An "Emergency in International Relations" of its Own Making

The WTO's Misstep on National Security in *U.S. – Steel and Aluminum*

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As tectonic shifts take place in the global geopolitical and economic landscape, questions of national security have increasingly been hauled into an adjudicative forum that is decidedly ill-equipped to deliberate on them: the World Trade Organization (WTO). In the wake of World War II, the drafters of the General Agreement on Tariffs and Trade (GATT) that underpins the WTO system intentionally included a carefully worded "escape hatch" for member states to derogate from their multilateral trade commitments in the face of competing essential security interests. That escape hatch takes the form of GATT Article XXI: the national security exception. The national security exception was long considered too contentious of an issue to bring to formal adjudication before the WTO's Dispute Settlement Body (DSB). But beginning with Russia – Traffic in Transit (2019) *and carrying through to* U.S. – Steel and Aluminum (2022)*, the DSB has increasingly been willing to offer its own proclamations on the scope and applicability of the national security exception. This paper will argue that WTO adjudicators are unfit to deliberate on national security issues by showing how the panel in the recently decided* U.S. – Steel and Aluminum *case made significant errors of both fact and law that resulted in an ultimately flawed conclusion. The troubling implications of the* Steel and Aluminum *decision, including for the future survival of the entire WTO system, will finally be explored.*

I. INTRODUCTION

> *The United States strongly rejects the flawed interpretation and conclusions in the World Trade Organization (WTO) Panel reports released today regarding challenges to the United States' Section 232 measures on steel and aluminum brought by China and others. The United States has held the clear and unequivocal position, for over 70 years, that issues of national security cannot be reviewed in WTO dispute*

settlement and the WTO has no authority to second-guess the ability of a WTO Member to respond to a wide-range of threats to its security. […] The United States will not cede decision-making over its essential security to WTO Panels.[1]

The international trade system under the auspices of the World Trade Organization (WTO) is in a state of existential crisis. The above statement from the Office of the United States Trade Representative is a stark illustration of the startling new posture that the United States government has adopted towards the WTO across two bipartisan presidential administrations. What are the roots of this current malaise? International adjudicative bodies, not least of all the WTO's Dispute Resolution Body (DSB), have long been forced to confront political realities and navigate the tightrope tension between politics and law that is inherent to dispute resolution under public international law.[2] China's legal challenge to President Donald Trump's 2018 tariffs on imports of steel and aluminum products, pursuant to a relevant determination under domestic law that such imports "threaten[ed] to impair" U.S. national security,[3] thus posed a formidable test to the DSB in striking the right balance on two competing interests of paramount significance: trade and national security. Security is the ultimate sovereign prerogative, and one which must be accordingly approached with the utmost caution in any supranational adjudicative context that would limit a state's furtherance of its own politico-military objectives. The intricate relationship between economic power and military power is just one further complicating factor in this delicate and high stakes balancing act; indeed, one point which even the textbook proponent of neoliberal thought Adam Smith conceded is "the necessity of state intervention in

[1] *Statement from USTR Spokesperson Adam Hodge*, OFF. OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFF. OF THE PRESIDENT (Dec. 9, 2022), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/december/statement-ustr-spokesperson-adam-hodge.
[2] *See* Tom Ginsburg, *Political Constraints on International Courts* (Univ. of Chi. L. Sch., Pub. L. and Legal Theory Working Paper No. 453, 2013).
[3] Trade Expansion Act of 1962 § 232, 19 U.S.C. § 1862.

economic matters insofar as it might be essential to the military power of the nation".[4] It was surely not lost on the WTO then that it was playing with fire when tasked with ruling on a dispute that challenges the most core area of national sovereignty of the largest underwriter of the post-World War II international order. The DSB had a real opportunity to get things right and lay the foundations for a workable framework to manage these dueling interests in a geopolitical context of increasing competition and rising tensions among the world's two largest economies. Instead, the panel in *U.S. – Steel and Aluminum* committed significant errors of both fact and law in its assessment that led to an ultimately incorrect conclusion: denying the United States an affirmative defense of its tariffs on national security grounds to which it should have been entitled. More alarmingly, the panel's stunning misstep could be the *coup de grâce* for the continued survival of the WTO system in its current form altogether.

II. BACKGROUND: THE WTO, ARTICLE XXI, AND *RUSSIA – TRAFFIC IN TRANSIT*

The WTO is in essence comprised of three institutional pillars: 1) a negotiating forum for the creation of new trade rules and agreements for its 164 member countries, 2) an executive arm whereby the WTO oversees and manages an array of tariff schedules, subsidy notifications, and other trade-related administrative functions, and 3) a formerly-robust two-tier dispute settlement body in which binding resolutions of trade disputes that arise under the text of the WTO treaties are adjudicated and issued.[5] By many measures, the world has prospered since the founding of the WTO in 1995 on the basis of the earlier General Agreement on Tariffs and Trade (GATT), which is incorporated into the WTO agreements. The WTO aims to foster economic growth by

[4] Edward Mead Earle, *Adam Smith, Alexander Hamilton, Friedrich List: The Economic Foundations of Military Power*, *in* MAKERS OF MOD. STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE 217, 222 (Peter Paret ed., 1986).
[5] *The United States Needs a Reformed WTO Now: Hearing Before the S. Comm. on Fin.*, 116th Cong. 3 (2020) (statement of Jennifer A. Hillman, Senior Fellow for Trade and Int'l Pol. Econ., Council on Foreign Rels.).

establishing a set of binding obligations by which member states must liberalize their economies and open their markets. This is thought to maximize economic efficiency under a theory of comparative advantage and create a wide array of benefits in the form of wage growth, job creation, lower prices for a wider array of products, increased productivity, and more efficient resource allocation.[6] Riding a wave of economic growth underpinned by the WTO trade system, it is estimated that the number of people worldwide living in extreme poverty fell by one billion between 1990 and 2015.[7] This is a staggering and laudable accomplishment by any measure.

As we are now all too aware, however, economic growth and development is not where the story of the 21st century begins and ends. The euphoric post-Cold War era in which the WTO was created has ceded to one of heightening global anxiety and tension over issues like climate change, the rise of resentful populist movements, and the specter of renewed great power conflict. Article XXI of the GATT was drafted to give parties an "escape hatch" from their trade commitments and ample leeway to craft domestic economic policies in furtherance of security interests in the midst of a world in turmoil, such as the one we are living in today. The text of GATT Article XXI reads in part as follows:

> *Nothing in this Agreement shall be construed*
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> > *(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or*
> >
> > *(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests*
> >
> > > *(i) […]*

[6] SHAYERAH I. AKHTAR ET AL., CONG. RSCH. SERV., IF10156, U.S. TRADE POLICY: BACKGROUND AND CURRENT ISSUES (2022).
[7] Press Release, WBG, Decline of Global Extreme Poverty Continues but Has Slowed: World Bank (Sept. 19, 2018).

(ii) […]

(iii) taken in time of war or other emergency in international relations;[8]

Article XXI thus offers an affirmative defense to a party whose trade measure is being challenged before the WTO's Dispute Settlement Body (DSB) via a national security exception. The negotiating history of the GATT and the Havana Charter of the International Trade Organization, a proposed precursor organization to the WTO that never came to fruition, reveals a careful balancing act to craft an appropriate security exception within the new trade regime. On the final text of Article XXI that came out of negotiations, John Marshall Leddy, head of the U.S. delegation, explained:

> *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.*[9]

Striking the right balance on the national security exception has thus been a tightrope act from the very beginning. WTO members have historically refrained from initiating disputes that may invite invocation of Article XXI in a generalized effort to avoid dragging such paramount questions of national security and sovereignty into the WTO.[10] While the GATT dispute resolution body that preceded the WTO considered the affirmative defense of Article XXI several times throughout its history, the national security exception had only been ruled on once

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[8] General Agreement on Tariffs and Trade art. XXI, Oct. 30., 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].
[9] U.N. Econ. and Soc. Council, *Verbatim Report - Thirty-Third Meeting of Commission A*, GATT Doc. E/PC/T/A/PV/33, 21 (July 24, 1947).
[10] *See* James Bacchus, *The Black Hole of National Security: Striking the Right Balance for the National Security Exception in International Trade* (Cato Inst., Pol'y Analysis No. 936, 2022), https://www.cato.org/policy-analysis/black-hole-national-security.

before at the WTO's DSB prior to the December 2022 *U.S. – Steel and Aluminum* decision. *Russia – Measures Concerning Traffic in Transit* (2019) is the first case in which a WTO panel interpreted the scope and applicability of GATT Article XXI. The dispute was initiated by Ukraine in response to Russian measures restricting transit routes across its territory for traffic to Central Asian markets. Russia invoked Article XXI as an affirmative defense of these measures, claiming that the language of Article XXI(b) "which it considers contrary to its essential security interests" renders the entire article self-judging and thus not subject to review by the DSB when invoked as a defense. While the panel ultimately granted Russia a national security exception defense based on the facts of the case, it disagreed with Russia's argument on the self-judging, non-justiciable nature of Article XXI. In its interpretation of the article, the panel espoused the view that the language of Article XXI(b) "which it considers necessary" is indeed self-judging in regard to the challenged measure, but that "which it considers" does not carry through to the enumerated circumstances in subparagraphs (i) – (iii), one of which must be satisfied in order for a party to successfully avail itself of the defense. The panel also defined what it deems to constitute an "emergency in international relations" for the purposes of subparagraph (iii), proclaiming that such an emergency includes "all defense and military interests, as well as maintenance of law and public order interests." The panel further stated that "political or economic differences between members are not sufficient, of themselves, to constitute an emergency in international relations for the purposes of subparagraph (iii) … unless they give rise to defense and military interests, or maintenance of law and public order interests."[11] While Russia did not provide any substantial evidence showing that its measure was "taken in time of war or other emergency in international relations" as per subparagraph (iii), the panel

[11] Panel Report, *Russia — Measures Concerning Traffic in Transit*, ¶ 7.74, WTO Doc. WT/DS512/R (Apr. 5, 2019) [hereinafter Russia – Traffic in Transit].

nonetheless undertook its own objective assessment and found that the situation between Russia and Ukraine that had existed since 2014 fit within the meaning of Article XXI(b)(iii).[12] Finally, citing to Articles 31(1) and 26 of the Vienna Convention on the Law of Treaties, the panel noted that the principle of "good faith" is a general principle of international law that should be applied to a party's use of an Article XXI defense so as to avoid a "slippery slope" of generalized circumvention of GATT principles simply by labeling pure commercial interests as security interests. Going a step further, the panel applied the "good faith" standard to establish that there must be a nexus between the challenged measure and the "essential security interest" that the party is seeking to further, or that the trade-restrictive measure must not be an "implausible" means of protecting the security interest.[13] In essence, the standard set forth is that a member's self-determination of a measure being "necessary" to protect an essential security interest is presumptively made in good faith when that measure is not implausible as being in furtherance of that interest.[14]

III. THE *U.S. – STEEL AND ALUMINUM* DECISION

After Russia in the *Traffic in Transit* case, the United States was next to invoke Article XXI in a WTO dispute in *U.S. – Certain Measures on Steel and Aluminum Products*. Section 232 of the Trade Expansion Act of 1962 authorizes the President of the United States to impose import restrictions based on an investigation and affirmative determination by the Department of

[12] Peter L.H. van den Bossche & Sarah Akpofure. *The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994*, *in* A NEW GLOBAL ECONOMIC ORDER: NEW CHALLENGES TO INTERNATIONAL TRADE LAW 121, 150 (Chia-jui Cheng ed., 2022). *See also* Mael Foucault et al., *L'exception de sécurité du GATT sous le prisme des surtaxes américaines sur l'acier et l'aluminium : une analyse à l'aune du rapport du Groupe spécial dans l'affaire* Russie – Trafic en transit, 32(2) REVUE QUÉBÉCOISE DE DROIT INT'L 243, 254 (2019).
[13] Russia – Traffic in Transit, ¶¶ 7.132-33, ¶¶ 7.138-39.
[14] *Id. See also* van den Bossche, *supra* note 12, at 158.

Commerce that certain imports "threaten to impair" U.S. national security.[15] Statutory factors to be considered in such an investigation include: "domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements" as well as "the impact of foreign competition on the economic welfare of individual domestic industries".[16] In April 2017, Commerce initiated a Section 232 investigation to determine the impact of imported steel on the national security of the United States.[17] The agency's final report presented the determination that "domestic steel production is necessary for national security applications",[18] and that the displacement of the U.S. domestic steel industry by excessive imports coupled with global excess capacity in steel weaken the internal U.S. economy and thereby "threaten to impair national security as defined in Section 232."[19] To arrive at this conclusion, Commerce relied on the finding that steel is important to U.S. national security because 1) steel is needed for national defense requirements, 2) steel is required for U.S. critical infrastructure, 3) domestic steel production is essential for national security, 4) domestic steel production depends on a healthy and competitive U.S. industry, and 5) steel is consumed in critical industries.[20] An analogous Section 232 investigation was also initiated in April 2017 in regard to imports of aluminum.[21] While the facts and findings presented in Commerce's "Aluminum Report" were distinct from those contained in the "Steel Report", the ultimate conclusion was similarly that aluminum is essential to U.S. national security and that imports of

[15] 19 U.S.C. § 1862.
[16] *Id.* at (d).
[17] Panel Report, *United States — Certain Measures on Steel and Aluminum Products*, ¶ 2.9, WTO Doc. WT/DS544/R (Dec. 9, 2022) [hereinafter U.S. – Steel and Aluminum].
[18] U.S. DEP'T OF COM., BUREAU OF INDUS. AND SEC., OFF. OF TECH. EVALUATION, THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY, 24 (2018).
[19] *Id.* at 55.
[20] *Id.* at 23-25.
[21] U.S. – Steel and Aluminum, ¶ 2.19.

aluminum products "threaten to impair" U.S. national security.[22] Upon transmission of these reports from the Secretary of Commerce, the President issued two proclamations in March 2018 imposing additional import duties of 25% and 10% on certain steel and aluminum products respectively.[23] Canada, Mexico, Australia, Argentina, Korea, Brazil, and the European Union would later be either wholly or partially exempted from these measures.[24]

Pursuant to consultations between the parties, China requested the establishment of a panel to rule on the consistency of the U.S. measures with various articles of the GATT.[25] The U.S. invoked Article XXI as a defense of the measures at issue. Adopting the same position as Russia in the *Traffic in Transit* case*,* the U.S. argued that the language of Article XXI(b) "which it considers necessary for the protection of its essential security interests" is self-judging and thus renders its applicability entirely non-justiciable by the DSB.[26] The panel acknowledged that "a central aspect of the design and application of the measures at issue is their relation to the United States' determination of a threat to its national security under the relevant domestic laws",[27] in effect satisfying the "essential security interest" element of Article XXI. But the panel still proceeded to a distinct inquiry to rule on the question of whether Article XXI is self-judging and thereby non-justiciable. Both parties submitted materials relevant to interpretation of Article XXI in support of their argument, including the *travaux préparatoires* of the GATT and the Havana Charter as well as GATT Council Decisions on Article XXI prior to the establishment of the WTO, but the panel considered that these materials do not provide clear guidance regarding the

[22] U.S. DEP'T OF COM., BUREAU OF INDUS. AND SEC., OFF. OF TECH. EVALUATION, THE EFFECT OF IMPORTS OF ALUMINUM ON THE NATIONAL SECURITY (2018).
[23] U.S. – Steel and Aluminum, ¶ 2.29.
[24] *Id.*, ¶ 2.31.a.
[25] *Id.*, ¶ 1.4.
[26] *Id.*, ¶¶ 7.105-06.
[27] *Id.*, ¶ 7.96.

question of justiciability of Article XXI(b).[28] The panel concluded that, while Article XXI(b) "preserves the right and discretion of a Member to take action it considers necessary for the protection of its essential security interests under the conditions and circumstances described in subparagraphs (i) to (iii)", it is not ultimately self-judging or non-justiciable and is thus subject to review by the DSB.[29]

Having established its discretion to review applicability of Article XXI(b), the panel proceeded to examine whether one of the enumerated circumstances in subparagraphs (i)-(iii) was met. While arguing that the text of Article XXI did not require it to identify a qualifying subparagraph (iii) circumstance, the U.S. acquiesced that its actions could be understood "most naturally" to fall under subparagraph (iii).[30] The panel's analysis was therefore focused on this subparagraph: "taken in time of war or other emergency in international relations". After first citing dictionary definitions of "emergency" ("[a] situation, esp. of danger or conflict, that arises unexpectedly and requires urgent attention", "a condition requiring immediate treatment", or a "pressing need."[31]) and international "relations" ("[t]he various ways by which a country, State, etc., maintains political or economic contact with another"[32]), the panel found that the reference to "war" within subparagraph (iii) should guide interpretation of what constitutes an "emergency in international relations".[33] More precisely, the panel concluded that "an "emergency in international relations" within the meaning of Article XXI(b)(iii) must be, "if not equally grave or severe, at least comparable in its gravity or severity to a "war" in terms of its impact on

[28] *Id.*, ¶¶ 7.126-28.
[29] *Id.*, ¶ 7.128.
[30] Second Written Submission of the United States of America, *United States – Certain Measures on Steel and Aluminum Products*, ¶ 24, WT/DS544 (Apr. 17, 2020), https://ustr.gov/sites/default/files/enforcement/DS/US.Sub2.fin%20(DS556).pdf.
[31] U.S. – Steel and Aluminum, ¶ 7.137.
[32] *Id.*
[33] *Id.*, ¶ 7.139.

international relations."[34] The French and Spanish language versions of Article XXI(b)(iii) ("grave tension internationale" and "grave tensión internacional") were cited in support.[35] While the U.S. argued that the self-judging language of paragraph (b) "which it considers" should extend to the circumstances described in the subparagraphs, the panel reasoned that the grammatical construction of the treaty indicated that the subparagraphs (i) – (iii) should be evaluated objectively and independently of the consideration of the party invoking Article XXI.[36] Therefore, despite acknowledging that the U.S. did in fact "consider" that its measure was "taken in time of war or other emergency in international relations", the panel proceeded to a distinct inquiry to objectively determine whether the measure was actually taken in such a time. Weighing the arguments proffered by the U.S. on the existence of a global economic crisis due to excess steel capacity, the panel ultimately concluded that such a circumstance does not rise to the level of an "emergency in international relations" for the purposes of satisfying subparagraph (iii).[37] Article XXI was thus held to be inapplicable as a defense for the challenged measures, which were ultimately deemed inconsistent with other GATT provisions in the absence of a viable national security exception defense.[38]

IV. CRITIQUE OF THE DECISION

The *U.S. – Steel and Aluminum* decision is a highly controversial one, not least of all because it amounts to a bold assertion by the WTO that it has the authority to "second-guess" a measure, enacted in accordance with relevant domestic law, that a member state "considers

[34] *Id.*
[35] *Id.*
[36] *Id.*, ¶ 7.128.
[37] *Id.*, ¶ 7.148.
[38] *Id.*, ¶ 7.149.

necessary for the protection of its essential security interests." But besides eliciting vehement protests from the United States, several errors of both fact and law made by the panel raise serious doubts as to the prudence of the WTO ultimately adopting the final panel report. The panel acquiesced that that the U.S. did "consider" that it had an essential security interest with respect to steel and aluminum and that its challenged measures were related to this interest, thus already satisfying Article XXI(b).[39] The crux of the decision therefore boils down to its interpretation of subparagraph (iii): "taken in time of war or other emergency in international relations". It is the panel's spurious definition and objective assessment of this subparagraph that most egregiously reveals the inadequacy of WTO jurists to deliberate on the inherently political question of national security threats. There are also significant flaws in the panel's report with respect to Article XXI(a) as well as using the correct standard of review.

A. Article XXI(a) and Standard of Review

The panel in *U.S. – Steel and Aluminum* held that it needed to undertake an objective inquiry as to the existence of a "war or other emergency in international relations". But Article XXI(a) makes it incredibly difficult for WTO panelists to accurately assess the existence of conflict, wars, and other international emergencies for the purposes of applicability of Article XX(b)(iii) when parties do not identify one themselves. At the same time, the plain language of paragraph (a) expressly precludes parties from being required to do so. Article XXI(a) stipulates that no party shall be required "to furnish any information the disclosure of which it considers contrary to its essential security interests", a self-judging clause that precludes parties from being required to present facts or evidence in the context of a dispute when it "considers" that doing so

[39] *Id.*, ¶ 7.96.

would be contrary to an essential security interest. This tends to support the notion that a party is not, and cannot be, required to justify their invocation of Article XXI(b)(iii), as was argued by the U.S.[40] Russia relied on this provision in refusing to provide certain information in the *Traffic in Transit* case, such as specifying the essential security interest that its measures were enacted to protect,[41] and the panel deferred to this interpretation[42] despite somewhat inconsistently also stating that it is "incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity."[43] But neither the *Russia – Traffic in Transit* nor the *U.S. – Steel and Aluminum* panel reports set forth any analogous standard for the articulation of the "emergency" itself, beyond its mere objective existence. States are in possession of considerable amounts of classified intelligence relating to present and future security threats to which the DSB is not privy. WTO panelists thus do not, and cannot, know based solely on the written submissions of the parties in a dispute the extent to which many security threats truly exist; indeed, any attempt to do so can only ever be a stab in the dark at best. What if, for instance, the U.S. had been in possession of credible intel at the time of enactment of the steel and aluminum measures that Russia was going to invade Ukraine within the next few years, and that the U.S. would as a result need to provide billions of dollars of matériel (made with large quantities of steel and aluminum) to the Ukrainians over the duration of a protracted military conflict at the doorstep of NATO and the EU? This would recast the situation in Crimea in March of 2018 as a "latent" stage of conflict that could well have satisfied subparagraph (iii), as discussed in more detail below. What about a hypothetical security threat to which the U.S. had been covertly responding militarily at

[40] Second Written Submission, *supra* note 30, ¶ 24.
[41] *See* Russia – Traffic in Transit, ¶ 7.115; Foucault, *supra* note 12, at 254.
[42] Russia – Traffic in Transit, ¶ 7.136.
[43] *Id.*, ¶ 7.134.

the time of enactment of the measures in March 2018 and whose existence is still unknown to the public today? The U.S. would not have divulged such sensitive information in its written submissions to the DSB, nor was it required to as per Art. XXI(a). There are several plausible circumstances under which a WTO panel may not be able to objectively assess the existence of a qualifying subparagraph (iii) circumstance when a party itself does not, which no party may be compelled to do. This conundrum within the four corners of the text of Article XXI underscores how it is perhaps an impossible task from the get-go for a WTO panel to ever arrive at a correct or coherent holding with respect to Article XXI(b)(iii).

Even with a complete set of facts divulged in full by the parties, WTO panels are bound by Article 11 of the Dispute Settlement Understanding (DSU) to "make an objective assessment of the matter before [them], including an objective assessment of the facts of the case" as well as to "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."[44] The correct standard of review applicable to the panel's fact-finding activities has been clarified in subsequent WTO cases, most notably *EC - Hormones*:

> *So far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither de novo review as such, nor "total deference", but rather the "objective assessment of the facts". Many panels have in the past refused to undertake de novo review, wisely, since under current practice and systems, they are in any case poorly suited to engage in such a review. On the other hand, "total deference to the findings of the national authorities", it has been well said, "could not ensure an 'objective assessment' as foreseen by Article 11 of the DSU.*[45]

[44] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 11, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].
[45] Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, ¶ 117, WTO Doc. WT/DS26/AB/R (Jan. 16, 1998) [hereinafter EC – Hormones].

The "objective assessment" standard of review coupled with the sensitive nature of factual evidence and arguments inherent to a national security-related matter as enshrined in Article XXI(a) creates a highly particularized set of circumstances for WTO jurists deliberating on the application of Article XXI(b)(iii). As per the panel's own interpretation, an objective inquiry must take place to determine if the temporal requirement of subparagraph (iii) is met. But at the same time, the parties are discharged from any requirement "to furnish any information the disclosure of which it considers contrary to its essential security interests"[46], including their submissions and arguments before the DSB. It is therefore entirely plausible that a subparagraph (iii) circumstance may objectively exist without a party identifying or proving its existence. While a party may proffer certain facts or evidence to support use of the affirmative Art.XXI(b)(iii) defense, the standard of review established in Article 11 DSU directs the panel to proceed to an "objective assessment of the matter before it, including an objective assessment of the facts of the case"[47]. Thus, whether the United States pointed to or factually supported the existence of a particular "war or other emergency in international relations" or not, the panel could have and indeed should have proceeded to objectively inquire whether such a circumstance existed. In fact, several such circumstances did exist at the time of enactment of the challenged measures in March 2018.

The United States was actively engaged in a protracted decades-long military conflict in Afghanistan, initially waged in response to the September 11, 2001 terrorist attacks, at the time of enactment of the steel and aluminum tariffs. The Taliban had launched "major attacks" within the country in January 2018 as the U.S. was gearing up for a renewed troop deployment effort.[48]

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[46] GATT art. XXI(a).
[47] DSU art. 11.
[48] *1999 – 2021 - The U.S. War in Afghanistan,* COUNCIL ON FOREIGN RELS., https://www.cfr.org/timeline/us-war-afghanistan (last visited June 6, 2023).

The United Nations Security Council (UNSC) issued a resolution in March 2018, the same month as the enactment of the steel and aluminum tariffs, in which it "[r]ecogniz[ed] the continuously alarming threats posed by the Taliban, including the Haqqani Network, as well as by Al-Qaida, ISIL (Da'esh) affiliates and other terrorist groups" and "[u]nderlin[ed] the importance of operationally capable, professional, inclusive and sustainable Afghan National Defence and Security Forces (ANDSF) for meeting Afghanistan's security needs, stressing the commitment of the international community to support their further development".[49] Steel and aluminum are both materials used to forge the weapons necessary for the U.S. war effort in Afghanistan aimed at preventing the country from ever again being a staging ground for terrorist attacks on U.S. soil, including arming the ANDSF as urged by the UNSC. The panel in *Russia – Traffic in Transit* explicitly cited to UN General Assembly Resolution No. 71/205 as evidence in support of its decision that subparagraph (iii) was satisfied with respect to Russia's Article XXI defense, despite Russia not having argued this itself.[50] In light of the Afghanistan conflict and concurrent UNSC resolution, the panel should have done the same in *U.S. – Steel and Aluminum*, and could arguably have even granted the U.S.'s Article XXI defense on the basis of paragraph (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." It is unclear why the panel completely ignored relevant UNSC resolutions in undertaking its objective assessment despite looking to similar UN resolutions in the *Traffic in Transit* case.

Would the *Steel and Aluminum* decision have come down the same way had Russia's full-scale invasion of Ukraine already been launched at the time the panelists were deliberating on the steel and aluminum tariffs? The U.S. is currently bankrolling and arming the resistance of

[49] S.C. Res. 2405, 2 (Mar. 8, 2018).
[50] Russia – Traffic in Transit, ¶ 7.122.

a sovereign state in a galling incursion upon its sovereignty by a nuclear-armed neighbor in what could well be one of the most pivotal conflicts in determining the fate of the entire post-World War II international order. Steel and aluminum are critical components in the massive amounts of matériel that the United States is currently pouring into Ukraine. A portion of Ukraine's territory was already under active occupation in March 2018 subsequent to Russia's Crimea invasion of 2014. We know now in retrospect that what may have appeared as a *fait accompli* at the time of the panel's decision was in fact nothing more than a lull in active armed hostilities before the larger-scale invasion that would follow in 2022. The panel did not know this at the time because they are trade adjudicators, not security experts or fortune tellers. But a state of latent conflict was explicitly enumerated in *Russia – Traffic in Transit* as being a qualifying subparagraph (iii) circumstance.[51] The dictionary definition of "latent" is "present and capable of emerging or developing but not now visible, obvious, active…".[52] This begs the question: if the existence of a latent conflict satisfies subparagraph (iii), how can WTO panelists possibly accurately assess the existence of such a conflict that, by definition, is "not now visible"? With hindsight, the inability of WTO jurists to correctly rule on security-related matters becomes even more clear in the case of the Ukraine conflict and the U.S.'s involvement therein. Does defending the UN system by arming a sovereign country against an ongoing illegal invasion by a UNSC Permanent Member rise to the level of an essential security interest? As per the DSB's test, as long as the U.S. "considers" that it does and takes its challenged measures in what is objectively a "time of war or other emergency in international relations", then the challenged measures should be subject to an affirmative Article XXI(b)(iii) defense. With Russia holding a veto at the UNSC, the body was unable to issue any resolution condemning Russia's invasion of

[51] *Id.*, ¶ 7.76.
[52] *Latent,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/latent (last visited June 6, 2023).

Ukraine, however, UNSC Resolution 2623 called for a special emergency session of the UNSC to deliberate on the invasion and could have been referred to in the panel's objective assessment.[53] All things considered, it is unclear why the panel stated that it needed to undertake an objective assessment in regard to subparagraph (iii) but then did not actually do so.

B. Panel's Overly Rigid Definition of Subparagraph (iii)

The panel in *U.S. – Steel and Aluminum* relied on its own definition of subparagraph (iii) to reach its determination that such a circumstance was not satisfied in order to make the Article XXI defense available to the United States. The definition put forth by the panel is that "an "emergency in international relations" within the context of Article XXI(b)(iii) "must be, if not equally grave or severe, at least comparable in its gravity or severity to a "war" in terms of its impact on international relations."[54] There are several flaws, however, with this definition. First, the panel's definition does not respect the rules of treaty interpretation as governed by the WTO's Dispute Settlement Understanding (DSU) treaty and the Vienna Convention on the Law of Treaties (VCLT) in that it ignores crucial insights from the *travaux préparatoires* of GATT Article XXI. The panel's interpretation is also dubious in that it fails to adequately reconcile the equivalent terms of "emergency" in the equally authentic French and Spanish versions of the GATT with its definition. Finally, from a normative perspective, the definition proffered by the panel is overly rigid and ill-suited to be a workable framework for states responding to genuine 21st century security threats.

[53] S.C. Res. 2623 (Feb. 27, 2022).
[54] U.S. – Steel and Aluminum, ¶ 7.139.

The DSU mandates that the DSB shall "clarify the existing provisions of [WTO] agreements in accordance with customary rules of interpretation of public international law".[55] The VCLT is widely considered to be an authoritative codification of the customary international law rules of treaty interpretation. Article 31(1) of the VCLT states that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 32 of the VCLT states that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31".[56] Following the guidance of VCLT Article 32, the panel did look to the *travaux préparatoires* and negotiating history of the Havana Charter/GATT on the question of the overall justiciability of Article XXI(b).[57] But the panel report did not refer to these materials when endeavoring to define subparagraph (iii), despite the fact that crucial insights can be gleaned from them. When finalizing the language of what would become GATT Article XXI, there was concern from the delegation of the Netherlands that "essential security interest" would be so broadly encompassing as to allow trade-restrictive measures in non-defense sectors such as agriculture.[58] To this, U.S. delegate John Marshall Leddy responded:

> *We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great deal of danger of having too wide an exception […] 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 […]. With regard to [GATT Article XXI(b)(iii)], the limitation, I think, is primarily in the time: first "in time of war". <u>As to the second provision, "or other emergency in international</u>*

[55] DSU art. 3.2.
[56] Vienna Convention on the Law of Treaties arts. 31-2, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].
[57] U.S. – Steel and Aluminum, ¶¶ 7.126-28.
[58] GATT Doc. E/PC/T/A/PV/33, *supra* note 9, at 19.

> *relations," we had in mind particularly the situation which existed before the last war, before our own participation in the last war, which was not until the end of 1941. War had been going on for two years in Europe and, as the time of our own participation approached, we were required, for our own protection, to take many measures which would have been prohibited by the Charter.*[59]

When asked if this was a satisfactory response, the delegate from the Netherlands responded: "Well, Mr. Chairman, I certainly could not improve the text myself. I only wanted to point out certain dangers. Otherwise I agree with it."[60] Why didn't the panel refer to this incredibly illuminating exchange in the Article's negotiating history that offers a paradigm case to define an "emergency in international relations"? Perhaps the panelists did not recognize the troubling analogies between the state of the world today and the state of the world leading up to U.S. entry into World War II. The first phase of a full-scale war in Europe was already well underway at the time of enactment of the steel and aluminum tariffs in March 2018 with the occupation of Crimea. At the same time, a rising East Asian power was increasingly saber-rattling and threatening territorial conquest: China stated just three months prior in December 2017 that it would invade Taiwan if the U.S. were to dock Navy ships in Taiwanese ports.[61] The intent of the drafters vis-à-vis subparagraph (iii) seems troublingly pertinent to the state of the world in which the U.S. steel and aluminum tariffs were enacted. The panel could have, and indeed should have, relied on this negotiating history when contemplating the meaning of subparagraph (iii). Its ultimate failure to adequately consider incredibly relevant passages from the *travaux préparatoires* of the GATT/Havana Charter is in contravention of the VCLT and the DSU and thus severely undermines the accuracy of the definition it came up.

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[59] *Id.,* 19-20 (emphasis added).
[60] *Id.*
[61] Patrick Temple-West, *GOP pressures Trump on Taiwan as China issues threats*, POLITICO (Feb. 7, 2018), https://www.politico.com/story/2018/02/02/china-taiwan-trump-republicans-386449.

The panel further attempted to bolster the legitimacy of its definition of "emergency in international relations" by citing to the equivalent terms in the French and Spanish texts of GATT Article XXI: "grave tension internationale" and "grave tensión internacional" respectively. The panel elaborated on the presence of the adjective "grave" (roughly, "serious" or "severe" in English), stating that "[t]he term "grave" in these languages may be understood as referring to international tensions that are of a critical or serious nature in terms of their impact on the conduct of international relations."[62] But what the panel completely ignored is the noun "tension / tensión". This choice of noun warrants further inspection in that it is a slight variation on the more exact French and Spanish translations of the English word "emergency": "urgence" and "emergencia" respectively. These exact terms could have been used analogously to "emergency" in the GATT, and indeed are used in this precise way in other French- and Spanish-language international law commentaries[63] or instruments. The Spanish text of a bilateral investment treaty between Colombia and Türkiye, for instance, includes a practically "copy-paste" version of GATT Article XXI but opts for the term "emergencia" rather than "grave tensión".[64] A "tension" is defined in French as "a tense situation between two groups, two peoples, two States, e.g. diplomatic tension".[65] "Tensión" is defined in Spanish as a "state of opposition or latent hostility between people or human groups, such as nations, classes, races, etc."[66] Neither of these definitions per se rises to the level of an "emergency" in English, even

[62] U.S. – Steel and Aluminum, ¶ 7.139.
[63] *See e.g.* Guy Tremblay, *Les situations d'urgence qui permettent en droit international de suspendre les droits de l'homme*, 18 LES CAHIERS DE DROIT 1 (1977).
[64] Acuerdo entre el Gobierno de la República de Colombia y el Gobierno de la República de Turquia sobre Promoción y Protección Recíproca de Inversiones art. 6(2)(c)(iii), Colom.-Turk., July 28, 2014, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6683/download
[65] *Tension,* LAROUSSE, https://www.larousse.fr/dictionnaires/francais/tension/77330 (last visited June 6, 2023) (author trans.).
[66] *Tensión*, REAL ACADEMIA ESPAÑOLA, https://dle.rae.es/tensi%C3%B3n?m=form (last visited June 6, 2023) (author trans.).

with the addition of the adjective "grave", and they certainly do not lend support to the panel's somewhat arbitrary assertion that an "emergency in international relations" for the purposes of Article XXI(b)(iii) must have an impact that is equally severe to that of an actual war. VCLT Article 33(3) states that "[t]he terms of the treaty are presumed to have the same meaning in each authentic text" while Article 33(4) adds that "when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."[67] If anything, the two non-English versions of GATT Article XXI support a much looser definition of subparagraph (iii) than the one proffered by the *Steel and Aluminum* panel; a "severe tension" in international relations, such as a "diplomatic tension" cited in the French dictionary definition of the term, is a much lower threshold than an "emergency" that is as serious as an actual war. The French and Spanish terms likewise do not convey the same sense of unexpectedness or pressing urgency as the English term "emergency"; a "severe tension" could be a much more protracted and long-lasting state than a sudden "emergency". Despite the panel having attempted to rely on the French and Spanish versions of GATT Article XXI, the precise definitions of the terms used in these texts were inadequately reconciled with the panel's ultimate determination of what subparagraph (iii) in fact means, again in plain contravention of the VCLT and the DSU.

Compounding these issues of treaty interpretation, the panel's definition of subparagraph (iii) is even more questionable from a normative perspective. It is perfectly reasonable for the panel to have read in a strict "in time of" temporal restriction for a state invoking Article XXI(b)(iii) as per its plain text; this interpretation comports well with the intent of the drafters as

[67] VCLT art. 33.

well.[68] But by so rigidly defining which circumstances in fact qualify as an "emergency in international relations", the panel's holding in essence precludes states from taking preventative measures towards avoiding conflict, ostensibly only permitting reactionary measures in the face of a conflict that has already erupted. This approach is incompatible with the nature of the numerous intractable national security threats to which governments must respond in the present day. Essential security in real-world terms means not just fighting in armed conflicts, but also actively deterring and avoiding them.[69] Several genuine security threats to which states may respond in good faith via trade-restrictive measures do not fit within the rigid definitional framework established by the *U.S. – Steel and Aluminum* panel.

The panel emphatically rejected U.S. arguments equating economic and supply chain security with national security in the steel and aluminum sectors. This is unsurprising, as enabling the creation of intricate networks of global supply chains is arguably one of the WTO's primary *raisons d'être.* But what happens when the globally interdependent nature of a particular supply chain is in and of itself the national security threat to which a state is responding? A report from the RAND Corporation underscores that in the case of the global semiconductor supply chain, heavily dependent on supply from Taiwan, "[t]he economic impact of a severe disruption would create a national security challenge […] Taking national security into account more broadly than military posture and readiness, lack of access to semiconductor chips would have an impact on prosperity and well-being and could even have an impact on overall health and welfare. These impacts would be significant even in the absence of out-right military

[68] GATT Doc. E/PC/T/A/PV/33, *supra* note 9, at 19-20.
[69] *See* Statements by the United States at the Meeting of the WTO Dispute Settlement Body, 12 (Jan. 27, 2023). https://www.worldtradelaw.net/document.php?id=dsbstatements/Jan27.23.DSB_.Stmt_.as_.deliv_.fin_-1.pdf

action."[70] In a tabletop exercise, it was further found that in the event of a global semiconductor supply disruption due to a Chinese invasion of Taiwan, "[e]conomic impacts could range from concerning to devastating",[71] and that "[t]he United States and its allies [would have] no good nonmilitary options for dealing with the disruption".[72] The CHIPS and Science Act aims to counter this looming security threat by subsidizing domestic U.S. semiconductor production and implementing a strict export control regime on semiconductor technologies among other aspects.[73] These measures may be inconsistent with the GATT, however, and China has already taken the first steps towards initiating a trade dispute at the WTO in response to the CHIPS Act.[74] The United States could very likely raise an Article XXI defense if the dispute makes it beyond consultations to the panel phase. If Article XXI is invoked, as per the test from *U.S. - Steel and Aluminum* we would have*:* 1) a genuine national security interest (mitigating the risk of "devastating" economic impacts and attempting to avoid direct military conflict with China in the event of an invasion of Taiwan), and 2) a good faith effort to respond to this interest via application of a trade-restrictive measure (the relevant provisions of the CHIPS and Science Act). What is missing is 3) a temporal element of "war or other emergency in international relations" that fits within the panel's rigid definitional framework as, thankfully, there is no state of open armed conflict between the U.S. and China at present. But why should a hypothetical crisis in Taiwan already have to have erupted in order for the U.S. to take good faith steps to protect what is a vital and genuine security interest? Does it not behoove the entire international system to allow countries to take reasonable preventive measures towards mitigating and

[70] Bradley Martin et al*., Supply Chain Interdependence and Geopolitical Vulnerability: The Case of Taiwan and High-End Semiconductors*, RAND CORP., viii (2023). *Id.* at 37.
[71] *Id.* at 39.
[72] *Id* at x.
[73] CHIPS and Science Act, Pub. L. No. 117-67, 136 Stat. 1366 (2022).
[74] Request for Consultations by China, *United States – Measures on Certain Semiconductor and other Products, and Related Services and Technologies*, WTO Doc. WT/DS615/1 (Dec. 15, 2022).

avoiding armed conflict and other related emergencies in the first place? The framework established in *U.S. – Steel and Aluminum* would severely tie the U.S.'s hands on the semiconductor issue, despite this appearing to be quite a clear-cut case of a national security interest that should be subject to an Article XXI defense. Another genuine security threat that is incredibly difficult to reconcile with the *U.S. – Steel and Aluminum* decision on Article XXI is in the cyber realm. It is likely that a massive cyberattack on critical infrastructure would qualify as a subparagraph (iii) "emergency". But what about hypothetical trade-restrictive measures taken to avoid such an attack from happening in the first place, such as import restrictions on computer network components? Further complicating a potential Article XXI cybersecurity case is the fact that malign cyber operations, as well as the means by which states respond to them, are often covert[75] with concrete facts unable to be pleaded at the WTO consistent with Article XXI(a). Finally, as one commentator has noted, there is an even greater danger inherent to a WTO panel strictly defining subparagraph (iii) based on its own preconceived ideas of what an emergency in international relations should look like: such an approach ultimately risks escalating existing international tensions and conflicts by encouraging states to take further actions such as imposition of sanctions or severance of diplomatic ties just to be able to satisfy arbitrarily delineated criteria for application of Art.XXI(b)(iii) when enacting trade-restrictive measures.[76] Instead of a workable framework to balance genuine national security interests with existing trade commitments, what we are left with in *U.S. – Steel and Aluminum* is an inadequate test that

[75] *See e.g.* Richard L. Manley, *Cyber in the Shadows: Why the Future of Cyber Operations Will Be Covert*, 106 JOINT FORCE Q. (2022).
[76] Hitoshi Nasu, *US – Origin Marking Requirement: Did the WTO Panel get the Balance Right Between Trade Security and National Security?*, EUR. J. INT'L L.: EJIL: TALK! (Jan. 25, 2023), https://www.ejiltalk.org/us-origin-marking-requirement-did-the-wto-panel-get-the-balance-right-between-trade-security-and-national-security/.

is ill-suited or inapplicable to a variety of pressing real-world scenarios in the security realm, in addition to potentially even exacerbating existing tensions.

C. Granting of an Article XXI Defense: a "Slippery Slope"?

What would have happened had the panel granted the U.S. an Article XXI defense for its steel and aluminum tariffs? One particularly prevalent fear is that this would create a "slippery slope" effect at the WTO towards allowing member states to do "anything under the sun"[77] under the guise of national security. But steel and aluminum, crucial inputs in critical infrastructure and military equipment, are far from being "anything under the sun"; they are a paradigm example of essential security-related goods that should be subject to a national security exception. In contrast, the WTO panel in the contemporaneously decided *U.S. – Origin Markings* case also denied the U.S.'s invocation of Article XXI when China challenged a U.S. Customs and Border Protection requirement that imported goods from Hong Kong must be labeled with their country of origin as being China.[78] Country of origin labeling requirements are, on their face, far more of a technical standard than a security interest, and the facts of that case do not support the applicability of an Article XXI defense in the same clear-cut way that the facts in *U.S. – Steel and Aluminum* do. While the panel's interpretive approach in *Origin Markings* has been criticized,[79] important factual differences may have justified denial of the U.S.'s Article XXI defense in that case.

Moreover, the "good faith" requirement established as part of the test for determining applicability of Article XXI(b) in *Russia – Traffic in Transit* also significantly mitigates the

[77] GATT Doc. E/PC/T/A/PV/33, *supra* note 9, at 20.
[78] Panel Report, *United States – Origin Marking Requirement*, WTO Doc. WT/DS597/R (Dec. 21, 2022).
[79] *See* Nasu, *supra* note 76.

slippery slope scenario. In that case, the panel astutely stated that "[t]he obligation of good faith […] applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their connection with the measures at issue."[80] In light of the limiting principle of the good faith standard the United States would not, for example, be able to invoke Article XXI to justify tariffs on soap or nail polish just because it is fighting a war in Afghanistan. There is at least one analogous historical example within the pre-WTO GATT system that shows how, even outside of formal adjudication, member states have been unsuccessful in justifying "anything under the sun" via Article XXI. In November 1975 Sweden enacted import quotas on certain types of footwear and invoked Article XXI as justification. Sweden argued that a "decrease in domestic production has become a critical threat to the emergency planning of Sweden's economic defence as an integral part of the country's security policy" and that "[t]his policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such a capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations".[81] These arguments track similarly with those raised by the U.S. in *Steel and Aluminum* albeit with two key factual differences: 1) the U.S. was actively engaged in a war at the time of enactment of its measures and 2) unlike footwear, steel and aluminum have a strong and unequivocal nexus to defense and security. Placing restrictions on trade in these goods is therefore not an implausible means of furthering a security interest and passes the "good faith" test, whereas placing restrictions on trade in shoes does not. Fellow GATT members were rightfully unimpressed with Sweden's

[80] Russia – Traffic in Transit, ¶ 7.138.
[81] WTO, *Article XXI Security Exceptions*, GATT ANALYTICAL INDEX 599, 603 (2012), https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf.

Article XXI argument, and the footwear quotas were subsequently withdrawn in July 1977.[82] The Swedish example shows how the carefully crafted language of Article XXI coupled with application of the subsequently articulated "good faith" standard already makes for an exception that is broad enough to protect genuine security interests, all while clamping down on abuse of the exception in more far-fetched scenarios such as disguised protectionism of the domestic shoe industry.

Another question that looms large over the *U.S. – Steel and Aluminum* decision is: why didn't the U.S. simply point to the existence of one of several global events identified herein that could have satisfied subparagraph (iii)? One can only speculate as to why the United States did not plead one of several clear-cut examples of war or other emergencies in international relations in its written submissions. The simplest explanation is that the U.S. was merely sticking to its overarching line of argument that Article XXI is entirely self-judging and that no justification is required to invoke it.[83] The U.S. could have also been trying to establish WTO precedent of an economic crisis in a critical sector such as steel and aluminum production justifying the application of an Article XXI(b)(iii) defense with its references to displacement of the U.S. domestic steel industry by excessive imports and global excess capacity in steel. Or, establishing a WTO precedent on the viable use of Article XXI to respond to security threats linked to interdependent global supply chains in certain critical sectors could have been the goal. But regardless of the litigation strategy employed by the U.S. or its effectiveness, the panel was mandated by the provisions of DSU Article 11 as clarified by subsequent WTO case law to employ a certain standard of review. The applicable standard is one that proceeds to an

[82] *Id.*
[83] *See* First Written Submission of the United States of America, *United States – Certain Measures on Steel and Aluminum Products*, ¶ 19, DS548 (June 12, 2019), https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.%28DS548%29.fin.%28public%29.pdf.

"objective assessment of the facts",[84] not one that gives total deference to the findings of national authorities, or here, any claims as to which objective circumstance rises to the level of a "war or other emergency in international relations". The panel's failure to acknowledge the obvious existence of several such circumstances, despite them not having been argued as such by the United States, equates to a complete eschewing of the appropriate standard of review and a notable deviation from the approach taken in *Russia – Traffic in Transit*. From the moment the panel deemed subparagraph (iii) to require an objective assessment, the arguments of the parties themselves as to the existence of a qualifying Art.XXI(b)(iii) circumstance should have become merely persuasive, not dispositive.

One particularly disturbing result of the panel's inexplicable departure from the standard of review used in *Russia – Traffic in Transit* is that the WTO has now in effect shown greater deference to Putin's Russia than to Trump's America when it comes to questions of national security. It is of course difficult to ignore the highly unconventional and doggedly anti-internationalist U.S. President who was behind the steel and aluminum tariffs in the first place. The tariffs could easily have been interpreted as just one isolated tactic in Trump's wider assault on the WTO, which he accused of being "unfair" to the U.S.,[85] and other international organizations. But, challenging as it may have been to ignore Trump's impetuous tweets and crude one-liners, the panel in *U.S. – Steel and Aluminum* was tasked not with taking a stand on Trumpism, but with issuing an impartial interpretation of WTO law. One does wonder if the decision would have come down the same way had the tariffs been put in place under an Obama, parallel universe Clinton, or Biden presidency, especially since the latter's administration has

[84] EC- Hormones, ¶ 117.
[85] Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 6, 2018), https://twitter.com/realDonaldTrump/status/982264844136017921

largely taken the same tack towards the WTO albeit more quietly than his loudmouthed predecessor. The steel and aluminum tariffs have moreover been criticized for being an ineffective or even counterproductive means to achieve the U.S. government's stated policy ends.[86] But this is immaterial to what the DSB's analysis should have been limited to: an objective assessment of facts to determine whether the textual requirements of GATT Article XXI were met. The applicable test as established by the panel report is 1) whether the invoking member state "considers" that there is an essential security interest at play 2) whether the measure at issue is enacted in good faith, or otherwise stated whether the measure is not an implausible means of protecting the essential security interest and 3) whether one of the objective circumstances in subparagraphs (i)-(iii) of Article XXI is satisfied. The effectiveness of the measure in furthering the invoking state's security interest is not a relevant factor within this test. The *necessity* of the measure in furthering the invoking state's security interest is also, more crucially, not a dispositive factor within this test and is only relevant insofar as a state "considers" a given measure to be necessary. Rather, questions of policy effectiveness and necessity are for individual member state governments to deliberate on as they craft their own sovereign economic and defense policies.

V. CONCLUSION

A world of proliferating crises such as climate change, global pandemics, and the renewed threat of great power conflict demands robust transnational cooperation. International organizations such as the World Trade Organization have long proven to be particularly effective forums for such cooperation. Striking the right balance between trade liberalization and national

[86] *See e.g.* Rachel Brewster, *The Struggle for International Economic Law*, *in* A NEW GLOBAL ECONOMIC ORDER: NEW CHALLENGES TO INTERNATIONAL TRADE LAW 229, 246-48 (Chia-jui Cheng ed., 2022).

security in the *U.S. – Steel and Aluminum* decision could accordingly have gone a long way in encouraging the continued prosperity of the multilateral trading system under the auspices of the WTO. But in so egregiously erring on issues of both fact and law, the wrongly decided *Steel and Aluminum* decision has only further imperiled the WTO system. This system was already in a precarious state prior to the decision, in no small part due to the U.S. policy of blocking appointments to the Appellate Body (AB), the second and final tier of review within the DSB. With the controversial *Steel and Aluminum* decision being so completely unacceptable to the United States,[87] the Trump-era policy of blocking judicial appointments to the AB has now been carried on practically unchanged by the Biden administration, and the U.S. has already appealed the decision "into the void" in the absence of a quorum of jurists on the AB to review the case.[88] But the fate of the U.S.'s steel and aluminum tariffs is only the small picture in the bigger picture of delineating the leeway that a WTO member state has to protect its essential national security interests in accordance with GATT Article XXI, a question that will not disappear anytime soon if tensions between the world's largest economies continue to rise on their current trajectory. Today, less than five years since the dispute was initiated, war rages in Ukraine. China's rhetoric on Taiwan has become increasingly bellicose, just as it is apparently only one arms shipment to Russia away from "open[ing] a new chapter in international affairs" and "turning the conflict in Ukraine into a truly global one".[89] States such as Iran and North Korea are pressing forward with weapons-grade uranium enrichment. The global security situation today is a deeply concerning one. Gazing out at this state of the world as they penned their report, could the three panelists

[87] *See* Statements by the United States, *supra* note 69.
[88] Notification of an Appeal by the United States under Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/14 (Jan. 30, 2023).
[89] Liana Fix & Michael Kimmage, *How China Could Save Putin's War in Ukraine: The Logic – and Consequences – of Chinese Military Support for Russia*, FOREIGN AFFS. (Apr. 26, 2023), https://www.foreignaffairs.com/china/how-china-could-save-putins-war-ukraine.

who decided the case truly say that they saw a bucolic world at peace with no crises, emergencies, or wars involving the defending party?

When crafting their ambitious new trade organization, the drafters of the GATT conceived of an important exception to the trade liberalization regime to give member states appropriate leeway to respond to just such a precarious global security environment as the one in which we are living today. That exception takes the form of Article XXI, the national security exception. While the drafters likely did not envisage or intend for Article XXI matters to ever be formally adjudicated by a dispute settlement body,[90] they nonetheless intentionally included an "escape hatch" in their multilateral trade agreement that would balance protection of genuine security interests in the face of global instability on the one hand without creating a loophole to circumvent GATT obligations at will on the other. The *U.S. – Steel and Aluminum* decision eviscerates this affirmative national security defense that was carefully drafted, rigorously negotiated, and ultimately ratified within the GATT text. Formal adjudication of national security questions at the WTO was never an inevitable outcome. The judicialization of such an intensely political question in *U.S. – Steel and Aluminum* makes all the less sense when the ultimate conclusion is that tariffs on these two products, which are unequivocally related to national security interests as the final panel report acquiesces,[91] do not fit under the Article XXI national security exception. It is little wonder that the WTO is now on "very, very thin ice" with the United States as U.S. Trade Representative Katherine Tai recently put it.[92] The *Steel and Aluminum* decision will likely discourage the United States from negotiating a path out of the

[90] Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions*, 41 MICH J. INT'L L. 109, 171-73 (2020).
[91] U.S. – Steel and Aluminum, ¶ 7.96.
[92] 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.

DSB's current state of deadlock; if anything, it provides even more incentive for the opposite. Indeed, as the Appellate Body does not have a mandate to review issues of fact,[93] reviving the highest level of appeal at the DSB would only expose the U.S. to the risk of the AB confirming a lower panel judgment which it already deems entirely unacceptable. Far from checking the unilateral impulses of the United States or rebuking its bombastic former President as the panelists may have hoped, the decision may yet prove to be the straw that broke the camel's back of a multilateral trade organization that was already struggling under the weight of a shifting global economy and geopolitical landscape.

Avoiding a formal DSB ruling altogether on applicability of Article XXI to the U.S.'s steel and aluminum tariffs would have yielded a better outcome vis-à-vis both the national security question but also the vitality of the WTO system overall. History is a pertinent guide here. In 1949 Czechoslovakia challenged an export control regime under the GATT that the United States had established as part of the Marshall Plan, to which the U.S. raised an Article XXI defense. The U.S. argued that there were essential security interests at play within the Marshall Plan that justified its export controls. If the question had been formally adjudicated using the same framework as in *Steel and Aluminum*, the U.S. would have likely lost the case on the same subparagraph (iii) grounds. Luckily for the U.S. and for the beneficiaries of the Marshall Plan, with the exception of Czechoslovakia, all other GATT members unanimously voted against referring the matter to an adjudicative panel for resolution.[94] How would the history and trajectory of the Cold War have been reshaped if portions of the Marshall Plan had been struck down by the nascent multilateral trade regime? Only with decades of hindsight can we fully appreciate how undesirable of a result this would have been. Going forward, trade law

[93] DSU art. 17.6.
[94] Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 709-10 (2011).

professor Nicolas Lamp has compellingly argued that seeking a GATT Article XXIII non-violation nullification or impairment claim may be the most optimal way for WTO members to "sidestep" adjudicative dispute resolution when invoking Article XXI, all while adequately addressing any economic harm to other member states resulting from the measures at issue.[95] This solution is precisely what the U.S. is now arguing for at the WTO as it attempts to prevent adoption of the *Steel and Aluminum* panel report;[96] the negotiating history of the GATT/Havana Charter confirms that the Article XXIII procedure, not binding adjudication, was also the exact approach contemplated by the drafters of Article XXI.[97]

Dragging an Article XXI claim into dispute resolution when better alternative avenues were available was an undeniably explosive move on China's part. Now, in the aftermath of *U.S. – Steel and Aluminum*, it is highly uncertain if the WTO's DSB will ever be fully functional again. The longer that dispute resolution at the WTO remains deadlocked, the more likely it is that the WTO regime will be bypassed altogether in favor of competing multilateral or regional trade agreements. Such a gradual weakening, or even fading into irrelevance, of the WTO system would undoubtedly be a great loss to the international community and a significant blow to the entire post-World War II international order. But faced with the choice of either glibly going along with over-reaching external constraints on its own national security prerogatives in the face of an increasingly hazardous international environment or rethinking and retooling its approach towards the WTO multilateral trade regime altogether, it is hard to see how the United States would ever opt for the former over the latter, especially in light of the myriad errors in the

[95] Nicolas Lamp, *Why WTO Members Should Bring Pure Non-Violation Claims Against National Security Measures*, INT'L ECON. L. & POL'Y BLOG (Oct. 15, 2018), https://worldtradelaw.typepad.com/ielpblog/2018/10/guest-post-why-wto-members-should-bring-pure-non-violation-claims-against-national-security-measures.html.
[96] Statements by the United States, *supra* note 69, at 12.
[97] Pinchis-Paulsen, *supra* note 90, at 171-73. *Id.* at 183-84.

Steel and Aluminum panel's maladroit final report identified herein. In the end, by forcing the world's largest economy and most influential architect of the GATT/WTO system to confront such an impossible decision between two highly undesirable options, the WTO may very well have created an "emergency in international relations" of its own making that, if not properly mitigated via political and other institutional processes, could be a death knell to the current multilateral trade regime altogether.