ADDRESSING THE ELEPHANT IN THE ROOM: DISCUSSING THE WTO'S CONTROVERSIAL QUESTION REGARDING THE APPLICATION OF ARTICLE XXI OF GATT 1994

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ABSTRACT

This Comment will explore an unsettled area of international trade law—the application of Article XXI of the General Agreement on Tariffs and Trade (GATT), known as the "National Security Exception." This Exception contains self-judging language that is available as a defense for Member Nations of the World Trade Organization (WTO) accused of violating GATT. The Dispute Settlement Board (DSB) of the WTO must determine how the self-judging language of the National Security Exception should be applied—using a good faith standard or a completely deferential standard, barring the DSB's review. After many years of evading the issue, the DSB recently fully heard a case in which a Member Nation invoked the Exception. Still, this leaves Member Nations with little guidance on the Exception's application and its impact on trade disputes.

This Comment focuses on the avenues that the DSB may take to interpret the self-judging language of the National Security Exception. The DSB may refer to the history and near applications of Article XXI as well as the interpretation of other self-judging rules in international law. The Board may ultimately conclude that a good faith standard must be used. Given the tension that exists between the sovereignty of nations and the fear of undermining the authority of the WTO, this Comment provides an overview of the concerns of using a good faith standard. It then concludes by discussing how the DSB may decide a pending case using a good faith standard.

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I. INTRODUCTION

A. Sovereignty and the Importance of the National Security Exception

Political philosopher Thomas Hobbes once explained that sovereignty assists in maintaining the order and peace of a nation,[1] an idea referred to as *salus populi suprema lex*.[2] Thus, it follows that the impingement of sovereignty may hinder a

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1. THOMAS HOBBES, LEVIATHAN: WITH SELECTED VARIANTS FROM THE LATIN EDITION OF 1668 110–18 (Edwin Curley ed., Hackett Publishing Co. 1994) (1668).

2. The phrase translated from Latin means "the safety of the people shall be the highest law." MARCUS TULLIUS CICERO, THE REPUBLIC AND THE LAWS, 152 (Jonathan Powell & Niall Rudd

nation's efforts to protect the welfare and security of its citizens. Though the preservation of sovereignty is essential to a nation's welfare and security interests,[3] in today's globalized world, nations often cede some sovereignty by participating in international organizations and agreements.[4] Consequently, international organizations must balance the sovereignty of their members with their own interests of effectively exercising jurisdiction over those members.[5] The World Trade Organization (WTO) attempted to balance these interests in an April 2019 decision concerning trade disputes between Russia and Ukraine.[6] In this decision, the Dispute Settlement Body (DSB) grappled with the interpretation of Article XXI ("National Security Exception" or "Exception") of the General Agreement on Tariffs and Trade (GATT) 1994.[7]

The language of Article XXI indicates that the Exception is "self-judging."[8] Prior to April 2019, the DSB had never published a decision interpreting the self-judging language.[9] The DSB finally addressed the application of Article XXI by choosing to apply a good faith standard of review in *Russia—Measures Concerning Traffic in Transit of Ukrainian Products* (*Russia—Traffic in Transit*).[10] In *Russia—Traffic in Transit*, the DSB had to decide whether to grant Russia[11] unfettered discretion in invoking the Exception, thereby preserving total national sovereignty

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eds., Niall Rudd trans., Oxford Univ. Press 1998) (c. 53 B.C.E.).

3. *See* HOBBES, *supra* note 1 ("And because the end of this institution is the peace and defence of them all, and whosoever has right to the end has right to the means, it belongeth of right to whatsoever man or assembly that hath the sovereignty, to be judge both of the means of peace and defence, and also of the hindrances and disturbances of the same, and to do whatsoever he shall think necessary to be done, both beforehand (for the preserving of peace and security, by prevention of discord at home, and hostility from abroad) and when peace and security are lost, for the recovery of the same.").

4. David A. Nill, *National Sovereignty: Must It Be Sacrificed to the International Criminal Court?*, 14 BYU J. PUB. L. 119, 119 (1999) (citing Patrick Tangney, *The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany*, 21 YALE J. INT'L L. 395, 397 (1996)).

5. *See* Andrew Guzman, *International Organizations and the Frankenstein Problem*, 24 EUR. J. INT'L L. 999, 1000 (2013) (finding nations often try to limit the scope of an international organization's authority in order to preserve sovereignty).

6. *See* Panel Report, *Russia—Measures Concerning Traffic in Transit of Ukrainian Products*, ¶ 7.98, WTO Doc. WT/DS512/R (Apr. 29, 2019) [hereinafter Panel Report, *Russia—Traffic in Transit*] (citing negotiating history of Article XXI of the GATT and balancing security interests and exceptions).

7. *See generally id.*

8. Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 698 (2011).

9. *Id.* at 699; Panel Report, *Russia—Traffic in Transit*, *supra* note 6, □ 7.20.

10. Panel Report, *Russia—Traffic in Transit*, *supra* note 6, □ 7.20.

11. Joining the WTO is a four-step process where the applicant must: (i) submit a memorandum detailing how its trade and economic policies bear on WTO agreements; (ii) engage in a bilateral negotiation with member nations regarding the applicants' trading interests; (iii) draft a membership treaty detailing the applicants commitments; (iv) be admitted by a two-thirds vote from the WTO General Council. *Understanding The WTO: The Organization: Membership, Alliances and Bureaucracy*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (last visited Sept. 9, 2019).

in cases of national security, or whether to scrutinize Russia's motive in invoking the Exception using a good faith standard, thereby granting the DSB reviewing authority.[12] However, notwithstanding the decision in *Russia—Traffic in Transit*, there remains a lack of guidance around how Article XXI issues are to be resolved, especially considering the fact that the Appellate Body of the WTO has also yet to review any issues on appeal.[13]

This Comment focuses exclusively on the legally appropriate application of Article XXI of GATT 1994 and the practical implications in applying the provision given that the intended purpose of the Exception was to leave some discretion to nations for policy considerations that would affect the protection of their citizens.[14] 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
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> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) taken in time of war or other emergency in international relations; or
>
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[15]

Since GATT's drafting, commentators have worried that the Agreement would interfere with a Member Nation's sovereignty and ability to create national security policies.[16] In giving GATT 1942 much forethought, the original drafters of Article XXI shared the same sentiment that many critics hold today—a fear that an international organization would impose its power on the sensitive and confidential national security interests of a nation.[17] It was because of this fear that the drafters

12. Panel Report, *Russia—Traffic in Transit*, *supra* note 6, □□ 7.20–.26, 7.33–.34.

13. *See id.* □□ 7.35–.52 (noting that nine Member Nations and the European Union gave conflicting third-party opinions on how the DSB should resolve the dispute).

14. *See* Alan S. Alexandroff & Rajeev Sharma, *The National Security Exception Provision—GATT Article XXI*, *in* THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1571, 1572–73 (Patrick F. J. Macrory et al. eds., 2005) ("The debates on the ITO Charter reveal concern about the critical balance required between national security and national sovereignty on the one hand, and the need to promote commerce and to protect an open trading system on the other.").

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

16. Alford, *supra* note 8, at 699, 706.

17. Alexandroff & Rajeev, *supra* note 14.

intended the Exception to be broad, but not so broad that the provision could be subject to abuse by Member Nations.[18] The original drafters of Article XXI made these concerns clear, stating:

> I think no one would question the need of a Member, or the right of Member, to take action relating to its security interests and to determine for itself—which I think we cannot deny—what its security interests are . . . . I think there must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed for purely 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 . . . . This is the best we could produce to preserve the proper balance.[19]

The drafters were concerned that abuse of Article XXI would undermine the WTO's legitimacy.[20] Because many Member Nations turn to the WTO to resolve disputes,[21] the WTO must preserve its legitimacy and authority, which it derives from the assent of Member Nations.[22] Generally, the legitimacy of international organizations, such as the WTO, is often the center of scholarly debate.[23] Specifically, the preservation of the WTO's authority hinges in part on protecting the gravity of its agreements, like GATT, from Member Nations abusing loopholes, such as the National Security Exception.[24] Without good faith adherence to the Exception, the role of the WTO is minimized and undermined.[25] In fact, the DSB

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18. *Id.*

19. Alford, *supra* note 8, at 699 (citing Conference on Trade & Employment, Thirty-Third Meeting of Commission A, at 19, U.N. Doc. E/PC/T/A/PV/33 (July 24, 1947) [hereinafter Thirty-Third Meeting of Commission] (quoting Dr. Speekenbrink on behalf of the Netherlands).

20. *Id.* at 702.

21. *See Dispute Settlement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited Feb. 6, 2019) ("Since 1995, over 500 disputes have been brought to the WTO and over 350 rulings have been issued.").

22. *See* Peter Sutherland et al., *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, WORLD TRADE ORG. 1, 54–55 (2004), https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf (noting the importance that WTO decisions be followed so the dispute system maintains its credibility).

23. *See* Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 907 (2004) (stating that the legitimacy of international law is now a central concern, despite not being explored in prior years).

24. *See* Alford, *supra* note 8, at 701–02 (explaining that Member Nations must act in good faith while handling the power of the Exception lest the legitimacy of the WTO be undermined).

25. Some argue that past actions have already undermined the authority of the WTO, claiming the United States has previously disregarded WTO rulings. *E.g.*, *Trade Dispute with Mexico Over 'Dolphin-Safe' Tuna Heats Up*, NAT'L. PUB. RADIO (Oct. 3, 2013, 5:52 PM), https://www.npr.org/2013/10/03/228941329/trade-dispute-with-mexico-over-dolphin-safe-tuna-heats-up. Additionally, in 2016 and in 2018, the United States blocked the appointment of WTO judges. *E.g.*, Manfred Elsig et al., *The U.S. Is Causing a Major Controversy in the World Trade Organization. Here's What's Happening.*, WASH. POST (June 6, 2016, 7:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/; *see also* Tom Miles, *U.S. Blocks WTO Judge Reappointment as Dispute Settlement Crisis Looms*, REUTERS (Aug. 27, 2018, 8:54 AM), https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispu

recognized the importance of maintaining the legitimacy of the WTO when it highlighted Japan's third-party argument in *Russia—Traffic in Transit*, which stated that Japan urged Russia and Ukraine to seek a satisfactory solution "in order to maintain the effective functioning of the WTO."[26]

The competing interests of national sovereignty and the WTO's legitimacy put pressure on the DSB to interpret Article XXI carefully and thoughtfully. This Comment discusses the application of Article XXI according to a good faith standard, the most appropriate application considering the provision's self-judging nature. Further, it addresses the criticism of the standard's practicality given the tension between the maintenance of the WTO's legitimacy and authority, and the sovereignty of nations. Part II delves into the history and the intent of Article XXI during the drafting of GATT 1942. Part III reviews the possible alternative interpretations of the Exception, including a fully self-judging standard, a partially self-judging standard, and a good faith standard. Part IV explores past invocations of Article XXI to analyze how the DSB and its predecessor, the GATT Panel, have handled the Exception in other international trade disputes. Part V looks beyond GATT and the WTO to observe how other international law tribunals and courts have interpreted other self-judging rules. Part VI analyzes the origin and past invocations of Article XXI in addition to interpretations of self-judging standards in other areas of international law. Based on this discussion, Part VI proposes a good faith standard as the appropriate approach for interpreting Article XXI. Finally, Part VII applies the proposed approach in a case pending before the WTO that involves the United States.

B. Historical Background on the WTO and Its Perceived Impingement on Sovereignty

The liberalization of trade comes at a cost, even with provisions such as Article XXI at the disposal of Member Nations.[27] Member Nations effectively barter the protection of their domestic industries and sovereignty in what resembles an international contract. [28] In doing so, they hope to stimulate free and efficient trade

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te-settlement-crisis-looms-idUSKCN1LC19O. A discussion of legitimacy is relevant to the undermining of the WTO because without legitimacy, Member Nations would disregard the holdings of the DSB regardless of whether the Court applies a good faith standard. However, given the complexity of the topic of legitimacy and the derived authority of international institutions, such a discussion is beyond the scope of this Comment. Assuming that the WTO maintains legitimacy and authority amongst Member Nations, this Comment will highlight the concerns scholars hold in adopting a good faith standard.

26. Panel Report, *Russia—Traffic in Transit*, *supra* note 6, ¶ 7.44 (citation omitted).

27. "The WTO Agreement is a treaty - the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement." Sutherland et al., *supra* note 22, ¶ 111 (citing Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, at 16, WTO Doc. WT/DS8/AB/R (adopted Oct. 4, 1996)).

28. *See id.* ("Acceptance of almost any treaty involves a transfer of a certain amount of decision-making authority away from states, and towards some international institution.").

that encourages economic development and greater access to products and services.[29] However, since the advent of the internet and technological improvements,[30] the WTO has faced much criticism for its contribution to globalization and its alleged impingement on national sovereignty.[31]

In 1948, twenty-three nations formed GATT.[32] In 1995, the members of GATT then formed the WTO with the purpose of opening trade "for the benefit of all."[33] To ensure free trade, the Member Nations founded the WTO on the Most Favored Nation (MFN) principle.[34] A Member Nation is required "to extend to another the most favorable trade concessions it has granted, or may grant, to any third country."[35] To comply with the MFN principle, Member Nations agree not to discriminatorily impose trade barriers on other Member Nations.[36] However, there are exceptions for when trade barriers and tariffs are acceptable.[37] For example, cases involving the protection of public morals and "human, animal or plant life" permit deviations from the Agreement.[38] Most notably, exceptions like Article XXI address the criticism of the WTO's impingement on sovereignty by allowing Member Nations policymaking space.[39] Nevertheless, the DSB has applied the

29. *Id.*

30. *See* John Williamson, Chief Economist, S. Asia Region at the World Bank, Keynote Address to the Congress of the Sri Lankan Association for the Advancement of Science Colombo, Sri Lanka: Globalization: The Concept, Causes, and Consequences (Dec. 15, 1998), *in* PETERSON INST. FOR INT'L ECON., https://piie.com/commentary/speeches-papers/globalization-concept-causes-and-consequences ("The costs of transport, of travel, and above all the costs of communicating information have fallen dramatically in the postwar period, almost entirely because of the progress of technology. A 3-minute telephone call from the USA to Britain cost $12 in 1946, whereas today it can cost as little as 48 cents, despite the fact that consumer prices have multiplied by over eight times in the intervening period.").

31. *See Seattle: What's at Stake? Concerns . . . and Responses*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/minist_e/min99_e/english/book_e/stak_e_6.htm#unrepresentative (last visited Sept. 24, 2019) [hereinafter *What's at Stake?*] (addressing criticisms of the WTO including assertions that the WTO is an anti-democratic institution that undermines the sovereignty of its members).

32. Press Release, Renato Ruggiero, Dir.-Gen., World Trade Org., Fiftieth Anniversary of the Signing of the General Agreement on Tariffs and Trade (Oct. 27, 1997) (on file with author).

33. *Overview*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm (last visited Sept. 24, 2019).

34. *Id.*

35. G. C. Hufbauer et al., *The GATT Codes and the Unconditional Most-Favored-Nation Principle*, 12 L. & POL'Y INT'L BUS. 59, 59 (1980) (citing SUBCOMMITTEE ON INTERNATIONAL TRADE, 96TH CONG., MTN STUDIES PT. 1: AGREEMENTS BEING NEGOTIATED IN THE MULTILATERAL TRADE NEGOTIATIONS IN GENEVA-U.S. INTERNATIONAL TRADE COMM. INVESTIGATION NO. 33-101, at 28–29 (Comm. Print 1979)).

36. *Understanding the WTO: Principles of the Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#seebox (last visited Sept. 9, 2019).

37. *See, e.g.*, GATT, *supra* note 15, art. XX–XXI.

38. *Id.* art. XX.

39. *See* Peter Lindsay, Note, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 DUKE L. REV. 1277, 1298 (2003) ("These concerns about maintaining the flexibility of the term 'National Security' help to explain why the drafters of GATT knowingly left Article XXI as an ambiguous instrument.").

National Security Exception only once, leaving uncertainty for Member Nations wanting to invoke the provision.[40]

An appropriate interpretation of Article XXI is imperative given the criticism that the WTO faces regarding the impingement of national sovereignty. Since its inception, many have criticized the WTO as an organization that has prioritized free trade and globalization over national sovereignty.[41] Critics claim that as nations surrender authority to the WTO, they are losing their ability to self-regulate and protect themselves from negative market forces.[42] For example, in the United States, "globalization has led to higher levels of unemployment, particularly in manufacturing industries that compete with imports."[43] Protests, including the "Battle of Seattle" in 1999, manifested these criticisms and began the rise of an anti-globalization movement.[44] The movement subsequently spread to Europe, causing fear amongst European leaders.[45] Anti-globalization activists targeted both the WTO's and European Union's authority over its member nations.[46] Much criticism continues to concern developing nations, which the WTO puts at the center of its agenda.[47] Although the WTO itself recognizes that the protection of the sovereignty of developing nations can be improved, the Organization shifts the responsibility to those nations.[48] The WTO argues that "over 30 more countries are lined up to join the WTO [which] does not suggest that they view membership as a risk to their

40. *See* Alford, *supra* note 8, at 699 (stating that for over sixty years, the WTO never made a binding resolution regarding Article XXI); Panel Report, *Russia—Traffic in Transit*, *supra* note 6, ¶ 7.20 ("This is the first dispute in which a WTO dispute settlement panel is asked to interpret Article XXI of GATT 1994.").

41. James McBride, *What's Next for the WTO?*, COUNCIL ON FOREIGN REL. (Mar. 23, 2018), https://www.cfr.org/backgrounder/whats-next-wto.

42. *See* Hans Mahncke, *Sovereignty and Developing Countries: Current Status and Future Prospects at the WTO*, 22 LEIDEN J. INT'L. L. 395, 400 (2009) ("[T]he current system implies a 'race to the bottom', whereby regulatory competition between sovereign states leads to a degradation of, among others, social and environmental standards.").

43. Ralph Gomory & Richard Sylla, *The American Corporation*, 142 DÆDALUS: J. AM. ACAD. ARTS & SCI. 102, 112 (2003) (citing Michael Spence, *Globalization and Unemployment: The Downside of Integrating Markets*, FOREIGN AFF. (July/Aug. 2011), https://www.foreignaffairs.com/articles/united-states/2011-06-02/globalization-and-unemployment).

44. Katherine Casey-Sawicki, *Seattle WTO Protests of 1999*, ENCYCLOPÆDIA BRITANNICA (Nov. 6, 2013), https://www.britannica.com/event/Seattle-WTO-protests-of-1999.

45. Philippe Lemaître, *Anti-globalization Movement Could Throw the EU Off Course*, EUR. INST. (2001), https://www.europeaninstitute.org/index.php/20-european-affairs/fall-2001/640-anti-globalization-movement-could-throw-the-eu-off-course.

46. *Id.*

47. *See* Aurelie Walker, *The WTO Has Failed Developing Nations*, THE GUARDIAN (Nov. 14, 2011, 10:49 AM), https://www.theguardian.com/global-development/povertymatters/2011/nov/14/wto-fails-developing-countries ("Developing countries have been completely sidelined by the economic and political interests of global powers.").

48. *See What's at Stake?*, *supra* note 31 ("None of these points is meant to argue that improvements could not be made. A real problem, for instance, is that some of the smaller developing countries do not have the trained officials and financial resources to participate fully in the WTO's work, and may therefore accept an agreement without fully understanding its significance.").

sovereignty."[49]

C. The Timely Necessity for an Appropriate Interpretation

For the first time in its history, the DSB published a landmark decision regarding the application of Article XXI.[50] Ukraine presented *Russia—Traffic in Transit* to the DSB in September 2016.[51] The dispute first arose in January 2016 when Ukraine implemented the Deep and Comprehensive Free Trade Area (DCFTA) with the European Union.[52] The DCFTA aimed "to boost trade in goods and services between the European Union and Ukraine by gradually cutting tariffs and bringing Ukraine's rules in line with the European Union's in certain industrial sectors and agricultural products."[53] In response to the implementation of the DCFTA, Russia imposed its own trade restrictions, negatively impacting the trade and trafficking of goods from Ukraine.[54] Ukraine brought the case to the DSB alleging that "[a]lmost all the trade affected by the Russian Federation's restrictions on traffic in transit takes place by means of road and railway and passes through the territory of the Russian Federation."[55] Among other allegations, Ukraine complained: (i) "the Russian Federation denies freedom of transit through the territory of the Russian Federation, via the routes most convenient for international transit;"[56] (ii) "as a result of the adoption and application of the measures at issue, traffic in transit coming from Ukraine is subject to unnecessary delays and restrictions;"[57] and (iii) "the charges and regulations imposed by the Russian Federation on traffic in transit from the territory of Ukraine through the measures at issue are not reasonable and have no regard to the conditions of the traffic."[58] Russia argued in favor of an exception for its imposed measures under Article XXI(b),[59]

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49. *Id.*

50. Panel Report, *Russia—Traffic in Transit*, *supra* note 6, ¶ 7.20.

51. Request for Consultations by Ukraine, *Russia—Measures Concerning Traffic in Transit of Ukrainian Products*, WT/DS512/1 (Sep. 14, 2016) [hereinafter Request for Consultations by Ukraine, *Russia—Traffic in Transit*].

52. *Id.* ("The restrictions on traffic in transit that the Russian Federation has recently adopted and implemented following Ukraine's decision to start the implementation of the Deep and Comprehensive Free Trade Area with the European Union on 1 January 2016 constitute measures inconsistent with the Russian Federation's WTO obligations."); *Countries and Regions: Ukraine*, EUR. COMM'N, http://ec.europa.eu/trade/policy/countries-and-regions/countries/ukraine/ (last updated July 22, 2019).

53. *Countries and Regions: Ukraine*, *supra* note 52.

54. *See* Request for Consultations by Ukraine, *Russia—Traffic in Transit*, *supra* note 51 ("The actions of the Russian Federation, in particular the transit restrictions covered by this Request for Consultations, seriously undermine the active efforts of the Ukrainian Government and businesses to open those markets and will impede Ukraine's ability to seize the new opportunities obtained through the WTO accession negotiations.").

55. *Id.*

56. *Id.* (citing GATT, *supra* note 15, art. V(2)).

57. *Id.* (citing GATT, *supra* note 15, art. V(3)).

58. *Id.* (citing GATT, *supra* note 15, art. V(4)).

59. Third-Party Executive Summary of Australia, *Russia—Measures Concerning Traffic in Transit of Ukrainian Products*, ¶ 8, WT/DS512 (Feb. 27, 2018), https://dfat.gov.au/trade/organisations/wto/wto-disputes/Documents/ds512-australian-third-party-executive-summary-270218.pdf.

stating that it enforced sanctions on Ukraine due to political turmoil from 2014.[60] Russia argued that because these restrictions are based on national security concerns, Russia's actions fall outside the jurisdiction of the DSB.[61]

Significantly, the United States sided with Russia and stated its interest as a third party, arguing for the application of a fully discretionary standard.[62] The European Union, also acting as a third party, argued that the standard should be one of good faith.[63] The European Union reasoned that the DSB should use applications of Article XX to interpret Article XXI since both sections were originally drafted together as a single text and were once both subject to the same *chapeau*[64] that currently begins Article XX.[65] The European Union stated that the DSB should use the same rationale that is used to interpret Article XX in which "obligations must be performed in good faith."[66] Finally, after considering the arguments and analyzing the construction and history of the Exception, the DSB concluded that Russia's invocation of Article XXI falls under its jurisdiction.[67] Thus, in determining whether the requirements of Article XXI have been satisfied in good faith, the DSB accepted Russia's justification for invoking the National Security Exception through the use of hypotheticals and vague references to Russia's dispute with Ukraine.[68]

II. ORIGINS OF ARTICLE XXI

As the European Union argued in *Russia—Traffic in Transit*, the earliest drafts of GATT combined Article XX, exceptions for the protection of public morals and "human, animal, and plant life,"[69] and Article XXI into one section.[70] The drafters

60. Panel Report, *Russia—Traffic in Transit*, *supra* note 6, ¶ 7.4.

61. *Id.*

62. *See* Third-Party Oral Statement of the United States, *Russia—Measures Concerning Traffic in Transit of Ukrainian Products*, ¶ 11, WT/DS512 (Jan. 25, 2018) [hereinafter Third-Party Oral Statement of the United States, *Russia—Traffic in Transit*] ("That is, a Member has the discretion and responsibility to make the serious determination, with attendant political ramifications, of what is required to protect the security of its nation and citizens."); *see also infra* Part VII for a discussion of the United States' argument for a fully self-judging standard in *U.S — Steel and Aluminium Products.*

63. *See* Third-Party Oral Statement of the European Union, *Russia—Measures Concerning Traffic in Transit of Ukrainian Products*, ¶ 31, WT/DS512 [hereinafter Third-Party Oral Statement of the European Union, *Russia—Traffic in Transit*] (Nov. 8, 2017) http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156602.pdf ("The *chapeau* is but an [sic] specification of the requirements imposed by the customary international law principle of *pacta sunt servanda*, according to which obligations must be performed in good faith.").

64. Max H. Hulme, *Preambles in Treaty Interpretation*, 164 U. PA. L. REV. 1281, 1308 (2016) ("Article XX consists of an enumerated list of exceptions, introduced by a prefatory statement known as the 'chapeau,' setting out general conditions for the application of those exceptions.").

65. Third-Party Oral Statement of the European Union, *Russia—Traffic in Transit*, *supra* note 63, ¶ 31.

66. *Id.* ¶ 31, 36.

67. *Id.* ¶ 7.104.

68. *Id.* ¶¶ 7.119–.123.

69. GATT, *supra* note 15, art. XX(b).

70. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 741 (1969).

subsequently separated the provisions so that Article XXI would apply to all obligations in the charter.[71] This separation made it so Article XX and XXI were no longer under the same *chapeau*.[72] The original parties to GATT knew that their agreement needed to create measures that would leave space for policymaking concerns such as national security interests.[73] Though Article XXI is seldom invoked,[74] the drafters of GATT understood that there was potential for abuse of Article XXI.[75] The drafters were concerned about striking a balance between national sovereignty and the liberalization of trade.[76]

Notably, the phrase "which [the country] considers necessary" in Article XXI(b) could be interpreted to imply a self-judging standard, allowing more deference to sovereign members of the WTO.[77] However, some argue that the language does not provide a completely self-judging standard, but instead contains both subjective and objective standards.[78] Though no decisions interpreting the language had ever been issued by the DSB or the GATT Panel before April 2019,[79] the Exception had been invoked in a number of cases.[80]

Still, the rare invocation of Article XXI of GATT 1994[81] may be due to a Member Nation's ability to invoke other provisions of GATT 1994. For example, the WTO allows Member Nations to opt out of normal trade relations in cases involving international enemies while opting in to deeper trade relations with allies.[82] Additionally, there are measures "granting preferential treatment to developing countries consistent with security interests, and protecting against the nullification or impairment of Member Nations' legitimate expectations even in the absence of a WTO violation."[83]

III. POTENTIAL INTERPRETATIONS OF ARTICLE XXI

Commentators have regarded the National Security Exception as a "magnificent safeguard clause" that would allow countries to unjustifiably invoke it.[84] While all Member Nations agree that the Exception provided by Article XXI is

71. *Id.* at 742.

72. *See* Hulme, *supra* note 64.

73. Alexandroff & Sharma, *supra* note 14, at 1572.

74. *Id.* at 1573–74.

75. *See id.* at 1572–73 (analyzing how the national security exception contained in Article XXI might lead to protectionist "mischief" among WTO members).

76. *Id.* at 1572.

77. Alford, *supra* note 8, at 704–05 ("Some approaches go further still and contend that the security exception has both objective and subjective elements.").

78. *Id.* at 706 ("Some approaches go further still and contend that the security exception has both objective and subjective elements.").

79. *Id.* at 699; Panel Report, *Russia—Traffic in Transit*, *supra* note 6, □ 7.20.

80. See *infra* Part IV for a discussion of cases concerning Article XXI. *See also* Alexandroff & Sharma, *supra* note 14, at 1574–76 (discussing disputes in which countries invoked Article XXI).

81. Alford, *supra* note 8, at 727.

82. *Id.* at 701.

83. *Id.*

84. *Id.* at 698 (quoting GATT Council, *Minutes of Meeting: Held in the Centre William*

to be used in good faith,[85] there is controversy as to whether the DSB should be able to review whether a party has truly acted in good faith.[86] The DSB may interpret the language of Article XXI in a number of ways by choosing to apply a fully self-judging standard, a partially self-judging standard, or a good faith standard.[87] Because this Comment more closely analyzes the application of Article XXI rather than what elements are modified by the Exception's self-judging language, it will focus largely on the fully self-judging and good faith standards.[88]

A. Fully Self-Judging Standard

The argument for a fully self-judging standard is based on both a textual and historical interpretation of the language of Article XXI.[89] Additionally, the interpretation is based on a nation's inherent ability to make autonomous decisions regarding national security measures.[90] Article XXI(b) provides that GATT 1994 shall not be construed to "prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests."[91] From a textualist point of view, the operative words in the provision are "it considers," where "it" refers to the "contracting party."[92] This would mean that the contracting party, or Member Nation, would exclusively be able to determine whether its actions have satisfied the requirements of Article XXI.[93] When interpreted in the light of the Member Nation's intent, the purpose of the National Security Exception is to allow countries room to create national security policies.[94]

B. Partially Self-Judging Interpretation

Those who believe that Article XXI expresses a partially self-judging standard assert that the language alludes to both subjective and objective standards.[95] First, the language "it considers" is thought to be subjectively determined exclusively by the country.[96] However, Article XXI(b)(i)–(iii) further specifies the scope of the

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Rappard on 7 May 1982, at 12, GATT Doc. C/M/157 (June 22, 1982) (internal quotation marks omitted).

85. *Id.* at 708.

86. *Id.* at 706–07.

87. *See* Alford, *supra* note 8, at 704 (outlining a number of potential interpretations of Article XXI).

88. A partially self-judging interpretation of the language focuses less on the application of Article XXI and more on what elements of the provision are considered self-judging in the first place. Some scholars in favor of a partially self-judging standard believe that Article XXI contains both subjective and objective standards. *Id.* at 706.

89. *Id.* at 705.

90. *See id.* ("[T]he implication of the word 'it' indicates that no WTO Member, nor group of Members [. . .] has any right to determine whether a measure taken by a sanctioning member satisfies the requirements.").

91. GATT, *supra* note 15, art. XXI.

92. Alford, *supra* note 8, at 705.

93. *Id.*

94. Alexandroff & Sharma, *supra* note 14, at 1572.

95. Alford, *supra* note 8, at 706.

96. *Id.* at 705.

National Security Exception.[97] The interests that Member Nations are allowed to protect relate to: (i) fissionable materials or derivations; (ii) the trafficking of war materials that directly or indirectly supply the military establishment; or (iii) times of war or emergency.[98] Using this approach, the enumerated conditions would fall under the judicial scrutiny of the WTO.[99] Those in favor of the partially self-judging approach believe that the language "it considers" does not modify the enumerated conditions.[100] In fact, the DSB applied the partially self-judging approach in *Russia—Traffic in Transit* when it decided that the adjectival clause "which it considers" does not modify Article XXI(b)(iii).[101] As mentioned, this Comment will not discuss the partially self-judging interpretation and which conditions are modified by the self-judging language.

C. Good Faith Standard

With a good faith application, there remains the issue that Member Nations may not give the justification itself in good faith.[102] Under an objective good faith analysis, a national security justification fitting into the allowances of Article XXI ultimately depends on the determination of the Member Nation.[103] However, the DSB would have the power to determine if the actions taken by a Member Nation in making the justification were made in good faith.[104] Such a determination is consistent with the belief that treaties are generally to be upheld in good faith,[105] known as the *pacta sunt servanda* rule under the Vienna Convention on the Law of Treaties (VCLT).[106]

IV. NEAR APPLICATIONS OF ARTICLE XXI

A. The Swedish Shoe Case

World trade scholar John H. Jackson argued that Article XXI is "so broad, self-judging, and ambiguous that it obviously can be abused."[107] He has even claimed

97. GATT, *supra* note 15, art. XXI(b)(i)-(iii).

98. Alford, *supra* note 8, at 703.

99. *Id.*

100. *Id.*

101. Panel Report, *Russia—Traffic in Transit*, *supra* note 6, ¶ 7.82.

102. Alford, *supra* note 8, at 706–07 ("The obligation to interpret a treaty in 'good faith' presents the same problem. No one disputes that nations should invoke in good faith, but who is to judge whether that has occurred: the Member State or the institution?").

103. *Id.* at 704.

104. *Id.*

105. *See id.* at 754 ((quoting Vienna Convention on the Law of Treaties arts. 31-32, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679) [hereinafter VCLT]) ("'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' A rule embedded within a formal treaty that is supported by a formal institution gives it legitimacy, which exerts a pull toward compliance.").

106. VCLT, *supra* note 105, art. 26.

107. Alexandroff & Sharma, *supra* note 14, at 1573 (quoting JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 230 (1997)).

that maintenance of shoe production facilities qualifies for the Exception because "an army must have shoes!"[108] Before the existence of the DSB, the GATT Panel faced this exact issue when Sweden imposed an import quota on footwear in *Sweden—Import Restrictions on Certain Footwear* (*The Swedish Shoe Case*).[109] The Panel nearly addressed the issue of distinguishing an action taken on the basis of a bona fide national security interest from an action performed for commercial purposes.[110] However, before the GATT Panel could decide, Sweden withdrew the quota.[111] While it was never decided, the case exemplifies just how far Article XXI has been stretched.[112]

B. Nicaragua I & II

In *United States—Imports of Sugar from Nicaragua* (*Nicaragua I*), Nicaragua filed a complaint against the United States for violating its WTO obligations after the United States reduced its sugar import quota imposed on Nicaragua.[113] In this case, the United States did not invoke any GATT exceptions; thus, the Panel made no ruling based on such exclusionary provisions.[114] Instead, the United States claimed that the issue was beyond the scope of the GATT Panel.[115] The Panel ruled against the United States.[116]

It was not until *United States—Trade Measures Affecting Nicaragua* (*Nicaragua II*) that the United States justified its actions using Article XXI.[117] In *Nicaragua II*, the United States prohibited all trade by air and sea between itself and Nicaragua.[118] The United States justified its conduct by arguing that its actions were in the interest of national security.[119] The United States also argued that the Exception is self-judging and therefore may not be subject to adjudication.[120] Nicaragua then responded that per a decision issued by the International Court of Justice (ICJ) and two United Nations resolutions, the embargo was a violation of international law.[121]

Ultimately, the GATT Panel refused to rule on the issue due to a stipulation

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108. *Id.*

109. *Id.* at 1574.

110. *Id.*

111. *Id.*

112. *See id.* at 1575 ("The Swedish case represents the 'edge' of the slippery slope in the history of the Article XXI debate that countries have for the most part wisely avoided to date.").

113. Report of the Panel, *United States—Imports of Sugar from Nicaragua*, ¶ 1.1, L/5607 (Mar. 13, 1984), GATT B.I.S.D (31st Supp.), at 67 (1984).

114. *Id.* ¶¶ 3.10, 4.1.

115. *Id.* ¶ 3.11.

116. *Id.* ¶ 4.7.

117. Alexandroff & Sharma, *supra* note 14, at 1576 (citing Report of the Panel, *United States—Trade Measures Affecting Nicaragua*, L/6053 (unadopted Oct. 13, 1986) [hereinafter *Nicaragua II*].).

118. *Nicaragua II*, *supra* note 117, ¶ 1.1.

119. *Id.* ¶ 5.2.

120. *Id.*

121. *Id* ¶ 4.5.

made at the Panel's formation.[122] The Panel only noted that while the United States argued that Article XXI is precluded from the review of the Panel, according to Nicaragua, "this provision should be interpreted in the light of the basic principles of international law and in harmony with the decisions . . . of the [ICJ] and should therefore be regarded as merely providing contracting parties . . . with a right of self-defence."[123] However, "clearly frustrated,"[124] the Panel questioned that "[i]f it were accepted that the interpretation of Article XXI was reserved entirely to the Contracting Party invoking it, how could the [Contracting Parties] ensure that this general exception . . . is not invoked excessively . . . ?"[125] Notwithstanding its worries, the Panel once again avoided directly commenting on the application of Article XXI.

C. US—Helms Burton

In 1996, U.S. President Bill Clinton signed the Helms-Burton Act into law.[126] The Act was intended to tighten the existing embargo on Cuba through various measures.[127] For example, the Act allowed U.S. nationals to sue foreign companies for trafficking in U.S. property that was confiscated by Cuba.[128] The European Union filed a complaint against the United States for violating multiple provisions of GATT 1994, resulting in *United States—The Cuban Liberty and Democratic Solidarity Act* (*US—Helms Burton*).[129] Invoking Article XXI, the United States threatened to not appear before the DSB to resolve the dispute.[130] If the DSB sided with the United States in favor of a fully self-judging provision, many feared that its decision would undermine the recently formed WTO.[131]

On the other hand, the U.S. Congress feared the negative reaction to a perceived impingement of sovereignty if the DSB were to rule in favor of the European Union.[132] However, before this case could result in adjudication by the WTO, the United States and the European Union signed a Memorandum of Understanding resolving the dispute.[133] The issue concerning the application of Article XXI remained unresolved.

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122. *Id.* ¶ 5.2.

123. *Nicaragua II*, *supra* note 117, ¶ 5.2.

124. Alexandroff & Sharma *supra* note 14, at 1576.

125. *Nicaragua II*, *supra* note 117, ¶ 5.17.

126. Alexandroff & Sharma, *supra* note 14, at 1577.

127. *Id.*

128. *Id.*

129. *See* Request for Consultations by the European Communities, *United States—The Cuban Liberty and Democratic Solidarity Act*, WTO Doc. WT/DS38/1 (May 13, 1996) (conveying concern regarding the United States conformity with several GATT provisions).

130. *U.S. Refuses WTO Helm-Burton Authority*, INT'L CTR. FOR TRADE & SUSTAINABLE DEV. (Feb. 24, 1997), https://www.ictsd.org/bridges-news/bridges/news/us-refuses-wto-helm-burton-authority ("[The United States] would not show up [to the panel proceedings] . . . This is a matter that touches on the foreign policy and national security of the United States, as to which no panel is competent.").

131. Alexandroff & Sharma, *supra* note 14, at 1577–78.

132. *Id.*

133. *Id.* at 1578.

V. OTHER SELF-JUDGING RULES IN INTERNATIONAL LAW

A. Background

Self-judging provisions are not exclusive to trade law. Other agreements in international law have included self-judging standards or language that would arguably give rise to a self-judging standard. For example, in 1946, when the United States accepted compulsory jurisdiction under the ICJ, it did so conditionally under what is known as the Connally Reservation.[134] The Reservation states that the ICJ may not have jurisdiction over "matters which are essentially within the domestic jurisdiction of the United States as determined by the United States of America."[135] This reservation[136] allows the United States, and other nations that have included similar clauses, to determine whether a dispute would fall under the jurisdiction of the ICJ, thus preserving the nation's policymaking discretion in domestic cases involving matters, such as immigration.[137] Notably, a nation's jurisdictional reservations may be used against itself when an opponent invokes its reservation by reciprocity.[138] As a result, many nations have repealed such reservations.[139]

Conversely, a self-judging standard is disfavored in international law.[140] Specifically, the VCLT contains a provision which prohibits nations from avoiding treaty obligations on the basis of domestic laws and affairs.[141] The provision has been interpreted to mean that the VCLT reflects a strong opposition to self-judgment.[142] Additionally, Judge Lauterpacht from the ICJ has argued that a self-judging standard "renders [an] entire declaration invalid."[143] The legality of self-judging reservations and standards has remained a controversial topic for years,

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134. Carsten Stahn, *Connally Reservation*, OXFORD PUB. INT'L L., https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e23.

135. Declaration by the United States on Recognition of ICJ's Compulsory Jurisdiction, Aug. 14, 1946, 61 Stat. 1218, 1 U.N.T.S. 9.

136. Some criticized the Connally Reservation stating that while there is no objection toward the reservation of disputes falling under domestic jurisdiction, some disputes should fall under the jurisdiction of the ICJ. *See* Lymon M. Tondel, Jr., *The Connally Reservation Should be Repealed*, 46 A.B.A. J. 726, 727 (1960) ("What a striking advance towards such unity it would be if the United States and the other friendly nations were to submit all international legal disputes with each other to the International Court of Justice. If we don't stockpile experience in the peaceful settlement of international disputes with our friends what hope do we have of ever avoiding war?").

137. Stahn, *supra* note 134.

138. *See, e.g.*, Case of Certain Norwegian Loans (Fr. v. Nor.), Judgment, 1957 I.C.J. 20, at 27 (July 6) (finding no jurisdiction to resolve a dispute after Norway, France's opposing party, invoked the French reservation by reciprocity).

139. Stahn, *supra* note 134.

140. DIANE A. DESIERTO, NECESSITY AND NATIONAL EMERGENCY CLAUSES: SOVEREIGNTY IN MODERN TREATY INTERPRETATION 212 (Loretta Malintoppi & Eduardo Valencia-Ospina eds., 2012).

141. *Id.*

142. *Id.* (citing Veteran Petroleum v. Russian Federation (Cyprus v. Russ.) Perm. Ct. Arb. Case No. AA 228, Interim Award on Jurisdiction and Admissibility, ¶ 316 (Nov. 20, 2009)).

143. J. Patrick Kelly, *The International Court of Justice: Crisis and Reformation*, 12 YALE J. INT'L L. 342, 355 (1987).

especially for the ICJ.[144]

Because of the aversion to self-judgment, international tribunals rarely grant discretion to nations unless such discretion is otherwise expressly indicated in a treaty.[145] Currently, there are few acceptable circumstances in which a nation may use a self-judging standard.[146] Thus, for a self-judging standard to be considered, an indication should be made with the use of phrases such as "that the State considers," similar to the language of the National Security Exception.[147]

B. Attempts to Invoke a Self-Judging Rule

1. Military and Paramilitary Activities in and Against Nicaragua

In an effort to eradicate communism in Nicaragua, the United States aligned with the anti-communist regime known as the "contrarrevolucionarios," or the "contras."[148] In December 1981, U.S. President Ronald Reagan made United States involvement official.[149] Nicaragua claimed that the United States unlawfully supported the contras as a force against it and that the United States' support was an "unlawful intervention in its internal affairs."[150] This intervention led to the ICJ case *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua*),[151] in which Nicaragua claimed that the United States violated international obligations, including those in the 1956 Treaty of Friendship, Commerce and Navigation (TFC).[152]

After unsuccessfully challenging the jurisdiction of the ICJ, the United States refused to appear before the Court.[153] The United States did not utilize the Connally Reservation in this case.[154] Instead, the United States invoked Article XXI of the TFC which states that the Treaty shall not preclude measures that are "necessary to fulfill the obligations of a Party for the maintenance or restoration of international

144. *Compare* Interhandel Case (Switz. v. U.S.), Judgment, 1959 I.C.J. 6, at 23–26 (Mar. 21) (finding that the Conallay Rule had no effect because the dispute was one of international, not domestic, law) *with* Fr. v. Nor., Judgment, 1957 I.C.J. at 27 (finding no jurisdiction under the French self-judging reservation invoked by the opposing party, Norway).

145. DESIERTO, *supra* note 140, at 213.

146. *Id.*

147. *Id.*

148. Jörg Kammerhofer, *The US Intervention in Nicaragua—1981–88*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH 342, 342 (Tom Ruys et al. eds., 2018).

149. *Id.*

150. James R. Crawford, *Military and Paramilitary Activities in and Against Nicaragua Case (Nicaragua v. United States of America)*, OXFORD PUB. INT'L L., http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e170 (last updated Jan. 2019).

151. *Id.*

152. Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U. J. INT'L L. & POL. 437, 471–72 (2008) (citing Treaty of Friendship, Commerce, and Navigation, U.S.-Nicar., art. XXI(1), Jan. 21, 1956, 9 U.S.T. 449 [hereinafter TFC]).

153. *Id.* at 471.

154. Stahn, *supra* note 134 (citing Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 67 (June 27)).

peace and security."[155] The United States argued that the Court should interpret this language as self-judging.[156]

The ICJ rejected the United States' arguments by instead holding that Article XXI of the TFC did not preclude the Court's jurisdiction over the matter at hand.[157] First, the Court established that Article XXIV of the TFC states that disputes in "interpretation or application" under the TFC fall within the jurisdiction of the Court.[158] The Court reasoned that "Article XXI [of the TFC] defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but [the Treaty] by no means removes the interpretation and application of [the disputed] article from the jurisdiction of the Court as contemplated in Article XXIV."[159] The Court then continues to distinguish the language of the TFC with GATT by explaining that the TFC "speaks simply of 'necessary' measures, not of those considered by a party to be such."[160]

In conclusion, the ICJ found that Article XXI of the TFC is not self-judging by reasoning that its language is distinguishable from the language in Article XXI of GATT 1994.[161] The Court noted a clear contrast between Article XXI of the TFC and Article XXI of GATT by highlighting the fact that GATT contains language to indicate that the tribunal shall leave discretion to the nation invoking the provision.[162] The decision caused the United States to react negatively and completely terminate its acceptance of compulsory jurisdiction under the ICJ in 1985.[163]

2. Sempra Energy International v. The Argentine Republic

After a U.S. corporation brought a claim against Argentina to the World Bank Group's International Centre for Settlement and Investment Disputes (ICSID), which facilitates the arbitration of disputes involving international investment,[164] Argentina argued that particular provisions in an investment treaty should be interpreted as self-judging.[165] In *Sempra Energy International v. The Argentine Republic*, Sempra invested funds in two Argentine gas companies.[166] During this

155. Rose-Ackerman & Billa, *supra* note 152 (quoting TFC, *supra* note 152).

156. Nicar. v. U.S., Judgment, 1986 I.C.J. ¶ 224.

157. *Id.* ¶ 222.

158. *Id.* (quoting TFC, *supra* note 152, art. XXIV(2)).

159. *Id.*

160. *Id.*

161. *Id.*

162. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 222 (June 27).

163. Stahn, *supra* note 134 (citing George P. Shultz, *United States: Department of State Letter and Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction*, 24 INT'L LEGAL MATERIALS 1742, 1742 (1985)).

164. *ICSID and the World Bank Group*, INT'L CTR. FOR SETTLEMENT INV. DISPS., https://icsid.worldbank.org/en/Pages/about/ICSID%20And%20The%20World%20Bank%20Group.aspx (last visited Nov. 28, 2019).

165. Sempra Energy Int'l v. Arg. Republic, ICSID Case No. ARB/02/16, Objections to Jurisdiction, ¶ 130 (May 11, 2005).

166. *Id.* ¶ 1.

time, the Argentine government enacted legislation that was aimed at attracting foreign investors.[167] However, following the economic crisis in Argentina during the 2000s, the government abrogated the legislation, resulting in the loss of profits for U.S. investors like Sempra.[168] In 2002, Sempra invoked provisions within the 1991 bilateral investment treaty made between the United States and Argentina (Argentina-US BIT).[169]

Sempra claimed that Argentina had breached several provisions of the Argentina-US BIT, including one that guarantees the fair treatment of foreign investments.[170] In response, Argentina invoked Article XI of the Argentina-US BIT which asserts that the Treaty "shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."[171] Argentina argued that the provision is a self-judging one because "public order and national security exceptions have to be interpreted broadly . . . so as to include considerations of economic security and political stability."[172] However, Argentina recognized that when the tribunal agrees to settle a dispute on this point, the tribunal evaluates whether either nation's invocation of Article XI was made in good faith.[173]

Conversely, Sempra cited the ICJ *Nicaragua II* judgment to illustrate the extraordinary circumstances when a self-judging standard would apply.[174] Sempra also referenced the language in GATT,[175] arguing that the self-judging interpretation would "result in the creation of a broad and sweeping exception to the obligations established under the Treaty, and would eviscerate the very object and purpose of this kind of treaty."[176] It further argued that Article XI did not apply to economic emergencies but rather to internal security.[177]

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167. Daniel A. Krawiec, *Sempra Energy International v. The Argentine Republic: Reaffirming the Rights of Foreign Investors to the Protection of ICSID Arbitration*, 15 L. & BUS. REV. AM. 311, 333 (2009).

168. Sempra Energy Int'l, ICSID Case No. ARB/02/16, Objections to Jurisdiction, ¶ 1.

169. *Id.*

170. *Id.*; Sempra Energy Int'l v. Arg. Republic, ICSID Case No. ARB/02/16, Award, ¶ 321 (Sept. 28, 2007); s*ee* Treaty Concerning the Reciprocal Encouragement and Protection of Investment, art. II(2)(a), Arg.-U.S., Nov. 14, 1991, T.I.A.S. No. 94–1020 [hereinafter Bilateral Investment Treaty] ("Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.")).

171. Sempra Energy Int'l, ICSID Case No. ARB/02/16, Award, ¶¶ 365–66 (citing Bilateral Investment Treaty, *supra* note 170, art. XI).

172. *Id.* ¶ 366.

173. *Id.*

174. *Id.* ¶ 369.

175. *Id.* ("It is also maintained that a self-judging clause is an extraordinary exception that has to be clearly stated, as has been done in Article XXI of the GATT and confirmed by the International Court of Justice in the *Nicaragua* case in rejecting an argument of the U.S. similar to the one advanced here by Argentina.")

176. *Id.* ¶ 372.

177. *Id.*

The ICSID agreed with Sempra, emphasizing the fact that the language of the provision is essential to determining whether a provision is self-judging.[178] The ICSID pointed to GATT and *Nicaragua*, saying that the language must be "precise" to imply a self-judging rule,[179] noting that "[i]n those decisions, the fact that the language was not express turned out to be crucial to the rejection of arguments favoring a self-judging interpretation."[180] Finally, the ICSID highlighted that "not even in the context of GATT Article XXI is the issue considered to be settled in favor of a self-judging interpretation, and the very fact that such article has not been excluded from dispute settlement is indicative of its non-self-judging nature."[181]

C. Successful Invocation of a Self-Judging Rule: Djibouti v. France

The successful invocation of a self-judging rule can be seen in a case involving the murder of prominent judge, Bernard Borrel.[182] Judge Borrel served as an advisor to the Djiboutian Minister of Justice before officials found his charred corpse on October 19, 1995.[183] Djiboutian officials initially ruled his cause of death to be suicide.[184] However, Judge Borrel's widow insisted that officials investigate his death as a murder.[185] In 1996, Ms. Borrel requested an investigation into the death of her husband.[186] Later in 2003, Ms. Borrel accused the Djiboutian government of involvement in Judge Borrel's death, to which Djibouti responded: "the French State is pursuing a sole and single objective: destabilizing a country."[187] Djibouti then presented a letter rogatory to France requesting the transmission of the French investigation file into Judge Borrel's death.[188] France did not execute the letter rogatory.[189]

In response, Djibouti filed a dispute against France for breach of its international obligation under the Convention on Mutual Assistance of Criminal Matters for failing to execute the letter rogatory, which led to the ICJ case *Djibouti v. France*.[190] In *Djibouti*, France invoked Article 2(c) of the Convention Concerning Judicial Assistance in Criminal Matters, which states that a nation may refuse to assist in criminal matters "if the requested *State considers* that the execution of the

178. *Id.* ¶ 383.

179. *Id.*

180. *Id.*

181. *Id.* ¶ 384 (citing MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION 594–98 (2d ed. 2006)).

182. Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), Application Instituting Procedures, 2006 I.C.J. 136, ¶ 6 (Jan. 9).

183. *Id.*

184. *Id.*

185. *Id.* ¶¶ 7–8.

186. *Id.* ¶ 7.

187. *Id.* ¶ 11.

188. Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), Application Instituting Procedures, 2006 I.C.J. 136, ¶¶ 12–13 (Jan. 9).

189. *Id.* ¶ 13.

190. Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), Judgment, 2008 I.C.J. 177, ¶ 1 (June 4).

request is likely to prejudice its sovereignty, its security, its *ordre public* or other essential interests of the nation."[191] Djibouti recognized the discretion provided by Article 2(c) but argued that, even with such discretion, the ICJ should base the invocation on a standard of reasonableness and good faith.[192] In addition, Djibouti noted that it is insufficient to plainly cite Article 2(c).[193] Instead, it argued that France was required to provide reasons for invoking Article 2(c).[194]

In beginning its analysis of Article 2(c), the ICJ generally cited *Nicaragua* as one of the cases that involved a provision that gave wide discretion to the state invoking the provision.[195] The ICJ reasoned that France would need to prove that the invocation was made in good faith based on the obligation of implied good faith in the VCLT.[196] In applying this standard, the ICJ required France to provide a reason as to why they did not execute the letter rogatory.[197] France argued that the failure to execute the letter rogatory was based on defense secrets and confidential information on file.[198] The ICJ noted that the justification France gave in the *soit-transmis*[199] was initially insufficient, yet the "written and oral pleadings of France [informed] the Court . . . that the intelligence service documents and information permeated the entire file."[200] The Court accepted this justification, exemplifying the limited extent of a good faith basis review.[201]

VI. ANALYSIS

Before *Russia—Traffic in Transit*, the DSB never issued a decision interpreting Article XXI.[202] With other cases involving Article XXI before the DSB, such as *United States—Certain Measures on Steel and Aluminium* (*US—Steel and*

191. Convention Concerning Judicial Assistance in Criminal Matters, Fr.-Djibouti, Sept. 27, 1986, 1695 U.N.T.S 297 (emphasis added).

192. Djib. v. Fr., Judgment, 2008 I.C.J. 177, ¶ 135.

193. *Id.*

194. *Id.*

195. *Id.* ¶ 145.

196. *Id.* ("The Court begins its examination of Article 2 of the 1986 Convention by observing that, while it is correct, as France claims, that the terms of Article 2 provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties. . . . This requires it to be shown that the reasons for refusal to execute the letter rogatory fell within those allowed for in Article 2.").

197. *Id.* ("This requires it to be shown that the reasons for refusal to execute the letter rogatory fell within those allowed for in Article 2."); Robyn Briese & Stephan W. Schill, *Djibouti v. France: Self-Judging Clauses before the International Court of Justice*, 10 MELB. J. INT'L L. 308, 318 (2009).

198. *Id.* ¶ 137 ("France claims that the protection of defence secrets falls under the grounds set out in Article 2 [(c)] of the Convention of 1986. To justify the non-transmission of even a part of the file, France contends that the declassified notes were used by the investigating judge in such a way that the information they contain runs through the whole of the file, and that therefore, it was not possible to transmit a file from which they had simply been removed.").

199. Translated as "an order." *Id.* ¶ 28.

200. *Id.* ¶ 148.

201. Briese & Schill, *supra* note 197, at 317–18.

202. Alford, *supra* note 8, at 699.

Aluminium Products (China)), there remains a lack of guidance as to how the DSB should approach the interpretation of Article XXI. Legally, the DSB should follow a good faith standard. However, following a good faith standard of review poses a separate question as to whether this standard is the most appropriate from a practical perspective.

A. Good Faith as a Matter of Legality

The DSB should approach the interpretation of Article XXI through the application of a good faith standard. Legally, the good faith standard is the most appropriate as evidenced by the history of Article XXI and the interpretation of other self-judging rules in international law.

The interpretation of Article XXI can be divided into two steps: (i) determining whether the language allows for some sort of self-judging standard; and (ii) determining the application of such standard. The need for such a division can be seen through cases such as *Sempra Energy International*, *Nicaragua*, and *Djibouti*. In *Sempra Energy International* and *Nicaragua*, the courts only determined whether the language implicated a self-judging standard, not addressing the question of how that standard should be applied.[203] In contrast, the Court in *Djibouti* acknowledged that the language of Article 2(c) of the Convention Concerning Judicial Assistance in Criminal Matters contained a self-judging clause; however, the Court's concern related to how the language should be applied.[204] Likewise, the DSB faces a similar question.[205]

1. Determining Whether Article XXI Contains Self-Judging Language

First, the DSB should find that the language calls for a self-judging standard. As noted in *Nicaragua* and *Sempra Energy International*, key language such as "it considers" is necessary to trigger a self-judging standard.[206] It follows that there is no presumption of a self-judging standard. Instead, agreements use explicit and purposeful language. In the case of Article XXI, the drafters made it clear that the Exception is to be self-judging.[207] Thus because, the language in Article XXI is inarguably recognized as self-judging, controversy usually only surrounds its application as seen in the *Swedish Shoe Case*, *Nicaragua II*, and *US—Helms Burton*.[208] The language of Article XXI clearly and explicitly calls for a self-judging

203. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 222 (June 27); Sempra Energy Int'l v. Arg. Republic, ICSID Case No. ARB/02/16, Award, ¶ 372 (Sept. 28, 2007).

204. Djib. v. Fr., Judgment, 2008 I.C.J. ¶ 137 (explaining that the concern was how the language of Article 2(c) should be applied while acknowledging the language triggers "a self-judging clause").

205. *See id.* (concerning how Article 2(c) should be interpreted regarding the self-judging clause).

206. Nicar. v. U.S., Judgment, 1986 I.C.J. 14, ¶ 222; Sempra Energy Int'l, ICSID Case No. ARB/02/16, Award, ¶ 383.

207. Alford, *supra* note 8, at 702 (citing Thirty-Third Meeting of Commission, *supra* note 19).

208. See *supra* Part IV for an analysis of past invocations of Article XXI.

rule through the words "which it considers necessary."[209] Specifically, Article XXI states that the DSB may excuse a Member Nation from complying with certain GATT 1994 obligations which "it considers contrary to its essential security interests" or "it considers necessary for the protection of its essential security interests."[210]

When the DSB finds that the language calls for a self-judging standard, it will then need to decide whether the standard should be applied as a fully self-judging standard or a partially self-judging standard. The DSB recently made its position clear in *Russia—Traffic in Transit* when it applied a partially self-judging approach, deciding that the adjectival clause "which it considers" does not modify the enumerated paragraph "taken in time of war or other emergency in international relations" under Article XXI(b)(iii).[211] As discussed previously, this Comment focuses on whether the appropriate standard is fully self-judging or one of good faith "regardless of which enumerated paragraphs are modified by the self-judging language." To determine which standard applies, the factors previously discussed should be considered, including the history of Article XXI, prior uses of the Exception, and the use of other self-judging rules in international law. Based on these factors, the DSB should analyze Article XXI under the limited review of a good faith standard.

2. Determining the Application of the Self-Judging Rule

History and intent support a good faith standard of review of Article XXI. In its third-party submission for *Russia—Traffic in Transit*, the European Union referred to the drafting history of Article XX and XXI.[212] The European Union urged the DSB to look to the interpretation of Article XX of GATT 1994 for guidance.[213] The European Union reasoned that interpretation of Article XX should be used to construe Article XXI since the provisions were originally drafted as a single text and subject to the same *chapeau*.[214] The European Union noted that the Appellate Body has ruled that the objective of the *chapeau* in Article XX is to prevent abuse.[215] Because of this, the European Union attempted to persuade the DSB that a good faith standard should apply.[216]

On the other hand, if the drafters had intended Article XXI to be under the original *chapeau*, they would not have separated the provisions. They would have also included a similar *chapeau* with Article XXI.[217] The European Union

209. GATT, supra note 15, art. XXI.

210. *Id.*

211. Panel Report, *Russia—Traffic in Transit*, *supra* note 6, ¶ 7.82.

212. *See* Third-Party Oral Statement of the European Union, *Russia—Traffic in Transit*, *supra* note 63 (comparing the structure of the two articles).

213. *Id.* ¶¶ 30–36.

214. *Id.*¶¶ 34–35.

215. *Id.* ¶ 36 (citing Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 156, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998) (adopted Nov. 6, 1998)).

216. *Id.*

217. Third-Party Oral Statement of the European Union, *Russia—Traffic in Transit*, *supra*

recognized this and argued that it "does not mean that Members enjoy unfettered discretion under Article XXI."[218] Consequently, the fact that Article XXI is not under the *chapeau* does not exclusively preclude the implication of good faith. For example, a presumption of good faith can be applied through the VCLT.[219] The VCLT prefers good faith over self-judgment.[220] In other words, the entirety of treaties, such as GATT 1994, include a presumption that nations are to abide by its terms in good faith. This indicates that the DSB should apply a good faith standard in cases involving Article XXI.

Next, a good faith standard is also supported by the apparent intention of the drafters of Article XXI. While the drafters intentionally created the provision to be broad, they still recognized that they could not make it "so broad that, under the guise of security, countries will put on measures which really have a commercial purpose."[221] By admitting their concern about abuse of the Exception, the drafters infer that some limitation may be necessary in applying Article XXI.

Finally, it is not unusual for international tribunals to look to other organizations in order to identify how other courts have adjudicated similar cases. In fact, in *Nicaragua II*, Nicaragua urged the DSB to interpret Article XXI "in the light of the basic principles of international law and in harmony with the decisions . . . of the International Court of Justice."[222] Additionally, the ICSID in *Sempra Energy International* cited the ICJ in *Military and Paramilitary Activities in and Against Nicaragua*.[223] Thus, in adjudicating Article XXI cases, the DSB could cite the ICJ decision in *Djibouti*.

In *Djibouti*, the ICJ applied a good faith interpretation of a self-judging clause based on the good faith implication of treaties through the VCLT.[224] The ICJ required France to explain why it breached its international obligations.[225] The ICJ found the justification sufficient under the limited good faith standard of review.[226] The DSB should follow the reasoning of the ICJ in *Djibouti* by requiring a justification for the invocation of Article XXI. As in *Djibouti*, a good faith review would not require the DSB to investigate the specifics, details, or substance of an asserted justification. Rather, the panel may simply inquire whether a Member

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note 63, ¶ 35 ("The fact that Article XXI does not include language equivalent to the *chapeau* of Article XX suggests that the drafters intended to accord wider discretion to Members when adopting measures baed [sic] on the security grounds cited in Article XXI.").

218. *Id.*

219. VCLT, *supra* note 105, arts. 31–32.

220. DESIERTO, *supra* note 140, at 212.

221. WORLD TRADE ORG., GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 554 (6th ed. 1994).

222. *Nicaragua II*, *supra* note 117, ¶ 5.2.

223. Sempra Energy Int'l v. Arg. Republic, ICSID Case No. ARB/02/16, Award, ¶¶ 369, 382–83. (Sept. 28, 2007).

224. Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), Judgment, 2008 I.C.J. 177, ¶ 202 (June 4).

225. Briese & Schill, *supra* note 197.

226. *Id.*

Nation has invoked the Exception in good faith.[227]

B. Criticism of Good Faith as a Matter of Practicality

A good faith standard is by no means a perfect solution, but it is the most practical solution considering the concurrent risks of the Exception's potential for abuse and the minimizing of WTO's authority and legitimacy. There are very few solutions for closing the large loophole that Article XXI creates.[228] On one hand, a reporting requirement obligating Member Nations to disclose justifications for invoking Article XXI would be counterproductive given the confidential nature of national security matters.[229] On the other hand, applying a fully self-judging standard gives Member Nations unfettered discretion, which could result in abuse of the National Security Exception, thus potentially undermining the legitimacy of the WTO.[230]

While there are difficulties in applying Article XXI using a good faith standard, the difficulties in its application are outweighed by the negative consequences of allowing countries complete and unfettered discretion. These practical difficulties are seen in *Russia—Traffic in Transit*. As a third party, the United States argued that the dispute cannot be adjudicated because "there are no legal criteria by which the issue of a Member's consideration of its essential security interests can be judged."[231] For example, in justifying its good faith invocation of Article XXI, Russia argued that the invocation was based on an emergency in international relations "well known to Ukraine."[232] Ukraine professed "not to know what Russia means."[233] Still, considering that the fully self-judging standard prohibits the WTO from reviewing all actions taken by Member Nations, the good faith standard is the most practical solution because it gives the WTO some authority in balancing the Organization's legitimacy with the preservation of national sovereignty.

With the use of a good faith standard, a Member Nation would only need to give a justification to the DSB.[234] In *Russia—Traffic in Transit*, Russia pointed out particular factors the DSB could consider in its good faith review including the time period in which the emergency arose, the fact that the dispute involved border security between Russia and Ukraine, the fact that other countries have imposed sanctions against Russia, and the fact that the dispute was known to the public.[235] The ICJ took a similar approach in *Djibouti* when it accepted France's justification

227. *See* Djib. v. Fr., Judgment, 2008 I.C.J. 177, ¶¶ 147–48 (noting that France argued that the failure to execute the letter rogatory was based on defense secrets and confidential information on file under Article XXI. The Court noted that the justification was sufficient under the provision).

228. JACKSON, *supra* note 70, at 748.

229. *Id.*

230. *See* Alford, *supra* note 8, at 702 (arguing that a self-judging exception carries risks of abuses that could undermine WTO).

231. Panel Report, *Russia—Traffic in Transit*, *supra* note 6, ¶ 7.52.

232. *Id.* ¶ 7.112.

233. *Id.* ¶ 7.113 n.192.

234. *See id.* ¶ 7.134 (noting that Russia must give a justification for the invocation of Article XXI).

235. *Id.* ¶ 7.119.

that the letter rogatory could not be executed given the confidential information that permeated most of the file.[236] Although good faith allows for a low standard of review, the standard provides the WTO with the opportunity to review *some* actions by the Member Nations. In following the application of a good faith standard in *Djibouti*, the DSB would not analyze the substance of the justification or whether the security measure was appropriate.[237] Instead, the DSB would ensure that measures are made in good faith while refraining from scrutinizing a Member State's national security policy.

Critics argue that a good faith standard does not fully solve the issue of potential threats to the WTO, even though it is legally the most appropriate approach in applying the National Security Exception.[238] Considering the negative implications on legitimacy by using a purely self-judging standard, it is preferable to maintain an objective good faith standard rather than a purely discretionary standard.[239] The use of a good faith standard gives the WTO a voice in trade disputes that it would not otherwise have with a fully self-judging standard, thus enhancing the perception of legitimacy that accompanies the creation of formalities.[240]

Since the creation of GATT and the WTO, nations have used great discretion in invoking Article XXI.[241] The minds of skeptics have been put at ease by this fair judgment, which suggests that the National Security Exception has yet to be abused.[242] Until recently, "[i]n over sixty years of international trade, invocations of the security Exception have only been challenged a handful of times, and those challenges have never resulted in a binding GATT/WTO decision."[243] Because Member Nations already exercise great discretion in invoking Article XXI,[244] a decision in favor of a good faith standard may not change the invocation of the provision going forward. Alternatively, adopting a good faith standard may incentivize the invocation of other GATT provisions if Member Nations want to avoid justifying their security measures. This means that Member Nations may only turn to Article XXI when other alternatives that GATT provides cannot be used.[245]

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236. Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), Judgment, 2008 I.C.J. 177, ¶ 148 (June 4).

237. *See id.* ¶ 145 ("[The self-judging standard] requires it to be shown that the reasons for refusal to execute the letter rogatory fell within those allowed.").

238. *See* Alford, *supra* note 8, at 702 ("[A] self-judging security exception poses grave risks. If abused, it could undermine the entire WTO regime. But the practice of the WTO Member States is to invoke the security exception in good faith, with a margin of discretion.").

239. *Id.* at 702.

240. *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2529, 2628–29 (1997) (citing THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24–26 (1990)) (noting that legitimacy may be derived from symbolic validations which are founded upon formalities and rituals).

241. *See* Alford, *supra* note 8, at 699 (noting that nations have generally avoided controversial uses of Article XXI).

242. *Id.* (discussing the Norwegian Chairman and his opinion that the atmosphere of GATT is efficient and acts as a guarantee to prevent abuses).

243. *Id.*

244. *See id.* (noting present state practice to avoid controversial applications of Article XXI).

245. *Id.* at 725–26.

The formality of requiring a justification by applying a good faith standard creates an additional obstacle for Member Nations who plan on invoking Article XXI. Though not an infallible method of detecting abuse, review under this standard would further reiterate that Member Nations must invoke the Exception in good faith.

VII. TIMELY APPLICATIONS OF ARTICLE XXI: US—STEEL AND ALUMINIUM PRODUCTS (CHINA)

How will the DSB adjudicate future cases that involve the sensitive balance between national sovereignty and protection of free trade as well as the legitimacy of the WTO? In March 2018,[246] in an effort to combat China's advances in trade,[247] President Donald J. Trump imposed tariffs on the importation of steel and aluminum from China and other countries under Section 232 of the Trade Expansion Act of 1962.[248] The imposition of tariffs on steel led some critics to accuse President Trump of protectionism.[249] Within one month of the imposition of the new tariffs, China filed a complaint with the WTO accusing the United States of violating provisions of GATT 1994 in *US—Steel and Aluminium Products (China)*.[250]

The United States may raise Article XXI as a defense.[251] Considering that the United States championed the liberalization of trade but feared, and continues to fear, the interference with national security and sovereignty from trade rules,[252] it should come as no surprise that U.S. delegates played a key role in drafting Article

246. Chad P. Bown & Melina Kolb, *Trump's Trade War Timeline: An Up-to-Date Guide*, PETERSON INST. FOR INT'L ECON. (Sept. 20, 2019, 12:00 PM), https://piie.com/blogs/trade-investment-policy-watch/trump-trade-war-china-date-guide.

247. The industrialization of China negatively impacted the United States, especially in manufacturing. This resulted in an "enormous imbalance of trade, as imports from China are not balanced by a roughly equivalent counterflow of exports from the United States." Gomory & Sylla, *supra* note 43, at 110.

248. 19 U.S.C. § 1862 (1964); Heather Long, *Winners and Losers from Trump's Tariffs*, WASH. POST (Mar. 6, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/03/06/winners-and-losers-from-trumps-tariffs/.

249. Protectionism is defined as "the imposition of barriers to international trade by government entities. These barriers usually involve either taxes on imports—that is, tariffs—or quantitative restrictions limiting the volume of legally allowable imports of particular goods—or quotas—to achieve various economic and political targets." Xiaokai Yang & Dingsheng Zhang, *Protectionism*, *in* 1 GLOBALIZATION: ENCYCLOPEDIA OF TRADE, LABOR, AND POLITICS 247 (Ashish K. Vaidya, ed., 2006); *Trade Wars, Trump Tariffs and Protectionism Explained*, BBC NEWS (May 10, 2019), https://www.bbc.com/news/world-43512098.

250. Request for Consultations by China, *United States—Certain Measures on Steel and Aluminium*, WTO Doc. WT/DS544/1 (Apr. 9, 2018) [hereinafter Request for Consultations by China, *US—Steel and Aluminium Products*].

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

252. See *infra* Part VII for discussion of the national concerns the United States highlighted during the accession of China to the WTO.

XXI.[253] In an additional effort to advocate for a fully self-judging standard, the United States, as a third party, supported Russia in *Russia—Traffic in Transit.*[254] In doing so, the United States argued that Article XXI completely bars the DSB from making findings on the merits of the case.[255] On the other hand, the European Union argued, that the DSB should interpret Article XXI similarly to Article XX which, at the very least, includes a standard of good faith.[256]

As discussed, the DSB has several alternative approaches available to interpret Article XXI.[257] If *US—Steel and Aluminium Products (China)* were to be reviewed under the good faith standard, the DSB would likely find the standard satisfied. Like in *Russia—Traffic in Transit*, the DSB here will likely find that the tariffs are justified. While critics argue that President Trump imposed the tariffs for the protection and growth of the domestic steel industry,[258] the DSB may consider the fact that the steel industry has always been an important factor during times of war, specifically in the history of the United States.[259] China may submit that, during his campaign, President Trump attributed the troubles in the steel industry to globalization and unfair trade practices.[260] Specifically targeting China, President Trump accused the country of perpetrating one of the "greatest thefts in the history of the world."[261] However, the United States could respond by pointing out that the sentiment that U.S. companies are struggling to compete with foreign companies in industrializing nations predates the Trump Administration.[262]

In particular, ever since China's admission to the WTO in 2002, the United States has been concerned about trade issues with China and national security risks involving the steel industry.[263] The steel industry, especially during times of war,

253. Alford, *supra* note 8, at 698.

254. *See* Third-Party Oral Statement of the United States, *Russia—Traffic in Transit*, *supra* note 62, ¶ 5 (arguing in an oral statement that the WTO should interpret Article XXI as a fully "self-judging standard" in which its invocation is not subject to review by the DSB).

255. *Id.*

256. Third-Party Oral Statement of the European Union, *Russia—Traffic in Transit*, *supra* note 63, ¶ 31.

257. See *supra* Part III for a discussion of several potential interpretations of Article XXI.

258. *Trade Wars, Trump Tariffs and Protectionism Explained*, *supra* note 249.

259. See *infra* notes 265–68 and accompanying text for a discussion of the importance of steel to U.S. national security defense.

260. Molly Ball, *Why Trump's 'Forgotten Man' Still Supports Him*, TIME (Feb. 15, 2018), http://time.com/5159859/why-trumps-forgotten-man-still-supports-him/.

261. Veronica Stracqualursi, *10 Times Trump Attacked China and Its Trade Relations with the US*, ABC NEWS (Nov. 9, 2017, 7:55 AM), https://abcnews.go.com/Politics/10-times-trump-attacked-china-trade-relations-us/story?id=46572567.

262. *See* Gomory & Sylla, *supra* note 43, at 111 (noting laments about declining American manufacturing).

263. *See* REPORT TO CONGRESS OF THE U.S.-CHINA SECURITY COMMISSION: THE NATIONAL SECURITY IMPLICATIONS OF THE ECONOMIC RELATIONSHIP BETWEEN THE UNITED STATES AND CHINA 70–72, 83 (2002) [hereinafter REPORT TO CONGRESS OF THE U.S.-CHINA SECURITY COMMISSION] (expressing concern with China joining the WTO).

such as World War II,[264] has been essential to the prosperity of the United States.[265] Thus, the idea to impose such tariffs and use Article XXI as a defense did not originate with the Trump Administration.[266] In fact, Congress previously released a report outlining the national security issues with China joining the WTO.[267] That report included a number of recommendations addressing the same industry that was later targeted by the Trump Administration in 2018: the steel industry.[268] It states that "[t]he Commission believes that the steel industry is a likely candidate for using Article XXI."[269] Like the DSB in *Russia—Traffic in Transit*, the DSB in *US—Steel and Aluminium Products (China)* would find that the invocation of Article XXI is in good faith. The DSB would not need to investigate beyond the justification the United States provides, thereby protecting the sovereignty and discretion of the United States over sensitive issues such as national security.

As far as practicality is concerned, many argue that if the WTO were to rule against the United States, there is a chance that the United States would do something that no nation has done before—[270]back out of GATT, consequently weakening the power of the WTO.[271] In fact, President Trump himself has threatened to withdraw the United States from the WTO if "[the WTO does not] shape up."[272] The same concerns arose in the dispute over the Helms-Burton Act of 1996 between the European Union and the United States in *US—Helms Burton*.[273] This withdrawal is unlikely, however, given the fact that the United States is the most active participant of the WTO and often takes advantage of its authority.[274] Under President Barack Obama's administration alone, the United States filed twenty-five cases using the WTO.[275] In light of this recent history, it is ironic that the United States does not have a greater interest in preserving the authority of the

264. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582–84 (1952) (noting that U.S. President Truman directed Secretary of Commerce to seize steel mills during the Korean War in 1952 because a labor strike allegedly threatened supply of steel for war).

265. Gomory & Sylla, *supra* note 43, at 105 (attributing American victory in World War II, in part, to steel capacity).

266. *See* REPORT TO CONGRESS OF THE U.S.-CHINA SECURITY COMMISSION, *supra* note 263, at 78–82 (listing enforcement mechanisms provided by the WTO in the case of noncompliance by China, including Article XXI).

267. *See id.* at 83 (reporting on U.S.-China relationship after China's accession to WTO as part of analysis of national security interests of United States).

268. *See id.* at 84–85 (listing recommendations for the steel industry).

269. *Id.*

270. MIKE MOORE, SAVING GLOBALIZATION: WHY GLOBALIZATION AND DEMOCRACY OFFER THE BEST HOPE FOR PROGRESS, PEACE AND DEVELOPMENT 147 (2009).

271. *Trade Talks: The Trump Administration Views Trade as National Security Threat* (Feb. 21, 2018) https://archive.org/details/TradeTalksEpisode24TheTrumpAdministrationViewsTradeAsNational.

272. John Micklethwait et al., *Trump Threatens to Pull U.S. Out of WTO If It Doesn't 'Shape Up,'* BLOOMBERG (Aug. 31, 2018, 4:23 PM), https://www.bloomberg.com/news/articles/2018-08-30/trump-says-he-will-pull-u-s-out-of-wto-if-they-don-t-shape-up.

273. See *supra* Part IV.C for a discussion of fears in the resolution of the case, *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996.*

274. McBride, *supra* note 41.

275. Sixteen of these were against China. *Id.*

WTO.

VIII. CONCLUSION

Accepting membership to the WTO comes with the duty to uphold international trade obligations such as those in GATT 1994.[276] Having elected to be subject to the jurisdiction of the DSB, a country choses to adhere to its authority. A nation must expect that by joining the WTO, the actions authorized by its inherent sovereignty could be scrutinized.[277] While sovereignty is essential in achieving *salus populi suprema lex*,[278] the legitimacy of the WTO and the authority of GATT 1994 are at stake when Member Nations misuse and exploit loopholes, such as Article XXI. Not only does abuse undermine the legitimacy of the WTO, but it also offends the principles of quid pro quo whereby by a nation reaps the benefits of free trade yet gives little in consideration.

Because it strikes a fair balance between preserving the authority of the WTO and protecting the sovereignty of nations, a good faith standard of review is the most appropriate application of Article XXI. The language of Article XXI of GATT 1994 inarguably calls for a self-judging standard. However, instead of a fully self-judging, discretionary standard, the DSB should impose a good faith standard based on how other international tribunals interpret self-judging provisions as well as the history and intent of the National Security Exception. From a practical standpoint, while a good faith standard is not the most ideal method of addressing potential abuses of the Exception, the standard provides the DSB with some review over disputes.

A good faith standard is the best option available to the DSB from both a legal and practical standpoint. The standard makes the most legal sense considering how little guidance is available to the DSB. Additionally, the WTO cannot give complete deference to Member Nations due to the fear of undermining GATT, and ultimately, the WTO itself. Allowing Member Nations unfettered discretion would defeat the WTO's objective of free and unrestricted trade. By applying a good faith standard to Article XXI, the DSB may set clear guidelines of what it expects from Member Nations while preserving the legitimacy of the WTO for disputes to come.

276. Sutherland et al., *supra* note 22, ¶ 111–12.

277. *Id.*

278. CICERO, *supra* note 2.