoun “it” refers to the Member invoking the exception. Dictionary definitions of “considers” include “to believe to be,” “to think of as,” and to “come to judge or classify.”²⁰

17. GATT, *supra* note 5, art. XXI.

18. *Id.*

19. Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products*, ¶ 188, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001).

20. See *Consider*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/consider>; see also *Consider*, MERRIAM–WEBSTER DICTIONARY,

Thus, the security exceptions do not refer to any action that “is necessary,” but rather to any action that the invoking Member believes to be, thinks of as, or judges or classifies as “necessary.” As the panel in *Russia – Traffic in Transit* concluded, and subsequent panels reviewing Article XXI(b) have confirmed, to give legal effect to the phrase “which it considers,” the question of whether an action is “necessary” must be left to the discretion of the invoking Member.²¹

The deference accorded to a WTO Member under GATT Article XXI(b) applies not only to whether the Member taking the action considered doing so to be “necessary,” but also whether the Member acted “for the protection of its essential security interests.”²² The text makes clear that this element must be examined from the vantage point of the Member invoking the exception. In the context of this provision, the term “its” precedes “essential security interests” and connotes that the interests are those that belong to the invoking Member. This language recognizes that each Member might define its own “essential security interests” differently. As the *Russia – Traffic in Transit* panel explained, what a Member considers relevant in protecting itself “from external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances.”²³ For these reasons, that panel found that the WTO allows each Member to define what it considers to be “its essential security interests.”²⁴

Article XXI(b) therefore permits Member discretion over the type of action it takes under Article XXI(b) (“any action”), whether that action is “necessary,” and whether that action will afford “protection” to what that Member identifies as its “essential security interests.” In short, the text of Article XXI(b) makes clear that Member discretion covers the whole of subparagraph (b). This discretion is not limitless.

<https://www.merriam-webster.com/dictionary/consider>.

21. See Panel Report, *Russia – Measures Concerning Traffic in Transit*, *supra* note 9, ¶ 7.146; see also Panel Report, *United States – Origin Marking Requirement*, *supra* note 9, ¶¶ 7.27–28, 7.31; Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Turkey)*, *supra* note 9, ¶ 7.129.

22. See GATT, *supra* note 5, art. XXI.

23. Panel Report, *Russia – Measures Concerning Traffic in Transit*, *supra* note 9, ¶ 7.131.

24. See *id.*

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

Article XXI begins with an overarching chapeau—“Nothing in this Agreement shall be construed”—that covers three separate subparagraphs (a), (b) and (c).²⁵ Subparagraph (b), in turn, also has an overarching chapeau—“to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests”—that then covers three further subparagraphs (i), (ii) and (iii).²⁶ The structure of both of these subparagraph groupings make clear that they are all exhaustive lists and not illustrative lists. In other words, under Article XXI(b), subparagraphs (i)-(iii) are an exclusive and exhaustive list, each of which may independently create a legitimate exclusion under subparagraph (b), but no other circumstance—no matter how similar—is permissible.²⁷ As the panel in *US – Steel and Aluminum Products (Norway)* concluded, “Article XXI(b) is to be given meaning as a complete sentence with the enumerated subparagraphs (i) to (iii) representing alternative endings to the sentence that begins ‘Nothing in this Agreement shall be construed.’”²⁸

Subparagraphs (i)-(iii) contain carefully crafted language that further *qualify* the type of action that would be permissible pursuant to Article XXI(b). Under subparagraph (i), for instance, an action must be “relating to” fissionable materials.²⁹ Under subparagraph (ii), an action must be “relating” to the “traffic in arms” or other enumerated categories of goods.³⁰ And under subparagraph (iii), an action must be “taken in the time of” a “war or other emergency in international relations.”³¹ Each of these conditions further narrow the permissible action to certain temporal or relational restrictions. Members cannot take “any action” under subparagraph (i), for example, if it does not *relate* to the listed materials. Put simply, a relational nexus must exist

25. See GATT, *supra* note 5, art. XXI.

26. *Id.*

27. *Id.*

28. Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 9, ¶ 7.99.

29. GATT, *supra* note 5, art. XXI.

30. *Id.*

31. *Id.*

between the Member's action and the listed materials if subparagraph (i) is to apply. Indeed, it would be noncontroversial that a Member could not justify an import ban on, say, reinforced concrete by invoking Article XXI(b)(i).

In this regard, prior panels have not found convincing U.S. textual arguments asserting that Article XXI(b) and its subparagraphs form a "single relative clause" that extends Members' discretion under "it considers" to subparagraphs (i)-(iii).³² For instance, the panel in *US – Steel and Aluminum Products (China)* considered that the text and the structure of the provision simply does not support the "single relative clause" reading because it does not "account for the structure of Article XXI(b) and the textual separation of the subparagraphs into an enumerated list, which corresponds to the role of the subparagraphs as alternative sentence endings that collectively delimit the scope of Article XXI(b)."³³

Moreover, doing so would be contrary to the principle of treaty interpretation that all terms of a treaty must be given meaning and effect, with none rendered to redundancy or inutility.³⁴ In the U.S. interpretation, the terms "relating to" and "taken in the time of" under subparagraphs (i)-(iii) would be rendered useless, as they would lose their intended purpose of qualifying an action in the particular circumstance captured under the subparagraph at issue. As such, under the rules of treaty interpretation, "relating to" and "taken in the time of" must be allowed to constrain the scope of Member action, pursuant to the ordinary meaning of those words. To do so, panels must have the authority to determine whether an action taken was in fact (i)

32. See, e.g., Panel Report, *United States – Certain Measures on Steel and Aluminum Products (China)*, *supra* note 9 ¶¶ 7.119–21; Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 9, ¶ 7.107; Panel Report, *United States – Origin Marking Requirement*, *supra* note 9, ¶ 7.57.

33. Panel Report, *United States – Certain Measures on Steel and Aluminum Products (China)*, *supra* note 9, ¶ 7.121.

34. See, e.g., Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, at 12, WTO Docs. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996); Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 45, WTO Doc. WT/DS50/AB/R (adopted Jan. 16, 1998); Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, *supra* note 15, at 23.

“relating to fissionable materials” or their derivatives; (ii) “relating to the traffic in arms” or other such goods; or (iii) “taken in the time of” a “war or other emergency in international relations.”³⁵ And to give those terms proper meaning as real limitations on a Member’s action, it must be within the panel’s purview to determine whether that action falls within the words enumerated in one of the subparagraphs of Article XXI(b). This has been the conclusion of every WTO panel that has adjudicated the question of Article XXI’s justiciability.³⁶

The object and purpose of the GATT and the Marrakesh Agreement Establishing the World Trade Organization (the “WTO Agreement”) further lends support to the above textual interpretation. The preamble of the WTO Agreement states that its purposes include to “eliminat[e] discriminatory treatment in international trade relations”; “to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade”; and “to preserve the basic principles and to further the objectives underlying this multilateral trading system.”³⁷ Further, pursuant to Article 3.2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (“Dispute Settlement Understanding” or DSU), the dispute settlement system serves “to provide security and predictability to the multilateral trading system,” as well as to “preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements.”³⁸ Taken together, these provisions make clear that an

35. GATT, *supra* note 5, art. XXI.

36. See, e.g., Panel Report, *Russia – Measures Concerning Traffic in Transit*, *supra* note 9, ¶ 7.110; Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, *supra* note 9, ¶¶ 7.241–42; Panel Report, *United States – Origin Marking Requirement*, *supra* note 9, ¶ 7.185; Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Turkey)*, *supra* note 9, ¶¶ 7.143–44; Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Switzerland)*, *supra* note 9, ¶¶ 7.146–47; Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 9, ¶¶ 7.116–17; Panel Report, *United States – Certain Measures on Steel and Aluminum Products (China)*, *supra* note 9, ¶¶ 7.128–29.

37. Marrakesh Agreement Establishing the World Trade Organization preamble, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

38. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2 1869 U.N.T.S. 401 [hereinafter DSU].

important object and purpose of the WTO agreements as a whole is to establish a long-lasting rules-based trading system that can predictably eliminate discriminatory treatment, and effectively enforce the rights and obligations that have been carefully negotiated among the vast majority of the global trading partners.

To now allow Members unfettered discretion to take “any action” without limitation and without review by the WTO dispute settlement system, simply on the bare invocation of “essential security interests” regardless of whether there are true security concerns or not, would simply be contrary to the object and purpose of the WTO agreements. Giving Members such a *carte blanche* to impose discriminatory treatment without question or accountability would render the dispute settlement system useless to rectify measures that could otherwise blatantly violate WTO rules.³⁹ It would deny the purpose of the dispute settlement system to “clarify the existing provisions” of the various WTO agreements and would provide an all-too-easy loophole for any Member, regardless of its intentions, to take unilateral discriminatory action. Thus, a wholly self-judging interpretation of Article XXI(b) would make the multilateral trading system brittle and weak, easily manipulable and ultimately irrelevant—the very opposite of “more viable and durable,” or more secure and predictable.

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

III. THE NEGOTIATING HISTORY OF ARTICLE XXI DOES NOT SUPPORT THE CONCLUSION THAT THE PROVISION IS ENTIRELY SELF-JUDGING

The United States has asserted that a general “understanding” existed at the time of Article XXI’s negotiation that the provision was

39. See Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 702 (2011), https://scholarship.law.nd.edu/law_faculty_scholarship/330.

intended to be self-judging.⁴⁰ Not only does this not align with the final text of Article XXI,⁴¹ but it also does not align with the full historical record of the negotiations. In fact, our review of the negotiating history illuminates that the negotiating parties expressed hesitation—and even opposition—to the notion that Article XXI would entirely preclude panel review.⁴² This Section traces that negotiating history, starting with the International Trade Organization (ITO) negotiations that initially conceived of a security exception and ending with Article XXI’s re-negotiation during the 1994 Uruguay Round.⁴³

The origin of Article XXI dates back to discussions by an initially small group of countries—largely led by the United States—in the early 1940s to establish a multilateral global trading system. Those discussions eventually formalized under the aegis of the Preparatory Committee of the U.N. Conference on Trade and Employment, which was established on February 18, 1946 by the U.N. Economic and Social Council to negotiate a draft the ITO Charter.⁴⁴ The ITO was envisioned to be just one of the many emerging agencies under the U.N. umbrella during that period.⁴⁵ Nineteen countries participated in

40. See First Written Submission of the United States, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, ¶¶ 167–168, WT/DS552 (June 12, 2019) (discussing previous understandings about the provision, as well as the implications of the withdrawal of Australia’s reservations).

41. See *Reports of the Commission to the General Assembly*, [1966] 2 Y.B. Int’l Law Comm’n 175, 218–221, U.N. Doc. A/6309/Rev (“[T]he text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.”); see also Panel Report, *United States – Origin Marking Requirement*, *supra* note 9, ¶¶ 7.90–91 & nn.130–31 (noting the ILC’s reference to the primacy of the text as a grounds for interpretation).

42. See, e.g., GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 1947–1994 608 (World Trade Org. ed., 6th ed. 1995) (highlighting the views of different parties concerning the relationship between Article XXI and international law).

43. See *The GATT years: from Havana to Marrakesh*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (outlining the timeline that led to the Uruguay Round).

44. See Seymour J. Rubin, *The Judicial Review Problem in the International Trade Organization*, 63 HARV. L. REV. 78, 79–80 (1949) (“On March 24, 1948, the Havana Conference concluded its activities with the signing of a Final Act authenticating the text of a Charter for an International Trade Organization.”).

45. See George Bronz, *The International Trade Organization Charter*, 62 HARV.

the Preparatory Committee.⁴⁶

The Preparatory Committee's negotiations began in earnest after the United States presented its first Suggested Charter for the ITO ("draft ITO Charter") in September 1946, which was based on a set of principles it had devised with the U.K. from 1941–1945.⁴⁷ The negotiations were split into four rounds in London (1946), New York (1947), Geneva (1947) and Havana (1947–1948), with each meeting advancing on the prior round's draft.⁴⁸ However, as its primary architect, the United States also made significant changes to the draft ITO Charter and the security exception in the periods between those formal rounds. The draft was finalized and signed in March 1948 during the Havana Round.⁴⁹

Despite the U.S. Administration's leadership in negotiating the Charter, the U.S. Congress effectively killed the ITO's establishment after refusing to ratify it in 1950.⁵⁰ With the pre-establishment collapse of the ITO, it was the GATT 1947 that eventually brought the security

L. REV. 1089, 1090 (1949) (outlining the many organizations that would comprise the framework of global economic cooperation).

46. See Robert R. Wilson, *Proposed ITO Charter*, 41 AM. J. INT'L L. 879, 880 n.5 (1947) (including Australia, Belgium, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxemburg, Netherlands, New Zealand, Norway, the Soviet Union, the Union of South Africa, the United Kingdom, and the United States).

47. See Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions*, 41 MICH. J. INT'L L. 109, 121 (2020) (outlining the beginnings of the ITO negotiations).

48. See Rubin, *supra* note 44, at 79–80 (explaining the four sessions of the Preparatory Committee as it revised the text of the "Suggested Charter" proposed by the United States).

49. See *id.* at 80 (noting the Charter for the International Trade Organization was signed and adopted on March 24, 1948).

50. See Roy Santana, *70th Anniversary of the GATT: Stalin, the Marshall Plan, and the Provisional Application of the GATT 1947*, 9 TRADE L. & DEV. 1, 19 (2017) (remarking the GATT became the "last bastion" of multilateral trade when the International Trade Organization failed to be ratified); see also Daniel Drache, *The Short but Significant Life of the International Trade Organization: Lessons for Our Time* 6–7 (Ctr. for Study of Globalisation and Regionalisation, Working Paper No. 62/00, 2000), <https://warwick.ac.uk/fac/soc/pais/research/csg/research/abstracts/abwp6200a> (noting the ITO's failure was the result of U.S. "elites" and the Republican-dominated U.S. Congress working against the Truman Administration, which had sponsored the Draft Treaty months earlier).

exception under Article XXI into force.⁵¹ Adopted on October 30, 1947, the GATT 1947 directly incorporated a late-stage version of the draft ITO Charter's security exception.⁵² This Section evaluates how the ITO negotiators' position on the security exception evolved during this time period of the security exception's drafting and adoption. It places an emphasis on the internal discussions within the U.S. delegation, due to the outsized role the United States had in crafting the security exception and the importance WTO and GATT panels have placed on those internal deliberations in later disputes.

A. THE EVOLVING U.S. POSITION PRE-ITO NEGOTIATIONS (MAY–SEPTEMBER 1946)

The United States had begun laying the groundwork for a multilateral trading system during World War II. The earliest proposals for a draft convention on international trading, informed by discussions with Canadian and U.K. officials, date back to 1944.⁵³ Even those early documents already contained draft exceptions to the parties' trade obligations for the protection of their security interests.⁵⁴ One early draft, inspired by bilateral trade agreements the United States had concluded with Argentina and Mexico, read:

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

...

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

51. See Pinchis-Paulsen, *supra* note 47, at 187 (“Due to the timing of the GATT negotiation during the Geneva ITO preparatory session, the text of article XXI was largely transplanted from the ITO’s New York and Geneva drafts.”).

52. See *id.* at 122, 187 (noting the inclusion of security exceptions in the GATT is largely due to the timing of its negotiation coinciding with the ITO preparatory session).

53. See *id.* at 126–27 (“The ECEFP drew from past U.S. trade agreements and discussions with British and Canadian officials to form the earliest proposals for a multilateral convention on commercial policy.”).

54. See *generally id.* at 126–28 (explaining the security exceptions arose from the U.S.-Argentina and U.S.-Mexico reciprocal trade agreements).

...

(h) undertaken in pursuance of obligations for the maintenance of international peace or security;⁵⁵

During these preparatory years, sharp internal divisions arose within the U.S. government over the question of national security's relationship to global trade, with the U.S. Department of State ("State Department") on one side and the U.S. Departments of War, the Army, and the Navy ("Services Departments") on the other.⁵⁶ These divisions defined the U.S. stance throughout the negotiation of the ITO and GATT 1947. As one commentator put it, the primary difference between the two was that, while the State Department "understood national security as an exception to free trade rules, Services saw *free trade* as the exception, and national security as the rule."⁵⁷ However, in the time leading up to the ITO negotiations, both sides largely agreed that the security exception should be subject to at least some form of review in an international adjudicative forum, as described below.

After several rounds of internal negotiations and proposed drafts, in May 1946, the U.S. Executive Committee on Economic Foreign Policy (ECEFP), the inter-departmental body primarily charged with the Suggested Charter's drafting, circulated a draft version for U.S. government stakeholder review.⁵⁸ The exception included in the draft stated:

Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures

...

55. *Id.* at 128.

56. *Id.* at 117, 122–23 (outlining the tensions between the U.S. State Departments and Services Departments as to post-war U.S. foreign economic policy).

57. *Id.* at 122–23.

58. While the ECEFP had been internally negotiating draft exceptions for around two years before the May 1946 draft, the establishment of the Preparatory Committee was the point when it became clear that that exception would specifically be put towards a draft ITO Charter. *See id.* at 129 & n.113.

(b) relating to the traffic in arms, ammunition, implements of war and fissionable materials;

(c) in time of war or imminent threat of war, relating to the protection of the essential security interests of a Member;

...

(j) undertaken in pursuance of obligations under the UN Charter for the maintenance or restoration of international peace or security.⁵⁹

In response to the draft, the Services Departments raised a number of criticisms, most of which focused on their concern that the proposed exceptions were “much too narrow” to properly address U.S. security interests, namely its ability to control the trade of raw materials essential for U.S. defense and military capabilities.⁶⁰ Officials at State in turn responded that, if the scope of the exceptions were broadened, this would give a “carte blanche to other countries to violate their commitments with respect to commercial policy under the cloak of a sweeping security exception.”⁶¹ Regarding the exception’s justiciability, some within the Services Departments at this point did appear to wish for the provision to be self-judging.⁶² During one discussion on June 17, 1946, representatives from the Services Departments sought an exception that would allow parties to “unilaterally” take action “which they feel might be helpful to security.”⁶³ However, others within the Services Departments still

59. *Id.* at 129–30.

60. *Id.* at 130 (highlighting the Services Departments’ reluctance to accept the proposed security exceptions due to concerns about the ability of the U.S. to conserve and develop raw materials necessary for security).

61. Supplement, *United States – Certain Measures on Steel and Aluminium Products (Norway)*, *supra* note 9, ¶ 4.5 (addressing the concerns of the military services for the proposed ITO Charter).

62. See Supplement, *United States – Certain Measures on Steel and Aluminium Products (Norway)*, *supra* note 9, ¶¶ 4.1, 4.19 (presenting the view of the U.S. concerning “various internal documents” of the U.S. delegation of the ITO Charter and the GATT 1947).

63. See First Written Submission of the United States, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 40, ¶ 89 (noting the desire of some U.S. government stakeholders for an exception to ITO obligations in order to “unilaterally” protect national security regardless of whether there is an imminent threat of war).

focused their arguments around *which body* should be able to review invocations of the exception, rather than whether the exception should be reviewable at all. One representative from the Services Departments expressed concern about handing “complete power” to interpret “national security exceptions” to the ITO Executive Board, while also recognizing the limitations of review by the International Court of Justice (ICJ).⁶⁴ That same Services Departments representative proposed in a June 28, 1946 not to exclude the exception from justiciability, but to recommend that “questions of interpretation involving national security” be left to the U.N. Security Council.⁶⁵ A State Department proposal in early July 1946 similarly suggested that, while the ITO Executive Board could be tasked with granting exceptions on the grounds of national defense, parties would have a right of appeal to the U.N. Security Council.⁶⁶

After further rounds of inter-departmental negotiation, the United States proposed a finalized draft ITO Charter to the Preparatory Committee in September 1946,⁶⁷ with a revised Article 32 that read:

Article 32

Nothing in Chapter IV shall be construed to prevent the adoption or enforcement by any Member of measures

...

(c) relating to fissionable materials;

64. See Pinchis-Paulsen, *supra* note 47, at 143 (noting the Services Departments objected to either the ITO Executive Board or the ITO Conference having enforcement power).

65. See *id.* (remarking that certain U.S. officials raised questions as to the ICJ’s review of national security exceptions).

66. See First Written Submission of the United States, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 40, ¶ 91 (explaining the proposed compromise for granting national defense exceptions to the ITO Charter).

67. See Panel Report, *Russia – Measures Concerning Traffic in Transit*, *supra* note 9, ¶ 7.85 (noting the inclusion of a single general exception clause in the U.S. September 1946 draft).

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

(e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member;

...

(k) undertaken in pursuance of obligations under the UN Charter for the maintenance or restoration of international peace and security. . . .⁶⁸

By this time, it had become the U.S. position that, to remedy concerns of abuse of the provision, countries would be permitted to resort to the nullification or impairment procedures in the ITO draft Charter, which could afford them compensation for measures taken under the security exception. But more importantly, the exception was still seen as justiciable at this point among the U.S. negotiators. As one expert commentator has put it, the primary debate concerned not justiciability itself, but rather “which body would undertake review of trade matters involving national security concerns—an organ of the ITO or the ICJ.”⁶⁹

B. THE ITO NEGOTIATIONS (OCTOBER 1946–MARCH 1948)

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

Multilateral negotiations over the U.S. draft of the ITO Charter began at the Preparatory Committee’s first official negotiation round in London in October 1946.⁷⁰ By the end of the Round, no substantive changes had been made to the articles related to the security exception and its justiciability, and they remained as the United States tabled them.⁷¹ As the United States has itself stated in subsequent

68. U.S. DEP’T OF STATE, COM. POL’Y SERIES 93, PUB. NO. 2598, SUGGESTED CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS 24 (1946).

69. See Pinchis-Paulsen, *supra* note 47, at 148 (summarizing the U.S. internal disputes as to the security exceptions).

70. See *id.* (highlighting the start of the first preparatory meetings).

71. See *id.* at 148, 150 (explaining U.S. negotiators continued to interpret the

submissions, there was no consensus at the time for the article to be nonjusticiable.⁷² For the United States:

These provisions lacked the key phrase that appears in the current text of GATT 1994 Article XXI(b) regarding action by a Member that “it considers necessary for” the protection of its essential security interests. In addition, the essential security exception set out in Article 32 of the ITO draft charter was one of twelve exceptions, several of which later formed the basis for the general exceptions at GATT 1994 Article XX. Thus, this initial proposed text drew no distinction between essential security interests and other issues that would permit derogation from ITO commitments.⁷³

Tellingly, the parties also decided *not* to change the review mechanism for the security exception. The Report of the London Round noted that “[t]he absolute right of appeal to the International Court of Justice in security matters, as set out in the United States Draft Charter, was not called into question.”⁷⁴ Thus, the absolute right to appeal issues involving invocation of the security exception remained.⁷⁵ The fact that the matter could be appealed to the ICJ, and therefore could be examined by it, makes clear that the security exception was not considered self-judging at the time of the conclusion of the London Round.

2. *The New York Round (January–February 1947)*

In January 1947, negotiators met again in New York to refine the Preparatory Committee’s work.⁷⁶ The most significant change arising from the New York negotiations relating to Article 37 (formerly Article 32) was to add the following *chapeau* (changes italicized

security articles as including an “absolute right to appeal”).

72. See First Written Submission of the United States, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 40, ¶¶ 94, 126 (explaining the 1947 revision of the ITO Charter to address the justiciability of dispute settlement provisions related to security).

73. *Id.* ¶ 58.

74. U.N. Conference on Trade and Employment, *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, § I(6)(d), E/PC/T/33 (Oct. 31, 1946).

75. See Rubin, *supra* note 44, at 82 (concluding the absolute right to appeal remained even after “prolonged and difficult negotiations”).

76. See *id.* at 79–80 (noting the refinement of the draft by a legal drafting committee).

below). The Article was published in a Report of the Drafting Committee of the Preparatory Committee of the U.N. Conference on Trade and Employment on 5 March 1947:

Article 37

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in Chapter V shall be construed to prevent the adoption or enforcement by any Member of measures:

...

(c) relating to fissionable materials;

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

(e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member. . . .⁷⁷

The idea to add the above chapeau originated during the London Round, when the U.K. expressed concern about the potential for Member “abuse” of the provision as a pretext for economic protectionism.⁷⁸ The chapeau was the U.K.’s proposed mechanism to avoid such abuse.⁷⁹ The U.S. delegation initially pushed back on the proposal, stating that it was unnecessary in light of the nullification or impairment procedures in draft Article 30, which were designed to prevent “evasions of the provisions.”⁸⁰ At any rate, in the words of the U.S. delegate, it was “impossible to draft exceptions which could not be abused, if good faith was lacking.”⁸¹ Nevertheless, the chapeau was

77. Supplement, *United States – Certain Measures on Steel and Aluminium Products (Norway)*, *supra* note 9, ¶ 2.6.

78. *See* Pinchis-Paulsen, *supra* note 47, at 148–49 (noting intent of the chapeau was to avoid abuse of the exception provision).

79. *See id.* at 148–49 (remarking on the U.K. contribution to the language of the chapeau).

80. *See id.* at 149 (highlighting the reluctance to modify the existing exception provisions).

81. *Id.* at 149.

eventually included in the March 1947 draft.

The United States has asserted in subsequent WTO disputes that the addition of the chapeau suggested that there was not yet a consensus that the exception was self-judging.⁸² To the United States, the inclusion of the language barring “arbitrary or unjustifiable discrimination” “contemplated panel review so that the exceptions would not be applied to discriminate unfairly. . . .” This structure suggests that, at that time, not all drafters may have viewed the essential security exception in subparagraph (e) as self-judging.”⁸³ Indeed, the United States itself was among them. In one report by the National Foreign Trade Council to the U.S. Senate Finance Committee, the Council emphasized the importance of “the preservation of the undiluted right of a day in court for any aggrieved member. Such a right of appeal should not in any case be subject to the veto of the agency against whose determination or decision the appeal would lie.”⁸⁴

After the New York Round, in the spring of 1947, State and the ECEFP considered two crucial changes. First, the ECEFP proposed consolidating the security-related exceptions into its own, dedicated provision at the end of the Charter to clearly indicate that it applied to the entirety of the agreement.⁸⁵ Second, the ECEFP considered eliminating the chapeau’s language concerning “arbitrary or unjustifiable discrimination” from the security exception provision based on concerns that its wording could “preclude the possible application of the exceptions to meet the legitimate circumstances for which the exceptions were designed.”⁸⁶ Instead, the ECEFP argued for reverting to the introductory language of the previously proposed

82. See First Written Submission of the United States, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 40, ¶ 60 (explaining the U.S. view on the implications of the proviso in the chapeau).

83. See *id.* (arguing the essential security exception is not self-judging).

84. See Rubin, *supra* note 44, at 84 (remarking that the fear of “frivolous appeals” was deemed less important).

85. See Supplement, *United States – Certain Measures on Steel and Aluminium Products (Norway)*, *supra* note 61, ¶ 2.9 (noting the U.S. proposed making the security exception of the ITO Charter into a standalone provision).

86. See generally Pinchis-Paulsen, *supra* note 47, at 149–51 (explaining the changes made to the chapeau during the drafting process).

Article 32.⁸⁷

The ECEFP's two proposals were submitted for consideration by the other countries participating in the negotiations and were approved in the May 1947 decisions by the Preparatory Committee.⁸⁸ Under a new chapter at the end of the Charter, the United States consolidated the New York draft provisions and its proposed changes into a new draft Article 94 (formerly Article 37):

Article 94

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

...

(c) Relating to fissionable materials;

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

(e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a contracting party.⁸⁹

Further changes were then made in an internally circulated June 1947 draft prepared by State (changes italicized).⁹⁰

87. That previous language read: “[n]othing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures. . . .” See U.N. Econ. and Soc. Council, *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment: United States Delegation*, at 5, U.N. Doc. E/PC/T/W/23 (May 6, 1947).

88. See *id.* at 2 (declaring the Working Party’s recommendation to the Executive Committee to adopt the United States’ new Article).

89. Supplement, *United States – Certain Measures on Steel and Aluminium Products (Norway)*, *supra* note 9, ¶ at 2.9 (containing the new Article 94 proposed by the U.S.).

90. See generally Pinchis-Paulsen, *supra* note 47, at 152–54 (describing the changes to the security exceptions of article 37 proposed by U.S. Department of State lawyer Edmund Halsey Kellogg).

Article 94

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

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

2. *This article shall not be interpreted as limiting the generality of other provisions of this Charter.*⁹¹

It is worth noting that the phrase, “which it may deem necessary,” was first included in the internal U.S. June 1947 draft, and is the same phrase that the United States refers to as making the security exception self-judging in subsequent WTO disputes. The State lawyer who drafted the article, however, had a narrower take on the purpose of this phrase, which he said was intended to simply clarify that each ITO Member had the right to determine whether its measures were “necessary,”⁹² and nothing more (including whether they properly fell within the scope of the subparagraphs).

3. *The Geneva Round (July–August 1947)*

On July 4, 1947, in advance of the Geneva Round, the United States circulated an updated draft to the Preparatory Committee that incorporated much of the June 1947 internal draft’s changes,⁹³

91. *Id.* at 152–54.

92. *See id.* at 154 (explaining the distinction between Kellogg’s draft, the Suggested Charter, and the New York Charter).

93. U.N. Economic and Social Council, *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment: Draft*

including shifting the security exceptions to a new “Miscellaneous” Chapter:

Article 94

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

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

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

The fragmentation within the U.S. position can be seen in the meeting notes of the U.S. delegation during the Geneva Round in early July 1947. From those notes, it appears that the core of the conflict focused on the danger of the exception’s potential to give members *carte blanche* to escape their ITO obligations using national security

Charter, at 13, U.N. Doc. E/PC/T/W/236, (July 4, 1947).

94. See Pinchis-Paulsen, *supra* note 47, at 122 (“The construction of the security exceptions captures a tense battle between the U.S. DOS and Services as to how to define post-war U.S. foreign economic policy . . . [t]hough both prioritized U.S. security, they did so in different ways. While the U.S. DOS championed multilateral approaches to trade liberalization and the norm of nondiscrimination, Services prioritized the U.S. expansion of power to counter rising concerns with Soviet actions in eastern Europe.”).

as a pretext.⁹⁵ The Services Departments were insistent that, in the words of one representative, the United States “be given a free hand to make whatever decisions may be necessary without challenge by the ITO.”⁹⁶ Similarly, another Services Departments representative argued that the security exception should be revised to state explicitly that Charter provisions on the settlement of disputes “shall not apply” to security measures, and that “each Member shall have independent power of interpretation” over such measures.⁹⁷ Meanwhile, as one State representative put it, many in his department felt strongly that if members could use “the pretext of national security” to “take any measure whatsoever it might wish in complete disregard of all provisions of the Charter,” it would destroy the ITO.⁹⁸ In the words of a later retelling by the United States, “[t]he majority of the U.S. delegation declined to adopt these suggestions” made by the Services Departments.⁹⁹

Interestingly, when the WTO panel in *Russia – Traffic in Transit* referred to that rejection of the Services Departments’ proposal as evidence that a majority of the U.S. delegation believed the security exception should be subject to review, the United States in response claimed that the suggestion was rejected simply because it was considered “unnecessary, as the majority of the U.S. delegation felt that the then-existing text adequately preserved U.S. freedom of action.”¹⁰⁰ However, additional evidence seems to support the *Russia – Traffic in Transit* panel’s determination. For instance, in a meeting between the U.S. delegation, the State representative expressly stated that he felt sure “as a practical matter no injury could possibly come

95. See *id.* at 159–160 (explaining that “Professor Kenneth Vandeveld concluded that under [Harold Hopkins] Neff’s proposed language, ‘[a] member could avoid any Charter obligation by a mere unilateral invocation of its essential security interests.’”) (citation omitted).

96. Supplement, *United States–Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 9, ¶ 4.23.

97. *Id.* ¶ 4.17.

98. *Id.* ¶ 4.22.

99. First Written Submission of the United States, *United States–Certain Measures on Steel and Aluminum Products (European Union)*, ¶ 89, WT/DS548 (June 12, 2019) [hereinafter First Written Submission of the United States, *Certain Measures on Steel and Aluminum Products (European Union)*].

100. *Id.* ¶ 98.

to the US” as a result of the ITO’s evaluation of whether “the measures introduced by the US were in fact taken in the interest of national security.”¹⁰¹ Moreover, as a potential compromise, the representative of the Department of War proposed revising the dispute settlement chapter to state that any challenge relating to national security would be heard by the ICJ, with the ITO entirely excluded.¹⁰² In other words, even those in the Services Departments still considered some form of judicial review of an invocation of the exception to be permitted as of early July 1947.

It was also around this time that U.S. politicians became concerned about the security exception. U.S. Senate hearings taking place after circulation of the New York draft underscored that many in Congress, including Senate Finance Committee Chairman Eugene Millikin were alarmed that the ICJ might be left to evaluate the validity of U.S. national security concerns.¹⁰³ In a July 10, 1947 memorandum, the Services Departments’ representative Harold Neff recounted that State had guaranteed to the U.S. Congress that the security exception would “be worded so as to give each Member *freedom to apply them as it determines* in the interests of its own security,” but he also acknowledged that some U.S. negotiators still did not have the “intent to reserve full power of unilateral interpretation.”¹⁰⁴ Nonetheless, by the end of July 1947, despite continuing reservations by many in State, the Services Departments’ view had appeared to largely win out publicly, bolstered by Congress.

The United States aside, other potential parties to the ITO were also debating the scope of the security exception at the same time. The Preparatory Committee delegates at the beginning of the Geneva Round appeared to assume that the exception would be reviewable.¹⁰⁵

101. Pinchis-Paulsen, *supra* note 47, at 161.

102. *Id.* (“After the vote, Neff proposed a provision whereby any challenges relating to national security measures would be heard by the ICJ, rather than the ITO.”).

103. *See id.* at 161–62 (explaining that “Senator Millikin, Chair of the Senate Finance Committee, had ‘vigorously objected’ to having the ITO determine ‘whether measures adopted by the U.S. were taken in defense of the national security.’”) (citations omitted).

104. *Id.* at 164–65.

105. *See id.* at 168–69, 171–72 (discussing Chairman Colban’s remarks as a plausible indication of the organization’s atmosphere, which signaled that the

Although the record of the discussions on Article XXI's justiciability is sparse, the main question under discussion in early July 1947 appeared to be not *if* the security exception should be justiciable, but rather *which* body should be able to exercise some form of review over invocations and interpretations of the security exception (at this point Article 94). At a July 16, 1947 meeting of the Preparatory Committee, for instance, the Australian delegate stated:

... obviously one cannot ignore security measures, and I would like to suggest [that we] should advise whatever is the appropriate international organization that there are trade problems associated with fissionable materials . . . we should ask advice from, or the opportunity to consult with, whatever is the most appropriate international body regarding the way in which this item should be treated.¹⁰⁶

In response to the Australian delegate's statement, a decision was made to discuss the matter further in another part of the negotiations.¹⁰⁷

The most consequential discussion concerning Article XXI's justiciability came at a meeting on July 24, 1947, when the negotiators discussed the proposed Article 94, which the United States had circulated on July 4, 1947. In that meeting, in line with the shifting internal politics discussed above, the U.S. tone notably swayed in favor of limited review of actions under the security exception. The United States later asserted that other parties agreed with its stance, although WTO panels,¹⁰⁸ expert commentators and the named parties themselves disagreed with the U.S. assertion.

delegates recognized a need for a formal review process in the embryonic dispute settlement mechanism).

106. U.N. ESCOR, 2nd Sess., 30th mtg. of Comm'n A at 17, U.N. Doc. E/PC/T/A/PV/30 (July 16, 1947) [hereinafter 2nd Sess., 30th mtg. of Comm'n A].

107. *See id.* at 19–20 (“In view of the statement of the Australian Delegate it would, I think, be only fair that, when the Secretariat submits these Sub-paragraphs to the Preparatory Committee for a decision on inclusion in one of the last Articles of the Charter, it should draw attention to the observations made by the Australian Delegate.”).

108. First Written Submission of the United States, *Certain Measures on Steel and Aluminum Products (European Union)*, *supra* note 99, ¶ 71 (stating that the exchanges from the July 1947 meetings of the Preparatory Committee “demonstrates that the drafters of the text that became GATT 1994 Article XXI(b) understood that essential security measures could not be challenged as violating obligations in the underlying agreement”).

The relevant discussion from the July 24, 1947 Committee meeting is as follows: First, the delegate from the Netherlands expressed concern that the reference to “essential security interests” was “very difficult to understand, and therefore possibly a very big loophole in the whole Charter.” The delegate then asked, as a hypothetical, whether protectionist policies to develop a country’s agriculture during a time of emergency to “bring as much food to the country as possible” would qualify under the exception.¹⁰⁹ The U.S. delegate replied:

We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying [in the chapeau]: ‘by any Member of measures relating to a Member’s security interests,’ because that would permit anything under the sun. Therefore we thought it well to draft provisions which would take care of really essential security interests and, at the same time, so far as we could, to limit the exceptions and to adopt that protection for maintaining industries under every conceivable circumstance. With regard to sub-paragraph (e), the limitation, I think, is primarily in the time: first, ‘in time of war.’ I think no one would question the need of a Member, or the right of a Member, to take action relating to its security interests and to determine for itself—which I think we cannot deny—what its security interests are . . .

I think there must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose. We have given considerable thought to it and this is the best we could produce to preserve that proper balance.¹¹⁰

The Netherlands delegate in response stated that he “certainly could not improve the text myself” and “only wanted to point out certain dangers. Otherwise I agree with it.”¹¹¹

After the exchange between the Netherlands and the United States, the chairman of the committee stated:

109. U.N. ESCOR, 2nd Sess., 33rd mtg. of Comm’n A at 19, U.N. Doc. E/PC/T/A/PV/33 (July 24, 1947) [hereinafter U.N. ESCOR, 33rd mtg.].

110. *Id.* at 20–21.

111. *Id.* at 21.

In defence of the text, we might remember that it is a paragraph of the Charter of the ITO and when the ITO is in operation I think the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind to which the Netherlands delegate has drawn our attention.¹¹²

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

I think that the place of an Article in the Charter has nothing to do with whether it comes under [the nullification or impairment procedures in] Article 35 . . . [which] is very broad in its terms and I think probably covers any action by any Member under any provision of the Charter. It is true that an action taken by a Member under [the security exception in] Article 94 could not be challenged in the sense that it could not be claimed that the Member was violating the Charter; but if that action, even though not in conflict with the terms of Article 94, should affect another Member, I should think that that Member would have the right to seek redress of some kind under Article 35 as it now stands. In other words, there is no exception from the Application of Article 35 to this or any other Article.¹¹³

In response to the U.S. delegate, the delegate from Australia stated:

Article 94 is so wide in its coverage—it says ‘or to prevent any Member from taking any action which it may consider to be necessary to such interests’—that I am very glad to have the assurance of the United States delegate that in his opinion, at any rate, a Member’s rights under Article 35(2) are not in any way impinged upon.¹¹⁴

The delegate then asked whether “we [could] have a paragraph in Article 94 to make it clear, or some wording in Article 94, that says a Member’s rights under Article 35(2) will not be impinged upon?”¹¹⁵ In response, the chairman suggested that the mandate of the current meeting was not to change the wording of the provision but to merely confirm that the suggested changes were “in conformity with what we have decided.”¹¹⁶ The Australian delegate then confirmed that it was

112. *Id.*

113. *Id.* at 26–27.

114. *Id.* at 27.

115. *Id.*

116. *Id.* at 28.

satisfied in “light of the declaration of the United States representative confirming the applicability of Article 35”¹¹⁷ and withdrew its reservation.¹¹⁸ The chairman then stated that he considered Article 94 to be properly “considered and approved.”¹¹⁹

In later WTO disputes, the United States referenced these exchanges as a:

demonstrat[ion] that the drafters of the text that became GATT 1994 Article XXI(b) understood that essential security measures could not be challenged as violating obligations in the underlying agreement. Nevertheless, any ITO member affected by essential security measures could claim that its expected benefits under the charter had been nullified or impaired.¹²⁰

As an initial matter, this appears to be an attempt by the United States to establish a false equivalency between the availability of the nonviolation nullification and impairment (NVNI) remedy and the issue of nonjusticiability. Nothing in the text of the WTO agreements equates these two concepts, nor does it require the granting of benefits when a measure is determined to be nonjusticiable. Furthermore, from the meeting notes, it does appear that no objection was registered to the U.S. assertions that Article 94 could not be challenged under the Charter, as the U.S. delegate argued.¹²¹ However, no delegate expressly noted their agreement with the U.S. interpretation either, and WTO panels have rejected the U.S. argument that the meeting proved the drafters collectively intended the security exception to be nonjusticiable.¹²²

In further support of its argument, the United States has pointed to

117. *Id.* (This quote was spoken by the chairman in the form of a question to the Australian delegate.).

118. *See id.* at 28–29 (“The Australian delegation would have no objection to the text provided a note is inserted in the Report of this Commission saying that it is our unanimous opinion that the text of Article 94 does not conflict with the Members’ rights under paragraph (2) of Article 35 . . . [we] withdraw our reservation.”).

119. *Id.* at 30.

120. First Written Submission of the United States, *Certain Measures on Steel and Aluminum Products (European Union)*, *supra* note 99, ¶ 71.

121. *See* U.N. ESCOR, 33rd mtg., *supra* note 109 at 29 (“[W]e have considered this proposed text of Article 94 and as far as we are concerned we have no objection to it, because we read it in conjunction with paragraph 2 of Article 35.”).

122. Supplement, *United States–Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 9, ¶¶ 2.44, 2.47.

three additional commentaries drafted in the months after the Geneva Round, which it claims suggest the drafters acknowledged by the end of the Geneva Round that the security exception was self-judging.¹²³ First, a U.S. internal September 1947 Summary Report of the Geneva Round stated that the security exception had “been so worded as to make it clear that members will be able to apply them as they themselves may determine”—next to that sentence was written in parentheses, “(Senate Finance Committee).”¹²⁴ Second, a November 1947 summary of the draft charter prepared by the negotiating group states that the essential security exception would permit Members to do “whatever they think necessary to protect their security interests relating to atomic materials, arms traffic and wartime or other international emergencies, and to maintain peace according to their obligations under the U.N. Charter.”¹²⁵ Third, a U.S. Tariff Commission commentary from that time stated that Article 94:

[R]eserves to the members complete freedom of action to prohibit or regulate in any manner imports and exports of fissionable materials, implements of war, and supplies for the Army, Navy, and Air-Force; that is to say, with respect to such items[,] exports or imports may be prohibited unqualifiedly or the Member may discriminate as to where it obtains its imports or sends its exports.¹²⁶

The commission’s commentary concluded that Article 94 included no requirement that Members obtain the “approval of the Organization for any action they take or refuse to take under these exceptions.”¹²⁷

However, to claim that these pieces of evidence suggest that *all* negotiating parties were aligned with a self-judging interpretation of the security exception is questionable. The first and third commentary were *written solely by the United States*; as such, they reflect only the U.S. interpretation at that time. As for the second commentary, the

123. *See id.* ¶¶ 2.44–2.47.

124. PRELIMINARY SUMMARY OF GENEVA DRAFT OF ITO CHARTER, CHANGES FROM NEW YORK DRAFT 14 (Sept. 15, 1947), <https://worldtradelaw.typepad.com/files/wilcox-xxi.pdf>.

125. U.N. Conference on Trade and Employment, *An Informal Summary of the ITO Charter*, at 35, U.N. Doc. E/CONF.2/INF.8 (Nov. 21, 1947).

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

127. *Id.* at 96.

report just confirms the conditionality of the text, i.e., the text is only dealing with “security interests relating to atomic materials, arms traffic, and wartime or other international emergencies, and to maintain peace according to their obligations under the UN.” Moreover, the second and third commentaries expressly recognize the limitations on Members’ actions that are conveyed in the text of the provision.¹²⁸

As for the actual text found at the end of the Geneva Round, the exceptions language had changed from “action which it may consider necessary” to the security exception’s current formulation, “action which it *considers necessary for the protection of its security interests.*” The United States has argued in subsequent WTO disputes that this change “strengthened and emphasized the explicitly self-judging nature of this exception,”¹²⁹ but the former seems to give Members more flexibility than the latter.

The final text submitted to the Preparatory Committee in September 1947¹³⁰ reads:

Article 94

Nothing in this Charter shall be construed . . .

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

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

ii. relating to the traffic in arms, ammunition and implements

128. See U.N. Conference on Trade and Employment, *An Informal Summary of the ITO Charter*, *supra* note 125, at 35 (“[A]spects of th[e] problem are dealt with in three suggested drafts of Article 93, which the Preparatory Committee is submitting to the World Conference.”); U.S. TARIFF COMM’N, *supra* note 126, at 95–96 (“The application of these security exceptions has been broadened by bringing them all together in Article 94. Under previous drafts some of them applied only to particular parts of the Charter; now they apply to every obligation under the Charter.”).

129. First Written Submission of the United States, *Certain Measures on Steel and Aluminum Products (European Union)*, *supra* note 99, ¶ 65.

130. U.N. Conference on Trade and Employment, *Report of the Second Session of the Preparatory Comm.*, at 56, U.N. Doc. E/PC/T/186 (Sept. 10, 1947).

of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

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

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

Article 91

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

Any resolution of the Conference under paragraph 3 of Article 90 or decision of the Conference under any other Article of this Charter shall be subject to review by the International Court of Justice through the means of a request by the Organization for an advisory opinion pursuant to the Statute of the International Court of Justice. The request for review of such resolution or decision shall be made by the Organization, in appropriate form, upon the instance of any substantially interested member.¹³¹

4. *The Havana Round (November 1947–March 1948)*

In November 1947, 56 state delegations gathered in Havana to finalize and pass the ITO draft Charter as part of the U.N. Conference on Trade and Employment.¹³² Regarding the draft security exception, the sub-committee charged with evaluating Article 94 made no meaningful modifications to this provision.¹³³

131. *Id.* at 53.

132. See Press Release, World Trade Org., Press Brief: Fiftieth Anniversary of the Multilateral Trading System, https://www.wto.org/english/thewto_e/minist_e/mIn96_e/chrono.htm (“In November, delegations from 56 countries met in Havana, Cuba, to consider the ITO draft as a whole. After long and difficult negotiations, some 53 countries signed the Final Act authenticating the text of the Havana Charter in March 1948.”).

133. See generally U.N. Conference on Trade and Employment, *Joint Sub-Committee of Committees V and VI: Draft Report of the Working Party*, U.N. Doc.

On January 16, 1948, the negotiating parties decided to incorporate a revision by the U.K. to alter the chapeau of Article 94 to read (changes italicized) that nothing in the Charter shall prevent a member from taking an action “which it considers necessary for the protection of its essential security interests; *where such action*” relates to fissionable materials, etc.¹³⁴ When asked about the change’s impact on the article, the U.K. delegate responded that the change “would neither permit, nor condemn, nor pass any judgment whatever on, unilateral economic sanctions.”¹³⁵ The meeting notes then state that a “majority of the sub-committee expressed support for this text.”¹³⁶

At a meeting by the same sub-committee on February 17, 1948 the delegate from India “expressed some doubt” about whether “the bona fides of an action allegedly coming within Article 94 could be questioned,” and also “whether such an action could be countered collectively by members of the Organization or only by affected members individually.”¹³⁷ The delegate added that it thought that the intention of the proposed Article 94 was to “confine such counteraction to compensatory action and not to include punitive action.”¹³⁸

At that same meeting, the sub-committee deliberated a U.K. proposal to make it explicitly clear that members could resort to nullification or impairment procedures for nonviolations under the article.¹³⁹ In response, the U.S. delegate argued that such a reference

E/CONF.2/C.5&6/W.3 (Jan. 14, 1948) (demonstrating that the sub-committee merely agreed to recommend an additional sub-paragraph to Article 94, and mainly considered linguistic alternatives).

134. U.N. Conference on Trade and Employment, *Sixth Committee: Organization, Sub-Committee I, Amendment to Article 94 Proposed by the United Kingdom Delegation*, at 1, U.N. Doc. E/CONF.2/C.6/W.48 (Jan. 16, 1948).

135. U.N. Conference on Trade & Employment, *Sixth Committee: Organization, Sub-Committee I (Article 94), Notes of the Eighth Meeting*, at 1, U.N. Doc. E/CONF.2/C.6/W.123 (Feb. 28, 1948).

136. *Id.* at 2.

137. U.N. Conference on Trade & Employment, *Sixth Committee: Organization, Sub-Committee I (Article 94), Notes of the Fourth Meeting*, at 3, U.N. Doc. E/CONF.2/C.6/W.60 (Jan. 20, 1948).

138. *Id.*

139. *See id.* (“The representative of the United Kingdom indicated that he would be agreeable to having the applicability of Articles 89 and 90 Written into the record rather than incorporated in the actual text of Article 94.”).

was “unnecessary” given the text of Article 89(b).¹⁴⁰ The U.K. then agreed with the United States, and the sub-committee charged with evaluating Article 89 later confirmed that Article 89(b) “would apply to the situation of action taken by a Member[,] such as action pursuant to Article 94 of the Charter.”¹⁴¹

In later U.S. submissions, the United States would argue that these discussions again “demonstrate[] [that] the drafters of the security exception that became GATT 1994 XXI(b) made several intentional choices that make clear that this provision is self-judging.”¹⁴² However, the United States ignores statements by others like the U.K., which as noted above made clear that its proposed edit was not intended to permit or condemn “unilateral economic sanctions.”

A month later, on March 24, 1948, the participating delegations passed the ITO Charter in The Final Act of the U.N. Conference on Trade and Employment.¹⁴³ The security exception in Article 99(1) (formerly Article 94) read:

Article 99(1)

1. Nothing in this Charter shall be construed

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

140. Pinchis-Paulsen, *supra* note 47, at 182 (stating the U.S. delegate believed the explicit reference unnecessary because it repeated the text of article 89(b)).

141. U.N. Conference on Trade and Employment, *Rep. of Working Party of Sub-Committee G of Committee VI on Chapter VIII*, at 2, U.N. Doc. E/CONF.2/C.6/W.30 (Jan. 9, 1948) (discussing several alternatives on the texts of Articles 89 and 90).

142. First Written Submission of the United States, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 40, ¶ 77 (“Specifically, they separated this provision from the “commercial” exceptions that became Article XX, altered the placement of this text so that it was broadly applicable, and inserted the pivotal “it considers” language.”).

143. U.N. Conference on Trade and Employment, *Final Act and Related Documents*, at 5, U.N. Doc. E/Conf. 2/78 (Mar. 24, 1948), https://www.wto.org/english/docs_e/legal_e/havana_e.pdf (drawing up the Havana Charter for an International Trade Organization).

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

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

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

(iii) is taken in time of war or other emergency in international relations.¹⁴⁴

C. THE PASSAGE OF THE GATT 1947

Unfortunately for the ITO, the U.S. Congress refused to ratify the ITO Charter, despite the U.S. Administration having signed it.¹⁴⁵ After repeated failed attempts and mounting pressure from the business community, President Truman withdrew his efforts to ratify the ITO Charter and, absent its main architect, the ITO was never established.¹⁴⁶

However, Article XXI had already found a home elsewhere. Operating on a parallel track to the ITO negotiations were discussions to establish the GATT. The GATT negotiators expressly adopted the language of the ITO security exception, with the wording of what was to become Article XXI of the GATT 1947, which was nearly identical to the draft Article 94 presented at the Geneva Round on July 24, 1947.¹⁴⁷

144. See *id.* at 92–93.

145. See Special Message to the Congress Transmitting the Charter for the International Trade Organization, 1949 PUB. PAPERS 233 (Apr. 28, 1949), <https://www.trumanlibrary.gov/library/public-papers/88/special-message-congress-transmitting-charter-international-trade> (highlighting President Harry S. Truman’s support for an International Trade Organization).

146. See Richard Toye, *Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947-1948*, 25 INT’L HIST. REV. 282, 301–304 (2003) (arguing the negotiated charter provisions on the security of foreign investment were “unacceptably weak” compared to U.S. business interests).

147. See Panel Report, *Russia – Measures Concerning Traffic in Transit*, *supra* note 9, ¶ 787 n.166 (containing justifications reflected in Article XXI of the GATT

The resulting agreement and tariff reductions were finalized on October 30, 1947 and came into force for most countries on January 1, 1948.¹⁴⁸ The final GATT 1947 security exception has not been amended since.

D. THE URUGUAY ROUND

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

Specifically, some delegations expressed dissatisfaction with the breadth of Article XXI. Argentina, for example, expressed concern that “there is no restriction on the unilateral interpretation of the contracting party invoking [Article XXI], which creates a legal gap that will have to be studied and resolved during the current round of Negotiations.”¹⁴⁹ Nicaragua brought forward a proposal that would have limited Member discretion in invoking the security exception, but it was rejected.¹⁵⁰ The United States has asserted that the rejection of Argentina’s and Nicaragua’s proposals during the Uruguay Round support its view of a consensus that Article XXI was self-judging.¹⁵¹

1947 and new introductory language proposed by the United States).

148. See Douglas A. Irwin, *The GATT's Contribution to Economic Recovery in Post-War Western Europe* 7 (Bd. of Governors of the Fed. Rsrv. Sys., Int'l Fin. Discussion Paper No. 442, 1993), <https://www.federalreserve.gov/pubs/ifdp/1993/442/ifdp442.pdf> (stating the in the case of the United States, the GATT did not require Congressional approval).

149. GATT Secretariat, *Negotiating Group on GATT Articles: Communication from Argentina*, at 1, GATT Doc. MTN.GNG/NG7/W/44 (Feb. 10, 1988) (presenting the opinions from the delegation of Argentina to avoid future uses of Article XXI).

150. See GATT Secretariat, *Negotiating Group on GATT Articles: Proposal by Nicaragua*, GATT Doc. MTN.GNG/NG7/W/48 (June 29, 1988) (arguing that the term “emergency in international relations” be limited to the opinions of contracting parties and should first be brought to the United Nations or other appropriate inter-governmental organization).

151. 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) (“The General Agreement left to each contracting party the judgement as to what it considered to be necessary to protect its security interests.”).

However, the very existence of those proposals, which expressly rejected Members' rights to unilaterally invoke Article XXI, suggests that the matter was very much still open for debate.¹⁵² Indeed, through these discussions, Members were attempting to achieve greater clarity on the limitations of Members' discretion under Article XXI.

In sum, the totality of the negotiating history does not favor either the U.S. assertion that there was a general understanding that Article XXI was self-judging at its original adoption, or its assertion that such a consensus further solidified over time. As discussed above, the majority of the statements the United States has pointed to that expressly mention the self-judging nature of Article XXI were internal documents or statements made by U.S. officials themselves.¹⁵³ This alone does not demonstrate consensus by the negotiating parties that Article XXI fell out of the jurisdiction of panel review. Furthermore, the United States has relied heavily on its exchange with the Netherlands during the Geneva round as evidence of this general "understanding," and in particular the lack of delegates' opposition to the U.S. delegate's statement.¹⁵⁴ Once again, as mentioned above, the United States is attempting to improperly equate the availability of a NVNI remedy with the issue of nonjusticiability.¹⁵⁵ However, nothing in the text of the WTO agreements equates these two concepts or requires the use of NVNI remedies when an issue is deemed nonjusticiable. Further, silence does not equate to acquiescence. The U.S. statements in that exchange only affirm that Members have the

152. See *id.* at 21–22.

153. See *id.* at 19.

154. See, e.g., Third Party Submission of the United States, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, ¶ 26, WT/DS567 (June 5, 2019) (“The Netherlands requested clarification on the meaning of a Member’s ‘essential security interests,’ and suggested that this reference could represent ‘a very big loophole’ in the ITO charter.”); First Written Submission of the United States, *United States – Origin Marking Requirement*, ¶¶ 89, 93–94, WT/DS597 (July 2, 2021); First Written Submission of the United States, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 40, ¶ 65.

155. See First Written Submission of the United States, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 40, ¶¶ 65–66, 70 (noting a back-and-forth between the U.S. delegate and the Chairman concerning mutual policing, security, and self-restraint).

right to determine its own security interests,¹⁵⁶ *not* that such determinations would by themselves fall within one of the enumerated conditions in Article XXI, let alone that such determinations would by definition fall outside of the enumerated conditions in Article XXI to create a common “understanding.”¹⁵⁷

IV. STATE PRACTICE AND GATT/WTO JURISPRUDENCE REGARDING ARTICLE XXI DOES NOT SUPPORT THE CONCLUSION THAT THE PROVISION IS ENTIRELY SELF-JUDGING

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

A. THE UNITED STATES EXPORT MEASURES DISPUTE (1949)

In 1949, Czechoslovakia challenged its exclusion from the Marshall Plan as a most-favored nation (MFN) violation under Article I of the GATT 1947. Eastern European countries that were not a part of the Plan were subject to sweeping export controls on a number of goods that were not imposed on countries participating in the Plan. In defending the Marshall Plan, the United States claimed that the measure was necessary to protect its essential security interests under Article XXI. For its part, the head of the Czech delegation warned that

156. *See id.* ¶ 65.

157. *See id.* ¶¶ 65, 71.

such an expansive definition would mean that “practically everything may be a possible element of war,” which could “change the face of civilization” and stretch a country’s war power “until it covers the whole nation.”¹⁵⁸

In June 1949, the GATT Council met to discuss the dispute. In framing the decision before the Contracting Parties, the chairman of the Council stated that Czechoslovakia’s desire to decide whether the U.S. measures conformed to GATT Article I “was not appropriately put.” To the chairman, the United States had defended its actions under Article XXI, which “embodied exceptions” to Article I. Instead, as the chairman put it, the question should be whether the United States “had failed to carry out its obligations” under the GATT 1947.¹⁵⁹ With the exception of Czechoslovakia, seventeen of the twenty-one present Contracting Parties voted against referring the matter to a panel to decide whether the U.S. export controls violated its GATT obligations. Czechoslovakia voted for referral to a panel; India, Lebanon and Syria abstained.¹⁶⁰

Although the Contracting Parties determined not to refer the matter to a panel, the discussion and the vote itself operated to confirm a set of norms surrounding the invocation of the exception.¹⁶¹ These norms happened to align with the U.S. position of nonjusticiability, however, the mere existence of this debate and operation confirms that U.S. discretion to act was not absolute. This is confirmed by the U.K. delegate, who stated:

[S]ince the question clearly concerned Article XXI, the United States action would seem to be justified because every country must have the last resort on questions relating to its own security.¹⁶² On the other hand, the

158. GATT & Contracting Parties, *Statement by the Head of the Czechoslovak Delegation Mr. Zdenek Augenthaler to Item 14 of Agenda*, at 6, GATT Doc. GATT/CP.3/33 (May 30, 1949) (discussing the request of the government of Czechoslovakia for a decision under Article XXIII as to whether or not the government of the United States of America has failed to carry out its obligations under the agreement through its administration of the issue of export licenses).

159. GATT & Contracting Parties, *Summary Record of the Twenty-Second Meeting*, at 9, GATT Doc. GATT/CP/3/SR.22 (June 8, 1949) (the issue being the United States’ administration of export licenses).

160. *See id.*

161. *See id.* at 9–10.

162. *See id.* at 7.

Contracting Parties should be cautious not to take any step which might have the effect of undermining the General Agreement.¹⁶³

B. PORTUGAL'S ACCESSION TO THE GATT (1961)

The interpretation of Article XXI was not raised again until 1961, when the GATT Contracting Parties considered Portugal's draft GATT protocol of accession. During that meeting, Ghana's representative stated, "as all contracting parties were aware, the Government of Ghana maintained a ban on goods coming into Ghana from Portugal."¹⁶⁴ The representative justified the import ban on the basis of Article XXI, citing the pressure an import ban may place on Portugal as an effective means to encourage resolution to the conflict in Angola, which was "a constant threat to the peace of the African continent."¹⁶⁵ He further asserted that "under this Article each contracting party was the sole judge of what was necessary in its essential security interests. There could therefore be no objection to Ghana regarding the boycott of goods as justified by its security interests."¹⁶⁶ The chairman noted Ghana's statement, and no other comments in reaction to Ghana's statement were registered.¹⁶⁷

C. UNITED ARAB REPUBLIC'S ACCESSION TO THE GATT (1970)

During a February 25, 1970 meeting discussing the United Arab Republic's accession to the GATT, some parties registered concerns over the Republic's boycott of Israel. In response, the United Arab Republic's representative noted that the boycott was part of a "major political issue known as the Middle East problem. . . . In view of the political character of this issue, the United Arab Republic did not wish

163. *See id.*

164. GATT & Contracting Parties, *Summary Record of the Twelfth Session*, at 196, GATT Doc. SR.19/12 (Dec. 21, 1961) (Mr. Arkaah's government had "found it necessary to impose a ban on goods entering Ghana from Portugal, their justification resting on Article XXI which stated that nothing in the Agreement should be construed to prevent any contracting party from taking any action which it considered necessary for the protection of its essential security interests, taken in time of war or other emergency in international relations.").

165. *See id.*

166. *See id.*

167. *See id.*

to discuss it within GATT.”¹⁶⁸

The meeting notes state further that “[s]everal members of the Working Party,” without naming which ones, “supported the views expressed by the representative of the United Arab Republic that the boycott measures were of an exceptional and temporary character and that their background was political and not commercial.”¹⁶⁹ The representative of Israel further agreed that “she would not reply to the political issues raised, since these were being discussed in the competent organs of the United Nations.”¹⁷⁰

While Article XXI was not expressly mentioned in the meeting, the United States has asserted before WTO panels that the United Arab Republic’s argument that the boycott was a political, rather than commercial issue and was thus outside the purview of the GATT “indicate[d] further that the GATT contracting parties (now WTO Members) viewed Article XXI as self-judging.”¹⁷¹ However, the involvement of the U.N. in reviewing the political aspects of the dispute is consistent with the ideas in early drafts of Article XXI, which subjected states’ actions to review by at least some international body, through which the norms in the text could be interpreted and applied.

D. SWEDEN’S GLOBAL IMPORT QUOTA SYSTEM FOR CERTAIN FOOTWEAR (1975)

In November 1975, Sweden imposed an import quota system for certain footwear, stating that the measure had been taken in conformity with Article XXI because the “decrease in domestic production has become a critical threat to the emergency planning of Sweden’s

168. GATT & Contracting Parties, *Report by the Working Party on Accession of the United Arab Republic*, at 6, GATT Doc. L/3362 (Feb. 25, 1970) (explaining why “[i]t would not be reasonable to ask that the United Arab Republic should do business with a firm which transferred all or part of its profits from sales to the United Arab Republic to an enemy country.”).

169. *See id.* at 7.

170. *See id.*

171. First Written Submission of the United States, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 40, ¶ 109 (supporting “Egypt’s views that the background of the boycott measures was political and not commercial.”).

economic defense as an integral part of the country's security policy."¹⁷² At a GATT Council meeting on November 10, 1975 to discuss the new requirements, several parties registered their concern with Sweden's invocation of Article XXI. The meeting notes from the council discussion stated that:

Many representatives expressed their concern at the Swedish decision taken at a time of high unemployment in their own countries. They noted that no detailed economic justification for the measures had been given and pointed to the need at the present time for avoiding all restrictions on imports as far as possible. They expressed doubts as to the justification of these measures under the General Agreement. While they had noted that the measures would be of a temporary nature, they noted that no provision was made for a terminal date.¹⁷³

Sweden notified the termination of the quotas in July 1977.¹⁷⁴ The negative reaction to Sweden's "action" by the GATT Council again demonstrate the operation of normative influence exercised by Members in the GATT Council absent panel proceedings. It does not require a conclusion that the exception is nonjusticiable.

E. THE FALKLANDS WAR DISPUTE (1982)

As part of its response to Argentina's invasion of the Falkland Islands in 1982, the U.K., along with the European Community (EC), Canada and Australia, imposed a trade embargo against Argentina. Argentina then challenged the embargo under the GATT 1947, and in response the U.K. invoked Article XXI. At two GATT Council meetings on May 7 and August 10, 1982, the parties made several statements regarding the applicability of Article XXI.¹⁷⁵

172. GATT Council, *Sweden – Import Restrictions on Certain Footwear*, at 2–3, GATT Doc. L/4250 (Nov. 17, 1975) (arguing the "policy necessitates the maintenance of a minimum domestic production capacity in vital industries.").

173. GATT Council, *Minutes of Meeting Held in the Palais des Nations, Geneva, on 31 October 1975*, at 9, GATT Doc. C/M/109 (Nov. 10, 1975) (discussing Sweden's import restriction on certain footwear).

174. See Addendum, GATT Council, *Sweden – Import Restrictions on Certain Footwear*, GATT Doc. L/4250/Add.1 (Mar. 15, 1977) (terminating the quota system for leather and plastic shoes).

175. See GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 7 May 1982*, at 10–11, GATT Doc. C/M/157 (June 22, 1982) ("The representative of the European Communities said that, as indicated in document L/5319, the EEC

Argentina, Brazil, Cuba, Poland, Uruguay, Colombia, Dominican Republic, Ecuador, Spain and Pakistan all expressly or impliedly registered an opposition to a self-judging interpretation of Article XXI.¹⁷⁶ In each of their statements, the parties either expressly rejected a self-judging interpretation of Article XXI or stated that there had been no proper justification for the invocation of Article XXI. The latter argument could be understood to imply that, to those parties, a Party's mere invocation of the exception does not automatically justify its measures.

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

[T]here were no trade restrictions which could be applied without their being notified, discussed and justified, and he believed that the contracting parties concerned had made a wrong interpretation of Article XXI.¹⁷⁷

The representative from Brazil, meanwhile, stated:

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

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.”); see also GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 29–30 June 1982*, at 14–16, GATT Doc. C/M/159 (Aug. 10, 1982) (noting that “the contracting parties applying the sanctions had stated that it gave them a ‘natural right’ to adopt restrictions without the need for notification, justification and compensation.”).

176. See GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 7 May 1982*, *supra* note 175, at 4–7, 9 (stating the representatives believed a self-judging interpretation threatened the credibility of the General Agreement).

177. GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 29–30 June 1982*, *supra* note 175, at 14–16 (discussing the trade restrictions affecting Argentina applied for non-economic reasons).

scope of Article XXIII.¹⁷⁸

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

[The] GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis. This was wise . . . since no country could participate in GATT if in doing so it gave up the possibility of using any measures, other than military, to protect its security interests . . . [F]orcing the GATT . . . to play a role for which it was never intended, could seriously undermine its utility, benefit and promise for all contracting parties.¹⁷⁹

At the end of the discussion, the Chairman noted that “there were differing views as to whether the trade measures in question violated GATT obligations, as to whether the measures were based on inherent or natural rights and whether justification, notification and/or approval were necessary.”¹⁸⁰

While no dispute was brought, the GATT Council in November 1982 adopted a Decision recognizing that measures taken for security reasons “could constitute, in certain circumstances, an element of disruption and uncertainty for international trade.”¹⁸¹ The Decision additionally stated that the security exception “constitute[s] an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved” and that “[w]hen action is taken under Article XXI, all contracting parties

178. GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 7 May 1982*, *supra* note 175, at 12 (also discussing the trade restrictions affecting Argentina applied for non-economic reasons).

179. *See id.* at 8.

180. *See id.* at 12.

181. GATT Council, *Decision Concerning Article XXI of the General Agreement*, GATT Doc. L/5426 (Dec. 2, 1982) (arguing “the exceptions envisaged in Article XXI of the General Agreement constitute an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved.”).

affected by such action retain their full rights under the General Agreement.”¹⁸² While the Decision did not expressly touch on the justiciability of the security exception under Article XXI, some have argued that this language suggests that the Parties could still resort to the GATT’s dispute resolution procedures “even if [A]rticle XXI GATT is invoked.”¹⁸³

F. THE U.S.-NICARAGUA EMBARGO DISPUTE (1985)

When the United States imposed a trade embargo on Nicaragua to punish the Sandinista government’s support for communism, the United States defended the measure under Article XXI and argued that the Nicaraguan government’s policies undermined U.S. essential security interests.¹⁸⁴ At a GATT Council meeting on June 28, 1985, several statements were made regarding whether Article XXI was self-judging.¹⁸⁵ Compared to the discussion concerning the Falkland Islands dispute just three years prior, more parties voiced direct opposition to the self-judging interpretation of Article XXI.¹⁸⁶

In the face of that opposition, the United States conceded to the establishment of a GATT panel on the condition that review of Article XXI was left out of its terms of reference.¹⁸⁷ While noting that its scope

182. *See id.*

183. Stephan Schill & Robyn Briese, “*If the State Considers*”: *Self-Judging Clauses in International Dispute Settlement*, in MAX PLANCK Y.B. U.N. L., at 101 (Jan. 1, 2009), https://www.mpil.de/files/pdf2/03_schillbriese.pdf (noting that the dispute about trade restrictions against Argentina prompted this alternative).

184. *See* Report by the Panel, *United States – Trade Measures Affecting Nicaragua*, ¶ 1.2, L/6053 (Oct. 13, 1986) (claiming Article XXI “left it to each contracting party to judge what actions it considered necessary for the protection of its essential security interests.”).

185. GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 29 May 1985*, at 4, 8, 10, GATT Doc. C/M/188 (June 28, 1985) (emphasizing it is “up to each country to define its essential security interests under Article XXI” and “contracting parties should be expected to exercise their rights under that Article with utmost prudence.”).

186. *See* GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 1947–1994, *supra* note 42, at 603–04 (describing the 1982 suspension of imports from Argentina by the EEC and its member states, and the 1985 prohibition of imports from Nicaragua by the US).

187. *See* Report by the Panel, *United States – Trade Measures Affecting Nicaragua* *supra* note 184, ¶ 1.3 (describing the terms the U.S. conditioned in permitting the establishment of the Panel).

did not include a review of the U.S. invocation of Article XXI, the GATT panel raised some “general” questions about the proper application of the security exception and noted that panels must have some jurisdiction over the question of its invocation.¹⁸⁸ It also observed that it was incumbent on “each contracting party, whenever it made use of its rights under Article XXI, [to] carefully weigh[s] its security needs against the need to maintain stable trade relations.”¹⁸⁹ The United States blocked the adoption of the panel report.¹⁹⁰

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

It was not for GATT to approve or disapprove the judgment made by the United States as to what was necessary to protect its national security interests; GATT was a trade organization, and had no competence to judge such matters . . . GATT’s effectiveness in addressing trade issues would only be weakened if it became a forum for debating political and security issues.¹⁹¹

The report was never adopted.

Regarding the criticism registered against the U.S. actions at the June 28, meeting, Cuba, Brazil, Chile, Argentina, Spain, Sweden, Switzerland, India, Peru, Poland, Hungary, Czechoslovakia and China all expressly or impliedly voiced opposition to a self-judging interpretation of Article XXI. For example, while Sweden’s representative stated at the June 28 meeting that “it had to be up to each country to define its essential security interests under Article XXI,”¹⁹² after the publication of the panel report on the dispute

188. See *id.* ¶ 5.17 (listing the questions that the Panel raised concerning Article XXI and Article XXIII:2 during its review).

189. See *id.* ¶ 5.16 (describing that Article XXI protects each party’s essential security interests, but that if invoked improperly embargoes are contrary to the basic aims of GATT).

190. See GATT Council, *Minutes of Meeting Held in the Centre William Rappard on Oct. 10, 1985*, at 11, GATT Doc. C/M/192 (Oct. 24, 1985) (noting the United States’ opposition to the notion of interpretative understanding of panel reports and explaining why the U.S. did not block the report or asked to have it reinterpreted).

191. See GATT Council, *Minutes of Meeting Held in the Centre William Rappard on May 29, 1985*, at 5, GATT Doc. C/M/188 (June 28, 1985) (describing that the U.S. did not believe that GATT was the appropriate forum to resolve political disputes).

192. See *id.* at 10 (describing Sweden’s concern of politically motivated trade measures).

Sweden clarified that “panels should be able to examine all relevant GATT Articles, including Article XXI. . . . To restrict a panel’s examination of measures taken in the context of Article XXI was to risk an erosion of faith in GATT’s rules.”¹⁹³

Meanwhile, the United States, Australia, Canada, EC, Iceland, Portugal, Finland, Norway, Egypt and Japan voiced support for a self-judging interpretation of Article XXI or stated outright that the GATT Council had no competency to adjudicate the matter. However, many of those countries also threw into doubt the wisdom of the U.S. measures even as they agreed with its interpretation of Article XXI.¹⁹⁴

G. THE EC-YUGOSLAVIA DISPUTE (1991)

In November 1991, the EC imposed trade measures against Yugoslavia. In justifying its measures, the EC stated, “These measures are taken by the European Community upon consideration of its essential security interests and based on GATT Article XXI.”¹⁹⁵ Further measures were imposed on December 2, 1991, and other economic sanctions or withdrawal of preferential benefits were taken by Australia, Austria, Canada, Finland, Japan, New Zealand, Norway, Sweden, Switzerland and the United States.¹⁹⁶

In response, Yugoslavia stated in a communication dated February 6, 1992 that “[t]he justification of the measures in question cannot be found in Article XXI. The situation in Yugoslavia is a specific one and does not correspond to the notion and meaning of Article XXI(b) and

193. See GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 5–6 November 1986*, at 12, GATT Doc. C/M/204 (Nov. 19, 1986) (describing Sweden’s perspective on what GATT Articles panels should be able to examine and why).

194. See GATT Council, *Minutes of Meeting Held in the Centre William Rappard on May 29, 1985*, *supra* note 191, at 4–5, 11–15 (describing multiple countries’ perspective on how Article XXI should be applied and interpreted).

195. See GATT Council, *Communication from the European Communities: Trade Measures Taken By the European Community Against the Socialist Federal Republic of Yugoslavia*, at 1, GATT Doc. L/6948 (Dec. 2, 1991) (describing the trade measures against Yugoslavia by the European Community and its Member States).

196. See GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 1947–1994, *supra* note 42, at 604 (describing the trade measures against Yugoslavia by the European Community, its Member States, and others).

(c).”¹⁹⁷ Yugoslavia then requested the establishment of a GATT panel to determine whether the EC had properly invoked Article XXI.¹⁹⁸ At a meeting on April 10, 1992, the GATT Council decided to grant the request to establish a panel. While many countries made statements supporting Yugoslavia’s right to establish a panel, they overwhelmingly urged the resolution of the dispute through the ongoing political process.¹⁹⁹ None commented substantively on the justiciability of Article XXI.²⁰⁰ The representative of the United States for example, stated, “[a]ny contracting party had the right to request a panel.”²⁰¹ However, it was clear that the problems that had given rise to the Community’s measures would not be capable of resolution by the Council.”²⁰² The representative from Canada similarly stated, “like others [sic], Canada believed that under the April 1989 rules Yugoslavia had a right to the establishment of a panel at the present meeting if it so wished.”²⁰³ However, some disputes did not readily lend themselves to a resolution through the panel process.”²⁰⁴

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

H. THE U.S.-CUBA SANCTIONS DISPUTE (1996)

In 1996, the United States imposed sweeping sanctions against both Cuba and its trading partners after Cuba shot down two U.S. civilian

197. See GATT Council, *EEC – Trade Measures Taken for Non-Economic Reasons, Recourse to Article XXIII:2 by Yugoslavia*, at 1–2, GATT Doc. DS27/2 (Feb. 6, 1992) (stating Yugoslavia’s perspective of the trade measures taken against itself).

198. See *id.* at 2 (stating the measures Yugoslavia requested in response to the trade measures taken against it by the European community).

199. See GATT Council, *Minutes of Meeting Held in the Centre William Rappard on March 18, 1992*, at 14–18, GATT Doc. C/M/255 (Apr. 10, 1992) (stating GATT member states’ responses to Yugoslavia’s request for a panel to review the trade measures taken against it).

200. See *id.*

201. *Id.* at 15.

202. *Id.*

203. *Id.*

204. *Id.*

planes.²⁰⁵ Frustrated by the disruption to its trade with Cuba, the EC brought a complaint in the WTO, signaling a major shift in its position since the Falklands dispute against the self-judging nature of the exception.²⁰⁶ In response, the United States delegate stated at a meeting of the Dispute Settlement Body (DSB) on November 26, 1996 that “the United States would invite the [EC] to reflect on the fact that certain measures . . . had been expressly justified by the United States under the GATT 1947 as measures taken in pursuit of [its] essential security interests.”²⁰⁷ It further reiterated its position that, as under the GATT regime, the WTO was not competent to adjudicate questions of “foreign and security policy.”²⁰⁸ As with its dispute with Nicaragua, dissent against the U.S. position grew louder.²⁰⁹ However, most statements were critical of the measure without addressing the issue of whether Article XXI is justiciable.²¹⁰ At the November 1996 DSB meeting, several Members registered strong complaints about the U.S. measure, including Australia, the Rio Group (which included Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay, and Venezuela), Canada, India and Switzerland.²¹¹ Although a panel was established (which the United States threatened to boycott), its work was suspended after the United States and EC reached an agreement.²¹²

205. See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on Oct. 16, 1996*, at 5–6, GATT Doc. WT/DSB/M/24 (Nov. 26, 1996) (describing the European Communities’ concerns of extra-territorial objectives of the US’s Helms-Burton Act).

206. See *id.* at 5–7 (describing the European Communities’ concerns of extra-territorial objectives of the US’s Helms-Burton Act).

207. *Id.* at 7.

208. See Andrew D. Mitchell, *Sanctions and the World Trade Organization*, in *RESEARCH HANDBOOK ON U.N. SANCTIONS AND INTERNATIONAL LAW* 283, 298 (Larissa van den Herik et al. eds., 1st ed. 2017) (describing a global trend away from interpreting art. XXI(B) as self-judging).

209. See *id.* (“Australia and Canada, which had previously advanced the same view with respect to their participation in the Falkland Islands sanctions, registered ‘strong concerns’ at the US measures.”).

210. See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on Oct. 16, 1996*, *supra* note 205, at 7–9 (describing international concern over the U.S. Helms-Burton Act).

211. See *id.* at 7–8.

212. Mitchell, *supra* note 208, at 298.

In sum, as illustrated in this section, ever since the Czechoslovakia dispute in 1961, at least some Members have continuously believed that questions over Article XXI's application should be referred to a GATT panel for review. Even among those who did not support panel proceedings in these cases directly participated in a process through which they conveyed norms about the scope of the exception. By the U.S.-EU Nicaragua dispute in 1985, Members were expressly rejecting a self-judging interpretation of Article XXI and asserting the justiciability of its invocation, in opposition to the U.S. position. In fact, since nearly the beginning of the GATT 1947 regime, at least some members have expressed their belief that questions of Article XXI's invocation should be subject to panel review.²¹³

I. RUSSIA – TRAFFIC IN TRANSIT (DS512)

In keeping with this trend by Members away from a wholly self-judging interpretation of Article XXI, recent adjudication by WTO panels have uniformly rejected the U.S. argument that Article XXI is nonjusticiable. Since 2019, several disputes have now directly addressed the question of Article XXI's justiciability, and in each one the panel stated that it is within its jurisdiction to review whether Members' invocation of Article XXI properly falls within one of subparagraphs (i)-(iii).²¹⁴

213. See GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 1947–1994, *supra* note 42, at 606 (explaining the history behind the dispute settlement provisions in regard to the use of Article XXI).

214. In a panel report circulated in August 2023 in the dispute China – Additional Duties (US) (DS558), the panel found that the same Section 232 tariffs on aluminum and steel at issue in the US – Steel and Aluminum Products disputes had “national security objectives” and “were sought, taken, or maintained pursuant to Article XXI of the GATT 1994.” See Panel Report, *China – Additional Duties on Certain Products from the United States*, ¶ 7.116, WTO Doc. WT/DS558/R (circulated Aug. 16, 2023). Upon the release of the panel report, the Office of the U.S. Trade Representative (USTR) applauded the report, stating that the panel “recogniz[ed] that the U.S. Section 232 actions on steel and aluminum are security measures.” See Press Release, *supra* note 12. However, this interpretation is incorrect. The panel had merely stated that the Section 232 tariffs were designed with national security objectives as the United States had defined them, *not* as what would be considered permissible under Art. XXI. Indeed, the panel later concurred with the prior panel's conclusion in US – Steel and Aluminum Products (China), which found that the U.S. measures were not “taken in time of war or other emergency in international relations” and were thus “not justified under Article XXI(b)(iii) of the GATT 1994.”

Russia – Traffic in Transit presented the first opportunity for a WTO panel to directly evaluate the question of Article XXI’s justiciability. On August 7, 2014, amid deteriorating relations between Russia and Ukraine, Russia imposed restrictions in connection with the transit of goods from Europe subject to an import ban. Specifically, Russia prohibited the transit of these imported goods through Belarus and only permitted their transit across Russia through designated checkpoints.²¹⁵ Ukraine challenged the transit measures under, *inter alia*, Articles V:2-V:5 and Articles X:1-X:3 of the GATT 1994, as well as paragraphs 2, 1426 and 1427 of Russia’s Working Party Report.²¹⁶ Russia in turn invoked Article XXI(b)(iii) and requested that the panel “for lack of jurisdiction, [] limit its findings to recognizing that Russia has invoked a provision of Article XXI of the GATT 1994, without engaging further to evaluate the merits of Ukraine’s claims.”²¹⁷

The United States joined the dispute as a third party.²¹⁸ In its submission in support of Russia’s argument, the United States claimed that the text, context, object and purpose, negotiating history, and state practice all supported a wholly self-judging interpretation of Article XXI.²¹⁹ The panel disagreed and concluded that “Russia’s invocation of Article XXI(b)(iii) is within the Panel’s terms of reference for the purposes of the DSU.”²²⁰ In its textual interpretation of the provision, the Panel found that “the adjectival clause ‘which it considers’ in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in subparagraph (iii). Rather, for action to fall within

See Panel Report, *China – Additional Duties on Certain Products from the United States*, *supra* note 214, ¶ 7.149.

215. See Panel Report, *Russia – Measures Concerning Traffic in Transit*, *supra* note 9, ¶ 7.10 (describing the import bans Russia imposed in retaliation to other countries sanctions against it in 2014).

216. *Id.* ¶ 3.1 (stating Ukraine’s request for the Panel to find that Russia was not in conformity with its WTO obligations and that Russia should bring itself back into conformity).

217. *Id.* ¶ 3.2 (describing Russia’s response to Ukraine’s request to find that Russia was not in conformity with its WTO obligations).

218. See *id.* ¶ 1.6 (listing which member states wished to participate in the Panel as third parties).

219. See *id.* ¶¶ 7.51–52 (stating the US’s interpretation of Article XXI and its’ perspective of the jurisdiction of the Panel).

220. *Id.* ¶ 7.56 (stating the Panel’s conclusion of Russia’s response to the sanctions taken against it).

the scope of Article XXI(b), it must *objectively* be found to meet the requirements in one of the enumerated subparagraphs of that provision.”²²¹ The panel further found that its textual interpretation was supported by the negotiating history, concluding that the negotiations struck a “balance” in the security exception, by which:

Members would have ‘some latitude’ to determine what their essential security interests are, and the necessity of action to protect those interests, while potential abuse of the exceptions would be curtailed by limiting the circumstances in which the exceptions could be invoked to those specified in the subparagraphs of Article XXI(b).²²²

In light of this balance and the limitations imposed, “the security exceptions would remain subject to” dispute settlement.²²³

J. SAUDI ARABIA – IPRS (DS567)

The dispute concerned Saudi Arabia’s decision, along with other Gulf allies, to sever all diplomatic, economic and political relations with Qatar in June 2017. Along with a variety of other measures, Saudi Arabia blocked access within its territory to beIN, a Qatari sports broadcaster.²²⁴ Days later, the Saudi Arabian government issued a Circular stating that beIN was no longer licensed to distribute media content and could not operate in Saudi Arabia.²²⁵ Qatar challenged the measure under the TRIPS Agreement.²²⁶ Saudi Arabia in turn requested that the panel find it had invoked the security exception under Article 73.²²⁷

The United States joined the dispute as a third party and argued that,

221. *Id.* ¶ 7.82 (explaining the Panel’s reasoning for its conclusion that it had jurisdiction to review the matter).

222. *Id.* ¶ 7.98(b) (explaining the Panel’s reasoning for its conclusion that it had jurisdiction to review the matter).

223. *See id.* ¶ 7.98(c).

224. *See* Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, *supra* note 9, ¶¶ 2.30, 2.36 (describing the restrictions Saudi Arabia took against beIN Media Group LLC).

225. *See id.* ¶ 2.37.

226. *See id.* ¶¶ 1.1–2 (describing the complaint Qatar filed to the Dispute Settlement Body in hopes that Saudi Arabia would engage in consultations with Qatar).

227. *See id.* ¶ 3.4 (stating Saudi Arabia’s request that the Panel reject Qatar’s claims and why).

given that its text mirrors that of Article XXI(b) of the GATT 1994, Article 73 of the TRIPS Agreement too was self-judging.²²⁸ The U.S. arguments did not differ substantively from those it offered in *Russia – Traffic in Transit*.²²⁹

Citing the panel report in *Russia – Traffic in Transit*, the panel disagreed with the United States and found that it had jurisdiction to assess whether Article 73 had been properly invoked.²³⁰ “Guided” by the previous panel, the panel found that it may assess under invocations of Article XXI(b)(iii): (i) whether a “war or other emergency in international relations” existed; (ii) whether the invoking Member’s actions were “taken in time of” that war or other emergency; (iii) whether “the invoking Member has articulated its relevant ‘essential security interests’ sufficiently to enable an assessment of whether there is any link between those actions and the protection of its essential security interests”; and (iv) “whether the relevant actions are so remote from, or unrelated to, the ‘emergency in international relations’ as to make it implausible that the invoking Member considers those actions to be necessary for the protection of its essential security interests arising out of the emergency.”²³¹ In doing so, the panel stretched its jurisdiction beyond an evaluation of whether the Member had properly invoked one of the subparagraphs. Under the panel’s interpretation here, panels also had jurisdiction to evaluate whether Members had “sufficiently” articulated their “essential security interests” in the chapeau of Article XXI(b), and whether its actions were plausibly related to that war or emergency.²³²

K. U.S. – STEEL AND ALUMINUM PRODUCTS (DS544, 552, 556, 564)

The dispute concerned U.S. additional duties on steel and aluminum imports. On March 19, 2018, the United States Administration acting under the authority in Section 232 of the Trade Expansion Act of 1962

228. *See id.* ¶ 1.6 (listing which member states wished to participate in the Panel as third parties).

229. *See id.* ¶ 7.248 (describing third party opinions on the matter).

230. *See id.* ¶ 7.241 (describing what the Panel can review regarding Article 73(b)(iii) disputes).

231. *See id.* ¶ 7.242.

232. *Id.* ¶¶ 7.242–43.

imposed tariffs on certain steel and aluminum imports, citing the results of an investigation showing that the displacement of domestic steel by imported goods was “weakening our internal economy” and thus those imports “threaten to impair the national security.”²³³ In their complaints, China, Norway, Switzerland and Türkiye all challenged the measure under, *inter alia*, the Agreement on Safeguards, and Articles I:1, II:1(a) and (b), X:3(a), XIX:1(a), and XIX:2 of the GATT 1994.²³⁴ Norway, Switzerland and Türkiye further brought a challenge under XI:1 of the GATT 1994, and Switzerland also brought a challenge under XVI:4 of the WTO Agreement.²³⁵ The United States in turn requested that the panels find that it had invoked its essential security interests under Article XXI(b).²³⁶

In its submission to the panels, the United States again made several arguments based on the text, context, object and purpose, negotiating history, and state practice regarding Article XXI, none of which had

233. OFF. OF TECH. EVALUATION, U.S. DEP'T OF COM., *THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED*, 4–5 (2018).

234. See Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Turkey)*, *supra* note 9, ¶¶ 3.1–2 (requesting that the Panel find that the United States has not met its obligations under the certain provisions of GATT because the United States applied selectively additional import duties on steel and aluminum products from different Members, the United States does not accord to commerce of the majority of WTO members, the United States does not issues its laws, regulations, decisions, and rulings in a fair and impartial manner, among other findings); see also Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Switzerland)*, *supra* note 9, ¶¶ 3.1–2; Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 9, ¶ 3.1; Panel Report, *United States – Certain Measures on Steel and Aluminum Products (China)*, *supra* note 9, ¶ 3.1.

235. See Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Turkey)*, *supra* note 9, ¶ 3.1 (challenging Article XI:1 because the United States imposed additional trade restrictions on the importation of products from certain WTO members); see also Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Switzerland)*, *supra* note 9, ¶¶ 3.1–2; Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 9, ¶ 3.1.

236. Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Turkey)*, *supra* note 9, ¶ 3.3; Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Switzerland)*, *supra* note 9, ¶¶ 3.3; Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 9, ¶ 3.2; Panel Report, *US – Steel and Aluminum Products (China)*, *supra* note 9, ¶ 3.1.

meaningfully changed from its prior arguments. However, it did offer a response to the panel’s finding in *Russia – Traffic in Transit* as it relates to its examination of the negotiating history, arguing that the panel erred in its interpretation. The United States asserted that when viewed “as a whole and in context . . . [the documents] further confirm that Article XXI(b)” was understood by the majority of the U.S. delegation to be “self-judging.”²³⁷

In each case, the panel disagreed with the U.S. argument that Article XXI is self-judging²³⁸ and found that, once again, the text, context, object and purpose, negotiating history and state practice did not, as the United States suggested, conclusively demonstrate that the negotiating parties considered the security exception to be nonjusticiable.²³⁹ The panel in the Norway dispute found that, in all the materials and arguments offered by the United States, it “[did] not find any clear indication in these materials of the ‘self-judging nature’

237. First Written Submission of the United States of America, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 40, ¶ 88; First Written Submission of the United States of America, *United States – Certain Measures on Steel and Aluminum Products (China)*, ¶ 89, WT/DS544 (June 12, 2019), [https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.\(DS544\).fin.\(public\).pdf](https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.(DS544).fin.(public).pdf); First Written Submission of the United States of America, *United States – Certain Measures on Steel and Aluminum Products (Switzerland)*, ¶ 89, WT/DS556 (June 12, 2019), [https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.\(DS556\).fin.\(public\).pdf](https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.(DS556).fin.(public).pdf); First Written Submission of the United States of America, *United States – Certain Measures on Steel and Aluminum Products (Turkey)*, ¶ 89, WT/DS564 (June 12, 2019), [https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.\(DS564\).fin.\(public\).pdf](https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.(DS564).fin.(public).pdf).

238. See Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Turkey)*, *supra* note 9, ¶ 7.143 (finding the United States interpretation of Article XXI(b) of GATT as self-judging and nonjusticiable impermissible and that there is no clause that allows a single WTO member reserve sole judgment on the conditions and circumstances subparagraphs); see also Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Switzerland)*, *supra* note 9, ¶ 7.146; Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 9, ¶ 7.116; Panel Report, *United States – Certain Measures on Steel and Aluminum Products (China)*, *supra* note 9, ¶ 7.146.

239. Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Turkey)*, *supra* note 9, ¶¶ 7.137–43; Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Switzerland)*, *supra* note 9, ¶¶ 7.140–46; Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 9, ¶¶ 7.110–116.

or ‘non-justiciability’ of Article XXI(b) of the GATT 1994.’²⁴⁰ Rather, the panel found the “materials to support the general conclusion that the terms of Article XXI(b) of the GATT 1994 establish a right to take action for the protection of essential security interests in the conditions and circumstances described in the three subparagraphs.”²⁴¹ For that reason, the panel found that it had the jurisdiction to evaluate whether the U.S. tariffs “were taken under the circumstances described in the subparagraphs of Article XXI(b)(iii) of the GATT 1994,” following the approach of the panel in *Russia – Traffic in Transit*.²⁴²

L. U.S. – ORIGIN MARKING (HONG KONG, CHINA) (DS597)

In August 2020, the U.S. Customs and Border Protection Agency published a requirement that imported goods produced in Hong Kong must be marked to indicate “China” as their origin.²⁴³ Hong Kong challenged the measure under, *inter alia*, Articles 2(c) and 2(d) of the Agreement on Rules of Origin (ARO), Article 2.1 of the Agreement on Technical Barriers to Trade (“TBT Agreement”), and Articles I:1 and IX:1 of the GATT 1994.²⁴⁴ The United States in turn requested that “the Panel find that the United States has invoked its essential security interests under Article XXI(b) of the GATT 1994 and so report to the DSB.”²⁴⁵ The United States justified its invocation of Article XXI(b) in this instance by citing the deteriorating relationship between it and China, and China’s increasing control over Hong

240. Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 9, ¶ 7.115.

241. *Id.* ¶ 7.115; *see* GATT, *supra* note 5, art. XXI (describing exceptions, which include actions taken for the protection of essential national security concerns “relating to fissionable materials or the materials from which they are derived; relating to the traffic in arms, ammunition and implements of war and to such traffic in other good and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; taken in time of war or other emergency in international relations”).

242. Panel Report, *United States – Certain Measures on Steel and Aluminum Products (Norway)*, *supra* note 9, ¶ 7.124; *see* Panel Report, *Russia – Measures Concerning Traffic in Transit*, *supra* note 9, ¶¶ 7.127–39 (evaluating whether the conditions of the of Article XXI(b) of the GATT 1994 were satisfied).

243. Country of Origin Marking of Products of Hong Kong, 85 Fed. Reg. 48551, 48551 (Aug. 11, 2020).

244. Panel Report, *United States – Origin Marking Requirement*, *supra* note 9, ¶ 3.1.

245. *Id.* ¶ 3.2.

Kong.²⁴⁶ As with the two disputes before it, none of the U.S. arguments significantly diverged from what it had previously asserted in *Russia – Traffic in Transit*.²⁴⁷

And as with all panels before it, the panel disagreed with the U.S. argument that Article XXI is self-judging, finding that “Article XXI(b) is not entirely self-judging insofar as the unilateral determination granted to the invoking Member through the phrase ‘which it considers’ in the chapeau of that provision does not extend to the subparagraphs. Instead, the subparagraphs are subject to review by a panel.”²⁴⁸

V. IMPLICATIONS OF THE U.S. POSITION

As the above analysis establishes, the United States’ position that Article XXI of the GATT 1994 is and has always been self-judging, and thus not subject to WTO review, is untenable from both a legal and factual point of view. It is untenable legally because the text of Article XXI simply does not support a reading that a mere unilateral invocation of “essential security interests” would necessitate permitting the invoking Member to continue its otherwise WTO violative action, and there continues to be no GATT or WTO panel report supporting such an interpretation. It is untenable factually as a careful review of the negotiating history of Article XXI and related state practice do not support the view that all Members at the time Article XXI was negotiated (or at any time before or after those negotiations) agreed by consensus that this provision is self-judging and thus outside the scope of review of the WTO, as continuously claimed by the United States and some U.S. scholars and practitioners.

Despite the lack of legal and historical support for its position, the United States has continued to push for a self-judging interpretation of Article XXI.²⁴⁹ Furthermore, the United States has reportedly asserted

246. *Id.* ¶¶ 7.317, 7.323–52.

247. See Panel Report, *United States – Origin Marking Requirements*, supra note 9, ¶¶ 7.115, 7.138 (explaining the United States’ argument that Article XXI of the GATT 1994 is self-judging and not subject to WTO review); see also Panel Report, *Russia – Measures Concerning Traffic in Transit*, supra note 9, ¶¶ 7.51–52.

248. Panel Report, *United States – Origin Marking Requirement*, supra note 9, ¶ 7.185.

249. See OFF. U.S. TRADE REP., EXEC. OFF. OF THE PRESIDENT, U.S. REPLY TO

that it will only contemplate engaging in formal negotiations on WTO reform if all other Members agree—through an authoritative interpretation under Article IX of the 1994 Marrakesh Agreement—that Article XXI is self-judging, regardless of what the text of Article XXI actually says.²⁵⁰ At the December 2022 World Economic Forum, U.S. Trade Representative Ambassador Katherine Tai went as far as to state that the WTO was “getting itself on very, very thin ice” after another panel once again rejected the argument that Article XXI was nonjusticiable.²⁵¹

Nonetheless, the United States’ willingness to reengage fellow WTO Members to try to “reform” the dispute settlement mechanism is encouraging, as evidenced by Ambassador Pagán’s statement that the U.S. supported “a constructive process and encouraged Members to exercise restraint and compromise in preserving the delicate balance achieved in the draft work program.”²⁵² However, the United States cannot hinge the outcome of these discussions on its self-judging position in contravention to the facts and the law. This is unhelpful and will not assist the WTO in reaching a solution to the current existential crisis and its faltering dispute settlement mechanism, the “crown jewel” of the organization.²⁵³

RUSSIA’S REQUEST TO JOIN CONSULTATIONS (2023) (indicating that the U.S. continues to assert that issues of national security are self-judging and not susceptible to the WTO’s review); *see also* OFF. U.S. TRADE REP., OFF. OF THE PRESIDENT, U.S. REPLY TO CHINESE TAIPEI’S REQUEST TO JOIN CONSULTATIONS (2023); Off. U.S. Trade Rep., *supra* note 6, at 14.

250. Off. U.S. Trade Rep., *supra* note 6, at 14.

251. *See* Council on Foreign Relations, *Katherine Tai: The WTO is ‘On Thin Ice’ in Challenging National Security–Based Trade Decisions*, YOUTUBE (Jan. 24, 2023), <https://www.youtube.com/watch?v=DpCp86axySE> (recording of Ambassador Tai’s remarks at the World Economic Forum).

252. Summary of U.S. Mission to the WTO and Ambassador María L. Pagán’s Engagement at the WTO during the week of May 27, 2024, *linked to in* Hannah Monicken, *At First post-MC13 Dispute Reform Meeting, Talk of Appeal Limits, Pre-appeal Review*, INSIDE U.S. TRADE’S WORLD TRADE ONLINE (May 31, 2024, 3:05 PM), <https://insidetrade.com/daily-news/first-post-mc13-dispute-reform-meeting-talk-appeal-limits-pre-appeal-review>.

253. *See The WTO can . . . Settle Disputes and Reduce Trade Tensions*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi02_e.htm (“[d]ispute settlement is sometimes described as the jewel of the WTO’s crown”).

A. PRESSURE TO SUPPORT A SELF-JUDGING PROVISION

First, it is concerning that the United States appear to be seeking support from other Members for its position not by reasoning or logic, but through political and diplomatic pressure. The United States has intimated that the other WTO Members must agree with its position that Article XXI is self-judging as a requirement to reach a resolution in the dispute settlement reform.²⁵⁴

Such pressure is unhelpful and will not bring about a win-win resolution. As described above, many Members in the past (including the United States itself) and presently have vocalized the concern with a self-judging exception, which could lead to overuse, misuse, and, ultimately, the dispute settlement system's obsolescence. There must be a way to determine what is real "essential security" and what is merely an excuse to avoid one's WTO obligations. Denying the WTO system an ability to enforce its rules by opening such a loophole would lead to an outcome that even the United States would not seem to want. Under the United States' interpretation, for example, export bans by China for critical rare earths and government-led industrial policies through which the United States claims China has achieved global dominance²⁵⁵ would be fully sanctioned under multilateral trade rules. As long as China asserted that it considers such measures necessary for the protection of its essential security interests, then its actions would be considered nonjusticiable. The United States would also be barred from seeking recourse for other measures that it has criticized

254. See Off. U.S. Trade Rep., *supra* note 12 ("The WTO does not have the authority to second-guess a WTO Member's response to threats to its security, and WTO reform must ensure that issues of national security cannot be reviewed in WTO dispute settlement.").

255. See Evelyn Cheng, *China's Rare Earths Dominance Makes U.S. Supply Chains Vulnerable*, *Trade Representative Says*, CNBC (Aug. 26, 2023, 11:37 PM), <https://www.cnbc.com/2023/08/27/ustr-china-rare-earths-dominance-makes-us-supply-chains-vulnerable.html> (noting that China is dominant in the earth metals market, which are used to make high-tech products); Cory Combs, *Gaming out China's Next Export Controls on Critical Minerals*, TRIVIUM CHINA (Feb. 28, 2024), <https://triviumchina.com/research/gaming-out-chinas-next-export-controls-on-critical-minerals> (explaining that, in response to foreign technology controls and investigations, China banned exports on certain rare earth metals).

as being discriminatory, including digital services taxes,²⁵⁶ or Mexico's ban on genetically modified corn, which the United States has challenged under the U.S.-Mexico-Canada Agreement.²⁵⁷

Indeed, self-judging provisions in the WTO have long been troubling, to the point that even the United States itself has fought against them. Take for instance the WTO practice that allows Members to self-judge their development status.²⁵⁸ The United States has long warned against the harms of allowing countries to self-designate and receive the advantages of "developing country" status at the WTO, calling on USTR to "use all available means to secure changes at the WTO that would prevent self-declared developing countries from availing themselves" of flexibilities in WTO rules and negotiations that are not justified by objective economic and other related indicators.²⁵⁹ The United States was concerned about countries, through a self-declared status, receiving advantages that such status conferred when the factual circumstances did not warrant such treatment.²⁶⁰ Thus, making the essential security exception self-judging will result in the same problem.

256. See David Lawder, *USTR Says Austria, Spain, UK Digital Taxes Discriminate Against U.S. Firms*, REUTERS (Jan. 14, 2021, 12:27 PM), <https://www.reuters.com/article/us-usa-trade-digital-tax/ustr-says-austria-spain-uk-digital-taxes-discriminate-against-u-s-firms-idUSKBN29J2AZ> (describing how the U.S. found that digital taxes imposed by certain countries discriminate against U.S. companies and are not consistent with international taxation principles).

257. Press Release, Off. U.S. Trade Rep., U.S. Requests USMCA Dispute Settlement Consultations on Mexico's Agriculture Biotechnology Measures (June 2, 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/june/united-states-requests-usmca-dispute-settlement-consultations-mexicos-agricultural-biotechnology>.

258. See *Development: Definition: Who are the Developing Countries in the WTO?*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm ("[m]embers announce for themselves whether they are 'developed' or 'developing' countries"); *MC12 Briefing Note: WTO Reform — An Overview*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/minist_e/mc12_e/briefing_notes_e/bfwtoreform_e.htm.

259. Reforming Developing-Country Status in the World Trade Organization, 84 Fed. Reg. 37555, 37556 (July 31, 2019).

260. See *id.* at 37555 ("[N]early two-thirds of TWO Members have been able to avail themselves of special treatment and to take on weaker commitments under the WTO framework by designating themselves as developing countries.").

B. INTERPRETATION THROUGH ARTICLE IX:2 OF THE MARRAKESH AGREEMENT

The United States has floated the possibility that the WTO Members could agree to an authoritative interpretation of GATT Article XXI that is different from what prior WTO and GATT panels have found.²⁶¹ It has proposed that, through the use of Article IX:2 of the Marrakesh Agreement, three-fourths of the Members can vote to accept the U.S. view that the “essential security” exception is self-judging. Article IX:2 states:

The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.²⁶²

Article X, in turn provides that WTO Members “may initiate a proposal to amend the provisions of this Agreement or the [WTO agreements] by submitting such proposal to the Ministerial Conference.”²⁶³ Amendments to Article IX further requires acceptance by *all* WTO Members.²⁶⁴ Articles IX and X of the WTO Agreement thus clearly distinguish between *authoritative interpretations* of existing text and an *amendment* to such text, and further warn against conflating the two.

Therein lies the trouble with the United States’ proposal to rely on Article IX. This provision would still require the authoritative interpretation to abide by the rule of treaty interpretation in public international law as set forth in Articles 31 and 32 of the Vienna

261. See Mona Paulsen, *The Curious Case of US Self-Judging, Part 2*, INT’L ECON. L. AND POL’Y BLOG (Jan. 30, 2023, 12:08 PM), <https://ielp.worldtradelaw.net/2023/01/the-curious-case-of-us-self-judging-part-2.html> (reiterating that the U.S. views Article XXI of the GATT 1994 as self-judging and that the U.S. is leading the efforts to solidify its interpreting of Article XXI).

262. Marrakesh Agreement, *supra* note 37, art. IX, ¶ 2.

263. *Id.* art. X, ¶ 1.

264. *Id.* art. X, ¶ 2.

Convention on the Laws of Treaty (VCLT).²⁶⁵ However, as illustrated in Sections III and IV above, neither the ordinary meaning nor the preparatory work (or state practice) support the interpretation of the treaty text espoused by the United States, and therefore, would “undermine the amendment provisions in Article X” as prohibited by the WTO Agreement.

To be sure, the United States has the right to “initiate a proposal to amend” Article XXI such that the text would support a self-judging interpretation.²⁶⁶ And in fact, if the United States seeks to adopt an interpretation that Article XXI is self-judging and nonjusticiable, this might be the only rule-of-law option available to the United States, in light of the text and negotiating history of the provision. This would require the consent of *all* WTO Members (as opposed to three-fourths of the membership)—which the United States should obtain through negotiations and genuine engagement, rather than political and diplomatic pressure.²⁶⁷

C. COMPENSATION FOR INVOKING A SELF-JUDGING ARTICLE XXI

Finally, it is worth mentioning that some have suggested (including the United States itself done in past GATT negotiations) that a possible way forward is to permit any Member to continue with its self-proclaimed “essential security” action, but then require that Member to be subject to compensation negotiations, where the aggrieved Member could take retaliatory trade measures if trade compensation could not be agreed.²⁶⁸ This would be done so as to appease those

265. See Vienna Convention, *supra* note 15, art. 31–32 (interpreting treaties in good faith and in context of the treaties’ objective and purpose with room for recourse for supplementary interpretations of treaties).

266. See Marrakesh Agreement, *supra* note 37, art. X, ¶ 1 (“[A]ny member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference.”).

267. See *id.* art. X, ¶ 2 (“[A]mendments to the provisions of this Article and to the provisions of the following Articles shall take effect only upon acceptance by all Members.”).

268. See Maruyama & Wolff, *supra* note 9, at 19 (suggesting that trade measures justified by the national security exception would be nonjusticiable, and in return, adversely affected WTO members would have the right to institute retaliatory trade measures against the member invoking the national security exception to offset the benefits of the concession).

concerned about the misuse or overuse of a self-judging “essential security” exception.

We do not think this is a viable solution. This idea has been discussed during the negotiations of Article XXI, and the WTO agreements currently utilize such a compensation mechanism in three places: (1) in dispute settlement when the losing party cannot bring its measure into compliance, and opt instead to pay compensation (DSU Article 22);²⁶⁹ (2) when there is a finding of nonviolation of nullification or impairment (NVNI), and while the respondent need not withdraw its NVNI measure, it would need to pay a “mutually satisfactory adjustment” (DSU Article 26);²⁷⁰ and (3) when a Member needs to unilaterally modify any of its market access schedules (GATT Article XXVIII).²⁷¹ The outcomes provided in each of these instances provide a less-than-ideal secondary resolution when conformity with the agreed-upon WTO rules is not available or not applicable.

In terms of Article 22 of the DSU, compensation is offered as an alternative approach “[i]f the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance . . . or otherwise comply with the recommendations and rulings” of the DSB.²⁷² Thus, Article 22 recognizes that compensation is not an equivalent resolution to bringing a WTO-inconsistent measure into compliance.

The compensation option presented under Article 26 fares no better—Article 26 relates to NVNI claims described in Article XXIII:1(b) of the GATT 1994, which provides for “the application by another contracting party of any measure, whether or not it conflicts with the provisions of [the GATT].”²⁷³ Article XXIII:1(b) is distinct from Article XXIII:1(a), which covers “the failure of another contracting party to carry out its obligations under [the GATT],” and therefore, must be read to cover situations where there is nullification or impairment of benefits *despite there being no violation of the GATT*

269. DSU, *supra* note 38, art. 22(2).

270. *Id.* art. 26, ¶ 1.

271. GATT, *supra* note 5, art. XXVIII.

272. DSU, *supra* note 38, art. 22(2).

273. GATT, *supra* note 5, art. XXIII, ¶ 1(b).

1994.²⁷⁴ The compensation provision under Article 26 is thus not appropriate for a claim under Article XXI, which *does* involve a violation of a Member's obligations under the GATT, especially if the DSB is not given opportunity to adjudicate over whether the measure is properly justified under the claimed exception.

Finally, the compensation provision under Article XXVIII of the GATT 1994 also does not provide a basis to apply such mechanism to Article XXI claims. Article XXVIII provides a narrow basis for a WTO Member to modify its existing obligations under the GATT 1994, and for other Members aggrieved by such modifications to seek compensation with the aim of "maintain[ing] a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to [negotiations to modify or withdraw a concession]."²⁷⁵ It does not allow a Member to bypass or otherwise avoid scrutiny for actions that might be inconsistent with its obligations.

In short, such solutions have not been ideal when they were utilized in the WTO, and there is nothing that suggests that they would work in an Article XXI self-judging situation as well. At its core, the primary objective of dispute settlement is to "secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements."²⁷⁶ In fact, "[t]he provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement."²⁷⁷ A mechanism in which the default resolution to an Article XXI claim is compensation, regardless of whether a measure is properly justified under the exception, contravenes the very objective of the DSU and cannot be a permanent and viable approach to all claims under Article XXI. As a practical matter, it is also more likely that Members invoking Article XXI will claim little to no adjustment needed, which will only lead to more disputes about the proper level of the adjustment. This would end up

274. *Id.* art. XXIII, ¶ 1(a).

275. *Id.* art. XXVIII:2.

276. DSU, *supra* note 38, art. 3(7).

277. *Id.*

leading to further disputes with a less ideal outcome available to Members and taxing the system more. Finally, if (and when) a Member refuses to pay, this would further undermine the viability of the WTO. In conclusion, such a solution would not deter misuse or overuse of the “essential security” exception but would just usher in a slower death of the WTO.

VI. CONCLUSION

While U.S. concerns about the treatment of national security issues by the WTO is valid and should be discussed, it may be unwise to pressure Members to adopt an erroneous interpretation as a precondition to accepting any resolution to the WTO dispute settlement problem. As demonstrated in this article, the U.S. interpretation of GATT Article XXI as wholly self-judging is unsupported by the text, context, object and purpose, and negotiating history of Article XXI, as well as state practice. Following such an interpretation would give countries license to evade their WTO obligations under the guise of national security, a clearly undesirable outcome for all Members. Instead, WTO Members should continue to engage constructively and inclusively to consider solutions that are either supported by existing text of GATT Article XXI, or that can lead to successful renegotiations of the existing text.

* * *