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Sophie-Katharina Perl

The Protection of National Security in International Economic Law – US policy on Steel and Aluminium in the Light of WTO Law

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A. Introduction

Tendencies toward economic nationalism and anti-globalist unilateralism have increased in recent years. The trade policies of the United States (US) are perhaps the most obvious and consequential example of this trend.[1] Particularly troublesome to the viability of the multilateral trading system are the tariffs on steel and aluminium products imposed by the US administration under the pretext of national security.[2]

The multilateral trading system of the World Trade Organisation (WTO) is largely based on the General Agreement on Tariffs and Trade (GATT).[3] The most important basic principles of the GATT are indicated in its preamble. Accordingly, the GATT's objective is substantially reducing tariffs and other non-tariff barriers to trade, as well as eliminating discriminatory treatment by entering into reciprocal and mutually advantageous arrangements.[4] These basic principles of reciprocity, reduction of trade barriers, and non-discrimination are not only relevant to the GATT, but similarly apply to the other multilateral trade agreements of the WTO. They can therefore be considered general principles of substantive WTO law.[5] However, these principles, as well as other GATT obligations, do not apply without exception. While some exceptions apply to specific principles, there further are general exceptions which apply to all GATT obligations and may justify the violation of GATT principles.[6]

The most important, and most widely available, exceptions to GATT obligations are the "general exceptions" laid down in Article XX.[7] These exceptions are based on the recognition that, in certain situations, it is reasonable and legitimate to maintain or introduce trade restrictive measures which serve the protection of public, non-economic goods.[8] Some exceptions provided in Article XX, including measures necessary to protect human, animal, or plant life or health, or measures relating to the conservation of exhaustible natural resources, have frequently been invoked in GATT and WTO dispute settlements to justify otherwise GATT-inconsistent measures. On the contrary, Article XX(a), which concerns measures necessary for the protection of public morals, was rarely invoked until recently.[9] For more than 50 years after the exception went into force, there were no disputes involving Article XX(a).[10] Similarly, member states have largely refrained from invoking Article XXI, which contains exceptions to maintain national security that apply, for example, to measures relating to fissile materials or

1 *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

2 *Svetlicinii*, KLRI Journal of Law and Legislation 9 (no. 1, 2019), 29 (30).

3 In the following, GATT refers to the General Agreement on Tariffs and Trade of 15 April 1994, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization, 33 ILM 1153.

4 Preamble, GATT 1994.

5 *Krajewski*, Wirtschaftsvölkerrecht, 85.

6 *Ibid.,* 101.

7 In the following, Articles without legal reference are those of the GATT 1994.

8 *Krajewski*, Wirtschaftsvölkerrecht, 101.

9 *Van den Bossche/Zdouc*, The Law and Policy of the World Trade Organisation, Ch. 8, Sec. 2.3.4.

10 *Kerr*, Estey Journal of International Law and Trade Policy 19 (no. 2, 2019), 49 (52).

trade in military equipment. For many decades, national security exceptions were dealt with only in rare instances, under the GATT 1947 regime as well as under the WTO.[11] Given the self-restraint shown in invoking Article XX(a) and XXI, the public morals and national security exceptions appear to play a distinctive, particularly sensitive role in the system of the WTO.

Although both GATT and WTO members have refrained from bringing Article XX(a) and XXI to WTO dispute settlement for several decades, US President D. Trump invoked both the public morals and the national security exception during his time in office. Under President Trump, the US first justified measures against China on the grounds of protecting public morals within the meaning of Article XX(a). In the context of China's practices related to technology transfer, intellectual property, and innovation, which the US consider unfair and immoral, the US imposed additional tariffs on certain products from China. While the US did not seek to refute China's assertion that the measures are inconsistent with certain GATT principles, the US argued that the additional duties were justified under Article XX(a) as measures necessary to protect US public morals.[12] Secondly, as part of the new "America First" policy stance announced by the Trump administration, which inter alia emphasised the protection of US industries, President Trump imposed additional tariffs on aluminium and steel articles imported from almost every country in 2018.[13] In defending these tariffs, the US referenced Article XXI and argued that aluminium and steel articles would be imported into the US in such quantities and under such circumstances as to threaten to impair the national security of the US.[14] The Panel decision on the additional tariffs on aluminium and steel articles is pending.

The US's justification of the additional steel and aluminium tariffs under the pretext of national security raises some important legal and political issues. The importance of the US's case against China is illustrated by the fact that there are no less than seven complainants and another 22 WTO members intervening in the panel proceedings as third parties.[15] This publication will present the importance of the case in more detail and highlight the challenges the US's invocation of Article XXI poses to the WTO and its dispute settlement system. Section B examines the national security exception of the GATT in more detail. Section C summarises the facts of the case and discusses several issues the Panel in *US – Steel and Aluminium* will have to address. Finally, Section D concludes the work with a short summary and outlook.

B. The Exception and the Rule: The National Security Exception of the GATT

It is not the intention of the GATT to eliminate all tariff and non-tariff barriers to trade. Rather, the GATT seeks to liberalise markets to a large extent. The GATT recognises situations in which, for a variety of reasons, a specific interest of a WTO member may outweigh the

11 *Glöckle*, The second chapter on a national security exception in WTO law: the panel report in Saudi Arabia – Protection of IPR, EJIL:Talk! Blog of the European Journal of International Law 22 July 2020.

12 WTO, *United States – Tariff Measures on Certain Goods from China*, Report of the Panel dated 15 September 2020, WT/DS543/R, para. 7.1 and 7.63.

13 *Y.S. Lee*, World Trade Review 18 (no. 2, 2019), 481 (484).

14 WTO, *United States – Certain Measures on Steel and Aluminium Products (US – Steel and Aluminium)*, Communication from the US dated 6 July 2018, WT/DS548/13.

15 *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

general interest of liberalising trade.[16] However, the existence of such exceptions can hardly be justified from a mere economic perspective. The welfare losses caused by measures based on the exceptions regularly exceed the benefits of free trade. Instead, the granting of exceptions can be explained by the fact that member states need "breathing space" to be able to react to any domestic protectionist pressure, despite the progressive international liberalisation of economic relations. Exceptions are thus based on the idea of pursuing national interests and constitute a clear expression of the principle of sovereignty.[17] Although international economic law, perhaps more than any other area of international law, recognises the ever-increasing interdependence of states and thus the relativity of the principle of sovereignty in the international economic system, state sovereignty remains the basis of international law.[18]

I. Problems Underlying the National Security Exception

National security exceptions ensure that the multilateral system of the WTO does not require members to comprise their essential security interest.[19] Yet, national security exceptions are one of the most sensitive provisions in international economic law.[20] For one thing, national security issues are by nature highly political and inherently sensitive. Further, Article XXI misses the requirements of the chapeau of Article XX which requires that such exception measures are not to be applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade."[21] The general exceptions' chapeau acts as a safety valve to prevent the misuse or abuse of the exceptions, and Article XXI consequently misses such safeguard.[22] Moreover, the language of Article XXI is broad, ambiguous, and open-ended to a significant extent.[23] Article XXI states:

> *"Nothing in this Agreement shall be construed*
>
> *(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or*
>
> *(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests*
>
> *(i) relating to fissionable materials or the materials from which they are derived;*
>
> *(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;*

16 *Tietje*, in: Tietje (Editor), Internationales Wirtschaftsrecht, 158 (197).

17 *Ibid.,* 1 (49).

18 *Hahn*, MJIL 12 (1991), 558 (560).

19 *Mitchell/Ayres*, in: Carr/Alam/Bhuiyan (Editors), International Trade Law and the WTO, 226 (227).

20 *Prazeres*, World Trade Review 19 (no. 1, 2020), 137 (137).

21 GATT Article XX.

22 *Weiß*, in: Weiß/Furculita (Editors), Global Politics and EU Trade Policy, 255 (263 f.).

23 *Hahn*, MJIL 12 (1991), 558 (583).

(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."[24]

The most contentious part of the security exception provision is the phrase "which it considers" enacted in the chapeau of Article XXI(b). This phrase gave rise to different interpretations regarding the self-judging nature of the provision. The wording implies that at least part of the rationale is at the discretion of the member, but it is not clear whether those words refer to all of Article XXI(b) or only part of it.[25]

A first possible reading of Article XXI(b) is that the phrase "which it considers" qualifies all elements of the provision. This reading would leave the decision on the "action […] necessary," the "essential security interests" and the conditions of subparagraphs (i) to (iii) completely up to the member. This would allow the members to decide for themselves whether a measure is essential to their security interests and if it relates to one of the conditions of the subparagraphs. A second possible interpretation is that the phrase "which it considers" qualifies both the terms "necessary" and "essential security interests." This would leave subparagraphs (i) to (iii) capable of objective determination and judicial review. Under a third interpretation, the phrase "which it considers" qualifies only the term "necessary." This implies that the other elements "essential security interests," and the conditions in subparagraphs (i) to (iii), are not self-judging but subject to objective determination.[26,27]

On the one hand, an interpretation of Article XXI(b) which allows a panel to judge the validity of a national security justification which substitutes for that of the invoking member would arguably interfere with the member's sovereignty.[28] As such, the security exception of Article XXI(b) acts as the member states' sovereignty safeguard provision, reflecting the recognition of the principle of sovereignty.[29] On the other hand, the inherent difficulty with an exception of this nature is the high potential for abuse.[30] If Article XXI(b) was largely self-judging, the provision could be used by countries to give themselves a "carte blanche" freedom to flout their obligations under the WTO agreements.[31]

24 GATT, Article XXI.

25 *Alford*, Utah Law Review 2011, 697 (706).

26 *Ibid.,* 704.

27 *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

28 *Murril*, The "National Security Exception" and the World Trade Organization, Report of the Congressional Research Service 28 November 2018, available online: https://crsreports.congress.gov/product/details?prodcode=LSB10223 (last accessed: 13/03/2021).

29 *Hahn*, MJIL 12 (1991), 558 (560).

30 *Y.S. Lee*, World Trade Review 18 (no. 2, 2019), 481 (485).

31 *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

II. The Proliferating Use of the National Security Exception

The national security exception was available to GATT Contracting Parties from 1947. Between 1947 and 1994, Article XXI was invoked on a few occasions, even in the context of dispute settlement, but no GATT panel had to make a definitive ruling on the meaning and scope of these exceptions.[32] There have also been some WTO disputes where Article XXI has been invoked as a defence, however, all of these disputes were settled during consultations.[33] It appears that both GATT, and later WTO, members have largely refrained from invoking the national security exception of Article XXI and are eager to avoid any related dispute or to settle such dispute out of court.[34]

States have refrained from either invoking this provision or challenging measures of other countries invoking it for several reasons.[35] One reason why Article XXI has not been expressly interpreted by the WTO Dispute Settlement Body until recently could be that members have not regarded the WTO dispute settlement mechanism as an appropriate forum to litigate their national security concerns.[36] Another reason for the self-restraint may lie in what can be referred to as the Spirit of the GATT: trade liberalisation is expected to be welfare increasing and even though the multilateral system of the WTO constrains the activities of individual member states, members accept these constraints for the benefit of trade advantages. While there is no trade rule restricting the use of GATT exceptions, it is the countries' willingness to act in the Spirit of the GATT and therefore to self-restrain the use of exceptions, loopholes, escape, and safeguard clauses.[37] Due to the high potential for abuse of the security exception, first GATT contracting parties, and later WTO members, commonly regarded Article XXI of the GATT as a Pandora's box which was best kept closed.[38]

This seven-decade long era of self-restraint came to an end a few years ago when WTO members gave up their hesitation in using national security exceptions.[39] In September 2016, the first national security case was filed when Russia invoked the provisions of Article XXI(b)(iii). The Ukraine requested consultations with Russia regarding alleged restrictions on traffic in transit from Ukraine through Russia to Kazakhstan and other countries. Russia asserted that it considered the transit measures necessary for the protection of its essential security interests, which it took in response to the emergency in international relations that occurred in 2014. The Panel in *Russia – Traffic in Transit* was established in March 2017 and became the first Panel examining the scope and self-judging nature of Article XXI.[40]

32 *Prazeres*, World Trade Review 19 (no. 1, 2020), 137 (137).

33 *Yoo/Ahn*, J. Int. Econ. Law 19 (no. 2, 2016), 417 (431).

34 *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

35 *J. Lee*, Asian J WTO & Int'l Health L & Pol'y 13 (no. 2, 2018), 277 (287).

36 *Svetlicinii*, KLRI Journal of Law and Legislation 9 (no. 1, 2019), 29 (43).

37 *Kerr*, Estey Journal of International Law and Trade Policy 19 (no. 2, 2019), 49 (50 f.).

38 *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

39 *Weiß*, in: Weiß/Furculita (Editors), Global Politics and EU Trade Policy, 255 (256 f.).

40 *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

Since the adoption of the panel report in *Russia – Traffic in Transit*, a series of WTO disputes in which the Respondent has invoked, or is expected to invoke, a national security exception have emerged. In the case *Saudi Arabia – Protection of IPRs*, Saudi Arabia invoked the national security exception under the Article 73 of the TRIPS Agreement. In *United Arab Emirates – Goods, Services and IP Rights* (complaint by Qatar), Japan – Products and Technology (complaint by Korea), and *US – Steel and Aluminium* (complaints by the European Union (EU) and six other WTO members), the panel proceedings are ongoing. An invocation of the national security exception of Article XXI of the GATT 1994 may further be expected in *US – Measures Relating to Trade in Goods and Services* (complaint by Venezuela) in which the Panel has not yet been established.[41]

Of the pending cases, *US – Steel and Aluminium* is of particular importance and will be discussed in more detail in the next section.

C. DS548: United States – Certain Measures on Steel and Aluminium Products

In the case *US – Steel and Aluminium*, several members of the WTO launched legal proceedings in the WTO and requested consultations with the US after the US imposed additional tariffs on steel and aluminium articles in 2018.

I. Facts of the Case

In April 2017, the Trump Administration initiated multiple investigations under Section 232 of the US Trade Expansion Act of 1962. Section 232 allows any department, agency head, or any interested party to request the US Department of Commerce to initiate an investigation to ascertain the effect of specific imports on US national security. If the Department of Commerce determines in the affirmative, the President can determine the nature and duration of the action to be taken to adjust the subject imports. The President may decide to impose tariffs or quotas to offset the adverse effect or exclude specific products or countries.[42]

Following these investigations, the US Secretary of Commerce formally submitted two reports on the investigation into the effects of imports of aluminium and steel on national security to President Trump. In its reports, the Secretary found that the present quantities of steel and aluminium imports and the circumstances of global excess capacity for producing steel and aluminium are weakening the internal economy of the US. The Secretary concluded that aluminium and steel are being imported into the US in such quantities and under such circumstances as to threaten to impair the national security of the US, which is precisely the condition under which Section 232 of the US Trade Expansion Act of 1962 authorises the President to adjust the imports of an article and its derivatives. Based on the findings and recommendations laid down in the reports, on March 8, 2018, the President announced the imposition of a 10 percent ad valorem tariff on aluminium articles and a 25 percent ad valorem

41 *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

42 *Fefer*, Section 232 of the Trade Expansion Act of 1962, Report of the Congressional Research Service 9 December 2020, available online: https://crsreports.congress.gov/product/details?prodcode=IF10667 (last accessed: 13/03/2021).

tariff on steel articles imported from all countries, except Canada and Mexico. In addition to ongoing negotiations with Canada and Mexico, the President welcomed any country with which the US had an important security relationship to discuss alternative ways to address the threatened impairment of the national security caused by imports from that country.[43,44]

The announced tariffs went into effect on 23 March 2018. Due to ongoing discussions, tariffs were suspended for the EU, Canada, Mexico, Australia, Argentina, Brazil, and South Korea.[45] While the US reached arrangements on steel with South Korea, Australia, Argentina, and Brazil, and with Australia and Argentina on aluminium, no agreement was reached with Canada, Mexico, or the EU. They became subject to the steel and aluminium tariffs on 31 May 2018.[46] In May 2019, nearly one year after the tariffs became effective, the US, Canada, and Mexico reached an agreement, in conjunction with the approval of the US Mexico Canada Agreement,[47] and Canada and Mexico were excluded from the tariffs.[48,49]

Shortly after the tariffs on steel and aluminium went into force, China, India, the EU, Norway, the Russian Federation, Switzerland, and Turkey, launched legal proceedings in the WTO and requested consultations with the US.[50] While the US has taken the view that its tariffs are justified as national security measures under Article XXI,[51] the EU together with the above-mentioned WTO members challenge the tariffs as not being justifiable under the national security exception of Article XXI. The complaining parties argue that the US, by imposing the additional tariffs and exempting certain selected WTO members from the measures, violates several regulations of the GATT, inter alia the US' Schedules of Concessions (Article II:1(a) and (b)) and the Most-Favoured-Nation Principle (Article I:1). In addition to challenging the tariffs as not being covered under Article XXI, the complaining parties consider the

43 Presidential Proclamation on Adjusting Imports of Aluminum into the United States 8 March 2018, available online: https://trumpwhitehouse.archives.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states/ (last accessed 13/03/2021).

44 Presidential Proclamation on Adjusting Imports of Steel into the United States 8 March 2018, available online: https://trumpwhitehouse.archives.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states/ (last accessed 13/03/2021).

45 President Trump Approves Section 232 Tariff Modifications, White House Statements & Releases 22 March 2018, available online: https://www.whitehouse.gov/briefings-statements/president-trump-approves-section-232-tariff-modifications/ (last accessed 07.01.2021).

46 What You Need to Know About Implementing Steel and Aluminum Tariffs on Canada, Mexico, and the European Union, White House 31 May 2018, available online: https://www.whitehouse.gov/articles/need-know-implementing-steel-aluminum-tariffs-canada-mexico-european-union/ (last accessed 07.01.2021).

47 *Y.S. Lee*, Journal of World Trade 53 (no. 5, 2019), 811 (814).

48 Presidential Proclamation on Adjusting Imports of Aluminum into the United States 19 May 2019, available online: https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-adjusting-imports-aluminum-united-states/ (last accessed 13/03/2021).

49 Presidential Proclamation on Adjusting Imports of Steel into the United States 19 May 2019, available online: https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-adjusting-imports-steel-united-states-2/ (last accessed 13/03/2021).

50 WTO, *US – Steel and Aluminium* (DS544, DS547, DS548, DS550, DS551, DS552, DS554, DS556, DS564).

51 *Ibid.,* Communication from the US dated 6 July 2018, WT/DS548/13.

tariffs in question to be hidden safeguard measures that do not comply with the Agreement on Safeguards (SGA).[52]

The US accepted the request for consultations, noting however that it does not support the complaining parties' classification of the tariffs as safeguard measures. It is the US's view that the tariffs imposed pursuant to Section 232 are issues of national security, necessary to adjust the imports of steel and aluminium articles that threaten to impair the national security of the US. While referencing Article XXI, the US have not publicly stated to which exact provision of Article XXI it refers.[53] In view of the potentially broad scope of Article XXI, however, Article XXI(b) (ii) and (iii) can be considered as potential justification for the US measures on steel and aluminium articles.[54]

In brief, the US takes the position that its steel and aluminium tariffs are justified as national security measures, conceivably under Article XXI(b) (ii) and (iii), while the EU together with other WTO members considers the tariffs to be safeguard measures. This situation raises several issues for the Panel to address in the case *US – Steel and Aluminium*, which will be discussed in detail in the following sections. Given the different possible readings of Article XXI(b) discussed in Section B, the first question that arises is whether the Panel in *US – Steel and Aluminium* can judge the validity of a justification as a national security measure under Article XXI(b) in the first place. If the Panel concludes that it can review the US' invocation of Article XXI(b), the next question will be whether the requirements of Article XXI (b)(ii) or (iii) were substantially met when the US imposed the present steel and aluminium tariffs. Further, the complaining parties' unilateral classification of the tariffs as safeguard measures raises some additional questions. Section IV thus provides a brief review of other WTO members' reactions to the US' tariffs and explains in this context the different possibilities provided by WTO law to justify otherwise GATT-inconsistent measures.

II. The Self-judging Nature of Article XXI(b) GATT

As discussed in Section B, the most contentious part of the GATT security exception is the phrase "which it considers" in the chapeau of Article XXI(b), which gave rise to different opinions regarding the self-judging nature of the provision. One of the issues the Panel in *US – Steel and Aluminium* will have to address is whether there is a role for WTO dispute settlement in disputes in which Article XXI is invoked. This question can be addressed in two ways. First, the Panel must decide whether a Panel has "jurisdiction" in disputes involving Article XXI. Second, the Panel must establish whether such a dispute is "justiciable." If the Panel does not have jurisdiction, it cannot address the dispute at all. If the dispute is non-justiciable, the subject matter of the dispute is not capable of being reviewed by the Panel. While in the latter case, the Panel may have jurisdiction over the dispute, the subject matter is of such kind that the Panel cannot make any decisions on it.[55]

52 *Ibid.,* Request for consultations by the European Union dated 6 June 2018, WT/DS548/1.

53 *Jung/Hazarika*, ZEuS 21 (2018), 3 (13).

54 *Tietje/Sacher*, Stahl und Whiskey: ein transatlantischer Handelskrieg? Verfassungsblog, 11 March 2018.

55 *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

The Panel in *Russia – Traffic and Transit* was the first Panel to examine the nature and scope of the national security exceptions in Article XXI and shed some light on the debate over the self-judging nature of the provision.[56] The Panel recognised that the chapeau of Article XXI(b), which provides that a member is not prevented "from taking any action which it considers necessary for the protection of its essential security interests," can be read in different ways. It recognised that the adjectival clause "which it considers" can accommodate more than one interpretation and acknowledged all three possible readings discussed earlier.[57]

In *Russia – Traffic and Transit*, Russia argued that the Panel lacked jurisdiction to review the invocation of Article XXI(b)(iii).[58] Similarly, the US, as a third party to the case, initially argued that the Panel did not have jurisdiction. In the course of the proceedings, however, the US changed its argument and contended that while the Panel had jurisdiction, the self-judging nature of Article XXI(b)(iii) establishes that its invocation is non-justiciable and therefore not capable of findings by a Panel.[59]

In response to the objection to the Panel's jurisdiction, the Panel in *Russia – Traffic and Transit* started by referring to its "inherent jurisdiction" resulting from its adjudicative function and Articles of establishment which in no manner exclude Article XXI from the purview of WTO provisions subject to dispute settlement.[60] To further establish whether a Panel has jurisdiction to review the invocation of Article XXI(b), the Panel clarified whether the clause "which it considers" in the chapeau of Article XXI(b) qualifies the determination of the matters in the subparagraphs of that provisions. The Panel questioned the use and *effet utile* of the specific circumstances under the subparagraphs if their determination was left exclusively to the discretion of the invoking member. It thus found, when considering the logical structure of the provision, that the three subparagraphs operate as limitative qualifying clauses which restrict the exercise of the discretion accorded to members under the chapeau to these circumstances.[61]

The Panel continued by considering the subject-matter of each of the subparagraphs of Article XXI(b), in particular in sub-paragraph (iii), and querying whether that subject-matter "lends itself to a purely subjective discretionary determination."[62] The Panel came to the conclusion that the clause "which it considers" in the chapeau of Article XXI(b) does not extend to the determination of the circumstances in the subparagraphs. For an action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements of the subparagraphs. The Panel thus found that it had jurisdiction to determine whether the requirements of Article XXI(b)(iii) were satisfied, thus rejecting Russia's argument on the role of WTO dispute settlement, and further rejecting the US's argument that the invocation of Article XXI(b)(iii) is non-justiciable, to the extent that this argument also relies on the alleged totally

56 *Jung/Hazarika*, ZEuS 21 (2018), 3 (12).

57 WTO, *Russia – Measures Concerning Traffic in Transit (Traffic in Transit)*, Report of the Panel dated 5 April 2019, WT/DS512/R, para. 7.63.

58 *Ibid.,* 7.57.

59 *Ibid.,* para. 7.51, 7.52.

60 *Ibid.,* para. 7.53-57.

61 *Ibid.,* para. 7.65.

62 *Ibid.,* para. 7.65-76.

self-judging nature of the provision.[63] It follows from this interpretation that Article XXI(b)(iii) is not completely self-judging[64] which provided long-awaited clarification on the question of the self-judging nature of Article XXI(b).[65]

Neither Russia nor Ukraine appealed the decision, and the report was adopted by the Dispute Settlement Body on 26 April 2019. However, all the issues addressed in *Russia – Traffic in Transit* are currently again being addressed by the Panel in *US – Steel and Aluminium*. In the ongoing Panel proceedings, the US strongly contests the approach adopted by the Panel in *Russia – Traffic in Transit*. The US continues to argue that Article XXI is self-judging and that disputes in which the Respondent invokes Article XXI are non-justiciable.[66]

The repeated invocation of Article XXI and the rejection of the approach taken by the Panel in *Russia – Traffic in Transit* by the US presents an unprecedented challenge to the functionality of the WTO system.[67] On several occasions, the US noted that if a Panel was to review a member's invocation of Article XXI(b) GATT and the assessment of its own essential security interests, this would undermine the legitimacy of the WTO and its dispute settlement system. From these comments by the US, it appears that the *Panel in US – Steel and Aluminium*, as well as the WTO as a whole, are under intense political pressure from the US not to follow the lead of the Panel in *Russia – Traffic in Transit*.[68]

The preceding decision has put the Dispute Settlement Body in a bind and the WTO now finds itself in a possible lose-lose situation. On the one hand, if the Panel in *US – Steel and Aluminium* was to rule against the US on the principle that a Panel can review national security exception measures, this could set up a major conflict with Washington. Such a ruling would greatly exacerbate the US's concerns that the multilateral system of the WTO is over-reaching and interfering with US national sovereignty.[69] For political reasons, the US is unlikely to accept a Panel to judge the US's national security interests.[70] On the other hand, if the Panel were to rule in favour of the US's self-judging argument, contradicting what the other Panel did in the preceding case, this would undermine its credibility, similarly harming the multilateral dispute settlement system.[71]

Although the US contests the Panel's ruling in *Russia – Traffic in Transit*, the ruling is still likely to have important consequences for the pending WTO challenges to the US's imposition of tariffs on steel and aluminium articles. It is likely that other Panels will follow the lead of the

63 WTO, *Russia – Measures Concerning Traffic in Transit (Traffic in Transit)*, Report of the Panel dated 5 April 2019, WT/DS512/R, para. 7.101-103.

64 *Ibid.,* para. 7.102.

65 *Svetlicinii*, KLRI Journal of Law and Legislation 9 (no. 1, 2019), 29 (54).

66 *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

67 *Svetlicinii*, KLRI Journal of Law and Legislation 9 (no. 1, 2019), 29 (30).

68 *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

69 *Tran*, WTO in a bind over Trump's national security tariffs, Atlantic Council 2 May 2019.

70 *Tietje/Sacher*, Stahl und Whiskey: ein transatlantischer Handelskrieg? Verfassungsblog 11 March 2018.

71 *Tran*, WTO in a bind over Trump's national security tariffs, Atlantic Council 2 May 2019.

preceding Panel and reject the US's argument on the self-judging nature of the provision.[72] If the Panel in *US – Steel and Aluminium* follows the Panel's ruling in *Russia – Traffic in Transit* and reviews the US's invocation of Article XXI, the Panel would have to assess whether the requirements of Article XXI(b) (ii) or (iii) were met when the US imposed the steel and aluminium tariffs, which will be discussed in more detail in the next section.

III. Justifying the US Measures under the National Security Exception of the GATT

Assuming the Panel in *US – Steel and Aluminium* follows the Panel's ruling in *Russia – Traffic in Transit* and reviews the US's invocation of Article XXI, the Panel would have to determine whether the requirements for a correct application of the provision are satisfied. As the US has not publicly stated to which exact provision of Article XXI it refers, both Article XXI(b)(ii) and (iii) must be taken into consideration.

1. Requirements for invoking Article XXI(b)(ii) GATT

Article XXI(b)(ii) provides that "[n]othing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests […] 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." As provided by the Panel in *Russia – Traffic in Transit*, for an action to fall within the scope of Article XXI(b), it must objectively meet the requirements of the subparagraphs.[73] The US Department of Defence, however, repudiated the need for steel tariffs for military purposes. The Department released a report that supported tariffs against unfair trade practices but undercut any military need for a more robust domestic steel industry. The report stated that the US military requirements for steel and aluminium only amount three percent of US production and therefore, the US Department of Defence does not believe that the findings in the report impact the ability of the Department's programs to acquire the steel or aluminium in the amount necessary to meet national defence requirements.[74] Since the US Department of Defence even initially argued that the country's defence capability was not affected by the economic problems of the US steel industry,[75] it is seriously doubtful that the protected steel and aluminium products can be considered "materials as is carried for the purpose of supplying a military establishment." This means that the substantial compliance of the US steel and aluminium tariffs with Article XXI(b)(ii) is rather unlikely, at

[72] *Hartmann*, ILM 58 (no. 5, 2019), 899 (900).

[73] WTO, *Russia – Traffic in Transit*, Report of the Panel dated 5 April 2019, WT/DS512/R, para. 7.101-103.

[74] *Brewster,* Duke J. Gender L. & Pol'y 27 (2020), 59 (65).

[75] *Lawder/Chance,* U.S. defense department says prefers targeted steel, aluminum tariffs, Reuters, 23 February 2018, available online: https://www.reuters.com/article/us-usa-trade-steel/u-s-defense-department-says-prefers-targeted-steel-aluminum-tariffs-idUSKCN1G706A (last accessed 13/03/2021); *Tietje/Sacher*, Stahl und Whiskey: ein transatlantischer Handelskrieg? Verfassungsblog, 11 March 2018.

least when it comes to the narrow requirements in the subparagraph (ii),[76] and this alternative is not considered in any greater detail in literature.

2. Requirements for invoking Article XXI(b)(iii) GATT

Article XXI(b)(iii) provides that "[n]othing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests […] taken in time of war or other emergency in international relations." In contrast to Article XXI(b)(ii), this alternative has been interpreted broadly by member states, as well as legal scholars.[77] When justifying the US measures on steel and aluminium articles under Article XXI(b)(iii), if the Panel in *US – Steel and Aluminium* does indeed decide to follow the lead of the Panel in *Russia – Traffic in Transit*, the Panel in *US – Steel and Aluminium* would have to determine whether the requirements for a correct application of Article XXI(b)(iii) provided by the Panel in the preceding case are satisfied. The test adopted by the Panel in *Russia – Traffic in Transit* consists of two parts. The first part involves an objective examination of subparagraph (iii), and the second part requires a review of the chapeau of Article XXI(b) applied under the principle of good faith.

a) Objective Examination of the Subparagraph

In light of subparagraph (iii), the Panel in *US – Steel and Aluminium* would have to examine whether the measures adopted by the US were "taken in time of war or other emergency in international relations." The measures must thus be taken during a war or other emergency in international relations which implies a chronological concurrence between the measure and the situation at issue, which the Panel in *Russia – Traffic in Transit* considers to be an objective fact that is capable of objective determination.[78] Secondly, the Panel in *Russia – Traffic in Transit* found that the existence of a war or other emergency in international relations is also clearly capable of objective determination. While acknowledging that the boundaries of an emergency in international relations are less clear than those of war, the Panel determined that an emergency in international relations can only be understood as belonging to the same category of objective facts amenable to objective determination.[79] Further, the interests addressed in Article XXI(b)(i) and (ii), as well as in a situation of war in subparagraph (iii), are all defence and military interests, as well as maintenance of law and public order interests. The Panel found that the term "other emergency in international relations" must be understood as eliciting the same type of interests as those arising from the other matters addressed in the enumerated subparagraphs of Article XXI(b).[80] As such, the Panel defined an emergency in international relations as situations "of armed conflict, or latent armed conflict, heightened tension or crisis, or general instability engulfing or surrounding a state" which "give rise to particular types of

[76] *Jung/Hazarika*, ZEuS 21 (2018), 3 (7).

[77] *Ibid.,* 7.

[78] WTO, *Russia – Traffic in Transit*, Report of the Panel dated 5 April 2019, WT/DS512/R, para. 7.70.

[79] *Ibid.,* para. 7.71.

[80] *Ibid.,* para. 7.74.

interests for the member in question, i.e. defence or military interests, or maintenance of law and public order interests."[81] While some of these terms may be capable of broad interpretation, the Panel attached to them a narrower meaning, as an emergency in international relations must relate to defence or military interests or the maintenance of law and public order.[82]

In this regard, the US could argue that the armed conflicts in which the US army was involved in 2018 when the tariffs imposed on aluminium and steel imports took effect constitute an emergency in international relations. The Panel in *Russia - Traffic in Transit* noted that an emergency in international relations refers to world or global politics[83] and did not explicitly limit an emergency in international relations to events between the parties to the dispute. Thus, it is feasible that the Panel in *US – Steel and Aluminium* would recognise the armed conflicts in which US army is involved as an emergency in international relations.[84] Further, a series of restrictive trade measures have been adopted between the US and China in the near past, as was the case in 2018 when the tariffs imposed on aluminium and steel imports took effect, and the US could argue that there is an economic conflict with China which presents an emergency in international relation. With regard to political or economic differences between members, the Panel in *Russia – Traffic in Transit* provided that political or economic differences between members are not themselves sufficient to constitute an emergency in international relations for purposes of subparagraph (iii) unless they give rise to defence and military interests, or maintenance of law and public order interests.[85] Again, it is feasible for the Panel to conclude that there is an economic conflict that constitutes an emergency in international relations as long as the US prove that the conflict gave rise to defence and military interests, or maintenance of law and public order interests.[86]

In sum, it is conceivable that the US could satisfy the objective part of the test provided by the Panel in *Russia - Traffic in Transit* and established that there was an emergency in international relations. However, the US continues to argue that Article XXI(b) is completely self-judging and does not provide any information concerning an emergency in international relation.[87] In the Section 232 reports on the investigation into the effects of imports of aluminium and steel on the national security of the US Secretary of Commerce which form the basis for the imposition of the tariffs, the Secretary merely refers to the present quantities of steel and aluminium imports and the circumstances of global excess capacity. The existence of global excess capacity and the US's trade deficit with certain countries does not refer to a situation of armed or latent armed conflict, heightened tension or crisis, or general instability engulfing or surrounding a state as required by the Panel. The situation as laid down in the Section 232

81 WTO, *Russia – Traffic in Transit*, Report of the Panel dated 5 April 2019, WT/DS512/R, para. 7.76.

82 *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

83 WTO, *Russia – Traffic in Transit*, Report of the Panel dated 5 April 2019, WT/DS512/R, para. 7.73.

84 In detail: *Ioachimescu-Voinea*, Law Review 10 (no. 2, 2020), 3 (7 f.).

85 WTO, *Russia – Traffic in Transit*, Report of the Panel dated 5 April 2019, WT/DS512/R, para. 7.75

86 In detail: *Ioachimescu-Voinea*, Law Review 10 (no. 2, 2020), 3 (10 f.).

87 *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

reports thus does not substantiate the existence of an emergency in international relations that prompted the US to impose increased tariffs on steel and aluminium products.[88] However, given that the US does not even identify or invoke Article XXI(b)(iii) or any other subparagraph of Article XXI(b), maintaining that it does not need to do so based on the self-judging nature of the provision, it remains to be seen how the Panel in *US - Steel and Aluminium* will address this situation.[89]

b) Review of the Chapeau under the Principle of Good Faith

In light of the chapeau of Article XXI(b), the Panel in *US - Steel and Aluminium* must then consider whether the US measures comply with an "action which [the invoking member] considers necessary for the protection of its essential security interests." As discussed, the Panel in *Russia – Traffic in Transit* already found that the phrase "which it considers" does not qualify the requirements of the subparagraphs of Article XXI(b). The Panel did find, however, that the phrase qualifies both the terms "necessary" and "essential security interests" in the chapeau of Article XXI(b). It is therefore within the discretion of the invoking member to decide what its essential security interests are, and which measure it considers necessary to protect these interests.[90] The discretion given to the invoking member, however, does not apply without limits.[91]

The Panel in *Russia – Traffic in Transit* defined essential security interests as "those interests relating to the quintessential function of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally"[92] which "will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances."[93] While "it is left, in general, to every member to define what it considers to be its essential security interests,"[94] this is "limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith."[95] In order for a Panel to be able to assess whether a member invoking Article XXI(b)(iii) interprets and applies the provision in good faith, members must "articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity."[96] The sufficient level of articulation of the essential security interest will depend on the emergency in international relations at issue. If the emergency in international relations is closely related to an armed conflict, the required level of articulation of the essential security

88 *Svetlicinii*, KLRI Journal of Law and Legislation 9 (no. 1, 2019), 29 (53).

89 *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

90 WTO, *Russia – Traffic in Transit*, Report of the Panel dated 5 April 2019, WT/DS512/R, para. 7.131 and 7.146.

91 *Ibid.,* para. 7.132 and 7.138.

92 *Ibid.,* para. 7.130.

93 *Ibid.,* para. 7.131.

94 *Ibid.,* para. 7.131.

95 *Ibid.,* para. 7.132.

96 *Ibid.,* para. 7.134.

interest concerned will be lower, however, the more an emergency in international relations is removed from an armed conflict, the higher the required level of articulation becomes.[97]

While it is possible that a Panel would have found that the US met the objective requirements of the test provided in *Russia – Traffic in Transit* (had the US made arguments to that effect), there is a consensus in literature that the US would have, for a variety of reasons, significant difficulty "to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity."[98]

For one thing, the US does not provide any information concerning the essential security interests pursued. The US merely states that publicly available information "could be understood to relate most naturally to the circumstances described in Article XXI(b)(iii)."[99] Despite the low threshold for articulation established by the Panel in *Russia - Traffic in Transit*, it is unlikely that such general reference to publicly available information can be regarded as a sufficient articulation of the essential security interests pursued, particularly since the required level of articulation of the essential security interest will be higher the more an emergency in international relations is removed from an armed conflict.[100]

Further, the US lacks reasonable basis to support its invocation of Article XXI(b) in good faith. President Trump argued that the global excess of steel and aluminium would weaken the US's economy which, in turn, threatens essential security interests. Soon after raising this argument, the US welcomed other countries to discuss alternative ways to address the threatened impairment of the national security caused by imports from that country and permitted them to apply for permanent exemptions from the tariffs. Granting such exemptions demonstrates a lack of urgency that traditionally accompanies emergencies and undermines the argument that steel and aluminium tariffs are reasonably necessary to protect any essential security interest. Therefore, the readiness to negotiate with other countries diminishes the US's good faith appearance in defending its alleged essential security interests.[101] In addition, it is apparent that the US equally imposed tariffs on China and NATO members, which are linked to the US by a security alliance. As a reaction to the Section 232 reports of the US Secretary of Commerce, the US Department of Defence noted that the present steel tariffs were not aimed at Chinese production as Chinese imports already faced very high tariff barriers. According to the US Department of Defence, the tariffs impacted countries with whom the US has formal military alliances and the Department highlighted its concerns about the negative impact of the tariffs on the US's key NATO allies.[102]

The lack of a necessity justification from the US Department of Defence as described in Section C.III.1, the general reference to publicly available information, President Trump's adverse conduct, and the negative impact of the tariffs on the US's key NATO allies demonstrate

97 WTO, *Russia – Traffic in Transit*, Report of the Panel dated 5 April 2019, WT/DS512/R, para. 7.135.

98 *Svetlicinii*, KLRI Journal of Law and Legislation 9 (no. 1, 2019), 29 (53).

99 WTO, *US – Steel and Aluminium*, Second Written Submission of the USA dated 17 April 2020, para. 26-28, in: *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

100 *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

101 *Jordan*, Wis. Int'l LJ, 37 (2019), 173 (202 f.).

102 *Brewster,* Duke J. Gender L. & Pol'y 27 (2020), 59 (65).

that the US is not applying Article XXI(b)(iii) of the GATT 1994 in good faith, and therefore, the US should be precluded from invoking Article XXI(b) to justify the legality of its tariffs on steel and aluminium imports. Because the US's invocation of Article XXI(b) to justify its tariffs on steel and aluminium is likely to fail both the objective test and the good faith prongs, a WTO dispute panel applying the review standard proposed by the Panel in *Russia – Traffic in Transit* would likely find that the trade measures violate WTO obligations.[103] It remains to be seen how the Panel will address the US's failure to specify which provision of Article XXI(b) it relies on and the consequent lack of information concerning the essential security interests pursued.

IV. Safeguard Measures "in disguise"?

While there can only be speculation about the rationale behind both the US' invocation of Article XXI and the continuous argumentation for the self-judging nature of the provision, the preceding analysis is based on the US's classification of their steel and aluminium tariffs as being justified as a national security measure. This results in part from the nature of Section 232 of the US Trade Expansion Act of 1962, which serves the overall purpose of protecting national security,[104] and in part from the invocation of Article XXI GATT by the US.[105] As a reaction to the US steel and aluminium tariffs, several members affected by the tariffs, including the EU, China, Mexico, Canada, India, Russia, and Turkey, stated that they disagree with the classification of the tariffs as measures to protect national security concerns. The complaining parties considered the measures to be safeguard measures under the SGA and adopted retaliatory measures in the form of their own tariff increases on imports from the US.[106] To give a basic understanding of the challenges that arise by the unilateral classification of the tariffs and the implementation of retaliatory measures, the following section will briefly discuss the different possibilities provided by WTO law to justify otherwise GATT-inconsistent measures.

In addition to the exceptions for measures to protect national security concerns invoked by the US, WTO law provides further exceptions which allow for deviation from GATT principles. The national security exceptions provided by Article XXI, as well as the exceptions for trade-restrictive measures designed to protect public, non-economic goods in Article XX mentioned at the beginning of this publication, allow members to maintain or introduce measures that promote or protect societal values. Both exceptions thus concern matters of important societal interests.[107] The respective measures do not constitute a response to the trade practices of other members, nor are they intended to be based on other purely economic considerations.

On the contrary, WTO law also provides three types of so-called trade defence instruments (TDIs). TDIs are designed to re-establish a competitive environment and directly intervene in international trade relations. First, WTO law provides exceptions to the GATT principles for measures against the import of dumped goods (i.e., goods offered for sale below their normal

[103] *Jordan*, Wis. Int'l LJ, 37 (2019), 173 (203).

[104] *Jung/Hazarika*, ZEuS 21 (2018), 3 (16).

[105] WTO, *US – Steel and Aluminium*, Communication from the US dated 6 July 2018, WT/DS548/13.

[106] *Y.S. Lee*, World Trade Review 18 (no. 2, 2019), 481 (491).

[107] *Krajewski*, Wirtschaftsvölkerrecht, 101.

price) referred to as anti-dumping measures. Anti-dumping measures are regulated in Article VI and the Agreement on Implementation of Article VI of GATT 1994, commonly known as the Anti-Dumping Agreement. Second, WTO law recognises exceptions for countervailing measures against the import of subsidised goods laid down in Article XVI and the Agreement on Subsidies and Countervailing Measures. These two types of TDIs are directed against unfair trade practices. From a liberal economic perspective, dumping and subsidies are generally undesirable and may therefore be opposed. Anti-dumping and anti-subsidy measures can thus be applied by members to combat interventions of other members in market activity and free competition and can be justified by the fact that they aim to restore market equilibrium. Third, WTO law provides a TDI for safeguard measures against a sudden increase in imports which are regulated in Article XIX and the Agreement on Safeguards. Safeguard measures can be applied in the event of unforeseen import increases to give the impacted domestic industry the opportunity to adjust. In contrast to anti-dumping and anti-subsidy measures, safeguard measures are primarily a protectionist instrument and can be taken against fair trade practices under strict conditions.[108] In essence, this requires that unforeseen imports of a product have occurred in such absolute or relative quantities that they cause, or threaten to cause, serious injury to the domestic economy.[109]

This brief outline of the WTO law on safeguard measures already shows that there are some indications pointing towards the classification of the US's measures on steel and aluminium as safeguard measures. The Section 232 reports, as well as the Presidential Proclamations, refer to the import of goods. Consequently, the steel and aluminium tariffs were clearly levied to protect the US economy from imports competition.[110] Respectively, it is also the view of the EU and other WTO members that the US's tariffs should be considered safeguard measures under the SGA. The unilateral classification of the tariffs as safeguard measures and the related imposition of retaliatory measures by the complaining parties, however, gives rise to several questions.

Given that the EU and other WTO member states clearly disagree with the US's classification of the tariffs, the first question that arises is who is actually entitled to decide on the classification of a measure. To date, there are only indications whether the classification of a measure is the sole prerogative of the member invoking the measure, or whether a Panel or even another member state can decide under which category such a measure falls.[111]

Assuming that the classification of a measure is not the sole responsibility of the enacting WTO member, and if the complaining parties want to classify the US tariffs as safeguard measures "in disguise," there must at least be some objective indications for an alternative classification.[112] To this effect, the WTO Appellate Body has repeatedly held that when determining the objective of a measure, it is not the title or purpose of the measure put forward by the invoking member that must be considered, but rather a comprehensive and objective analysis must be conducted with regard to "the design, the architecture, and the revealing structure of

[108] *Krajewski*, Wirtschaftsvölkerrecht, 120.

[109] *Ibid.,* 126.

[110] *Jung/Hazarika*, ZEuS 21 (2018), 3 (17).

[111] In more detail: *Jung/Hazarika*, ZEuS 21 (2018), 3; *Tietje/Sacher*, Stahl und Whiskey: ein transatlantischer Handelskrieg? Verfassungsblog, 11 March 2018.

[112] *Jung/Hazarika*, ZEuS 21 (2018), 3 (16).

a measure"[113] in light of the specific application.[114] On the one hand, there are some indications contradicting the design, architecture, and structure of the US steel and aluminium tariffs as safeguard measures; for instance, the measures were adopted under Section 232 of the US Trade Expansion Act of 1962 and not Section 201, which presents the US domestic law for the imposition of safeguard measures. On the other hand, there are also objective indications supporting the classification as safeguard measures; for example, parts of the reports on the investigation into the effects of imports of aluminium and steel on national security by the US Secretary of Commerce resemble the injury analysis required by the SGA. It appears that this is another controversial question, however, literature suggests that the US measures do not meet the conditions to be recognised as safeguards under the SGA.[115]

This ambiguous legal situation is complicated by the fact that WTO law provides the right for a WTO member affected by safeguard measures to adopt retaliatory measures. Since safeguard measures are directed against fair trade practices of other members, the logic behind retaliatory measures is purely economic in nature. Safeguard measures imbalance multilateral obligations and concessions and disadvantage the affected members without fault on their part. Therefore, retaliatory measures are not "punitive" tariffs, but rather they are meant to compensate for the incurred trade disadvantages and to restore the original balance of obligations and concessions.[116]

Retaliatory measures are regulated in Article XIX:3 and Article 8 of the SGA. As a first step, Article 8.1 SGA requires binding bilateral negotiations between the parties. Only if negotiations fail does Article 8.2 provides the right to introduce retaliatory measures, subject to several narrow procedural and substantive requirements. The adoption of retaliatory measures is linked to strict time limits and requires that the Council for Trade in Goods does not object to the retaliatory measure after its formal notification. Further, if a safeguard measure has in fact been adopted as a response to an absolute increase in imports, and if such a measure is in conformity with WTO law, the member's right to adopt retaliatory measures is suspended for the first three years that a safeguard measure is in effect.[117]

As the EU and other members consider the US tariffs on steel and aluminium safeguard measures, they exercised their right to implement retaliatory measures under Article 8.2 of the SGA. However, these actions were based on several assumptions. First, the members assumed that they were entitled to determine the classification of the US measures. As noted above, it is questionable whether such unilateral classification is in conformity with WTO law.[118] Further, the members assumed that the US measures objectively constituted safeguard measures pursuant to the SGA; however, it is suggested in literature that this may not be the case. If the US

[113] For instance, WTO, *Japan - Taxes on Alcoholic Beverages*, Report of the Appellate Body dated 4 October 1996, WT/DS8/AB/R, 29.

[114] *Tietje/Sacher*, Stahl und Whiskey: ein transatlantischer Handelskrieg? Verfassungsblog, 11 March 2018.

[115] *Y.S. Lee*, World Trade Review 18 (no. 2, 2019), 481 (492 f.).

[116] *Tietje/Sacher*, Stahl und Whiskey: ein transatlantischer Handelskrieg? Verfassungsblog, 11 March 2018.

[117] *Ibid*.

[118] *Jung/Hazarika*, ZEuS 21 (2018), 3 (15).

measures are not safeguards under the SGA, the provisions of the SGA would not apply, and the retaliatory measures could not be justified under the provisions of the SGA at all.[119]

Even assuming that these prerequisites are fulfilled and that the EU and the other WTO members are therefore entitled to the right to adopt retaliatory measures, the implementation of such measures still requires that all respective requirements for correct application are met.[120] As mentioned above, the right to retaliate in response to a safeguard measure is suspended for three years where the safeguard measure has been taken as a result of an absolute increase in imports and conforms to the provisions of the SGA. The other way round, this means that the suspension does not apply in cases in which a measure does not conform to the provisions of the SGA.[121] The complaining parties argue that the US, by imposing the additional tariffs, violated several regulations of the SGA which consequently allowed them to react immediately. Normally, the member adopting a safeguard measure would initially have the conformity of the measure be determined during an investigation. In the case of the US tariffs, however, such investigation did not take place since the US did not notify the tariffs as safeguard measures. Nevertheless, several complaining countries adopted the retaliatory measures for US non-compliance with the SGA provision while it is questionable whether the factual conformity of the safeguard measure with WTO law is subject to the assessment of the member imposing the retaliatory measure.[122]

It is therefore evident that it is not only the conduct and attitude of the US administration that poses a challenge to the functionality of the WTO system. The summary given above shows that the reactions of other WTO members are just as problematic and that the case in its entirety proves to be a good example of the crisis in which the WTO has found itself for quite some time.

D. Conclusion

Possibilities to exploit legal interpretations have been available to GATT and later WTO members since the beginning of the GATT. However, only recently have members begun to take advantage of such "loopholes" to advance their trade agendas.[123] This trend is clearly illustrated by the broad interpretation the US has adopted when justifying measures against China on the grounds of protecting public morals within the meaning of Article XX(a), as well as in defending the tariffs imposed on aluminium and steel articles under the national security exception of Article XXI. With regard to *US – Tariff Measures on Certain Goods from China*, the Panel already concluded in September 2020 that the US had not shown how the imposition of additional tariffs was apt to contribute to the public morals objective invoked, nor how they were necessary to protect public morals. The Panel therefore found that the US had not met

119 *Y.S. Lee*, World Trade Review 18 (no. 2, 2019), 481 (492 f.).

120 *Tietje/Sacher*, Stahl und Whiskey: ein transatlantischer Handelskrieg? Verfassungsblog, 11 March 2018.

121 *Y.S. Lee*, World Trade Review 18 (no 2, 2019), 481 (492).

122 *Tietje/Sacher*, Stahl und Whiskey: ein transatlantischer Handelskrieg? Verfassungsblog, 11 March 2018.

123 *Kerr*, Estey Journal of International Law and Trade Policy 19 (no. 2, 2019), 49 (57).

its burden to demonstrate that the measures were provisionally justified under Article XX(a).[124] With regard to the pending decision in *US – Steel and Aluminium*, the Panel in the preceding case *Russia – Traffic in Transit* already provided a well-balanced approach for the interpretation of Article XXI which avoids abuse of the GATT security exception while still providing a certain margin of discretion to the members invoking it.[125] It is not always straightforward to determine whether a trade measure is applied for a legitimate concern, or if it presents disguised trade protection,[126] and it remains to be seen how the Panel in *US – Steel and Aluminium* will address the numerous open questions and challenges. Ultimately, however, the US can simply appeal the Panel's decision as they did in the case *US – Tariff Measures on Certain Goods from China*. Due to the US's obstruction of the appointment of WTO appellate judges, appealing first instance WTO panel reports to the paralysed Appellate Body prevents any dispute from being resolved in a legally binding manner.[127]

[124] WTO, *United States – Tariff Measures on Certain Goods from China*, Report of the Panel dated 15 September 2020, WT/DS543/R, para. 7.238 and 8.1.

[125] *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

[126] *Y.S. Lee*, World Trade Review 18 (no. 2, 2019), 481 (488).

[127] *Van den Bossche/Akpofure*, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, World Trade Institute, 15 September 2020.

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