

# THE NATIONAL SECURITY EXCEPTION IN WTO LAW: EMERGING JURISPRUDENCE AND FUTURE DIRECTION

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## ABSTRACT

*The original General Agreement on Tariffs and Trade (GATT 1947) was written with a broadly worded national security exception. This national security exception was copied into the founding agreements of today’s World Trade Organization (WTO). The exception allows a contracting party, under certain specified circumstances, to take “any action which it considers necessary for the protection of its essential security interests” notwithstanding other WTO commitments.*

*Despite the national security exception’s potential as an almost total escape clause from WTO commitments, it was rarely invoked and even more rarely adjudicated. That is, until now. Over the past five years, a number of WTO members—including the United States—have invoked the national security exception as a defense to alleged violations of WTO commitments. Additionally, in 2019 and 2020, the WTO Dispute Settlement Body (DSB) interpreted the scope of the national security exception for the first time in two landmark decisions: Russia – Measures Concerning Traffic in Transit and Saudi Arabia – Measures Concerning the Protection of Intellectual Property.*

*This Note analyzes the Russia and Saudi Arabia decisions and explores what they mean for future applications of the national security exception in WTO law. It suggests that despite the common approach applied in the Russia and Saudi Arabia cases, the future direction of the WTO’s national security exception is far from clear. Within the Russia and Saudi Arabia decisions lie significant ambiguities that will condition both the future use and adjudication of the national security exception. This Note uses the United States’ invocation of the national security exception to defend its Section 232 steel and aluminum tariffs to demonstrate the variety of outcomes that could result from future application of the Russia/Saudi Arabia decisions. With the collision between national security and trade showing no signs of abating, navigating the jurisprudential ambiguities of the national security exception will be a critical task for the WTO.*

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I. INTRODUCTION

The intersection of national security and trade is an increasingly important space in international trade law. In recent years, states have incorporated notions of economic security into existing concepts of national security. This “securitization” of economic concerns has caused friction in the global trading order as matters relating to the international flow of goods, capital, and ideas are fused with security concerns.<sup>1</sup>

The interaction of trade and national security is nothing new in the history of trade. Both free-traders and trade skeptics have appealed to national security as a key reason for either expanding or restricting trade. Free traders tout the role of trade and international trading rules in promoting peace between nations.<sup>2</sup> Trade skeptics of both strong and mild varieties argue that unrestricted imports from abroad can

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1. “Securitization” is a term borrowed from the international relations literature, in which it describes the process by which states incorporate new subjects into existing concepts of “security” or “national security.” BARRY BUZAN, OLE WÆVER & JAAP DE WILDE, *SECURITY: A NEW FRAMEWORK FOR ANALYSIS* 25 (1998).

2. See, e.g., NORMAN ANGELL, *THE GREAT ILLUSION: A STUDY OF THE RELATIONSHIP OF MILITARY POWER TO NATIONAL ADVANTAGE* (1913) (arguing that the expansion of international trading networks makes war less likely). For a more modern view of this thesis see Erik Gartzke, Quan Li & Charles Boehmer, *Investing in the Peace: Economic Interdependence and International Conflict*, 55 INT’L ORGS. 391 (2001).

open the door to malign influence from adversaries,<sup>3</sup> while global trading rules constrain national sovereignty in ways that are detrimental to national security.<sup>4</sup>

The gravitational force that such critiques exercise over free trade has resulted in numerous carve-outs for national security across domestic and international legal regimes.<sup>5</sup> The predecessor to the WTO, the General Agreement on Tariffs and Trade (GATT), included in its founding charter Article XXI, a broadly worded provision, which amounts to a virtually complete escape clause from all other trading commitments.<sup>6</sup> This exception was copied exactly from the original GATT into “GATT 1994,” the foundational document of the modern World Trade Organization (WTO).<sup>7</sup>

Yet, over the roughly seventy years since the initial formation of the GATT, national security has played a rather muted role in the functioning of the global trading order. Article XXI was rarely invoked and even more rarely adjudicated. Indeed, Article XXI had never been definitively interpreted under international trade law.

That is, of course, until now. The past five years have seen an explosion in claimed applications of WTO law’s national security exception. After a long refrain from adjudicating the national security exception, two WTO Dispute Settlement Body (DSB) panels handed down decisions interpreting the exception. The first decision came in 2019 in *Russia – Measures Concerning Traffic in Transit*, the first-ever WTO panel decision interpreting the Article XXI national security exception.<sup>8</sup> Shortly after the *Russia* case, in 2020, another WTO panel handed down a decision in *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*.<sup>9</sup> The *Saudi Arabia* case adopted the framework

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3. See, e.g., Robert A. Cass, *National Security, Trade, and China: Risks and Responses in the Internet Age*, 20 FEDERALIST SOC. REV. 162 (2019).

4. See, e.g., Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 2 CHI. J. INT’L LAW 403 (2001).

5. Kathleen Claussen, *Trade’s Security Exceptionalism*, 72 STAN. L. REV. 1095, 1100–01, 1134 (2020).

6. General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT].

7. General Agreement on Tariffs and Trade 1994 art. XXI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

8. *Members Adopt National Security Ruling on Russian Federation’s Transit Restrictions*, WORLD TRADE ORG. (Apr. 26, 2019), [https://www.wto.org/english/news\\_e/news19\\_e/dsb\\_26apr19\\_e.htm](https://www.wto.org/english/news_e/news19_e/dsb_26apr19_e.htm). See Report of the Panel, *Russia–Measures Concerning Traffic in Transit*, WT/DS512/7 (Apr. 29, 2019) [hereinafter *Russia–Traffic in Transit*].

9. Panel Report, *Saudi Arabia–Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/8 (adopted June 16, 2020) [hereinafter *Saudi Arabia–Intellectual Property*].

set out in *Russia – Traffic in Transit* and applied it to Article 73 of the TRIPS agreement,<sup>10</sup> a carbon copy of Article XXI.

Because the two cases applied a common approach, they might be seen as forming the basis of an emerging WTO national security jurisprudence. However, this Note argues that the two decisions are not as clear as they might seem. Despite the common approach taken by the panels, the decisions actually suggest a bifurcated jurisprudence. There is a split between the “formal” approach to adjudicating Article XXI claims announced in both decisions and the “practical” approach actually applied by the panels. Although the precedential effect of DSB panel decisions is itself a controversial and unsettled topic in WTO law, it seems likely that future panels will look to the *Russia* and *Saudi Arabia* panel reports given the landmark status of those decisions. This leaves future panels with discretion to choose between the two options or even to apply some as-yet untried test that splits the difference between the two approaches.

Part II of this Note examines the text, structure, and interpretive history of the Article XXI national security exception. Part III analyzes the *Russia* and *Saudi Arabia* decisions and explains how the two cases work together. Part IV shows how the two decisions apply a bifurcated approach leaving future WTO panels with significant leeway as to how to decide future cases. Part V demonstrates how future WTO panels might apply the bifurcated approach by examining the United States’ Section 232 tariffs on steel and aluminum products, currently awaiting a decision by a WTO panel.<sup>11</sup> Lastly, Part VI offers some concluding thoughts on the operation of this bifurcated approach and on the national security exception more broadly.

## II. NATIONAL SECURITY IN WTO AGREEMENTS

The WTO’s key agreements contain broadly-worded national security exceptions. Article XXI of the GATT 1994 Agreement, the core agreement of the Uruguay Round, provides that:

Nothing in this Agreement shall be construed:

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10. TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights art. 73, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

11. Request for the Establishment of a Panel by China, *United States—Certain Measures on Steel and Aluminum Products*, WT/DS544/8 (Oct. 19, 2019) (panel composed Jan. 25, 2019) [hereinafter *United States—Steel and Aluminum*].

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- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
  - (i) 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.<sup>12</sup>

Other foundational agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the General Agreement on Trade in Services (GATS) contain substantially identical provisions.<sup>13</sup>

The core of the Article XXI exception lies in section (b).<sup>14</sup> Section (b) provides an enumeration of three instances where a member state may take “action” to restrict trade where such action is “necessary” to protect its “essential security interests.”<sup>15</sup> These include restrictions relating to (i) “fissionable material,” (ii) “arms . . . and other materials . . . for the purpose of supplying a military establishment,” and (iii) “war or other emergency.”<sup>16</sup> The substantive content of section (b) is considerably open-textured. Article XXI provides no further

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12. GATT 1994, *supra* note 7, art. XXI(b).

13. For ease of treatment, I refer collectively to these provisions as a single “national security exception.” TRIPS Agreement, *supra* note 10, art. 73; GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Article XIV bis, 1869 U.N.T.S. 183 (1994) [hereinafter GATS].

14. GATT 1994, *supra* note 7, art. XXI(b).

15. *Id.*

16. *Id.*

definitions of ambiguous terms such as “necessary,” “essential,” “security interests,” or “emergency.”

However, the difficulty in interpreting Article XXI is not just determining *what* the content of the exception is, but also *who* determines the scope of the exception. The *chapeau* of section (b) provides that a state may take action “which it considers necessary for the protection of its essential national security interests.”<sup>17</sup> This language seems to imply that a state may determine for itself both what makes up its “essential national security interests” and whether or not a particular action is “necessary for the protection” of those interests.<sup>18</sup>

Thus, Article XXI and its sister exceptions in the TRIPS and GATS agreements contain on their face two cavernous ambiguities: (1) the substantive scope of the exception and (2) who gets to decide the substantive scope of the exception. In reality, though, this is only really one ambiguity—*who* gets to judge is the threshold inquiry. The substantive content of the national security exception becomes an open question only if it is clear that the exception is not self-judging. If, on the other hand, the national security exception is self-judging, the substantive scope of the exception is simply whatever a state says it is.

The authority to decide on the national security exception may be further clarified by distinguishing between two different flavors of non-justiciability.<sup>19</sup> A strong form of non-justiciability is one in which the state claiming the exception also claims sole authority to interpret the appropriate scope of the national security exception, i.e., the exception is entirely self-judging.<sup>20</sup> In this view, the DSB has no jurisdiction to rule on national security questions on procedural grounds.<sup>21</sup> A weaker form of non-justiciability makes a similar argument, but on substantive grounds.<sup>22</sup> In this view, as advocated by the United States in the *Russia – Traffic in Transit* case,<sup>23</sup> a state’s “essential security interests” are inherently subjective, as is a state’s determination that it “considers” the

17. *Id.*

18. See, e.g., Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697 (2011) (arguing Article XXI’s security exception to be self-judging and generally invoked in good faith).

19. See Hannes L. Schloemann & Stefan Ohlhoff, “Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 AM. J. INT’L LAW 424, 426 (1999).

20. *Id.*

21. *Id.* at 439–40.

22. *Id.* at 441–42.

23. The United States as a third-party argued that the national security exception was self-judging. See *infra* p. 9 and note 44.

action “necessary” for achieving that interest.<sup>24</sup> Therefore, although the DSB theoretically has jurisdiction to consider an invocation of the national security exception, it must nevertheless defer to the invoking state on the substantive interpretation of the exception. Despite the theoretical distinction between the strong and weak forms of non-justiciability, the effect is fundamentally the same: the DSB cannot question a state’s invocation of the national security exception.

However, this interpretation of Article XXI and its sister provisions poses risks to the efficacy of the global trading order.<sup>25</sup> An entirely self-judging (or even merely non-justiciable) national security exception has the potential to become a free-floating escape clause from WTO commitments.<sup>26</sup> A world where each state interprets the content of Article XXI for itself threatens to “emasculate the rules of liberal trade order.”<sup>27</sup>

The contrary view holds that Article XXI is justiciable. First, the text of Article XXI(b) is ambiguous, particularly concerning the relationship of the provision’s *chapeau* to the substantive enumeration in subparagraphs (i)-(iii). Proponents of non-justiciability hold that the language of the *chapeau* (“which it *considers* necessary” [emphasis added]) implies an entirely self-judging, subjective interpretation of Article XXI(b). However, it is also possible to read the *chapeau* to be entirely self-contained, i.e., not applying to the enumeration in subparagraphs (i)-(iii). Indeed, according to some commentators, this is the more plausible reading of Article XXI(b) considering the context of GATT 1994.<sup>28</sup> First, there is nothing in the text of Article XXI that suggests it is not subject to the ordinary requirements under the Vienna Convention on the Law of Treaties that treaties be read “in good faith” and consistent with the “object and purpose” of the treaty.<sup>29</sup> A free-floating escape clause from WTO and GATT commitments

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24. GATT 1994, *supra* note 7, art. XXI; *see also* Schloemann & Ohlhoff, *supra* note 19, at 441–42.

25. Alford, *supra* note 18, at 702.

26. *See, e.g.*, Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exception*, 41 MICH. J. OF INT’L LAW 109, 114, 115 (2020).

27. David D. Knoll, *The Impact of Security Concerns Upon International Economic Law*, 11 SYRACUSE J. INT’L L. & COM. 567, 587 (1984) (unilateral interpretation of Article XXI would “emasculate the rules of liberal trade order”).

28. *See* Schloemann & Ohlhoff, *supra* note 19, at 438–39; Pinchis-Paulsen, *supra* note 26, at 115; Dapo Akande & Sope Williams, *International Adjudication of National Security Issues: What Role for the WTO?*, 43 VA. J. INT’L L. 365, 391–92.

29. Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 UNTS 331 [hereinafter VCLT].

would be inconsistent with the “object and purpose” of GATT 1994, namely, to promote a multilateral system of law-based rules underpinning a global regime of free trade. Second, the *travaux préparatoires* of the provision, which may be used as a supplemental method of interpretation in international law, provide additional support for a narrower reading of Article XXI.<sup>30</sup> At the time the original GATT 1947 was being discussed, the United States, which proposed the original national security exception,<sup>31</sup> feared that it would “permit anything under the sun,”<sup>32</sup> and consequently drafted Article XXI to prevent such an outcome (even if the United States has inconsistently applied this interpretation in practice).<sup>33</sup> Thus, the ambiguity of Article XXI (b), in this view, resolves in favor of justiciability.

### III. NATIONAL SECURITY IN WTO PANEL DECISIONS

Until very recently, the discussion concerning the national security exception was largely academic, fought out in the pages of law reviews and not the hearing rooms of Geneva. The national security exception was rarely invoked and even more rarely adjudicated. Indeed, the DSB had not authoritatively considered the meaning or scope of the national security exception. However, over the past two years, DSB panels have issued two reports concerning the national security exception: one in 2019 in *Russia – Measures Concerning Traffic in Transit*,<sup>34</sup> and another in 2020 in *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*.<sup>35</sup> These two decisions form the basis of an inchoate national security trade jurisprudence. It is likely that they will not be the last such cases, given the collision of trade and national security concerns in today’s geopolitical environment. Thus, explaining the two panel decisions is critical to understanding future disputes at the intersection of trade and national security.

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30. *Id.* art. 32.

31. Mona Pinchis-Paulsen, *supra* note 26, at 116 (2020) (referring to the United States as the “main architect” of the national security exception).

32. See Alford, *supra* note 18, at 699 (citing U.N., Econ. & Soc. Council, Preparatory Comm. of the U.N. Conference on Trade & Emp’t, Thirty-Third Meeting of Commission A, at 20, U.N. Doc. E/PC/T/A/PV/33 (1947) (Mr. Leddy on behalf of the United States) [http://www.wto.org/gatt\\_docs/English/SULPDF/90240170.pdf](http://www.wto.org/gatt_docs/English/SULPDF/90240170.pdf)).

33. See Pinchis-Paulsen, *supra* note 26, at 116–28.

34. *Russia–Traffic in Transit*, *supra* note 8.

35. *Saudi Arabia–Intellectual Property*, *supra* note 9.



Prior to these two cases, the national security exception lay largely dormant, with only sporadic consideration at the supranational level.<sup>36</sup> Under GATT 1947, the practice of the GATT hewed to a reserved approach, largely refraining from interpreting state invocation of Article XXI. Most notably, in *United States – Trade Measures Affecting Nicaragua* (1985), a GATT panel considered the validity of the United States’ imposition of a trade embargo on Nicaragua. The United States invoked Article XXI(b)(iii) in its defense, arguing that the terms of Article XXI prevented the panel from reviewing any invocation of the national security exception.<sup>37</sup> The panel punted on the substantive question of whether the U.S. invocation of Article XXI(b) was justified, finding that the matter was not in the panel’s terms of reference.<sup>38</sup> The *United States – Nicaragua* decision was emblematic of the general approach of refraining from adjudicating invocations of the national security exception or simply letting disputes brought under Article XXI come to political settlements.<sup>39</sup> After the conclusion of the Uruguay Round in 1994, there was some speculation that the newly constituted DSB might consider the validity of the Helms-Burton Act, which imposed stringent restrictions on trade with Cuba for U.S. and foreign nationals, but the Act was never scrutinized by a DSB panel.<sup>40</sup>

#### A. *Russia – Measures Concerning Traffic in Transit*

It was not until *Russia – Traffic in Transit*, adopted in 2019, that a DSB panel decided on the merits of an Article XXI defense. The case considered Russian restrictions on the transit of Ukrainian goods through Russian territory towards their end markets in Central Asia. Russia’s

36. See, e.g., Pinchis-Paulsen, *supra* note 26, at 111; Tania Voon, *The Security Exception in WTO Law: Entering a New Era*, 113 AM. J. INT’L L. UNBOUND 45, 45 (2019).

37. Panel Report, *United States–Trade Measures Affecting Nicaragua*, GATT Doc. L/6053, ¶ 5.2 (Oct. 13, 1986) (unadopted), [https://www.wto.org/gatt\\_docs/English/SULPDF/91240197.pdf](https://www.wto.org/gatt_docs/English/SULPDF/91240197.pdf).

38. *Id.* ¶ 5.3.

39. See, e.g., Contracting Parties Decision, *U.S. Export Restrictions (Czechoslovakia)*, 2 B.I.S.D. 28 (June 8, 1949) (rejecting that “the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licenses”); Communication of the European Community, Australia, and Canada, *Trade Restrictions Affecting Argentina Applied for Non-economic Reasons*, GATT Doc. L/5319/Rev.1 (May 18, 1982) (avoiding establishment of a panel through discussions); Panel Report, *United States–Imports of Sugar from Nicaragua*, GATT Doc. L/5607, ¶¶ 3.10, 4.7 (Mar. 13, 1984) (finding U.S. in violation of GATT Art. XIII(2) but declining to review invocation of Art. XXI); Communication from Yugoslavia, *Trade Measures Against Yugoslavia for Non-Economic Reasons*, GATT Doc. L/6945, 2–3 (Nov. 26, 1991) (action suspended due to uncertainty over continued existence of Yugoslavia).

40. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104–14, 110 Stat. 785; see also Schloemann & Ohlhoff, *supra* note 19, at 425.

blockade of Ukrainian goods in transit came amid broader tensions between Ukraine and Russia stemming from the Euromaidan protest movement in Ukraine, including Russia's annexation of Crimea and an ongoing struggle between Ukraine and Russian-backed separatists in Ukraine's eastern Donetsk and Luhansk regions.<sup>41</sup>

Ukraine claimed that the transit restrictions violated Article V(2) of GATT 1994, which guarantees "freedom of transit" through the territory of other contracting parties.<sup>42</sup> Russia invoked Article XXI(b) (iii), arguing that the panel did not have jurisdiction to review the national security exception.<sup>43</sup> In other words, Russia maintained that Article XXI was self-judging.<sup>44</sup> The United States, as a third party, argued that although Article XXI may not be self-judging, it is a non-justiciable matter, akin to a "political question."<sup>45</sup>

Examining the text, object and purpose, and negotiating history of the provision, the panel rejected both of these arguments.<sup>46</sup> First, it found that the *chapeau* of Article XXI(b) was self-contained; that is, the "which it considers" language in the *chapeau*, relied upon for the non-justiciability argument, does not apply to the enumeration of specific instances contained in subparagraphs (i)-(iii).<sup>47</sup> The language of each of the subparagraphs—"relating to" for (i) and (ii) and "taken in time of" for (iii)—supports the proposition that they describe an objective relationship and not a subjective determination.<sup>48</sup> Similarly, it would be inconsistent with the object and purpose of the GATT to interpret Article XXI subjectively because doing so would "subject[] the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that member."<sup>49</sup> Lastly, the negotiating history and *travaux préparatoires* of GATT 1994 indicate that the contracting parties—particularly the United States, which was the primary sponsor of the exception—did not intend it to be a unilateral escape clause

41. *Russia–Traffic in Transit*, *supra* note 8, ¶¶ 7.5–7.19.

42. *Id.* ¶ 7.2 (referencing GATT 1994, *supra* note 7, art. V(2)).

43. *Russia–Traffic in Transit*, *supra* note 8, ¶ 7.4.

44. *Id.* ¶ 7.57.

45. *Id.* ¶ 7.103.

46. The panel did not distinguish between the arguments that the Article is self-judging or merely non-justiciable, finding that these interpretations have the same effect. *Id.*

47. *Id.* ¶ 7.82.

48. *Id.* ¶¶ 7.69, 7.70, 7.77, 7.79.

49. *Id.* ¶ 7.79 (defining the object and purpose of the GATT as being "to promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade").

from WTO commitments.<sup>50</sup> Thus, DSB panels have the authority to review invocations of Article XXI.<sup>51</sup>

Having found that the invocation of Article XXI(b) was justiciable, the panel evaluated the substantive merits of Russia's claim. In doing so, the panel distinguished between the *chapeau* of Article XXI(b) ("necessary for the protection of its essential security interests") and the text of Article XXI(b)(iii) ("taken in time of war or other emergency").<sup>52</sup> As it did in finding that Article XXI was justiciable, the panel found that the existence of "war or other emergency" is an objective question.<sup>53</sup> It defined "war or other emergency" as "a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state."<sup>54</sup>

On the other hand, under the *chapeau* of Article XXI(b), it is left "to every member to define what it considers to be its essential security interests," qualified by the requirement that such consideration be made in good faith.<sup>55</sup> Thus, the named security interest must be actually "essential"<sup>56</sup> and must not be used to circumvent the state's obligations under GATT 1994.<sup>57</sup> Nevertheless, the definition of essential security interests, while not subjective, is still deserving of deference. Thus, to withstand scrutiny, a state must articulate its essential security interests "sufficiently enough to demonstrate their veracity."<sup>58</sup> Similarly, regarding the fit between its stated interests and the chosen means, the state must demonstrate a minimum requirement of plausibility; namely, that the relationship between the means and ends is "not implausible."<sup>59</sup>

Applying this framework to the case at hand, the panel found that an emergency objectively existed between Russia and Ukraine, a situation that the U.N. had deemed as involving armed conflict.<sup>60</sup> Given the existence of this situation, and of mutual sanctions between Russia and Ukraine, "[t]he measures at issue cannot be regarded as being so remote from, or unrelated to, the 2014 emergency, that it is implausible

50. *Id.* ¶¶ 7.83–7.100.

51. *Id.* ¶¶ 7.102–7.104.

52. *Id.*

53. *Id.* ¶ 7.82.

54. *Id.* ¶¶ 7.76, 7.111.

55. *Id.* ¶¶ 7.131–7.132.

56. *Id.* ¶ 7.130.

57. *Id.* ¶ 7.133.

58. *Id.* ¶ 7.134.

59. *Id.* ¶ 7.138.

60. *Id.* ¶ 7.122.

that Russia implemented the measures for the protection of its essential security interests arising out of that emergency.”<sup>61</sup> Notably, this held true even though Russia had not articulated the essential security interests “that it considers the measures at issue are necessary to protect.”<sup>62</sup> The mere existence of a state of armed conflict was enough to render the essential security interests of Russia cognizable.<sup>63</sup>

B. *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*

In *Saudi Arabia – Intellectual Property Rights*,<sup>64</sup> a DSB panel considered the legality of measures taken by Saudi Arabia with regard to certain Qatari broadcasters under the TRIPS Agreement.<sup>65</sup> Leading up to the challenged measures, Qatar and Saudi Arabia were engaged in a diplomatic dispute, leading to the severance of relations with Qatar by Saudi Arabia and several other states, including the United Arab Emirates, Bahrain, and Egypt.<sup>66</sup> Qatar alleged that shortly after this time, Saudi Arabia began to implement a “scheme of coercive economic measures against Qatar.”<sup>67</sup> In connection with that scheme, Qatar alleged that Saudi Arabia had permitted piracy of sports broadcasts licensed to Qatari media conglomerate beIN Media Group by Saudi broadcast pirate beoutQ (a play on beIN standing for “be out Qatar”).<sup>68</sup> Specifically, Qatar alleged two primary measures by Saudi Arabia in violation of the TRIPS Agreement: (1) “anti-sympathy” measures that imposed penalties on Saudi lawyers who represented Qatari nationals (effectively preventing beIN from securing legal representation necessary to enforce its intellectual property rights) and (2) Saudi Arabia’s failure to subject beoutQ’s blatant piracy to criminal penalties.<sup>69</sup> In response, Saudi Arabia invoked the security exception contained in Article 73(b) of the TRIPS Agreement, arguing that its actions were justified because they were necessary to protect Saudi Arabia’s essential security interests.<sup>70</sup>

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61. *Id.* ¶ 7.145.

62. *Id.* ¶ 7.136.

63. *Id.* ¶ 7.137.

64. *Saudi Arabia–Intellectual Property Rights*, *supra* note 9.

65. TRIPS Agreement, *supra* note 10.

66. *Saudi Arabia–Intellectual Property Rights*, *supra* note 9, ¶ 2.16.

67. *Id.* ¶ 2.18.

68. *Id.* ¶¶ 2.30–2.45.

69. *Id.* ¶ 2.47.

70. *Id.* ¶¶ 3.3–3.4.

Noting that the text of TRIPS Article 73(b) was identical to that of GATT Article XXI(b), the panel applied the same analytical framework as the *Russia – Traffic in Transit* panel did.<sup>71</sup> The *Saudi Arabia – Intellectual Property Rights* panel boiled this framework down into four parts:

- a. whether the existence of a “war or other emergency in international relations” has been established in the sense of subparagraph (iii) to Article 73(b);
- b. whether the relevant actions were “taken in time of” that war or other emergency in international relations;
- c. whether the invoking Member has articulated its relevant “essential security interests” sufficiently to enable an assessment of whether there is any link between those actions and the protection of its essential security interests; and
- d. whether the relevant actions are so remote from, or unrelated to, the “emergency in international relations” as to make it implausible that the invoking Member considers those actions to be necessary for the protection of its essential security interests arising out of the emergency.<sup>72</sup>

Applying this framework to the facts at hand, the panel found that, as an initial matter, the severance of all diplomatic and economic ties between Saudi Arabia and Qatar constituted “the ultimate State expression of the existence of an emergency in international relations”<sup>73</sup> and that the measure taken by Saudi Arabia therefore occurred during that ongoing emergency.<sup>74</sup> Second, the panel found that Saudi Arabia had sufficiently stated its essential security interest in protecting itself “from the dangers of terrorism and extremism” to overcome the threshold of “minimally satisfactory” articulation, noting that this requirement was “not a particularly onerous one, and is appropriately subject to limited review by a panel.”<sup>75</sup>

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71. *Id.* ¶ 7.241.

72. *Id.* ¶ 7.242.

73. *Id.* ¶ 7.259.

74. *Id.* ¶¶ 7.269–7.270.

75. *Id.* ¶¶ 7.280–7.282.

Lastly, on the question of fit between means and ends, the panel distinguished the anti-sympathy measures preventing Qatari nationals like beIN from seeking remedies in Saudi courts from Saudi Arabia's non-application of criminal procedures and penalties to beoutQ. The anti-sympathy measures, the panel found, met "a minimum requirement of plausibility in relation to the proffered essential security interests, i.e., that they are not implausible as measures protective of these interests."<sup>76</sup> These measures were minimally plausible because they might be seen as part of "Saudi Arabia's umbrella policy of ending or preventing any form of interaction with Qatari nationals" resulting from the break in relations between the two states, even though Saudi Arabia did not claim this as part of its essential security interests.<sup>77</sup> However, the non-application of criminal procedures and penalties to beoutQ were not covered by Article 73(b) because there was no minimally plausible connection that could be stated between "Saudi Arabia's stated essential security interests and its authorities' non-application of criminal procedures and penalties to beoutQ."<sup>78</sup>

### C. Common Features of WTO Panel Decisions

Taken together, *Russia – Traffic in Transit* and *Saudi Arabia – Intellectual Property Rights* share certain common features that may be seen as forming the basis of an inchoate WTO national security jurisprudence. This common approach rests on four pillars.

First, both cases make clear that invocations of the national security exception are unequivocally justiciable. This finding, first articulated in *Russia – Traffic in Transit* and reaffirmed in *Saudi Arabia – Intellectual Property Rights*, resolved a longstanding interpretive question about the function of Article XXI that had not been definitively addressed since the conclusion of the GATT in 1947. This principle alone cements the status of the two panel decisions as landmark cases in WTO jurisprudence.

Second, the substantive subparagraphs of Article XXI(b) and 73(b) are subject to objective analysis. Although both cases dealt exclusively with actions "taken in time of war or emergency," the reasoning of each panel demonstrates that the same sort of objective review would extend to actions taken relating to "fissionable materials" or "relating to "arms ... and other materials ... for the purpose of supplying a military

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76. *Id.* ¶ 7.288 (quoting *Russia–Traffic in Transit*, ¶ 7.138).

77. *Id.* ¶ 7.286.

78. *Id.* ¶ 7.289.

establishment.” Although it is not clear what substantive definition would apply to either of these categories, it is clear that they are nevertheless subject to objective analysis.

Third, in evaluating a state’s invocation of its “essential security interests,” the panels demonstrated substantial deference to the invoking parties. Indeed, Russia managed to skirt by this requirement without actually specifying what its essential interests were. Similarly, the panel did not scrutinize the factual basis of Saudi Arabia’s proffered interest in preventing terrorist attacks stemming from Qatar.

Fourth, the panels extended a similarly forgiving deference with respect to the fit between proffered interests and chosen actions, requiring only that actions taken are “not implausible” given the stated security interests. As the panel explained in the Saudi Arabia case, this standard is equivalent to a “minimum requirement of plausibility.”

#### IV. THE BIFURCATED APPROACH OF THE RUSSIA & SAUDI ARABIA PANELS

Although it is useful to note the through-lines of the *Russia–Traffic in Transit* and *Saudi Arabia–Intellectual Property Rights* panel decisions, the consistencies in the two panels’ stated approaches do not tell the whole story of how these panels actually adjudicated the national security exception. Between the lines of the two decisions, there is a dichotomy between the panels’ stated “formal” approach and the “practical” approach the panels actually applied. This bifurcated approach leaves open a zone of ambiguity in three key requirements of the “formal” approach: (i) the articulation of essential security interests, (ii) good faith, and (iii) the fit between states means and accomplished ends.

##### A. Articulation of Essential Security Interests

Both panels elided over the requirement that states claiming the broad exemption of Article XXI must actually articulate their essential security interests. Under the standard set out in the *Russia* case and affirmed in the *Saudi Arabia* case, the state claiming an essential security interest must articulate that essential security interest “sufficiently enough to demonstrate [its] veracity” in order to pass the good faith requirement.<sup>79</sup> Although the panels made clear that this is not a particularly onerous requirement, it still contains significant indeterminacy. It does not specify whether the veracity of a claimed security interest is determined by an objective inquiry into the reasonableness of a state holding such a security interest or a subjective inquiry into the state’s

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79. *Russia–Traffic in Transit*, *supra* note 8, ¶ 7.134.

actual security interests. Nor does the requirement specify what sort of a showing is sufficient to demonstrate the veracity of a stated security interest.

Because the rule stated by the panels is so indeterminate, the only way to determine what the panel had in mind is to look to the operation of the rule in practice. In *Russia–Traffic in Transit*, Russia argued that Article XXI was entirely self-judging, and consequently did not try to justify its actions by referencing an essential security interest. Nevertheless, the panel ignored its own articulation requirement in upholding Russia’s actions, reasoning that the existence of a state of armed conflict between Russia and Ukraine was enough to infer that Russia had an essential security interest at stake.<sup>80</sup>

The *Saudi Arabia* case differs slightly from the *Russia* case, because unlike Russia, Saudi Arabia actually offered the panel a definition of its essential security interests, namely, an interest in preventing terrorism in Saudi Arabia, ostensibly of Qatar’s doing. Yet, instead of evaluating Saudi Arabia’s articulated security interest, the panel devised its own by looking to the nature of the “emergency” between Saudi Arabia and Qatar (in this case the severing of diplomatic and trade relations). Looking to the state of emergency, rather than Saudi Arabia’s stated interest, the panel found that Saudi Arabia’s essential security interest was implied by a general policy of non-intercourse with Qatar. As in the *Russia* case, the *Saudi Arabia* panel looked not to what Saudi Arabia said, but to what it did.

The two panel decisions leave the test of essential security interests on shaky ground. Both panels affirmed in theory the principle that a state must make some minimum showing to demonstrate the veracity of its claimed essential security interest. In practice, however, both panels ignored this principle. Instead, the panels looked to the existence of “war or other emergency” to infer the existence of essential security interests relevant to the invoking parties’ claims. Which of the two approaches might apply in future cases is uncertain.

### B. *Good Faith Requirement*

Both panel decisions left open the question of how the good faith requirement applies to a state’s invocation of its essential security interests. In both *Russia–Traffic in Transit* and *Saudi Arabia–Intellectual Property Rights*, the DSB panel found that a state’s definition of its essential security interest still requires that the interest be justified by the

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80. *Id.*



general principle of good faith demanded by the Vienna Convention on the Law of Treaties.<sup>81</sup> In doing so, the panels stopped short of saying that a state's assertion of essential security interests for Article XXI purposes is entirely self-judging, reserving the right to some modicum of review of a state's professed essential security interests. This requirement of good faith announced by the panels pairs naturally with the theoretical requirement that the state invoking the Article XXI national security exception must adequately articulate its essential security interests for the panel to recognize its claim of exemption.

But, as with the articulation requirement, the panels did not inquire into whether Russia and Saudi Arabia were acting in good faith when they invoked Article XXI. This seems particularly puzzling in light of the underlying facts beneath the claims. In the *Russia* case, Russia unilaterally annexed Crimea and sent both materiel and personnel support to separatists in the Ukrainian regions of Donetsk and Luhansk, instigating the crisis.<sup>82</sup> Although the *Saudi Arabia* case was not quite as flagrant as the Russia example, the Saudi-led strategy of isolating Qatar by cutting off diplomatic relations and imposing a trade embargo on the Gulf nation was widely seen as an overreaction in the global community, with even stalwart Saudi allies like the United States exerting diplomatic pressure for Saudi Arabia to back off.<sup>83</sup>

The panels' decisions not to ascribe fault for the underlying causes of each case are perhaps understandable. Because the panels based their practical definition of essential security interests on the objective existence of "war or other emergency" under Article XXI(b) (iii), making a determination of good faith is entirely dependent on whether a state of "war or other emergency," in fact, existed. It would have been strange for the panels to set out "objective" criteria for the existence of "war or other emergency" under XXI(b) (iii) but then question the

81. VCLT, art. 31(1), *supra* note 29.

82. Andre Higgins, Michael R. Gordon & Andrew E. Kramer, *Photos Link Masked Men in East Ukraine to Russia*, N.Y. TIMES (Apr. 20, 2014), <https://www.nytimes.com/2014/04/21/world/europe/photos-link-masked-men-in-east-ukraine-to-russia.html>.

83. Initially, the Trump administration was careful not to broach criticism of the Saudi-led coalition. Indeed, one report suggests that former Secretary of State Rex Tillerson was fired, in part, because of his efforts to prevent Saudi Arabia from escalating into a hot war with Qatar. Alex Emmons, *Saudi Arabia Planned to Invade Qatar Last Summer. Rex Tillerson's Efforts to Stop it May Have Cost Him His Job*, THE INTERCEPT (Aug. 1, 2018, 7:00 AM), <https://theintercept.com/2018/08/01/rex-tillerson-qatar-saudi-uae/>. However, the Trump administration changed course and has more recently tried to broker a settlement between the feuding Gulf States. *Pompeo Says Trump Administration Eager for End to Gulf Rift*, REUTERS (Sept. 15, 2020, 5:03 PM), <https://www.reuters.com/article/gulf-crisis-qatar-usa-int/pompeo-says-trump-administration-eager-for-end-to-gulf-rift-idUSKBN265300>.

validity of essential security interests emerging from that emergency under the *chapeau* of XXI(b). Moreover, ascribing fault likely would have attracted political attacks on the WTO from countries who would see such blame-casting as squarely outside the judicial role.

But the panels would be in no such bind if they had actually required Russia or Saudi Arabia to articulate an essential security interest. In other words, actually requiring good faith would only be strange under the panels' deferential identification of essential security interests with the mere existence of war or other emergency in international relations.

Thus, it seems the panels had a bifurcated approach when it came to requiring good faith in the invocation of Article XXI. As with the scope of "essential security interests," whether the good faith requirement actually applies to Article XXI depends on whether a future panel is applying the test that was articulated or the test that was actually applied in *Russia-Traffic in Transit* and *Saudi Arabia-Intellectual Property*.

### C. Means-Ends Fit

The bifurcated approach to "essential security interests" and the good faith requirement necessarily has an effect on the means-end fit applied by the panels. The fit analysis, as articulated in *Russia-Traffic in Transit*, demands only a "minimum requirement of plausibility."<sup>84</sup> As summarized in the *Saudi Arabia* case, the fit analysis asks "whether the relevant actions are so remote from, or unrelated to, the 'emergency in international relations' as to make it implausible that the invoking Member considers those actions to be necessary for the protection of its essential security interests arising out of the emergency."<sup>85</sup>

Unlike with "essential security interest" and the good faith requirement, the application of this test in practice does not depart significantly from the articulation of the test given in the panel reports. However, the operation of the test in practice is altered as a result of the panels' deferential posture towards "essential security interests" and the good faith requirement.

As articulated in the *Saudi Arabia* case, the fit analysis claims to separately scrutinize (a) the stated interests and (b) the connection between stated interests and chosen means. In reality, though, this is collapsed into a single inquiry, namely, whether the action taken is justified by *any* interest conceivably inferred from the underlying situation. If there

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84. *Russia-Traffic in Transit*, *supra* note 8, ¶. 7.138.

85. *Saudi Arabia-Intellectual Property Rights*, *supra* note 9, ¶ 7.242.

is any conceivable basis for the action taken, the panel will find the action covered by the Article XXI national security exception. This approach is not tied to any specific articulation of good-faith essential security interests because the party invoking the exception need not articulate any such interest in the first place.

As a result, the test is far less stringent in practice than it is in theory (not that it is very stringent in theory to begin with). Whereas the theoretical test (as articulated in the panel decisions) resembles a sort of four-step rational basis standard, the test in practice more closely resembles a two-step *conceivable* basis standard. First the court asks whether a state of affairs objectively exists under the substantive subparagraphs of Article XXI(b), i.e., whether the action taken actually relates to (i) fissionable material, (ii) military equipment and personnel, or (iii) a state of war or other emergency in international relations. Second, if the action objectively relates to one of these categories, the panel will find the action covered by Article XXI if the objectively existing state of affairs implies some conceivable basis for taking the action.

The *Saudi Arabia* case provides a useful illustration of this test in action because it upheld Saudi Arabia's anti-sympathy measures but struck down its non-prosecution measures under this standard. The anti-sympathy measures aimed at Qatari nationals were covered by Article XXI because the breakdown in relations between Saudi Arabia and Qatar made it plausible that Saudi Arabia would want to institute a general policy of non-intercourse with Qatari nationals (even though Saudi Arabia did not articulate this as an interest). The anti-sympathy measures were therefore rationally related to the general policy of non-intercourse. The non-prosecution measures, however, were not covered by Article XXI because there was no reason why the diplomatic dispute between Saudi Arabia and Qatar would give Saudi Arabia a reason not to prosecute a blatant case of digital piracy. In other words, there was no plausible basis by which Saudi Arabia could justify its decision not to prosecute beoutQ even with the expansive definition of essential security interests so generously supplied by the panel.

In this manner, the *Russia* and *Saudi Arabia* tests applied a far less stringent approach than they claimed to be applying. The gap between theory and practice creates a zone of ambiguity for future panels applying the national security exception. A future panel applying the test articulated in the *Russia* and *Saudi Arabia* cases thus may come to a different conclusion than a panel that seeks to replicate the practical approach taken in the two decisions. Therefore, future panels will have a significant space for judicial discretion in deciding cases that fall

within the zone of ambiguity created by the *Russia* and *Saudi Arabia* decisions.

V. PATHS FORWARD FOR THE NATIONAL SECURITY EXCEPTION

The decisions in *Russia–Traffic in Transit* and *Saudi Arabia–Intellectual Property Rights* answered critical questions surrounding the Article XXI security exception. In the *Russia* case, the DSB panel established that claims of exemption made under Article XXI are justiciable, although it upheld Russia’s claim. In the *Saudi Arabia* case, a DSB panel for the first time refused to apply Article XXI to a claimed exemption. Together, the panel decisions demonstrate that the DSB can and will review claims brought under Article XXI, albeit under a highly deferential standard of review.

Despite the path-breaking nature of the panel decisions, they left as many questions open as they answered. The two cases are likely only the first step into the murky waters of Article XXI jurisprudence. The indeterminacies left open by the panel decisions will have to be resolved by practice. Which path future WTO panels decide to take is not entirely clear. Ordinarily, it would have been possible to appeal the *Russia* and *Saudi Arabia* cases to the WTO Appellate Body for a more definitive ruling. However, the United States has blocked new additions to the Appellate Body over criticisms about the Appellate Body’s “judicial activism,”<sup>86</sup> a move that has left the body without the three members necessary to form a quorum.<sup>87</sup> Accordingly, the Appellate Body is functionally moribund. The panel decisions in the *Russia* and *Saudi Arabia* cases are all that future panels will have to guide them.

The indeterminacies of the *Russia* and *Saudi Arabia* decisions are not necessarily a bad thing from the perspective of future panels. The zone of ambiguity created by the gulf between the panels’ stated approach and the approach they took in practice will provide future panels with a measure of discretion. Future panels looking to the *Russia* and *Saudi Arabia* decisions for guidance will be able to pick and choose between the more restrictive approach formally stated in the decisions and the

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86. OFF. OF U.S. TRADE REPRESENTATIVE, 2019 TRADE POLICY AGENDA AND 2018 ANNUAL REPORT 6 (2019), [https://ustr.gov/sites/default/files/2019\\_Trade\\_Policy\\_Agenda\\_and\\_2018\\_Annual\\_Report.pdf](https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf).

87. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 17(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU] (establishing three-member quorum); Emre Parker, “*The WTO is in Crisis*”: *Dispute Puts Global Trade Regulator at Risk*, WALL ST. J. (Dec. 9, 2019, 6:00 AM), <https://www.wsj.com/articles/the-wto-is-in-crisis-dispute-puts-global-trade-regulator-at-risk-11575889201> (noting loss of quorum).

more deferential approach actually applied. Of course, a future panel is free to totally jettison the approach of the *Russia* and *Saudi Arabia* panels.<sup>88</sup> However, it seems unlikely that a future panel would do so because sticking to the prior decisions would seem to provide a future panel with enough discretion to rule either way, particularly in difficult cases.

Perhaps the most closely watched of the cases on the DSB Docket is *United States—Certain Measures on Steel and Aluminum*. This case, detailed below, provides a useful window into how a future WTO panel might choose to apply either the “formal” approach articulated in the *Russia* and *Saudi Arabia* cases or the “practical” approach actually applied in those decisions and how the application of each approach may lead to differing outcomes.

#### A. Section 232 Tariffs

Section 232 of the Trade Expansion Act of 1962 accords the President of the United States broad authority to place controls on imports for reasons of national security.<sup>89</sup> Under Section 232, the Department of Commerce may initiate an investigation into 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.”<sup>90</sup> If the President concurs in Department of Commerce’s finding that an article threatens national security, she may take action that she sees fit “to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.”<sup>91</sup> Both the Department of Commerce and the President, in making their determinations, may give consideration to “domestic production needed for projected national defense requirements” and to “the impact of foreign competition on the economic welfare of individual

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88. Article 11 of the DSU states that “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.” This language suggests that the decisions of DSB panels or of the Appellate body do not have precedential value. DSU, *supra* note 87, art. 11. In practice however, prior decisions by DSB panels and by the Appellate Body play an important role in informing future decisions. *See, e.g.*, James Bacchus & Simon Lester, *The Role of Precedent and the Role of the Appellate Body*, 54 J. WORLD TRADE 183, 184 (2020). U.S. objection to the treatment of prior WTO decisions as precedential is a major factor in the U.S. blockage of new additions to the Appellate Body. *Id.* at 185.

89. 19 U.S.C. § 1862.

90. 19 U.S.C. § 1862(b)(3)(A).

91. 19 U.S.C. § 1862(c)(1)(A)(ii).

domestic industries” if displacement of domestic industries by foreign imports threatens to impair national security.<sup>92</sup>

Over the course of Section 232’s history, the Department of Commerce has produced reports on the national security effects of imports in eighteen instances, of which only five (excluding the steel and aluminum tariffs) resulted in action.<sup>93</sup> Prior to the Trump administration, Section 232 had fallen into disuse, with the last investigation having been conducted in 2001 (relating to iron ore and semi-finished steel).<sup>94</sup> However, Section 232 had a major resurgence under the Trump administration. President Trump campaigned on a pro-tariff agenda<sup>95</sup> and in office routinely noted his fondness for tariffs.<sup>96</sup>

In January 2018, the Department of Commerce issued its reports finding that steel and aluminum imports harmed U.S. national security.<sup>97</sup> The reports determined that both steel and aluminum are necessary to meet national defense requirements and that imports of foreign steel and aluminum adversely impact the economic welfare of the U.S. steel and aluminum industries.<sup>98</sup> Pursuant to those reports, in March of 2018, President Trump imposed a 25% tariff on imported steel<sup>99</sup> and a

92. 19 U.S.C. § 1862(d).

93. BUREAU OF INDUS. AND SEC., U.S. DEPT. OF COMMERCE, SECTION 232 INVESTIGATIONS: THE EFFECT OF IMPORTS ON NATIONAL SECURITY, <https://www.bis.doc.gov/index.php/other-areas/office-of-technology-evaluation-ote/section-232-investigations>.

94. *Id.*

95. See Reid J. Epstein & Colleen McCain Nelson, *Donald Trump Lays out Protectionist Views in Trade Speech*, WALL ST. J., <https://www.wsj.com/articles/donald-trump-lays-out-protectionist-views-in-trade-speech-1467145538> (Last updated June 28, 2016, 5:33 PM).

96. Donald J. Trump (@realDonaldTrump), TWITTER (July 24, 2018, 7:29 AM), <https://twitter.com/realdonaldtrump/status/1021719098265362432?lang=en> (proclaiming that “Tariffs are the greatest”); Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 4, 2018, 10:03 AM), <https://twitter.com/realdonaldtrump/status/1069970500535902208> (stating “I am a tariff man”).

97. BUREAU OF INDUS. AND SEC., U.S. DEP’T. OF COMMERCE, THE EFFECTS OF THE IMPORT OF STEEL ON THE NATIONAL SECURITY (JANUARY 11, 2018) [hereinafter Section 232 Steel Report]; BUREAU OF INDUS. AND SEC., U.S. DEP’T. OF COMMERCE, THE EFFECTS OF THE IMPORT OF ALUMINUM ON THE NATIONAL SECURITY (JANUARY 17, 2018) [hereinafter Section 232 Aluminum Report].

98. Section 232 Steel Report, *supra* note 97, at 55–57; Section 232 Aluminum Report, *supra* note 97, at 104–06.

99. Adjusting Imports of Steel Into the United States, 83 Fed. Reg. 11625 (Mar. 8, 2018). The Department of Commerce initially recommended a 24% tariff. Jennifer Jacobs, *Trump Favor’s Commerce’s Harsh Steel and Aluminum Tariffs, Sources Say*, BLOOMBERG (Feb. 23, 2018, 4:47 PM, updated February 24, 2018, 12:17 PM), [https://www.bloomberg.com/news/articles/2018-02-23/trump-is-said-to-favor-stiffest-u-s-steel-aluminum-tariffs?utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=newsletter\\_axiossneakpeek&stream=top-stories](https://www.bloomberg.com/news/articles/2018-02-23/trump-is-said-to-favor-stiffest-u-s-steel-aluminum-tariffs?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiossneakpeek&stream=top-stories). However, President Trump adjusted this figure upward to 25% because a round figure “sounded better.” Jonathan

10% tariff on imported aluminum.<sup>100</sup>

In April 2018, soon after the United States announced the tariffs (and just days after the DSB panel ruled on the *Russia* case), China requested consultations at the WTO (the first step in the WTO dispute settlement process), which were joined by a host of other countries affected by the Section 232 tariffs.<sup>101</sup> The United States, as predicted, articulated a defense based on Article XXI's national security exception, reiterating its argument from the *Russia* case that Article XXI is self-judging, ensuring that the WTO panel will have to construe the national security exception in addition to the substantive claims made by the countries bringing the challenge under Article XIX of the GATT 1994.<sup>102</sup>

How the DSB panel might rule is not immediately clear from looking at the decisions in the *Russia* and *Saudi Arabia* cases. Georges Abi-Saab, a former chairman of the Appellate Body, and the chair of the *Russia – Traffic in Transit* panel, stated that although it would be “very difficult” for the United States to defend Section 232 auto tariffs (which the United States declined to impose) under an Article XXI defense, “strategic raw materials may be easier to prove than a final product like a car” under Article XXI.<sup>103</sup> Abi-Saab's comments suggest that the *Russia* decision's jurisprudential approach affords some flexibility in marginal cases. What outcome the DSB panel comes to will largely depend on which of the two approaches implied by the *Russia* and *Saudi Arabia* panels it decides to take.

### B. Application of the “Formal” Approach

Under the approach formally stated in the *Russia* and *Saudi Arabia* decisions, the United States might have a more difficult time claiming the Article XXI security exception. If the formal approach were applied, the panel would have to be satisfied (i) that the actions taken

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Swan, *Inside the White House Trade Fights*, AXIOS (Feb. 25, 2018), <https://www.axios.com/inside-the-white-house-trade-fights-1519601322-5de818bf-4787-42a5-9e7e-f780f4e2ebef.html>.

100. Adjusting Imports of Aluminum Into the United States, 83 Fed. Reg. 11619 (Mar. 15, 2018).

101. Request for Consultations by China, *United States–Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/1 (Apr. 9, 2018).

102. First Written Submission of the United States, *United States–Certain Measures on Steel and Aluminum Products*, ¶ 3, WT/DS548 (June 12, 2019), <https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.%28DS548%29.fin.%28public%29.pdf> [hereinafter U.S. First Written Submission].

103. Tom Miles, *Adjudicator Says Any Security Defense of US Auto Tariffs at WTO “Very Difficult,”* REUTERS (May 27, 2019, 11:42 AM), <https://www.reuters.com/article/us-usa-trade-autos-wto-idUSKCN1SX117>.

objectively relate to one of the substantive subsections of Article XXI (b); (ii) that the United States has adequately and in good faith articulated an essential security interest; and (iii) that the actions taken are plausibly related to the articulated essential security interest.

It is difficult to evaluate how the United States would fare under a strict reading of the *Russia* and *Saudi Arabia* cases because the United States has not attempted to articulate an essential security interest, has not specified to which substantive subsection of Article XXI(b) its claims relate, and has not provided an explanation of how the measures taken naturally flow from that interest. The United States has suggested that the rationale it provided in the Section 232 reports “relate most naturally to the circumstances described in Article XXI(b)(iii)” but maintains that this is irrelevant as the invoking state must decide for itself what comprises its essential security interests.<sup>104</sup> This seems to be the closest acknowledgement by the United States of the *Russia/Saudi Arabia* approach. Nowhere else in the various documents submitted by the United States to the WTO panel is there even an implicit acknowledgement of the validity of the *Russia* or *Saudi Arabia* approaches. The United States maintains that the *Russia* case was wrongly decided,<sup>105</sup> that Article XXI is entirely self-judging,<sup>106</sup> and that the panel in the *Saudi Arabia* case was wrong to rely on the *Russia* decision both on the merits and on the ground that panel decisions have no precedential force.<sup>107</sup>

It might be possible for a panel applying the formal approach to find that the United States’ actions objectively relate to one of the substantive subsections of Article XXI(b). It would be a stretch to say that the United States’ actions related to a “war or emergency in international relations” under XXI(b)(iii). The state of trade relations between the United States and the rest of the world, even in their currently degraded condition, cannot be said to amount to the sort of quasi-war between Russia and Ukraine or the near-war tensions between Saudi Arabia and Qatar. However, there is a stronger case for a nexus to “traffic in arms, ammunitions, and implements of war” under Article XXI (b)(ii). Although the United States’ opening statement to the panel

104. Opening Statement of the United States, *United States—Certain Measures on Steel and Aluminum Products*, ¶ 56, WT/DS548 (Nov. 4, 2019), [https://ustr.gov/sites/default/files/enforcement/DS/US.Sub2.fin%20\(DS548\).pdf](https://ustr.gov/sites/default/files/enforcement/DS/US.Sub2.fin%20(DS548).pdf) [hereinafter U.S. Opening Statement].

105. U.S. First Written Submission, *supra* note 102, ¶ 129.

106. *Id.* ¶ 20.

107. Response of the United States to the Panel’s Additional Questions to the Parties, *United States—Certain Measures on Steel and Aluminum Products*, ¶¶ 50–52, WT/DS544 (Sept. 22, 2020), [https://ustr.gov/sites/default/files/enforcement/DS/US.As.Pnl.Qs1.\(DS544\).fin.\(public\).pdf](https://ustr.gov/sites/default/files/enforcement/DS/US.As.Pnl.Qs1.(DS544).fin.(public).pdf) [hereinafter U.S. Response to Additional Question].



hinted that the Section 232 tariffs might be justified under XXI(b) (iii),<sup>108</sup> it seems more likely that a panel would find that steel and aluminum production fall under Article XXI(b) (ii).

But even if a panel could find that the United States' actions might be objectively related to one of the substantive subsections of Article XXI(b), it does not necessarily follow under the formal approach that the United States' actions plausibly relate to an essential security interest in good faith. One problem is that the United States did not articulate an essential security interest in its submissions to the panel. This alone might be enough to undermine the United States' Article XXI (b) claim on a strict reading of the *Russia* and *Saudi Arabia* decisions. A more charitable panel might look to the reasons given by the United States in the published steel and aluminum investigations for both the essential security interest and for the fit between that interest and the action taken, i.e., that previous levels of steel and aluminum imports threatened the United States by putting domestic producers at a significant disadvantage and therefore threatened to impair national defense requirements and critical infrastructure.<sup>109</sup>

However, even if a panel were prepared to accept this reasoning as a minimally plausible explanation for imposing the tariffs, the panel would still have to determine that the tariffs were imposed in good faith. Here, the public statements of President Trump and other officials may prove an obstacle to the United States' claims. As the European Union details in its First Written Submission to the panel, President Trump's comments both before and after the imposition of the Section 232 tariffs suggested that the tariffs were more related to alleviating harm to domestic industry than to national security.<sup>110</sup> This sort of concern is more properly classified under the framework of safeguard measures under Article XIX than it is under the Article XXI national security exception.<sup>111</sup> It is still possible that the panel could find that a bare concern for the viability of domestic industry amounts to a national security rationale, but this seems doubtful.

Thus, it would be difficult for the United States to prevail under a strict reading of the formal approach announced in the *Russia* and *Saudi Arabia* decisions. Although it is theoretically possible that a panel

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108. See U.S. Opening Statement, *supra* note 104.

109. Section 232 Steel Report, *supra* note 97; Section 232 Aluminum Report, *supra* note 97.

110. First Written Submission by the European Union, *United States—Certain Measures on Steel and Aluminum Products*, ¶¶ 24–25, 570–76 WT/DS548 (May 1, 2019), [https://trade.ec.europa.eu/doclib/docs/2019/august/tradoc\\_158326.pdf](https://trade.ec.europa.eu/doclib/docs/2019/august/tradoc_158326.pdf).

111. *Id.* ¶¶570–76.

could find that the United States' actions were justified under the Article XXI national security exception, it would be a stretch. The United States would have to draw a panel willing to overlook both the absence of a stated essential security interest and the statements made by U.S. leaders in the run-up to the Section 232 tariffs.

C. *Application of the "Practical" Approach*

The United States stands a much higher chance of success if a subsequent panel decides to apply the test actually applied by the panels in the *Russia* and *Saudi Arabia* decisions. Under this test, the Section 232 tariffs on steel and aluminum would likely succeed. Here, the panel would only have to find (i) the actions taken objectively relate to one of the substantive subsections of Article XXI(b) and (ii) that the objectively existing state of affairs implies some conceivable basis for taking the action.

Neither of these requirements would be difficult to satisfy. As with the formal approach, there is a strong case that the Section 232 tariffs are objectively related to "traffic in arms, ammunitions, and implements of war . . . for the purpose of supplying a military establishment" under Article XXI(b) (ii), although perhaps maybe not "war or other emergency" under XXI(b) (iii). Even though the United States has not identified which subsection of XXI(b) would apply to this case, neither did Russia in *Traffic in Transit*. Given the "objective" nature of the test as applied, there is no need for the invoking state to make any sort of showing. All that is needed is for the panel to find that the actions taken by the invoking state did in fact relate to one of the subsections of Article XXI(b).

Once the actions taken are found to relate objectively to one of the subsections of Article XXI(b), most of the work is done. All that is left is to determine whether the actions taken could plausibly relate to some essential security interest implied by the objectively-existing condition. This is not a high bar to clear. As seen in the *Saudi Arabia* case, this standard will uphold all but the most patently absurd claims. Here, applying the sort of deference the practical approach recommends, the United States' tariffs relate to the sort of military materiel contemplated by Article XXI(b) (ii). The United States naturally has an essential security interest in military readiness. As such, it is plausible that the United States would restrict the import of steel and aluminum (strategic raw materials) in order to maintain the viability of domestic industries necessary for the supply of the military-industrial base.

VI. CONCLUSION & EVALUATION

The two approaches detailed above are merely the two poles on a spectrum of possible approaches a future DSB panel might take with

regard to the national security exception. In this respect, the seemingly rigid and formalistic test set out by the panel in the *Russia* case and confirmed in the *Saudi Arabia* case is deceptive. Had the *Russia* or *Saudi Arabia* panels actually applied the test they announced, it seems unlikely that either Russia's blockade of Ukraine or Saudi Arabia's blatant intellectual property theft could have passed muster.

By announcing one test and applying another, the panels in the two decisions have maximized the space for judicial discretion under the national security exception. In the *Saudi Arabia* case, for instance, the panel was able to throw Saudi Arabia a bone by upholding its anti-sympathy measures, and simultaneously signal to the rest of the world that Article XXI is not a blank check for flouting trade rules by striking down Saudi Arabia's non-prosecution measures. There are at least some limits. Had the panel said it was applying the test that it did in fact apply, the decision would likely have had little deterrent effect. Other countries would see that claiming an Article XXI exception is easy, which would incentivize those countries to violate the rules in the future.

It seems that this sort of discretion is precisely what is necessary for the WTO when dealing with the sensitive topic of national security. In a geopolitical environment where states increasingly see economic concerns wrapped up in national security, it is necessary for the WTO to tread a fine line between deterrence of violation and charges that it is riding roughshod over states' national security concerns, concerns that often lie at the heart of a nation's conceptions of sovereignty.

The collision between national security and trade shows no signs of abating. The *Russia* and *Saudi Arabia* cases were the first to interpret the meaning of Article XXI, but they are almost certain not to be the last. Indeed, use of the national security exception is likely to grow as states pack more and more subjects into their core security interests: not just economic security, but climate security, cyber security, and (now more than ever) health security.<sup>112</sup> Whether the approach taken in the *Russia* and *Saudi Arabia* decisions will succeed in maximizing compliance and minimizing dissatisfaction with WTO rules remains to be seen. It is possible that no approach could succeed in walking this fine line. Nevertheless, the sort of strategic ambiguity demonstrated in the *Russia* and *Saudi Arabia* cases may be the best the WTO has to offer.

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112. See J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1031–50 (2020).