'Make America Rich Again'

The Nationalist Motives Compromising Good Faith Usage of the Essential Security Exception of the GATT Article XXI

*Sarah Plew**

Abstract

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This article examines the recent applications of the essential security exemption of the General Agreement on Tariffs and Trade and suggests an undercurrent of camouflaged nationalist motivation that has produced an alarming pattern of misuse of the good faith element of the exemption. Part A will outline the essential security exemption of Article XXI in order to provide a background of its history and intended applications. Parts B and C analyse the recent practical applications of Article XXI through case studies, demonstrating the increasing evidence of nationalist motivations that exploit the good faith element of the essential security exemption. Part D assesses the dangers of such misuse and ponders the question: can contracting parties truly be trusted to adhere to international trade law in good faith?

Keywords: good faith usage, GATT Article XXI, essential security exception.

"I am a Tariff Man," tweeted US President Trump in December 2018,[1] following his imposition of steel and aluminium tariffs earlier that year.[2] This proclamation brought to mind the Black Sabbath song declaring "I am Iron Man!",[3] and we imagine Trump flexing his metaphorical muscles as he willed the gritty heavy metal chords to become the soundtrack of his presidency.[4] "When people or countries come in to raid the great wealth of our nation, I want them to pay for the privilege of doing so," he continued. "It will always be the best way to max out our economic power".[5] In typical Trumpian fashion, the message echoed through his inflammatory speech: America the Great, Rich and Powerful bends to no one. Officially, the

* Sarah Plew, Master of Laws in International and Comparative Law at Indiana University McKinney School of Law, 2020.

1 Donald J. Trump (@realDonaldTrump), Twitter (4 December 2018), https://twitter.com/realDonaldTrump/status/1069970500535902208?s=20 [hereinafter Twitter].

2 Press Release, Office of the United States Trade Representative, *USTR Finalizes Tariffs on $200 Billion of Chinese Imports in Response to China's Unfair Trade Practices* (18 September 2018), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/ustr-finalizes-tariffs-200.

3 Black Sabbath, *Iron Man, on* Paranoid (Warner Bros., 1970) [hereinafter *Iron Man*].

4 Twitter, *supra* note 1.

5 *Ibid.*

Trump Administration had instated the tariffs for essential security reasons, though from reading Trump's tweets, one might easily have insinuated commercial or nationalist intentions.

States enact all manner of measures in the name of national security, from immigration restrictions to travel bans, to trade tariffs and embargos. While the General Agreement on Tariffs and Trade (the GATT) allows for essential security interest exceptions to its trade obligations, the full scope of this exception has yet to be clearly defined. Up until now, State actors were generally trusted to make good faith national security decisions. If the GATT allows States to determine and act on national security matters at their discretion, then that presents an important consideration: Can all States be trusted to make these determinations in good faith without supervision? What prevents States from acting in their own interests and hiding behind a false narrative of national security? The United States and Russia are two countries that have consistently insisted that details behind national security measures should remain confidential and self-judging. Yet not all governments' actions instil particular confidence in their good faith intentions. Trump concluded his "Tariff Man" tweet with a boast of the "$billions" being acquired through his tariffs, adding an enthusiastic flourish of "MAKE AMERICA RICH AGAIN".[6] Trump's nationalist declarations and 'America first' policies made his Administration's intentions difficult to ignore, and without a watchdog holding the Administration accountable to certain standards, the world must simply trust that making America 'rich again' was a fortuitous by-product of Trump's essential security measures.

This article highlights the increasingly pressing need for clearer, more specific guidelines in order to hold accountable States who invoke the GATT national security exception, particularly in light of rising nationalism and trade measures that undermine goals and obligations in international trade law. This will be illustrated in the context of two specific case studies. The first case study explores the first analysis of the scope of the GATT national security exception by the World Trade Organization (WTO) in a dispute between Russia and Ukraine. The second case study will explore in further depth the US steel and aluminium tariffs imposed during the Trump Administration, from the perspective that the provided rationale of essential security camouflaged nationalism and commercial interests. These two cases demonstrate the unstable foundation of good faith evident in international trade, and the emerging reality that States cannot be trusted to self-regulate. Without further clarification and guidelines for the scope of Article XXI, the rise of nationalist policies threatens to undermine the collaborative progress made by the GATT and the WTO.

6 *Ibid.*

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A The GATT and Its Essential Security Exception

The GATT aimed to maintain a fair system of international trade among the twenty-three original signing States, including the United States.[7] Two primary commitments were required of contracting parties. Firstly, each State was required to confer most favoured nation status on all other contracting parties.[8] This meant that contracting members could not face different tariffs than other contracting countries, and no party could receive beneficial or detrimental treatment unless "all other contracting parties" were treated equally.[9] Secondly, contracting parties could not restrict numbers of imports and exports, following a freedom of transit provision.[10] A later provision was added in 1965 to require any newly joining parties to eliminate any already existing offending tariffs to comply with the GATT.[11] It is important to note that the GATT went through several revisions over the years, the most recent iteration establishing the WTO in 1994.[12] This version had expanded to include 128 signatories (officially 'WTO members').[13] This version also added dispute settlement provisions that had not been included in the GATT before.[14] Annex 2 of Marrakesh Agreement Establishing the World Trade Organization includes the Dispute Settlement Understanding (DSU), which still serves as the central WTO dispute settlement agreement. The DSU provides that members of the WTO can bring complaints of alleged violations by other WTO members; and members can request a panel review if a dispute is not resolved between the parties.[15]

Article XX provides general exceptions to GATT obligations, including measures that are "necessary to protect public morals", "human, animal or plant life or health" and "relating to the conservation of exhaustible natural resources", among others.[16] Article XXI contains the security exceptions, providing:

> 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

7 General Agreement on Tariffs and Trade 1947 preface, 30 October 1947, 60 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].
8 *Ibid.*, Art. I:I.
9 *Ibid.*
10 *Ibid.*, Art. V.
11 Decision of 8 February 1965, 135/2.
12 World Trade Organization, *The GATT Years: From Havana to Marrakesh*, www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last accessed 8 December 2020) [hereinafter *The GATT Years*].
13 World Trade Organization, *The 128 Countries That Had Signed GATT by 1994*, www.wto.org/english/thewto_e/gattmem_e.htm (last accessed 8 December 2020).
14 *The GATT Years*, *supra* note 12.
15 Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 2, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].
16 GATT, *supra* note 7, Art. XX.

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.[17]

State measures under Article XXI(b), allowing for "any action which it considers necessary for the protection of its essential security interests", has become a particular point of contention in international trade law. The exception has been invoked with increasing frequency lately, with many actions causing controversy and leading to disputes at the WTO. The disputes often turn on the meaning and scope of section (b), and whether the phrasing "which it considers necessary" renders the provision self-judging.[18]

This question is not addressed within the writing of the GATT 1994, or in other WTO agreements, and the provision has yet to be formally defined.[19] The DSU has provided some guidance, as referenced by the WTO panel that first faced the question of the scope of this provision.[20] Article 3.2 of the DSU outlines that WTO agreements should be interpreted "in accordance with customary rules of interpretation of public international law".[21] This points to Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention").[22] Article 31 of the Vienna Convention provides,

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[23]

17 General Agreement on Tariffs and Trade 1994, Art. XXI, 15 April 1994, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

18 *See* Panel Report, *Russia – Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted 26 April 2019) [hereinafter Panel Report, *Russia – Traffic in Transit*]; Request for the Establishment of a Panel by the European Union, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/14 (29 October 2018) [hereinafter Request by E.U., *U.S. – Steel and Aluminum*].

19 Brandon J. Murrill, *The "National Security Exception" and the World Trade Organization*, Cong. Res. Serv. 2 (2018), https://fas.org/sgp/crs/row/LSB10223.pdf [hereinafter *"National Security Exception" and the WTO*].

20 Panel Report, *Russia – Traffic in Transit*, *supra* note 18, at Para. 7.59.

21 DSU, *supra* note 15, Art. 3.2.

22 Vienna Convention on the Law of Treaties, Art. 31-32, 23 May 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

23 *Ibid.*, Art. 31(1).

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Even with this outline, interpretation of Article XXI(b) remains ambiguous. As one academic reasons,

> The "ordinary meaning" of the phrase "it considers" requires at least *some* of the exception to be self-judging, but it is not clear whether those words modify all or part of Article XXI(b).[24]

Further, interpreting the 'object and purpose' of the treaty in its entirety may contrast with the 'object and purpose' of the Article XXI security exception.[25] Approaching an Article XXI(b) question from the standard of 'object and purpose' requires balance, but, as one academic importantly notes, "it does not answer who should strike that balance, or how it should be struck".[26] Approaching an issue from a 'good faith' standard does not provide further clarity or confidence, particularly in light of widespread self-interested nationalist policies, and increasing use of the exception in international trade.

Concerns of an unfettered scope of Article XXI have been raised from the time of the creation of the GATT. The drafters themselves debated the scope of the exception and the potential for bad faith usage. One representative from the Netherlands requested clarification on Article XXI in a 1947 meeting of the Preparatory Committee of the United Nations Conference on Trade and Employment ('Committee'), asking,

> [W]hat are the "essential security interests" of a Member? I find that kind of exception very difficult to understand, and therefore possibly a very big loophole in the whole Charter.[27]

This concern was never resolved in Committee discussions, and the general assumption since has been that parties will act in good faith. However, it has been suggested that States with particularly tense international relations may be tempted to act in their own interests and invoke Article XXI in bad faith.[28] The complex, interwoven economic and political relationship between Russia and Ukraine is one example of a relationship with such potential.

B Case Study: Russia – Measures Concerning Traffic in Transit

In *Russia – Measures Concerning Traffic in Transit* (*Russia – Traffic in Transit*), a WTO dispute settlement panel ('the Panel') was asked to interpret the GATT national

24 Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 Utah L. Rev. 697, 706 (2011) [hereinafter *The Self-Judging Security Exception*] (emphasis added).

25 *Ibid.*

26 *Ibid.*

27 U.N. ESC, 2nd Sess., 23rd comm. mtg., E/PC/T/A/PV/33, 19 (24 July 1947), https://docs.wto.org/gattdocs/q/UN/EPCT/APV-33.PDF.

28 *The Self-Judging Security Exception*, *supra* note 24, at 726.

security exemption in the context of a trade dispute between Ukraine and Russia.[29] The dispute arose following a long deterioration in the relationship between the two States, with Russia eventually placing restrictions on travel from Ukraine.[30] Ukraine claimed that Russia's restrictions breached their obligations regarding freedom of transit and sought a remedy for Russia's transit restrictions.[31] Russia considered these restrictions necessary for the protection of essential security interests. They insisted that not only were the measures valid under the GATT national security exemption but also, as such, the matter was not justiciable; therefore, the WTO did not have jurisdiction to address the issue or analyse the matter.[32] Although the two States were settling on trading on increasingly unfavourable terms, there remained one pressing question requiring attention: If the GATT Article XXI national security exception is self-judging, then should the WTO (and other contracting States) simply trust a State's good faith interpretation of essential security interests, even in such situations?

The Panel noted that the relationship between Russia and Ukraine began to tarnish following Ukraine's withdrawal from discussions to join the Eurasian Economic Union Treaty.[33] The Ukraine government had chosen instead to foster a relationship with the European Union, signing onto the "EU-Ukraine Association Agreement" and a trade agreement with the EU in 2014.[34] The same year, Ukraine, with several other countries, brought the "de-escalation of the situation with respect to Ukraine" – diplomat speak for the Russian occupation of the Crimea – to the attention of the United Nations (UN).[35] The UN Generally Assembly Resolution that followed in 2016 condemned the "temporary occupation of part of the territory of Ukraine" and explicitly referenced the Geneva Conventions.[36] The two States then imposed sanctions and bans against each other (starting with Ukraine), leading eventually to the dispute before the WTO Panel, in which Russia claimed that an international emergency between the countries had led them to take national security measures.[37] However, Russia refused to provide evidence to refute Ukraine's claims, following their assertion that their actions under Article XXI were not justiciable and were outside the jurisdiction of the WTO.[38] From Russia's perspective, Ukraine's actions with the UN may have been interpreted as a threat of war. Alternatively, the bans and restrictions may have been retaliation for Ukraine's disloyalty, or Russia reacting to its bruised ego. There are numerous feasible explanations for Russia's actions, yet not all possible motives exude good

29 Panel Report, *Russia – Traffic in Transit*, *supra* note 18, at Para. 7.20.
30 *Ibid.*, at Para. 7.5.
31 *Ibid.*, at Paras. 7.203-7.204.
32 *Ibid.*, at Paras. 7.27-7.28.
33 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, 57 Off. J. E.u., L. 161, 170 (29 May 2014).
34 *Ibid.*
35 UN General Assembly Resolution No. 68/262. *Territorial Integrity of Ukraine*, 27 March 2014, 2 A/RES/68/262.
36 UN General Assembly Resolution No. 71/205, *Situation of Human Rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)*, 19 December 2016, A/RES/71/205.
37 Panel Report, *Russia – Traffic in Transit*, *supra* note 18, at Para. 7.16.
38 *Ibid.*

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faith. It was impossible to verify, without oversight or accountability, that Russia instated its restrictions purely or even primarily for essential security reasons.

Veiled in the Panel's analysis was the suggestion that a State's good faith should not necessarily be taken for granted. The Panel noted the breakdown of the relationship between Russia and Ukraine as a significant element in the factual background, saying that although it was not the Panel's responsibility to "pass [...] legal characterizations of those events" or "to assign responsibility for them", the context of the dispute was nonetheless noted as important.[39] The Panel seemed to consider the worsening relationship a notable influence on the circumstances, prompting consideration whether the animosity between the parties had inspired political backlash rather than simply national security concerns. If security concerns were not demonstrably the primary foundation for the embargo, then this raised questions of the good faith use of Article XXI.

In exploring these questions, the Panel began to define limits on the use of Article XXI for the first time. The Panel determined that measures "which [the acting State] considers necessary" under Article XXI only comprised actions that fell under subsection (b). They stated,

> Given that these subject matters – i.e. the 'fissionable materials [...]', 'traffic in arms [...]', and situations of 'war or other emergency in international relations' [...] – are substantially different, it is obvious that these subparagraphs establish [...] requirements that the action in question must meet in order to fall within the ambit of Article XXI(b).[40]

The Panel expanded upon this to more clearly define phrases such as 'taken in the time of' and 'emergency in international relations', deciding ultimately that although members can define their own essential security interests, members are still obligated to interpret and apply Article XXI(b)(iii) in good faith.[41] As such, the WTO may review whether a decision was made in good faith and whether measures taken were 'not implausible' in protecting necessary security interests.[42] Thus, the Panel asserted that Article XXI is not entirely self-judging and that the WTO has inherent jurisdiction as an "international adjudicative tribunal", and through the DSU, to review these measures.[43]

Regarding Russia's actions specifically, the Panel held that Russia had met the requirements for invoking Article XXI(b).[44] The Panel decided that the conflict between the two countries was not implausible to threaten essential security interests and was not 'so unrelated' to the emergency; therefore, the restrictions were allowable under the exception.[45] Specifically, these actions fell under Article XXI(b)(iii), as measures "taken in time of war or other emergency in

39 *Ibid.*, at Para. 7.5.
40 Panel Report, *Russia – Traffic in Transit*, *supra* note 18, at Para. 7.68.
41 *Ibid.*, at Paras. 7.108-7.110.
42 *Ibid.*, at Para. 7.138.
43 *Ibid.*, at Para. 7.53; DSU, *supra* note 21, Art. 2.
44 Panel Report, *Russia – Traffic in Transit*, *supra* note 18, at Para. 7.123.
45 *Ibid.*, at Para. 7.145.

international relations".[46] Though the Panel ultimately determined that Russia had legitimate essential security concerns, the Panel returned repeatedly to the concept of a State's good faith under Article XXI.[47] The Panel emphasized that the good faith obligation applies also to "[a State's] connection with the measures at issue"[48] and conceded that, although Russia had displayed 'allusiveness' regarding their decision and the surrounding circumstances of their relationship with Ukraine, their explanation was 'minimally satisfactory' to establish the connection.[49]

Though the Panel granted that the exception was partially self-judging in that a State may determine its essential security interests for itself, the Panel implied that the WTO does not have full confidence in States' good faith while making these decisions. The Panel reminded the parties that a WTO member cannot use Article XXI "as a means to circumvent their obligations under the GATT 1994", and the WTO still has the authority to supervise decisions to enforce this hard line.[50] Amidst the dispute, the Trump Administration submitted a statement to the chair of the Panel, supporting Russia's position that the Article XXI exception is not justiciable and that every State has the right and authority to determine their own security interests.[51] While the United States later conceded that the Panel did indeed have jurisdiction in the particular dispute through the DSU, they continued to insist that Article XXI was fully self-judging and generally "not capable of findings by a panel".[52]

The United States' supremacist perspective on Article XXI had already become apparent in the Trump Administration's imposition of steel and aluminium import tariffs.

C Case Study: United States – Certain Measures on Steel and Aluminium Products

In 2017, the US Secretary of Commerce (the 'Secretary') carried out an investigation into the impact of steel imports on national security,[53] the results of which were announced in January 2018.[54] In his report, the Secretary concluded that steel is essential to American national security because of its use in infrastructure and defence and that domestic steel production must be protected to ensure its

46 GATT 1994, *supra* note 17, Art. XXI.

47 Panel Report, *Russia – Traffic in Transit*, *supra* note 18, at Para. 7.138.

48 *Ibid.*, at Para. 7.138.

49 *Ibid.*, at Para. 7.137.

50 *Ibid.*, at Para. 7.133.

51 Third-Party Oral Statement by the United States, *Russia – Measures Concerning Traffic in Transit*, Para. 35, WTO Doc. WT/DS512 (25 January 2018).

52 Panel Report, *Russia – Traffic in Transit*, *supra* note 18, at Para. 7.52.

53 Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19, 205 (26 April 2017).

54 U.S. Dept. of Commerce Bureau of Indus. & Sec., *The Effect of Imports of Steel on the National Security* 20 (11 January 2018), www.bis.doc.gov/index.php/documents/steel/2224-the-effect-of-imports-of-steel-on-the-national-security-with-redactions-20180111/file.

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consistent availability.[55] Following these recommendations, President Trump imposed 25 per cent tariffs on steel imports and 10 per cent tariffs on aluminium in 2018, affecting 'virtually every country in the world'.[56] He cited national security concerns, wielding his power under Section 232 of the Trade Expansion Act of 1962, which provides that a president may determine whether "an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security" and can take action accordingly.[57] What subsequently transpired was a trade war with China[58] and an uproar from around the world that the tariffs undermined the United States' obligations under international trade law.[59]

Many countries imposed retaliatory tariffs in response to the steel and aluminium tariffs, including Canada,[60] Mexico,[61] China,[62] Russia[63] and the whole of the European Union.[64] This led to a legal challenge at the WTO brought by ten WTO Member States, alleging violations by the United States of Articles II, XIX and XVI of the GATT.[65] The United States argued that its tariffs fell clearly under the Article XXI security exception.[66] Despite the WTO Panel conclusion to the contrary in *Russia – Traffic in Transit*, the Trump Administration asserted its stubbornly consistent stance: their actions in the name of national security under GATT Article XXI were not justiciable. The United States insisted that each WTO Member has "the authority *to determine for itself* those matters that it considers necessary for the protection of its essential security interests".[67] The WTO convened a Panel to review the dispute,[68] though their decision has since been postponed due to the

55 *Ibid.*

56 Linfan Zha, *The Wall on Trade: Reconsidering the Boundary of Section 232 Authority Under the Trade Expansion Act of 1962*, 29 Minn. J. Int'l L. 229, 239 (2020) [hereinafter *The Wall on Trade*].

57 19 U.S.C. § 1862(c)(1)(A).

58 *See* Jill Disis, *Trump Promised to Win the Trade War with China. He Failed*, Cnn Bus. (25 October 2020), www.cnn.com/2020/10/24/economy/us-china-trade-war-intl-hnk/index.html.

59 Request by E.U., *US – Steel and Aluminum*, *supra* note 18.

60 Farrow, *Notice of Intent to Impose Countermeasures Action Against the U.S. in Response to Tariffs*, Farrow (11 August 2020), https://farrow.com/news/notice-of-intent-to-impose-countermeasures-action-against-the-u-s-in-response-to-tariffs/.

61 Chris Isidore, *Mexico Imposes Tariffs on $3 Billion Worth of US Exports*, Cnn (6 June 2018), https://money.cnn.com/2018/06/06/news/economy/mexico-us-tariffs-retaliation/index.html.

62 Chris Buckley, *China Slaps Tariffs on 128 U.S. Products, Including Wine, Pork and Pipes*, N.Y. Times (1 April 2018), www.nytimes.com/2018/04/01/world/asia/china-tariffs-united-states.html.

63 Erica York, Kyle Pomerleau & Scott Eastman, *Tracking the Economic Impact of U.S. Tariffs and Retaliatory Actions*, Tax Found. (22 June 2018), https://taxfoundation.org/tracker-economic-impact-tariffs/.

64 Alanna Petroff, *Here's How Europe is Punishing the US for Steel Tariffs*, Cnn (1 June 2018), https://money.cnn.com/2018/06/01/news/economy/trade-war-tariffs-eu-canada-mexico-response/index.html?iid+EL.

65 Request by E.U., *US – Steel and Aluminum*, *supra* note 18.

66 Communication from the United States, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/14 (18 October 2018) [hereinafter Communication from US – *Steel and Aluminum*].

67 Communication from US – *Steel and Aluminum*, *supra* note 66. Emphasis added.

68 Communication from the Panel, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/16 (10 September 2019) [hereinafter Communication from Panel – *Steel and Aluminum*].

coronavirus pandemic.[69] If the Panel follows its reasoning in *Russia – Traffic in Transit*, they may find against the United States, in which case the United States would be expected to revoke the tariffs.[70] Some raised concerns that had such 'an unfavourable outcome' for the United States come during the Trump Administration, the Administration may have used the excuse to finally, officially withdraw from the WTO.[71] Although a future without the WTO seems less imminent after President Biden came into power in 2021, the threat has not dissipated. The pervasive nationalist ideals of other American leadership – and of the seventy-four million people who voted to re-elect Trump in his re-election campaign against Biden[72] – have made themselves known, and they did not follow Trump out of the door.

When it comes to the steel and aluminium tariffs, it has been argued that the Secretary's findings from his Section 232 investigation do not justify recommendation of tariffs.[73] The tariffs aimed to fortify domestic steel and aluminium manufacturing in preparation for a national emergency;[74] yet this motive leaves questions. Domestic manufacturers made up 70 per cent of the steel[75] and 40 per cent of the aluminium consumed in the United States in 2017.[76] Generally, only around 3 per cent of steel and aluminium domestic production is aimed for military purposes.[77] This leaves the majority of steel and aluminium – both imported and domestic – entirely unrelated to national security purposes. Though the Trump Administration could have targeted imports directly related to security, it instead took a broad, authoritative approach, asserting their supremacy.[78] Levying steel and aluminium destined for pots, pans and car parts seems unnecessary, much less urgent for national security.

The WTO may well find that the tariffs are not justified under Article XXI, as it appears unlikely that the steel and aluminium tariffs would fall under the enumerated circumstances in Article XXI(b), as required in *Russia – Traffic in*

69 Communication from the Panel, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/17 (8 February 2021).

70 Rachel F. Fefer *et al.*, *Section 232 Investigations: Overview and Issues for Congress*, Cong. Research Serv. 7 (last updated 24 August 2020), https://fas.org/sgp/crs/misc/R45249.pdf [hereinafter *Section 232 Investigations*].

71 *The Wall on Trade, supra* note 56, at 270.

72 *See* Hamid Dabashi, *What to Make of More Than 70m Americans Who Voted for Trump?* Al Jazeera (21 November 2020), www.aljazeera.com/opinions/2020/11/21/what-to-make-of-more-than-70m-americans-who-voted-for-trump.

73 *The Wall on Trade, supra* note 56, at 239.

74 Donald J. Trump, *Presidential Proclamation on Adjusting Imports of Steel into the United States*, The White House (8 March 2018), www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states.

75 Chad P. Bown & Douglas A. Irwin, *Trump's Assault on the Global Trading System and Why Decoupling from China Would Change Everything*, Foreign Aff. (October 2019), www.foreignaffairs.com/articles/asia/2019-08-12/trumps-assault-global-trading-system.

76 *See* Michaela D. Platzer, *Effects of U.S. Tariff Action on U.S. Aluminum Manufacturing*, Cong. Research Serv. (last updated 9 October 2018), https://fas.org/sgp/crs/misc/IF10998.pdf.

77 *Section 232 Investigations*, *supra* note 70, at 7.

78 *The Wall on Trade*, *supra* note 56, at 239-240.

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Transit.[79] Even assessing the decision upon a good faith standard yields more uncertainty. If over 90 per cent of domestic steel and aluminium remains available for redirection to the military in case of emergency, then a good faith security necessity is dubious. Further, although the Trump Administration officially claimed 'national security' as their reasoning behind the tariffs, Trump's unofficial communication insinuated differently. Tweets of 'MAKE AMERICA RICH AGAIN' and laments of the '600 to 800 Billion Dollars a year' that the United States was 'losing' on trade strongly insinuated economic ambitions.[80] There are those who call the tariffs clear evidence of "the capture of the White House by the steel industry" and an act of protectionism.[81] During its tenure, the Trump Administration further extended the scope of national security exceptions to include "the general security and welfare of certain industries".[82] Yet a critical observer might challenge this overbroad definition and wonder, '*Security of whom?*' and '*Which industries?*' The answer to these questions is likely equally overbroad, encompassing anyone and any industry that proves convenient and opportune. Verifying the good faith of these international trade actions is unlikely, largely because the United States continually refuses to play by the rules of international law, seemingly asserting themselves as the omniscient leaders of the world.

Notably, the definition of 'national security' has remained vague in American law, which only allows further discretion in national security measures. The *Algonquin* case is often cited as the leading Supreme Court interpretation of 'national security'.[83] However, the Court only determined that national security has a narrower threshold than 'national interest', a wanting explaining.[84] Congress has not interpreted or clearly defined 'national security' either, and in legislation the concept is consistently broad or vague.[85] In an investigation into the national security impacts of iron ore in 2001, the Department of Commerce linked national security to national defence, asserting that imports might threaten national security if the United States was overly dependent on imports, or if imports were unreliable.[86] The report declared,

> [I]mports can *threaten the national security* if they fundamentally threaten the viability of U.S. industries and resources needed to produce domestically goods and services necessary *to ensure U.S. national security*.[87]

79 Panel Report, *Russia – Traffic in Transit*, *supra* note 18, at Para. 7.82.

80 *See* Matthew Yglesias, *The Trump Trade Tweets that Sent the Stock Market Tumbling, Explained*, Vox (6 May 2019), www.vox.com/2019/5/6/18531101/trump-china-tariff-tweet-schumer-stock.

81 Kayla Scott, *Steel Standing: What's Next for Section 232?*, 30 Duke Journal of Comp. & Int. Law 379, 404 (2020). [hereinafter *Steel Standing*]

82 *The Wall on Trade*, *supra* note 56, at 269.

83 *FEA v. Algonguin SNG, Inc.*, 426 U.S. 548.

84 *Ibid*. at 568-569.

85 Laura K. Donohue, *The Limits of National Security*, 48 Am. Crim. L. Rev. 1573, 1580 (2011).

86 Bureau of Export Administration, *The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security*, U.S. Dept. of Comm. 4 (October 2001), www.bis.doc.gov/index.php/documents/technology-evaluation/66-the-effect-of-imports-of-iron-ore-and-semi-finished-steel-on-the-national-security-2001/ [hereinafter *Effect of Imports of Iron Ore*].

87 *Effect of Imports of Iron Ore*, *supra* note 86, at 4. Emphasis added.

In other words, imports threaten national security if they do not bolster national security. Such a circular definition does not clarify or illuminate but rather further reinforces the power and discretion of the government to refashion and remodel as they see fit. Perhaps maintaining domestic supremacy is precisely the intention.

The president of the United States has always had some domestic discretion in international trade policy, the general argument being that the president can best "represent utilitarian national interests in opening trade".[88] The Trump Administration seemed to take this role to new extremes, maintaining Trump's 'America First' policy as a priority, and "erecting protectionist walls around the economy" in the name of national security.[89] Likely not alone in her suspicions, one writer wonders whether the conventional wisdom behind presidential control in international trade policy showed "misguided in the Trump presidency".[90] The previous Administration's enthusiastic use of national security measures begs the question whether all US presidents acknowledge their obligations in international law, or whether some leaders consider themselves commander-in-chief of the WTO and the world at large. Regardless of a sitting president's political position or personal opinions, the United States remains a WTO Member State, and as such, we must adhere to the associated obligations.

D The Battle for Sovereignty

Though the United States is not the only WTO member to consistently consider themselves experts in matters of their own national security,[91] the United States does stand out as one country that may benefit from stricter confines to their sovereignty. The concern regarding the United States' invocation of essential security measures has been steadily emerging for decades. In 1985, the Reagan Administration issued an executive order imposing a trade embargo on Nicaragua, claiming "an unusual and extraordinary threat to national security".[92] When Nicaragua brought the dispute to the GATT Council, the United States continued to argue both that the exception was self-judging and that only the United States had competence to determine its own security matters.[93] Though in general the Council agreed, many countries expressed concerns regarding the United States' intentions. Nicaragua argued that for the United States to "suggest that Nicaragua, a small and underdeveloped country, could pose a threat to the national security of one of the most powerful countries in the world" was "absurd".[94] Czechoslovakia worried about a precedent that the United States may have set in the embargo, to the extent that a country could reference Article XXI to justify any trade measures,

88 *Steel Standing, supra* note 81, at 404.
89 *The Wall on Trade, supra* note 56, at 233.
90 *Steel Standing, supra* note 81, at 404.
91 *The "National Security Exception" and the WTO, supra* note 19, at 4.
92 Exec. Order No. 12, 513, 3 C.F.R. 342 (1985).
93 GATT Council, *Minutes of Meeting: Held in the Centre William Rappard on 29 May 1985*, C/M/188 5 (28 June 1985), www.wto.org/gatt_docs/English/SULPDF/91150029.pdf.
94 *Ibid.*, at 3.

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and if such actions went unmonitored then this could have a negative impact on smaller, poorer countries who may have no recourse.[95] The Panel worried that if Article XXI were allowed to be entirely self-judging, then there would be no way to "ensure that this general exception to all obligations under the [GATT] is not invoked excessively or for purposes other than those set out in this provision".[96] Despite these apprehensions, the Panel failed to formally interpret Article XXI or restrict the embargo, leaving Nicaragua and other States to hope that a future Panel might tighten the reigns on the United States.

America's stubborn independence has also factored in their ongoing refusal to appoint a US member to the WTO Appellate Body ('Appellate Body') since 2017.[97] Accordingly, the Appellate Body's typical seven members has been whittled down to an unworkable number, effectively rendering the WTO paralysed and non-operational.[98] The United States has not been timid about the reasoning for its actions. In a Report by the Office of the United States Trade Representative under the Trump Administration, the Appellate Body was accused of

> [adding] to U.S. obligations and [diminishing] U.S. rights by failing to comply with WTO rules, addressing issues it has no authority to address, taking actions it has no authority to take, and interpreting WTO agreements in ways not envisioned by the WTO Members who entered into those agreements.[99]

This statement paints a picture of an anarchical dispute settlement body reaching beyond the scope of its powers for decades. The Report continued,

> On a more fundamental level, this overreaching also violates the basic principles of the United States Government. There is no legitimacy under our democratic, constitutional system for the nation to submit to a rule imposed by three individuals sitting in Geneva, with neither agreement by the United States nor approval by the United States Congress.[100]

95 *Ibid.*, at 10.

96 Panel Report, *United States – Trade Measures Affecting Nicaragua*, L/6053, Para. 5.17 (13 October 1986), www.wto.org/gatt_docs/English/SULPDF/91240197.pdf.

97 Manfred Elsig *et al.*, *Trump Is Fighting an Open War on Trade. His Stealth War on Trade May Be Even More Important*, Wash. Post (27 September 2017), www.washingtonpost.com/news/monkey-cage/wp/2017/09/27/trump-is-fighting-an-open-war-on-trade-his-stealth-war-on-trade-may-be-even-more-important/.

98 Chad P. Bown & Soumaya Keynew, *Why did Trump End the WTO's Appellate Body? Tariffs*, Peterson Inst. for Int'l Econ. (4 March 2020), www.piie.com/blogs/trade-and-investment-policy-watch/why-did-trump-end-wtos-appellate-body-tariffs.

99 Ambassador Robert E. Lighthizer, *Report on the Appellate Body of the World Trade Organization*, Office of the U.S. Trade Rep. (February 2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf [hereinafter Ambassador Report on the WTO].

100 *Ibid.*

The assertions here are confounding, inferring an undemocratic group of frauds rather than the collaborative multilateral organization that the U.S. had a seminal role in establishing.[101]

Though the United States was not the first country to dispute some WTO actions (or inactions),[102] the US perspective during the Trump Administration was particularly amplified by its appearance of a disgruntled pre-teen bemoaning the injustice of his curfew rather than of a leading world power. BBC News reported that former President Trump's international trade methods were "driven to a large extent by his belief that the United States is [...] unfairly treated by other countries".[103] Trump's stance on tariffs and international oversight was clear even during his campaign,[104] and Trump wasted little time in withdrawing from the North American Free Trade Agreement upon taking office.[105] The assertion, over and over, was that the United States wants and intends to preserve their sovereignty, and that the United States makes its own rules. Though many have hoped that President Biden's experience in foreign policy would lead to a correction of most, if not all, of the extreme positions taken by the Trump Administration and improve the United States' position in global trade and international relations,[106] this has yet to be the case. Early on, the Biden Administration affirmed that "national-security disputes are not subject to WTO review because it would infringe on a member's right to determine what is in its own security interests".[107]

The US Trade Representative's recent statements referring to the "three individuals sitting in Geneva"[108] bring to mind similar waves of nationalist ideals in global politics. Brexiteers claimed that "unelected bureaucrats of Brussels" made undemocratic decisions on behalf of the British people.[109] Anti–European Union

101 *United States of America and the WTO*, World Trade Org, www.wto.org/english/thewto_e/countries_e/usa_e.htm (last accessed 12 December 2020).

102 Chad P. Bown & Soumaya Keynew, *Why Did Trump End the WTO's Appellate Body? Tariffs*, Peterson Inst. for Int'l Econ. (4 March 2020), www.piie.com/blogs/trade-and-investment-policy-watch/why-did-trump-end-wtos-appellate-body-tariffs.

103 Andrew Walker, *What Trump Wants from Global Trade*, BBC News (28 November 2019), www.bbc.com/news/business-50465651.

104 Jose A. DelReal & Sean Sullivan, *Defying Republican Orthodoxy, Trump Trashes Trade Deals and Advocates Tariffs*, Wash. Post (28 June 2016), www.washingtonpost.com/politics/defying-republican-orthodoxy-trump-trashes-trade-deals-and-advocates-tariffs/2016/06/28/3b47617e-3d5a-11e6-84e8-1580c7db5275_story.html.

105 Andrew Chatzky, James McBride & Mohammed Aly Sergie, *NAFTA and the USMCA: Weighing the Impact of North American Trade*, Counc. on Foreign Rel. (last updated 1 July 2020), www.cfr.org/backgrounder/naftas-economic-impact.

106 *See* James McBride, *After Trump: What Will Biden Do on Trade?*, Counc. on Foreign Rel. (last updated 13 January 2021), www.cfr.org/in-brief/after-trump-what-will-biden-do-trade; David K. Li, *Biden takes subtle dig at Trump: Make America respected again*, NBC News (last updated 7 November 2020), www.nbcnews.com/politics/2020-election/live-blog/2020-11-07-trump-biden-election-results-n1246882/ncrd1247007#blogHeader.

107 Bryce Baschuk, *Biden Picks Up Where Trump Left Off in Hard-Line Stances at WTO*, Bloomberg (last updated 22 February 2021), www.bloomberg.com/news/articles/2021-02-22/biden-picks-up-where-trump-left-off-in-hard-line-stances-at-wto.

108 Ambassador Report on the WTO, *supra* note 99.

109 Jennifer Rankin, *Is the EU Undemocratic?* The Guardian (13 June 2016), www.theguardian.com/world/2016/jun/13/is-the-eu-undemocratic-referendum-reality-check.

and populist sentiments are 'mainstays' of France's Front National.[110] Parallel nationalist ideas have spread throughout Europe, with far-right parties gaining traction and power while touting comparable criticisms.[111] The idea espoused over and over insinuates that there are two alternatives: either a group of foreigners with illegitimate power make decisions for us, or we run our own country. Under the Trump Administration, the United States planted its flag firmly in the latter camp. Trump was 'Tariff Man', spreading fear and seeking vengeance like Black Sabbath's macho 'Iron Man'. Many hoped that the fall of Trump would signify a change to come, with a regeneration of the WTO and a strengthening of standards and enforcement in international law.[112] During his campaign, Biden inspired optimism that his foreign policy experience would renew America's participation at the WTO.[113] However, even post-Trump, the American government "continues to have systemic concerns" with the WTO Appellate Body and continues to block the appointment of new WTO panel members.[114] The change in administration has not yet mended our nation's international trade reputation or demonstrated that nationalist ideals are subsiding. If and when the WTO is revived, or when a Panel decision is eventually published in the case of steel and aluminium tariffs, the tightening of the reigns and clarifying of the boundaries of supremacy should be a priority.

110 Thomas Greven, *The Rise of Right-Wing Populism in Europe and the United States*, Friedrich Ebert Stiftung 2 (May 2016), http://dc.fes.de/fileadmin/user_upload/publications/RightwingPopulism.pdf.

111 Vivienne Walt, *How Nationalists Are Joining Together to Tear Europe Apart*, Time (11 April 2019), https://time.com/5568322/nationalism-in-europe/.

112 James McBride, *After Trump: What Will Biden Do on Trade?*, Counc. on Foreign Rel. (last updated 13 January 2021), www.cfr.org/in-brief/after-trump-what-will-biden-do-trade.

113 *See* David J. Lynch, *Biden aims for new course on trade, breaking with Trump and Democratic predecessors*, Wash. Post (14 January 2021), www.washingtonpost.com/politics/2021/01/14/biden-trade-katherine-tai-tariff/.

114 Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, 28 May 2021, p. 12, https://geneva.usmission.gov/wp-content/uploads/sites/290/May28.DSB_.Stmt_.as_.deliv_.fin_.public.pdf.