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The GATT Security Exception: A Standard of Review and Systemic Implications

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discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2019
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Abstract

The security exception of GATT, Article XXI, introduced in original GATT 1947, has not been interpreted for over 70 years. However, the issue of the interpretation of GATT Article XXI has been brought before the WTO in recent trade disputes such as *Russia-Traffic in Transit*, *Qatar v UAE* and *US Section 232 tariffs*. The awakening of the GATT security exception poses the following questions: (i) where are we to draw the line between imposing trade-restrictive measures for the protection of essential security interests and trade protectionism?; and (ii) what are the broader challenges for the WTO and international economic law that these disputes reveal and how to address them?

With regard to the first question, finding the answer requires determining the best standard of review to assess security exceptions. To this end, he main contribution of this thesis will be to propose guidelines as to the possible standard of review to be applied when adjudicating trade-restrictive measures which WTO Member State seek to justify by recourse to the GATT security exception. In the search for the standard of review this thesis will consider existing standards of review and general principles of law as they emerge from other areas of public international and WTO law. To demonstrate how different levels of deference can impact the interpretation of the security exception of the GATT, the thesis will simulate different scenarios by applying the standards of review identified to both the *Ukraine/Russia* and the *US Section 232* cases.

With regard to the second question, the thesis highlights how the cases dealing with the security exception reveal other, broader, challenges for the WTO. In particular, the use of the security exception illuminates the need to re-think the WTO and international economic law in the light of new geo-political and economic realities. Grasping current challenges seems important in order to find a level playing field in international economic law. Hopefully, the contestations emerged around the security exception cases might be treated by WTO Members as an opportunity to reinforce and perhaps rearticulate the international economic order while preventing the world trade system from reverting to power-based relations.

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Introduction and Structure of the Thesis

National security has become the justification *du jour* for economic policy in many countries, in both investment and trade policy. In 2015 China adopted a new National Security Law where it introduced, for the first time, the notion of national security.[1] The definition is very broad and includes "sovereignty, unity and territorial integrity, the welfare of the people, sustainable economic and social development, and other major national interests."[2] Furthermore, in 2017 China adopted a National Intelligence Law which strengthened the Chinese security legislation and put new obligations on foreign companies doing business in China.[3] The United States, on its part, in March 2018 adopted tariffs based on Section 232 of the US Trade Expansion Act of 1962 which allows application of trade-restrictive measures for protection of national security.[4]

These moves by States[5] are just a few examples of the general prominence of national security concerns and the specific use of national security in trade and investment policy. National security, to be sure, has always been a top priority for States, but currently States strive to protect themselves with ever growing intensity, so that national security becomes the explicit justification for very different kinds of economic policy. This trend could be explained by the increase of geopolitical conflicts – like the one over Crimea between Ukraine and Russia – and ongoing wars like in Syria or Afghanistan. The global order became so ridden with geopolitical conflicts that some commentators started to argue that the world might be heading towards a World War III.[6] However, one might say that the wars and geopolitical conflicts have been

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[1] For a historical overview of the Chinese national security legislation see Yuwen Li and Cheng Bian, 'A New Dimension of Foreign Investment Law in China – Evolution and Impacts of the National Security Review System' (2016) 24 Asia Pacific Law Review 149.

[2] 'China Enacts New National Security Law' <https://www.cov.com/~/media/files/corporate/publications/2015/06/china_passes_new_national_security_law.pdf>.

[3] Murray Scot Tanner, 'Beijing's New National Intelligence Law: From Defense to Offense' (*Lawfareblog*, 22 July 2017) <https://www.lawfareblog.com/beijings-new-national-intelligence-law-defense-offense>.

[4] For an overview of tariffs in connection with the crisis at the WTO see Rachel Ansley, 'Are Trump's Tariffs Aimed at the WTO?' *Atlantic Council* (6 March 2018) <http://www.atlanticcouncil.org/blogs/new-atlanticist/are-trump-s-tariffs-aimed-at-the-wto>.

[5] In this thesis the term State is used interchangeably with a term WTO Member State

[6] On a possibility of a nuclear conflict between Russia and US see Max Fisher, 'How World War III Became Possible' *Vox* (29 June 2015) <https://www.vox.com/2015/6/29/8845913/russia-war>. Tobias Chapple, 'Trump, Syria, North Korea: Are We Heading for a Third World War?' *BBC News* (11 April 2018)

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present before, so, there should be other reasons why States recourse to the national security justification. It might be due to a major shift away from Pax Americana and the free trade post-war consensus as well as to the growing dispersion of power away from the United States and Europe into China, Russia and other emerging powers. In one way or another, geopolitical conflicts led to a number of cases at the WTO which revived the relevance of the security exception provision. The security exception was first invoked in its defence by Russia in a case brought against it by Ukraine concerning the Russian restrictions on traffic in transit of goods from Ukraine through Russia to third countries.[7] Other cases in which the national security exception has been raised include Qatar's complaints against Saudi Arabia, Bahrain, the United Arab Emirates and Egypt.[8]

Moreover, in 2018 the United States started to use the national security for its trade-restrictive policy. Indeed, the United States imposed tariffs on steel and aluminium, which led to trade wars with China. Consequently, while a more traditional war still seems an exaggerated and unlikely outcome in the near future, trade wars between China and the United States have become a reality.[9] As a response to the US trade policy, the EU, Mexico, Canada and other countries brought cases against the United States' Section 232 tariffs[10] . While all these cases are still pending before the WTO, the mere invocation of the security exception has already brought a lot of tensions between the States and has put a strain on the WTO.[11]

The security exception was drafted along with GATT in 1947 and as a "safe harbor" for States in case they need to adopt measures for the protection of their national security which are contrary to their free trade obligations. In other words, the security exception gives a relief to States so that they would not be responsible for trade-restrictive measures when justified by national security. Some scholars have argued that the right of States to use the security

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<https://www.bbc.com/news/av/world-43732320/trump-syria-north-korea-are-we-heading-for-a-third-world-war>.

[7] *DS512, Russia — Measures Concerning Traffic in Transit*.

[8] *United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, Request for Consultations by Qatar, WT/DS526/1*.

[9] Chad P Bown and Melina Kolb, 'Trump's Trade War Timeline: An Up-to-Date Guide' <https://piie.com/blogs/trade-investment-policy-watch/trump-trade-war-china-date-guide>.

[10] As of September 2018, the cases include DS 543,544 and 565 (complaints by China), DS547 (India), DS548 (EU), DS550 (Canada), DS551 (Mexico), DS 552 (Norway), DS554 (Russia), DS556 (Switzerland) and Turkey (DS564)

[11] See, for example, in this regard the discussion on the US tariffs in light of the WTO crisis Giovanna Adinolfi, 'Le Misure Per La Protezione Dei Mercati Nazionali Dell'Acciaio e Dell'Alluminio: Un Nuovo Capitolo Della Crisi Dell'Organizzazione Mondiale Del Commercio?' (*SIDI Blog*, 13 April 2018) <http://www.sidiblog.org/2018/04/13/le-misure-usa-per-la-protezione-dei-mercati-nazionali-dellacciaio-e-dellalluminio-un-nuovo-capitolo-della-crisi-dellorganizzazione-mondiale-del-commercio/>.

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exception under certain circumstances has been "a bedrock feature of the international legal system."[12] Likewise, other scholars claim that "security exceptions are the mothers of all exceptions."[13] However, adjudicating the security exception requires finding a delicate balance between the right of States to protect themselves and the preservation and integrity of the WTO system. As such, throughout the history of the GATT/WTO, States have been reluctant to invoke the security exception to justify their trade-restrictive measures. Moreover, even in cases when national security measures have been adopted, other States haven't challenged them and tried to solve the issues in a diplomatic way. Indeed, no GATT/WTO Panel has yet adjudicated the security exception of the GATT as of November 2018.

The restraint or reluctance of States in invoking the security exception contributed to the creation of atmosphere free from the fear of abuse of the security exception. Such atmosphere lasted well over 70 years. However, as stated above, in 2016 Ukraine brought a case against the Russian trade-restrictive measures which Russia justified by recourse to the GATT Article XXI. But first, the invocation of the security exception by Russia in a case brought by Ukraine has led the status quo to an end. Then, the Gulf diplomatic crisis where Qatar brought WTO complaints in 2017 against Saudi Arabia, Egypt and Bahrain have also revived the use of the security exception. Last, the adoption of unilateral tariffs by the United States and counter-measures by the European Union, China and other States in 2018 also deal with a security exception. As States resorted to the WTO dispute settlement, the interpretation of the GATT security exception came before the Panel and concerns about the possibility of abuse have emerged strongly. The mere possibility of adjudication of the security exception has brought a lot of contention within the WTO.

In part these concerns are attributable to the fact that we are entering into "uncharted waters" – i.e. adjudicating on new issues. Arguably, there is always a degree of tension when an untested provision, especially involving national security, is being interpreted for the first time by an international tribunal.[14] However, as I will discuss in this thesis, the anxieties engendered by the adjudication of the security exception are of a different kind and degree. They point at fundamental questions about the possibility of maintaining an open free trade

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[12] Hannes L Schloemann and Stefan Ohlhoff, '"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence' (1999) 93 The American Journal of International Law 424. p.426
[13] George Dian Balan, 'On Fissionable Cows and the Limits to the WTO Security Exceptions' [2018] SSRN Electronic Journal <https://www.ssrn.com/abstract=3218513> accessed 15 October 2018.
[14] See, generally, on treaties and national security Susan Rose-Ackermann and Benjamin Billa, 'Treaties and National Security' (2008) 40 New York Journal of International Law and Politics 437.

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global order in the changing national and international political environment For example, scholars have already declared that if the US tariffs are upheld by the WTO decision, it will be "an unmitigated disaster".[15] And while maybe exaggerated in tone, such statements point at a fundamental problem. On the one side, if the US survives the review, the precedent would give a *carte blanche* to other member nations to take restrictive measures and justify them broadly by reference to the security exception. On the other side, if the US loses the case, compliance seems unlikely under the current Presidency, and the US might even leave the WTO. The possibility that the main original proponent of the WTO system may step out poses a fundamental challenge to the system.[16]

Adjudicating on the security exception is just one of the challenges lying before the WTO. The WTO is in fact confronted with institutional questions like fixing the dispute settlement crisis[17] or overcoming the deadlock of the Doha Round,[18] as well as political ones, like addressing the economic nationalism embraced by the US[19] and other States as part of the broader turn to nativism best exemplified by Brexit.[20] It is precisely in this context that the WTO has to deal with the security exception, which as aptly noted by some scholars may be its single biggest challenge:

> *"... security issues present the most fundamental challenge to international cooperation generally, and to institutions as hand-maidens of cooperation in particular...."* [21]

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[15] Stuart Malawer, 'Trump, Trade and National Security -- Blowing Up the WTO?' [2018] SSRN Electronic Journal <https://www.ssrn.com/abstract=3133770> accessed 25 September 2018.
[16] Bob Bryan, 'Trump Reportedly Wants to Pull the US out of the WTO, a Move That Would Wreck the International Trade System' *Business Insider* (29 June 2018) <https://www.businessinsider.com/trump-leave-world-trade-organization-wto-2018-6?IR=T>.
[17] See on this Tetyana Payosova, Gary Clyde Hufbauer and Jeffrey J Schott, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures, Policy Brief 18-5' <https://piie.com/system/files/documents/pb18-5.pdf> accessed 8 August 2018.
[18] For discussion of the underlying problem in impasse of the WTO decision-making see Richard Baldwin, 'Sources of the WTO's Woes: Decision-Making's Impossible Trinity' (*VOX CEPR Policy Portal*, 18 October 2018) <https://voxeu.org/article/sources-wto-s-woes-decision-making-s-impossible-trinity>.
[19] Diane Desierto, 'Economic Nationalism in a New Age for International Economic Law: Recalling Warnings of Ludwig von Mises and the Austrian School' (*EJIL Talk! Blog of the European Journal of International Law*, 30 January 2017) <https://www.ejiltalk.org/economic-nationalism-in-a-new-age-for-international-economic-law-recalling-warnings-of-ludwig-von-mises-and-the-austrian-school/>.
[20] For discussion of Brexit and other nativist trends in international economic law see 'From the Board: The Nativist Turn One Year On: Is the System Holding?' [2018] Legal Issues of Economic Integration 111.
[21] Etel Solingen and Wilfred Wan, 'International Security' in Orfeo Fioretos (ed), *International Politics and Institutions in Time* (Oxford University Press 2017) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198744023.001.0001/acprof-9780198744023-chapter-8> accessed 27 June 2018. p.168

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Indeed, if security is used as a justification for protectionism, it is so close to foreign policy that the question arises as to how to distinguish trade policy and foreign policy.[22] To question such distinction is not new. Scholars like Richard Cooper already in the 1970s doubted the tenability of the distinction between "high foreign policy" – issues of national security and survival of countries – and "low foreign policy" – secondary issues in relationships among countries including trade and investment policy.[23] This distinction is today made blurry again by unilateral trade-restrictive measures, which are used for foreign policy aims. As it has been evocatively noted, the world may be entering an era of geoeconomics and abandoning the old world of geopolitics.[24] In such geoeconomic world, convergence between foreign policy and trade puts an additional strain on the WTO since it revives the use of national security measures, which States justify by the security exception.[25]

To put simply, if the United States insists that its tariffs on steel and aluminium products could be justified by the security exception and the WTO Panel agrees with it – it will enable other States to follow that precedent. In turn, such scenario will lead to the reign of pre-WTO system where unilateral measures are adopted without taking into account the interests of other States. Therefore, the pressing question is how the Panel can draw a delicate line between the trade and security and interpret the security exception in a way which will be accepted by all States? To lawyers this question is related to choosing a best-suitable framework of review and establishing substantive conditions for the review. To this end, the main aim of this thesis is to provide a framework of review for the security exception of the GATT – Article XXI. Similarly, this thesis will show that the revival of the security exception of the GATT points out to other broader trends at international economic law in general and WTO in particular.

More precisely, in Chapter I I will set the scene for my discussion of the framework of review for the national security exception.[26] Part I will briefly analyse a world trading system, its creation and its system of rules. Part II will review the dispute settlement system of the

[22] See,generally, Kal J Holsti, 'Politics in Command: Foreign Trade as National Security Policy' (1986) 40 International Organization 643.
[23] Richard N Cooper, 'Trade Policy Is Foreign Policy' [1972] Foreign Policy 18. His example deals with foreign export controls with regard to the Communist countries
[24] Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, 'The Geoeconomic World Order' (*Lawfareblog*, 19 November 2018) <https://www.lawfareblog.com/geoeconomic-world-order>. (envisioning a "Geoeconomic World Order").
[25] Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, 'Geoeconomics: The Variable Relationship Between Economics and Security' (*Lawfareblog*, 27 November 2018) <https://www.lawfareblog.com/geoeconomics-variable-relationship-between-economics-and-security>.
[26] In this thesis the words "GATT security exception", "Article XXI of the GATT" and "national security exception" are used interchangeably.

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discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2019
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WTO, its structure and development throughout the history of a world trading system. The two-level dispute settlement system under WTO constitutes an essential feature of the WTO. The first instance adjudication of disputes is conducted by quasi-judicial bodies – the *ad hoc* Panels of three members which review factual and legal aspects of the dispute. The second instance adjudication is reserved to the Appellate Body, a permanent body of seven members, which has the right to review the issues of law and legal interpretations developed by Panels. Recent developments put the functioning of the WTO dispute settlement system under strain. From one side, the United States, due to its disappointment with the Appellate Body's decisions, blocked the appointment of new members of the WTO Appellate Body. From another side, the United States adopted unilateral trade measures aimed at protection of its national security. In turn, the EU, Canada, Mexico and some other States challenged the US measures before the WTO Panels. The two sets of events can bring the WTO dispute settlement system to a standstill: if the WTO Appellate Body becomes dysfunctional,[27] it will leave WTO Members without the final decision on the cases, including an interpretation of the national security exception. In other words, a rules-based world trade system might revert back a rules-based system without possibility to enforce such rules. Is it then still rules-based?

The current situation at the WTO evokes sentiments as to the tension between a rules-based and power-based trade system. In this context some scholars made arguments as to the tendency of the WTO towards disorganization where power-based relations govern. At the same time, an unstable situation may bring with it certain advantages in terms of flexibility and adaptability so that there could be virtues in seeking a balanced regime that is at the frontier between order and chaos -i.e. "at the edge of chaos".[28] One way to find the balance at least for national security cases would be to provide a framework for review of the GATT security exception.

[27] By dysfunctional is meant inability to operate – i.e. being composed of less than three Members necessary to hear the appeal. As of 10 November 2018, there are three Appellate Body members and on 10 December 2019 the term of two of them will expire. For an updated information on WTO Appellate Body members see 'Appellate Body Members' <https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm>.

[28] Joost Pauwelyn described international investment law as a regime at "the edge of chaos." He explains, that "seeking the edge of chaos is … seeking the right balance between order and flexibility". In contrast to the investment regime, Professor Pauwelyn sees the excessive centralization of the WTO as one of the reasons why the regime "suffer[s] from stagnation and deadlock". See J Pauwelyn, 'At the Edge of Chaos?: Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed' (2014) 29 ICSID Review 372. p.376

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Part III will discuss security exceptions in international law in general and the WTO law system in particular. Then I will expound on the theory behind the national security exception in WTO law, discuss its negotiation history and dissect its elements.

Part IV will show how the above debate plays out in the context of a specific case. In this regard I will analyse the first case where the national security exception came under review. In 1949 Czechoslovakia challenged certain US export restrictions. In its defence the US invoked the national security exception. While the outcome of the case was in favour of the United States without interpretation of the national security exception, this case illustrates several important points. In particular, institutional, dispute settlement-related and political differences between the GATT back in 1949 and the WTO today contribute to the explanation why the security exception was not interpreted in 1949 and why it might be interpreted in 2019.

Chapter II will proceed as follows: first it will lay out the steps of review by the Panel which precede the review under Article XXI of the GATT. Then it will explain theoretical premises for the standard of review in order to find which standard might suit a specific element of review. Then it will outline the framework of review and explain why a particular element appeals to a particular standard of review, and finally the Chapter will apply a relevant standard of review to a particular element of Article XXI.

Chapter III will be divided into two parts where I will first simulate the review of the national security exception by applying a framework as developed in Chapter II to two recent national security cases. Then I will overview the broader problems of the WTO to which such cases point. The chapter will be closed by the conclusions.

Methodology

In order to do an extensive analysis of the topic, I use the following methodology: historical, comparative and case study.

Since the origins of the national security exception could guide its interpretation and use by States, the historical approach could be useful in this regard. It allows to look at the development of the crucial concepts of the provision, main issues during its negotiation and the change of political environment.

Considering that the security exception can be found in other regimes, beyond the WTO, like public international law, EU law or international investment regime, the use of a comparative method can help to see all differences and similarities. Moreover, the interpretation

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of the security exception in other regimes could help to construct a framework of review in the WTO law.

Finally, testing a framework of review would be impossible without its application to particular cases. In this context the case-studies have been conducted with regard to the current pending cases at the WTO. Moreover, some cases where the Panels and the Appellate Body addressed the security exception and the standard of review are analysed to the extent necessary. While one could be sceptic about the breadth of research conducted in case-studies, a deep overview of the cases could point out to some general trends.[29]

[29] On this point Bent Flyberg stated that "*Concrete, context-dependent knowledge is … more valuable than the vain search for predictive theories and universals.* Bent Flyvbjerg, 'Five Misunderstandings About Case-Study Research' (2006) 12 Qualitative Inquiry 219. p.226

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1. Chapter 1 The WTO rules, Dispute Settlement and the National Security Exception of the GATT

"This system was constructed as the world's response to the chaos of the 1930s, when rising protectionism wiped out two thirds of global trade."

Roberto Azevedo[30]

WTO: rules-based system and its dispute settlement

Post-World War II arrangements made during the Bretton Woods Conference in 1944 laid foundations for the International Monetary Fund, World Bank and the International Trade Organization ("ITO"). The idea behind the ITO was to create an organization which would work as a complement to the United Nations.[31] The need for global rules for trade was prompted by the goal to avoid trade tensions and provide opportunities for states to trade more easily.[32] As is well known, the ambitious project for the creation of the ITO has never come into being mainly due to the failure of the US Congress to ratify the founding document of the ITO - Havana Charter.[33] Meanwhile, the parallel negotiations as to reduction of tariffs on goods and trade liberalization resulted in signing of the General Agreement on Tariffs and Trade ("GATT") in 1947. The GATT functioned as *de facto* international organization till 1994 when

[30] Roberto Azevedo, 'Speech, National Center for APEC, Deloitte and Moody's Event: "The Evolution of Trade, Technology, and Globalization: How to Foster Inclusive Growth"' <https://www.wto.org/english/news_e/spra_e/spra198_e.htm>.

[31] To this aim, Article 86 (1) of the Havana Charter stated: "*The Organization shall be brought into relationship with the United Nations as soon as practicable as one of the specialized agencies referred to in Article 57 of the Charter of the* United Nations. This relationship shall be effected by agreement approved by the Conference. " 'United Nations Conference on Trade and Employment, Final Act and Related Documents, Including Havana Charter for an International Trade Organization' <https://www.wto.org/english/docs_e/legal_e/havana_e.pdf>. p.85

[32] For example, the WTO mentions peace and stability among its contributions. '10 Things the WTO Can Do' <https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi09_e.htm>. On the history of the GATT and WTO in general see Craig VanGrasstek, *The History and Future of the World Trade Organization* (World Trade Organization 2013).

[33] For a broader overview see Giorgio Sacerdoti, 'Havana Charter (1948)', *Max Planck Encyclopedia of Public International Law* (2014) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1529>.

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it was transformed, and *de jure* institutionalized by signing the Marrakesh Agreement which established the World Trade Organization (WTO).[34]

Rationale behind creation of the GATT

To take a step back, we have to understand why GATT was needed in the first place. There are a variety of explanations on rationale behind creation of a new world trade regime: starting from those focusing on economic incentives, political incentives to those focusing on incentives to deal with discriminatory pre-GATT trade practices.[35]

One of the main ideas behind creation of the GATT was the idea of mutual gains from trade which in turn might prevent wars.[36] In economic terms, countries enter into trade agreements in order to benefit from international cooperation.[37] In turn, close economic interdependence could prevent wars between trading partners.[38] In other words, trade could to some extent promote peace and culture of collaboration.[39] Richard Cobden in his support of free trade mentioned:

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[34] For an extensive study on origins of the GATT see Douglas A Irwin, Petros C Mavroidis and Alan O Sykes, *The Genesis of the GATT* (Cambridge University Press 2008) <http://ebooks.cambridge.org/ref/id/CBO9780511817953> accessed 30 July 2018. Some scholars also characterize the WTO as an institutions-based regime rather than a rules-based system. See Geraldo Vidigal explained an institutions-based regime as a regime in which Members "*commit not only to a set of substantive rules but also to refraining from unilaterally interpreting the conduct of other Members as violations and reacting on the basis of their own interpretatio*n". Geraldo Vidigal, 'Westphalia Strikes Back: The 2018 Trade Wars and Threat to the WTO Trade Regime' (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3259127>.

[35] For a concise overview see Joost Pauwelyn, 'The Transformation of World Trade' (2005) 104 Michigan Law Review 1. pp.10-12

[36] VanGrasstek (n 32).pp.3-4

[37] See Chapter 7 by Gene M. Grossman "The Purpose of Trade Agreements" in Gene M Grossman, 'The Purpose of Trade Agreements' in Kyle Bagwell and Robert W Staiger (eds), *Handbook of commercial policy* (North-Holland is an imprint of Elsevier 2016).

[38] Notable in this respect is the statement of the representative of Czechoslovakia, Mr. Zdenek Augenthaler at the Second Plenary Meeting of the Preparatory Committee of the International Conference on Trade and Employment held on 17 October 1946 in London:*"…I hope that, paying due respect to the natural interests of all countries and to their economic structure, we shall be able to achieve an agreement which is necessary in the interests of peace and the economic and social prosperity of the whole world…"* 'United Nations - Economic and Social Council - Preparatory Committee of the International Conference on Trade and Employment - Verbatim Report of the Second Plenary Meeting Held at Church House, Westminster, S.W.1, E/PC/T/PV/2' <https://docs.wto.org/gattdocs/q/UN/EPCT/PV-2.PDF>. p.26 For a recent research on relation between trade and peace see Matthew O Jackson and Stephen Nei, 'Networks of Military Alliances, Wars, and International Trade' (2015) 112 Proceedings of the National Academy of Sciences 15277.

[39] Patrick J McDonald, 'Peace through Trade or Free Trade?' (2004) 48 The Journal of Conflict Resolution 547. For classic works on peace and war see Immanuel Kant, *Perpetual Peace: Philosophical Sketch* (1795). and Carl Von Clausewitz, *On War* (1832) <http://www.clausewitz.com/readings/OnWar1873/>.

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> *"...I see in the free-trade principle that which shall act on the moral world as the principle of gravitation in the universe, — drawing men together, thrusting aside the antagonism of race, and creed, and language, and uniting us in the bonds of eternal peace."*[40]

Moreover, trade and peace are believed to reinforce democracy. In this regard, Daniel Griswold calls the relationship between these three elements as a "virtuous circle" and explains that:

> *"The global trends we've witnessed in the spread of trade, democracy and peace tend to reinforce each other in a grand and virtuous cycle. As trade and development encourage more representative government, those governments provide more predictability and incremental reform, creating a better climate for trade and investment to flourish. And as the spread of trade and democracy foster peace, the decline of war creates a more hospitable environment for trade and economic growth and political stability."*[41]

In this context politics of States plays a crucial role in upholding a world trade system. In other words, world trade system is connected to the global political order. For example, a global order in post-World War II period was dominated by the United States and the Soviet Union.[42] The United States along with the United Kingdom played a crucial role in creation of the post - World War II institutions and this is why the GATT sometimes is referred to as Pax Americana.[43] However, the world order at the moment of the negotiations of the GATT does

[40] John Bright and Thorold Rogers, *Richard Cobden, Speeches on Questions of Public Policy by Richard Cobden, M.P.*, vol 1 (TFisher Unwin 1908) <http://oll.libertyfund.org/titles/927>.
[41] Daniel Griswold, 'Trade, Democracy and Peace: The Virtuous Cycle' (*Cato Institute*, 20 April 2007) <https://www.cato.org/publications/speeches/trade-democracy-peace-virtuous-cycle>.
[42] For a short overview see Margaret MacMillan, 'Rebuilding the World after the Second World War' *The Guardian* (11 September 2009) <https://www.theguardian.com/world/2009/sep/11/second-world-war-rebuilding>. For an overview from economic perspective see Kamran Dadkhah, 'The Post-War Economic Order' in Kamran Dadkhah, *The Evolution of Macroeconomic Theory and Policy* (Springer Berlin Heidelberg 2009) <http://link.springer.com/10.1007/978-3-540-77008-4_2> accessed 16 December 2018.
[43] Pax Britannica, in turn, existed from 1815 to the outbreak of the First World War. Christopher Layne, 'The US–Chinese Power Shift and the End of the Pax Americana' (2018) 94 International Affairs 89. p.90 Some scholars claimed that while the US helped to build the WTO, it is an occupant of this structure rather than the world's sheriff. Paul B Stephan, 'Sheriff or Prisoner? The United States and the World Trade Organization' (2000) 1 Chicago Journal of International Law 49. p.74

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not hold true anymore: the centers of world power are shifting from the Euro-Atlantic world to Asia (mainly China), which allows some scholars to claim that "the Pax Americana's days are numbered".[44] Instead of promoting multilateralism, the United States and United Kingdom go into the opposite direction.[45] Indeed, some commentators claim that the post-World War II order is under assault from those who created it.[46] For example, the United States has withdrawn from multilateral trade agreements[47] and the United Kingdom, in its turn, is preparing to leave the European Union.[48] The actions of the US and the UK fit into a picture of backlash against globalization.[49]At the same time, communist China became a full Member of the WTO in 2001 along with the post-Soviet Russia joining the WTO in 2012.[50] Albeit the world order has changed since then, the WTO still remains at the forefront for regulation of international trade, currently comprising 164 Member States.[51]

WTO as a rules-based system

WTO as a rules-based system can be described in broad strokes by reference to its main principles: reciprocity and non-discrimination.[52] The principle of reciprocity, while not explicitly mentioned in the WTO rules, can be explained through its two applications. First, under a principle of reciprocity countries should seek a balance of concessions, i.e. cut tariffs

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[44] Layne (n 43). p.90
[45] Harold James, 'Bretton Woods to Brexit' (2017) 54 Finance and Development 5. p.5
[46] Peter S Goodman, 'The Post-World War II Order Is Under Assault From the Powers That Built It' *New York Times* (26 March 2018) <https://www.nytimes.com/2018/03/26/business/nato-european-union.html>.
[47] U.S. President, 'Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement' <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific-partnership-negotiations-agreement/>.
[48] For public international law implications of Brexit see Michael Waibel, 'Brexit and Acquired Rights' (2017) 111 AJIL Unbound 440. For a narrow discussion of the UK's status in the WTO after Brexit see Lorand Bartels, 'The UK's Status in the WTO after Brexit' [2016] SSRN Electronic Journal <https://www.ssrn.com/abstract=2841747> accessed 11 November 2018.
[49] For a broad overview of backlash against globalization see Joseph E Stiglitz, *Globalization and Its Discontents Revisited: Anti-Globalization in the Era of Trump* (WW Norton & Company 2018). To be sure, the waves against globalization and attacks on the WTO were present before, like the Seattle attacks. See, for example, John H Jackson, 'The Perils of Globalization and the World Trading System The World Trade Organization, Globalization, and the Future of International Trade: Essay' (2000) 24 Fordham International Law Journal 371.
[50] What is more, now China with other countries try to safeguard the WTO system which suffers attacks from the United States For example, at the recent meeting in China, the WTO Director-General stated that he counts on China in preserving the WTO system 'DG Azevêdo and Premier Li Keqiang Discuss How to Safeguard the WTO' <https://www.wto.org/english/news_e/news18_e/dgra_06nov18_e.htm>.
[51] As of 29 July 2016 the WTO was joined by 164 States WTO website, 'Understanding the WTO: The Organization, Members and Observers' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.
[52] Of note, American economics professors, Kyle Bagwell and Robert Staiger claim that these two principles increase efficiency of the world trade system. See Kyle Bagwell and Robert W Staiger, 'An Economic Theory of GATT' (1999) 89 The American Economic Review 215.

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reciprocally. Second, a country is entitled to seek an equivalent suspension of concessions if its trading partner increases a previously bound tariff.[53]

Non-discrimination principles are embodied in the most-favoured-nation (MFN) and national treatment (NT) principles. The MFN principle requires not to discriminate between different WTO Members and to extend any favour granted to one WTO Member to all other Members.[54] MFN principle is enshrined in Article I of the GATT, Article 2 of the General Agreement on Trade Services (GATS) and Article 4 of the Agreement on Trade-Related Aspects of International Property Rights (TRIPS).[55] The national treatment principle provides for equal treatment of national and foreign products once they enter the market.[56] National treatment is embodied in Article III of GATT, Article 17 of GATS and Article 3 of TRIPS. Some exceptions from MFN and NT principles, as well as from other provisions are allowed subject to compliance with certain conditions established by these exceptions.

It is hard to overestimate the importance of a rules-based multilateral trade system which provides a clear framework for trade partners, which, in turn, increases trade linkages among countries.[57] The rules, though, would not have a lot of value if it was impossible to enforce them. To this end, the WTO performs the dispute settlement function, which along with two others functions of the WTO – forum for trade negotiations and an oversight of existing WTO

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[53] ibid. p.217

[54] To illustrate, Article I:1 of the GATT states: "*With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties*." For an interpretation of the GATT Article I see WTO, 'Part 1, Article I General Most-Favoured- Nation Treatment', *Analytical Index on the GATT* <https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art1_gatt47.pdf>.

[55] The Agreement on Trade-Related Aspects of International Property Rights

[56] For example, Article III:I of the GATT stipulates: "*The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production."* For an interpretation of the GATT Article III see WTO, 'Part II, Article III, National Treatment on International Taxation and Regulation', *Analytical Index of the GATT* <https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art3_e.pdf>.

[57] In that vein, that the WTO Deputy-General in his recent speech at the Western University of Africa on 8 October 2018 mentioned that *"the importance of the rules-based multilateral trading system cannot be overestimated due to its contribution to the expansion of global economy and reduction of poverty"* Alan Wolff, '"The Importance of the Rules-Based Multilateral Trading System Cannot Be Overestimated", a Speech Delivered to the University of Western Cape in South Africa' <https://www.wto.org/english/news_e/news18_e/ddgra_08oct18_e.htm>.

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agreements – constitute the main functions of the WTO.[58] Given the fact that the WTO negotiations function is almost dysfunctional since the deadlock of the Doha Round and the oversight function is less visible, the WTO dispute settlement function remains the one ensuring legitimacy and credibility of the WTO as an international organization.[59]

WTO dispute-settlement system

The main aim of the WTO dispute settlement system is to provide security and predictability for the multilateral trading system.[60] The two-level dispute settlement system under the GATT/WTO constitutes an essential feature of the WTO.[61] The first instance adjudication of disputes is conducted by quasi-judicial bodies –*ad hoc* Panels of three members which review factual and legal aspects of a dispute.[62] The second instance adjudication is reserved for the Appellate Body, a permanent body of seven members with the right to review issues of law and legal interpretations developed by the Panels.[63]

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[58] Note that Article III of the Marrakesh Agreement enumerates five functions of the WTO, adding the maintenance of the Trade Policy Mechanism and cooperation of the WTO with IMF and IBRD

[59] WJ Davey, 'The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges' (2014) 17 Journal of International Economic Law 679. p.679

[60] As provided by Article 3.2 of the Dispute Settlement Understanding

[61] For an extensive overview of the WTO dispute settlement system see Gabrielle Marceau (ed), *A History of Law and Lawyers in the Gatt/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press 2015) <http://ebooks.cambridge.org/ref/id/CBO9781316048160> accessed 11 November 2018.Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations, and Dispute Settlement* (Kluwer Law International 1997). and Giorgio Sacerdoti, 'The Dispute Settlement System of the WTO: Structure and Function in the Perspective of the First 10 Years' (2006) 5 The Law & Practice of International Courts and Tribunals 49.

[62] WTO Panels can exceptionally consist of five members WTO Secretariat, *A Handbook on the WTO Dispute Settlement System: Prepared by the Legal Affairs Division and the Rules Division of the WTO Secretariat, and the Appellate Body Secretariat* (2nd edn, Cambridge University Press 2017) <http://ebooks.cambridge.org/ref/id/CBO9781108265423> accessed 12 November 2018. p.29

[63] ibid. p.32 The Appellate Body got its prominence in the WTO system so that the performance of the WTO was measured with reference to compliance with Appellate Body rulings. Recent studies, though, show that the focus on compliance with AB rulings is an improper indicator. Nonetheless, the WTO as an institution achieved better results in performing its dispute settlement function as compared to the negotiation function, to say the least. For a discussion on measuring the performance of the WTO with reference to the WTO dispute settlement system see Manfred Elsig, Bernard Hoekman and Joost Pauwelyn, 'Thinking about the Performance of the World Trade Organization. A Discussion Across Disciplines' in Manfred Elsig, Bernard M Hoekman and Joost Pauwelyn (eds), *Assessing the World Trade Organization: fit for purpose?: World Trade Forum* (Cambridge University Press 2017). p.36 For a recent statistical data of the WTO dispute settlement system see Arie Reich, 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis' (European University Institute 2017) EUI Working Papers Law 20177/11 <http://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf?sequence=1>.

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The WTO dispute settlement process developed from a diplomat-like dispute settlement process to a more judicial-like dispute settlement procedure.[64] Some scholars claim that the WTO dispute settlement system has achieved arguably the greatest level of legalization known at the multilateral level.[65] The diplomatic ethos though, as put by Joseph Weiler, "tenaciously persists despite the much transformed juridified WTO".[66] The WTO dispute settlement system is one of those rare situations in which, as Joost Pauwelyn claims, the international adjudicatory body was able to achieve a rule of law (to some extent) *without* the rule of lawyers.[67]

The dispute settlement of the WTO is called a "jewel in the WTO's crown".[68] By all accounts, the WTO dispute settlement system can be considered as a guardian of the WTO rules and it should be in the interest of all the WTO Members to preserve its functioning.[69] That being said, the opposite scenario is developing now – the WTO dispute settlement system is put under

[64] For a narrative on the building of the WTO judicial system with a particular emphasis on the Appellate Body see Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 European Journal of International Law 9. Note the response from Joost Pauwelyn who claims, among others, that Robert Howse overestimates the legitimacy and effectiveness of the WTO dispute settlement system. Joost Pauwelyn, 'The WTO 20 Years On: "Global Governance by Judiciary" or, Rather, Member-Driven Settlement of (Some) Trade Disputes between (Some) WTO Members?' (2016) 27 European Journal of International Law 1119. p.1120 Robert Howse in his rejoinder pointed out that he puts a question of what constitutes legitimacy in international adjudication and his central argument was about the judicial techniques the Appellate Body may have adopted to create a legitimacy. Robert Howse, 'The WTO 20 Years On: A Reply to the Responses' (2016) 27 European Journal of International Law 1127.p.1127

[65] Gregory Shaffer, Manfred Elsig and Sergio Puig, 'The Law and Politics of WTO Dispute Settlement' in Wayne Sandholtz and Christopher Whytock (eds), *Research Handbook on the Politics of International Law* (Edward Elgar Publishing 2017) <https://www.elgaronline.com/view/9781783473977.xml> accessed 10 November 2018. p.305

[66] JHH Weiler, 'The Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' [2001] Journal of World Trade 191. p.193

[67] Joost Pauwelyn points out: "*In the WTO, legitimacy flows from within its diplomatic, governmental surroundings. The relative inexperience or lack of status of WTO panelists is compensated by the existence of an Appellate Body, a skilled Secretariat and the overall control of, and continuous interaction of adjudicators with, WTO members through WTO diplomatic channels.*" Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus' (2015) 109 The American Journal of International Law 761. pp.801-802

[68] Though, not without criticism. See, for example, John H Jackson, 'The WTO Dispute Settlement System', *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge University Press 2006) <http://ebooks.cambridge.org/ref/id/CBO9780511815645> accessed 25 October 2018. p.135 See also Petros C Mavroidis, 'Raiders of the Lost Jewel (in the Crown)' (2015) 14 Journal of International Trade Law and Policy 106. who says that "*The original uncritical euphoria has given its place to critique, which has been increasing lately*." p.105 For an overview of recent problems at the WTO dispute settlement see Giorgio Sacerdoti, 'The WTO Dispute Settlement System: Consolidating Success and Confronting New Challenges' in Manfred Elsig, Bernard Hoekman and Joost Pauwelyn (eds), *Assessing The World Trade Organization* (Cambridge University Press 2017) <https://www.cambridge.org/core/product/identifier/9781108147644%23CN-bp-7/type/book_part> accessed 8 August 2018. pp.153-158

[69] For example, see John WH Denton, 'The Rules-Based Trading System Is Worth Preserving' *Financial Times* (14 June 2018) <https://www.ft.com/content/98caa726-6ef3-11e8-92d3-6c13e5c92914>.

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strain by its Member States.[70] In a brief detour, it is worth looking at the tension present during creation of the dispute settlement system which can help us grasp the current crisis.

Current crisis – back to the roots?

The tension as to the goals of the GATT dispute settlement in 1947 was between a rules-oriented and power-oriented dispute settlement. The power-oriented process was perceived as "an extension of the diplomatic process" where governments settled disputes with the help of the dispute settlement system. On the contrary, the rule-oriented dispute settlement process was aimed not only at the achievement of a rule-consistent decision but also at elaboration of meaning of the rules which would increase predictability and stability of the world trade system.[71]

The current situation at the WTO Appellate Body brings back the sentiments of the tension between the rules-oriented and power-oriented dispute settlement. Indeed, some scholars started to voice the concerns as to whether rule of law is in peril.[72] In particular, currently, as of 2018, there is a deadlock on the appointment of the WTO Appellate Body members.[73] The United States, due to its disappointment with the Appellate Body's decisions, has blocked the appointment of new members to the WTO Appellate Body. In addition, the United States has adopted unilateral trade-restrictive measures for protection of its national security, which have been challenged before WTO Panels.[74] The two sets of events may bring

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[70] A present crisis when the US is blocking appointments of the new Appellate Body Members gave a possibility to the former WTO Appellate Body Member to say "This [WTO dispute settlement system] institution does not deserve to die through asphyxiation.
Ricardo Ramírez-Hernández, 'Farewell Speech of Appellate Body Member Ricardo Ramírez-Hernández' <https://www.wto.org/english/tratop_e/dispu_e/ricardoramirezfarwellspeech_e.htm>.

[71] Under the GATT 1947 only two articles dealt with the dispute settlement – Article XXII and XXIII. By and large a rule-oriented system was pushed by the United States and when in 1980 the question aroused as to its improvement, the Europeans initially opposed the improvement of the WTO system. Later the Europeans changed their position due to, among other reasons, their belief that there is a need of check on US "unilateralism". John H Jackson, 'Fragmentation or Unification Among International Institutions: The World Trade Organization' (1999) 31 New York Journal of International Law and Politics 823. pp.826-828 Note, the European Union and Japan accepted a more judicialized WTO dispute settlement system in exchange for the US Agreement to abstain from unilateral action under Section 301 of the 1974 US Trade Act.

[72] Giorgio Sacerdoti, 'The WTO Dispute Settlement System and the Challenge to Multilateralism: Is the Rule of Law in Peril?' [2018] SSRN Electronic Journal <https://www.ssrn.com/abstract=3343455> accessed 13 April 2019.

[73] For an extensive overview of the current crisis at the WTO dispute settlement system see Payosova, Hufbauer and Schott (n 17).

[74] There are other challenges facing the WTO, to name just one, there is the need to accommodate Chinese non-market economy practices under existing WTO rules. See Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57 Harvard International Law Journal 261. See also Mark Wu, 'The WTO and China's Unique Economic Structure' in Benjamin L Liebman and Curtis J Milhaupt (eds), *Regulating the Visible Hand?* (Oxford University Press 2015)

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the WTO dispute settlement system to a standstill: if the WTO Appellate Body becomes dysfunctional,[75] it will leave WTO Members without the final decision on cases, including interpretation of the national security exception.[76] In other words, the current situation puts the WTO under risk of returning back to the power-based relations of the GATT. [77]

Various notions were used to characterize the power-based relationships: some scholars claim the WTO is coming back to “Westphalian de-institutionalized dispute resolution”.[78] In a more general way, the risk is about turning back to “the wild west of trade”.[79] The EU Commissioner for Trade, Cecilia Malmstrom has characterized this situation by saying that

> *“They [countries] can go back to a time before the WTO existed, when global trade was neither predictable nor fair, and not based on rules...”*[80]

Interestingly, the wording of Malmstrom’s statement evokes a vision of a global trade system ruled by chaos rather than rules.[81]

<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780190250256.001.0001/acprof-9780190250256-chapter-13> accessed 15 November 2018. To note, other scholars also claimed that the WTO has become “dysfunctional” due to its inability to accommodate the Chinese economic model. See Dani Rodrik, ‘The WTO Has Become Dysfunctional’ *Financial Times* (5 August 2018) <https://www.ft.com/content/c2beedfe-964d-11e8-95f8-8640db9060a7> accessed 6 August 2018. Although this op-ed was criticized by other scholars like Joel Trachtman. See Joel P Trachtman, ‘Trachtman Comments on Dani Rodrik FT Op-Ed, August 5, 2018, “The WTO Has Become Dysfunctional”’ (*International Economic Law and Policy Blog*, 6 August 2018) <https://worldtradelaw.typepad.com/ielpblog/2018/08/trachtman-comments-on-dani-rodrik-ft-op-ed-august-5-2018-the-wto-has-become-dysfunctional.html>.

[75] By dysfunctional is meant inability to operate – i.e. being composed of less than three Members necessary to hear the appeal. As of 10 November 2018, there are three Appellate Body members and on 10 December 2019 the term of two of them will expire. For an updated information on WTO Appellate Body members see ‘Appellate Body Members’ (n 27).

[76] For example, recent news were referring to threat to world trade in connection with the Section 232 tariffs’ cases ‘The Rules-Based System Is in Grave Danger’ *The Economist* (8 March 2018) <https://www.economist.com/leaders/2018/03/08/the-rules-based-system-is-in-grave-danger>.

[77] The EU Commissioner for Trade, Cecilia Malmstrom characterized the present situation by saying that *“They [countries] can go back to a time before the WTO existed, when global trade was neither predictable nor fair, and not based on rules....”* Cecilia Malmstrom, ‘The EU Will Stand up for Rules-Based Trade’ *Financial Times* (26 July 2018) <https://www.ft.com/content/ddb1fa0e-8ff7-11e8-9609-3d3b945e78cf>.
Put simply, the risk is about turning back to “the wild west of trade”. Elvire Fabry and Erik Tate, ‘Saving the WTO Appellate Body or Returning to the Wild West of Trade?’ <http://institutdelors.eu/wp-content/uploads/2018/05/SavingtheWTOAppellateBody-FabryTate-June2018.pdf>. On a same note, one might call the situation as “Hobbesian world of lawlessness” drawing parallel with Pascal’s Lamy comment in 2003 when he pointed out that*“ If anything, the WTO helps us move from a Hobbesian world of lawlessness, into a more Kantian world - perhaps not exactly of perpetual peace, but at least one where trade relations are subject to the rule of law.”* Pascal Lamy, ‘Laying down the Law’ *The Guardian* (8 September 2003) <https://www.theguardian.com/environment/2003/sep/08/wto.fairtrade5>.

[78] Vidigal (n 34).

[79] The expression is taken from the title of Fabry and Tate (n 77).

[80] Malmstrom (n 77).

[81] In his speech at the Closing Ceremony of the World Trade Institute in Bern on 29 June 2018 the Deputy Director-General of the WTO, Alan Wm. Wolff mentioned “*Wherever one looks, wherever there is society, there are rules.*

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The scenario of “Westphalian de-institutionalized dispute resolution” is focused on the WTO as an institutions-based regime where states abide not only by the WTO rules but also refrain from unilaterally actions. Under this scenario enforcement actions from states are preceded by an authoritative decision of the WTO Dispute Settlement Body.[82] Based on these premises, Geraldo Vidigal claims that if WTO Members do not manage to overcome the block of the WTO Appellate, they will be left with an option to settle disputes by countermeasures as they were under the Westphalian regime, i.e. de-institutionalized dispute resolution. Put differently, if the WTO crisis deepens, the WTO will resemble a situation of “fragmented authority” where the rules exist without a final authoritative interpretation.[83]

In turn, the tendency to chaos could be characterized by a dysfunctional dispute settlement system, absence of the hegemonic State and unilateral restrictions by states against each other. While we should not necessarily be guided by the word “chaos” which provokes negative associations like disorganization or turmoil, at the very least we might treat these developments as a sign of disruptive tendencies at the WTO. In particular, all unilateral trade-restrcivtie measures, justified by recourse to the security exception, put an additional strain on the WTO. Any decision on the national security exception will not bring satisfaction to all WTO Members: on the one side, the WTO Members will consider the review of their national security measures by WTO Panel as an intrusion into their sovereignty. Some WTO Members claimed that they are even ready to leave the WTO if there is a decision on their national security measures.[84] On the other side, if a Panel leaves a full discretion to WTO Members, they will have a right to adopt any measure under the pretext of national security exception. Moreover, the less powerful states which suffer from the national security measures will be left without a

The alternative is chaos.” Alan Wolff, ‘“The Rule of Law in an Age of Conflict”, Keynote Address at the Closing Ceremony World Trade Institute Master Programmes University of Bern, 29 June 2018’ <https://www.wto.org/english/news_e/news18_e/ddgra_02jul18_e.htm> accessed 8 August 2018. To note, a former WTO Appellate Body Member, Ricardo Ramírez-Hernández in his farewell speech has also mentioned that *“… without a framework of binding and updated rules, anarchy and powerful actors, private and public, will take over”* Ramírez-Hernández (n 70). To illustrate, titles such as the following have become widespread in newspapers or blogposts: “*Donald Trump, Steel Tariffs, and the Costs of Chaos*” Edward Alden, ‘Donald Trump, Steel Tariffs, and the Costs of Chaos’ (*Council on Foreign Relations*, 1 March 2018) <https://www.cfr.org/blog/donald-trump-steel-tariffs-and-costs-chaos>. or “*WTO Head Warns U.S. Exit Would Mean Chaos for American Business*” Donnan Shawn, ‘WTO Head Warns U.S. Exit Would Mean Chaos for American Business’ *Bloomberg* <https://www.bloomberg.com/news/articles/2018-08-31/wto-head-warns-u-s-exit-would-mean-chaos-for-american-business>.

[82] Vidigal (n 34). p.3

[83] ibid. p.4

[84] Meera Manoj, ‘Trump and the WTO: A Love-Hate Relationship in International Trade’ (*KSLR Cmmercial & Financial Law Blog*, 4 June 2018) <https://blogs.kcl.ac.uk/kslrcommerciallawblog/2018/06/04/trump-and-the-wto-a-love-hate-relationship-in-international-trade/#_ftn1>.

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right to challenge such measures under WTO rules. Given these developments, the importance of review of national security exception of the GATT is elevated and has a systemic importance for the WTO. Against this backdrop, an issue of providing a framework for review of the security exception of the GATT has become a pressing need and this research aims to contribute to this area of WTO law. To do so, I will first conduct the analysis of the nature of the security exception and its place at international law in general and WTO system in particular.

Exceptions in international law

Preceding analysis of the security exception of the GATT, it would be instructive to provide a brief overview of the framework of exceptions in international law in general and in the WTO system in particular. [85] To illustrate, Article XXI of the GATT, named "Security Exceptions" reads as follows:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(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.

Starting from an ordinary meaning, the word "exception" refers to "a person or thing that is excluded from a general statement or does not follow a rule".[86] The need for exceptions can

[85] For a review of exceptions in light of doctrine of necessity see Diane A. Desierto, *Necessity and National Emergency Clauses* (Interactive Factory 2012) <https://brill.com/view/title/20888>.
[86] 'Exception' <https://en.oxforddictionaries.com/definition/exception>.

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be explained in various ways. Broadly, the need for exceptions stems from the fact that all legally binding treaties must be performed according to the universally agreed principle of international law – *pacta sunt servanda* – embodied in Article 26 of the Vienna Convention on the Law of Treaties. However, if certain circumstances arise, there might be a possibility to derogate from rules. Such circumstances could be clearly defined (as it is the case in Article XX and XXI of the GATT) or there could be unexpected circumstances. For example, certain clauses were crafted to allow States to respond to unexpected changes in circumstances while preserving the legitimacy of agreements they had entered into.[87] The first and foremost example of such clauses is Article 62 of the Vienna Convention on the Law of Treaties – so-called *rebus sic stantibus*[88] which allows for suspension of a treaty in the case of fundamental change of circumstances and is considered to be as an escape clause from *pacta sunt servanda.*[89] In this regard Christina Binder frames the discussion on the limits of *pacta sunt servanda* as a debate between the stability and change, which has been at the forefront in the history of international law.[90]

To specify, the need for exceptions could be explained by the fact that whereas in legal systems a rule takes a central place, conflict of rules prompts a need for exceptions.[91] Against this background, exceptions are widespread in international agreements[92] and can be conveyed in various ways: by missing consent for violation of an obligation[93] or by an override of

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[87] Some scholars claim that different exceptions from r*ebus sic stantibus* are considered not as exceptions but as modalities or scope of its application. Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford Univ Press 2011). p.683

[88] Interestingly enough, a recent research by a political scientist Krzysztof Pelc makes a comparison between *rebus sic stantibus* and the GATT security exception

[89] For a review of history of *rebus sic stantibus* from a political perspective see Krzysztof J Pelc, *Making and Bending International Rules: The Design of Exceptions and Escape Clauses in Trade Law* (Cambridge University Press 2016). pp.77-92. Interestingly enough, Krzysztof Pelc makes a comparison between *rebus sic stantibus* and the GATT security exception. p.77

[90] See Christina Binder, 'Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited' (2012) 25 Leiden Journal of International Law 909.

[91] For a review of exceptions in international law see Jaap Hage, Antonia Waltermann and Gustavo Arosemena, 'Exceptions in International Law' in Lorand Bartels and Federica Paddeu (eds), *Exceptions and Defences in International Law* (Oxford University Press 2019).

[92] For example, in the Draft Articles on Responsibility of States for Internationally Wrongful Acts there are six circumstances that preclude a wrongfulness of conduct in international law: consent (Article 20), self-defence (Article 21), countermeasures (Article 22), *force majeure* (Article 23), distress (Article 24) and necessity (Article 25). 'Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted in 2001, with Commentaries' <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>. For an extensive overview of exceptions and their justification in international law see Federica Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (1st edn, Cambridge University Press 2018) <https://www.cambridge.org/core/product/identifier/9781316226841/type/book> accessed 16 June 2018.

[93] For example, Article 20 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts states "Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of

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obligation by another more specific rule or, lastly, by allowing a State to act contrary to its obligations.[94]

In terms of legal techniques by which exceptions could be crafted, Jorge Viñuales defines seven techniques of excluding certain situations from general rules: (i) scope clauses, (ii) carve-outs, (iii) flexibilities, (iv) derogations, (v) exceptions *stricto sensu*, (vi) excuses, and (vii) circumstances precluding wrongfulness. The allocation of one or the other exception to a certain technique has legal implications, for example, as to a burden of proof, interpretation, the degree of deference for a respondent and a relationship with other clauses.[95]

Exceptions in the GATT, focus on the GATT security exception

Exceptions are pertinent to the WTO law where most of them deal with balance between trade and non-trade values. The GATT exceptions[96] range from those which allow to establish free-trade areas (GATT Article XXIV), give the right to take measures for protection of certain non-trade values (Article XX of the GATT), give the right to take measures for protection of essential security interests (GATT Article XXI) give the right to adopt measures to address balance of payment issues (Article XII and XVIII: B of the GATT), to those adopted as waivers to address exceptional circumstances (Article IX: 3 of the Marrakesh Agreement establishing the WTO). Moreover, WTO Members have the right to adopt anti-dumping and counter-valuing duties to address unfair trade practices and to impose safeguard measures in order to remedy a surge of imports.[97]

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that act in relation to the former State to the extent that the act remains within the limits of that consent." 'Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted in 2001, with Commentaries' (n 92).

[94] For a systematic analysis of exceptions in international law see Lorand Bartels and Federica Paddeu, *Exceptions and Defences in International Law* (Oxford University Press 2019).

[95] Jorge E Viñuales, 'Seven Ways of Escaping a Rule: Of Exceptions and Their Avatars in International Law' in Lorand Bartels and Federica Paddeu (eds), *Exceptions and Defences in International Law* (Oxford University Press 2019) <https://ssrn.com/abstract=2888963>. Since the book has not been printed yet, the numbers of pages are not available accordingly. The thesis uses the author's copy, posted on SSRN where the numbering is absent, but the author of this thesis will do an automatic numbering. p.1

[96] The reference is made to the GATT Agreements, while certain similar exceptions are also present in the GATS or TRIPS Agreements.

[97] These are trade defence mechanisms which are not called explicitly as exceptions, but they allow the WTO Members to derogate temporarily from their obligations like – to impose tariffs higher than their bound levels. For example, Krzysztof Pelc considers a safeguard provision of the GATT, Article XIX as an "escape clause" due to the fact it allows governments to temporary suspend their obligations in order to address surge of imports Krzysztof J Pelc, 'Seeking Escape: The Use of Escape Clauses in International Trade Agreements' (2009) 53 International Studies Quarterly 349.

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Although the focus of this thesis is the security exception of the GATT, it is worth mentioning in a brief detour that security exceptions are well-known phenomena in other areas of international law. They can be found in a variety of international agreements, starting from agreements covering wide range of issues like the Treaty on the Functioning of the European Union (TFEU),[98] through agreements dealing with specific matters (e.g. cooperation in criminal matters[99] or energy issues),[100] to free trade agreements and international investment agreements (IIAs).[101] Security exception clauses differ in their wording, scope and conditions for application.[102] At the same time there is an emerging convergence between systems: for example, some bilateral investment treaties include security exceptions with wordings similar to Article XXI of the GATT.[103]

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[98] 'Consolidated Version of the Treaty on the Functioning of the European Union' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>., Article 347 reads as follows: *Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.*

[99] For example, similar to Article 2 (c) in the Convention concerning judicial assistance in criminal matters between France and Djibouti, which was a part of controversy between States in the ICJ 'Convention between the Government of the French Republic and the Government of Djibouti Concerning Judicial Assistance in Criminal Matters (Adopted 27 September 1986, Entered into Force 1 August 1992) 1695 UNTS 297.' <https://treaties.un.org/doc/publication/UNTS/Volume%201695/v1695.pdf>. For a discussion of this exception in light of Djibouti v France case see Robyn Briese and Stephan W Schill, 'Djibouti v. France - Self-Judging Clauses before the International Court of Justice Case Notes' (2009) 10 Melbourne Journal of International Law 308.

[100] For instance, Article 24 (para 3) of the Energy Charter Treaty See Energy Charter Secretariat, 'The Consolidated Version of the Energy Charter Treaty and Related Documents Last Updated 15 January 2016' <https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf>.

[101] For an overview of security exceptions in investment law see Katia Yannaca-Small, 'Essential Security Interests under International Investment Law', *International Investment Perspectives: Freedom of Investment in a Changing World* (OECD 2007) <https://www.oecd.org/daf/inv/investment-policy/40243411.pdf>.The recent research reveals the rise of the security exception provisions in BITs, with the US being the most active user. See: Karl P Sauvant and Mevelyn Ong, 'The Rise of Self-Judging Essential Security Interest Clauses in International Investment Agreements' <https://academiccommons.columbia.edu/catalog/ac:205905> accessed 15 June 2018..

[102]Note that in some areas of law, for example, investment law, security exceptions can be called "non-precluded measures" clauses since they limit the liability of states in certain exceptional circumstances. Normally such "non-precluded measures" clauses allow States to take actions for protection of their essential security interests. See, for example, United Nations Conference on Trade and Development (ed), *The Protection of National Security in IIAs* (United Nations 2009). Wei Wang, 'The Non-Precluded Measure Type Clause in International Investment Agreements: Significances, Challenges, and Reactions' (2017) 32 ICSID Review - Foreign Investment Law Journal 447. and Jürgen Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59 International and Comparative Law Quarterly 325.

[103] For an overview of similar exceptions in investment law and WTO law see Jurgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press 2016) <http://ebooks.cambridge.org/ref/id/CBO9780511842115> accessed 26 October 2018. pp.168-228 For a similar language of Article XXI GATT and some security exceptions, for example, in Indian BITs see Prabhash Ranjan, "Non-Precluded Measures in Indian International Investment Agreements and India's Regulatory Power as a Host Nation," *Asian Journal of International Law* 2, no. 01 (January 2012): 21–58, https://doi.org/10.1017/S2044251311000129. p.37

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One example of the security exception in free trade agreements could be Article 99 (1) (d) of the EU-Russia Partnership Agreement which reads as follows:

> *"Nothing in this Agreement shall prevent a Party from taking any measures:*
> *(1) which it considers necessary for the protection of its essential security interests:*
> *…(d) in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security…"*[104]

As is seen, the wording of Article 99 (1) (d) of the EU-Russia Partnership Agreement is different from the security exceptions clause enshrined in GATT Article XXI (b) (iii). For example, it contains the wording "international tension" instead of "time of war or other emergency in international relations". Moreover, the wording in the EU-Russia Partnership Agreement is less restrictive since it also provides a possibility to take measures "in order to carry out obligations it has accepted for the purpose of maintaining peace and international security".

The security exception of the GATT falls within a broad picture of exceptions in the GATT, but covers a very sensitive subject matter, i.e. security-related issues. While the focus of this thesis is on the GATT security exception, other security exceptions in the WTO law include security exceptions in GATS (Article XIV bis) and in the TRIPS Agreement (Article 73).[105] In short, security exceptions allow States to adopt otherwise inconsistent trade-restrictive measures for protection of their national security.

The legal technique by which the GATT security exception was crafted is pertinent to one of the techniques discussed above, namely the exception *stricto sensu*. The operation of

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[104] 'Agreement on Partnership and Cooperation Establishing a Partnership between the European Communities and Their Member States, of One Part, and the Russian Federation, of the Other Part' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.1997.327.01.0003.01.ENG>.

[105] Note, there is also the security exception with regard to disclosure of information in the Government Procurement Agreement (Article III), a plurilateral agreement of the WTO, to which 47 Members of the WTO are parties. The GPA security exception clause was briefly discussed by Joost Pauwelyn, 'Iraqi Reconstruction Contracts and the WTO: International Law? I'd Better Call My Lawyer' (*Jurist*, 19 December 2003) <http://www.theinternational.jurist.org/forum/forumnew133.php>.

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exceptions *stricto sensu* involves two steps (i) whether there is a breach of a primary norm and (ii) whether a breach can be justified.[106] Such operation reflects the nature of the security exception of the GATT which allows for a justification of a breach of a primary rule like most-favoured nation principle or national treatment principle. The nature of the security exception of the GATT as the exception *stricto sensu* has implications for the burden of proof and its review.

One should understand the general context in which the GATT has been negotiated, which in turn had an impact on the vague wording of some concepts in exceptions. In this regard Robert Hudec argued that the GATT is a diplomat's jurisprudence.[107] Some scholars endorsed the view that the GATT jurisprudence should be more flexible by pointing out that international trade is "too delicate a matter to be left to hard laws alone and diplomats are aware of this."[108]

The GATT Article XXI can be compared to the GATT Article XX (general exceptions) which has similar structure. Under the established case-law, the analysis under Article XX of the GATT involves two inquiries (i) whether there is a breach of a primary rule (obligations under the GATT like MFN, NT or any other) and (ii) whether such breach could be justified by Article XX, accordingly. The operation of GATT Article XX was specified by the Appellate Body in *Thailand-Cigarettes (Philippines)*:

> *"…It is true that, in examining a specific measure, a panel may be called upon to analyse a substantive obligation and an affirmative defence, and to apply both to that measure. It is also true that such an exercise will require a panel to find and apply a 'line of equilibrium' between a substantive obligation and an exception. Yet this does not render that panel's analyses of the obligation and the exception a single and integrated one. On the contrary, an analysis of whether a measure infringes an obligation necessarily precedes, and is distinct from, the 'further*

[106] Viñuales (n 95). p.10 Indeed, in his analysis Jorge Viñuales referred to the GATT Article XX as an example of the exception *stricto sensu* ibid. p.10
[107] 'The GATT Legal System: A Diplomat's Jurisprudence' [1970] Journal of World Trade 615.
[108] Noel Zher Ming Chow, 'Professor Hudec's "Techniques of the Diplomat's Jurisprudence": Does It Still Apply?' (2015) 6 Asian Journal of Law and Economics <https://www.degruyter.com/view/j/ajle.2015.6.issue-1/ajle-2014-0004/ajle-2014-0004.xml> accessed 10 April 2019. p.40

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and separate' assessment of whether such measure is otherwise justified."[109]

There is a vast case-law on the GATT Article XX contrary to the GATT Article XXI. This is why in its interpretation of the GATT Article XXI the Panel would be left with a challenging task of entering into uncharted waters. Hence, there is a strong need to get the interpretation on the security exception from WTO Panels.

Interpretation

To begin with, the rules as to interpretation of WTO Agreements are established in Article 3.2 of the DSU which states

> *"The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."*[110]

In this regard the Appellate Body in *US-Gasoline* stated that

> *"The general rule of interpretation [as set out in Article 31(1) of the Vienna Convention on the Law of Treaties] has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify*

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[109] *DS371: Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines, Appellate Body Report*. para.173

[110] 'Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the WTO Agreement' <https://www.wto.org/english/Tratop_e/dispu_e/dsu_e.htm>.

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> *the provisions of the General Agreement and the other "covered agreements" of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law."*[111]

To recall, Article 31 (1) of the Vienna Convention on the Law of Treaties stipulates that *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*[112] The Appellate Body does not separate the text and context from the object and purpose. For instance, in *US-Shrimps* the Appellate Body underlined:

> *"It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought."*[113]

Given the specific nature of exceptions as derogations from general rules, some scholars argued for the specific rules of interpretation for exceptions. For instance, Asif Qureshi claimed that in terms of interpretation of exceptions the Latin principle exception *est strictissiame applicationis* should be applied, meaning that exceptions to treaty obligations are interpreted restrictively.[114]

The restrictive interpretation of the exceptions was mentioned by the Panel in Canada – Imported *Restrictions on Ice Cream and Yoghurt*: *"…exceptions were to be interpreted*

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[111] *United States — Standards for Reformulated and Conventional Gasoline, AB Report, WT/DS2/AB/R* [1996] Appellate Body DS2. p.17

[112] 'Vienna Convention on the Law of Treaties (with Annex). Concluded at Vienna on 23 May 1969' <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>.

[113] *United States — Import Prohibition of Certain Shrimp and Shrimp Products, DS58, Appellate Body report.* para.114

[114] Asif H Qureshi, 'Interpreting Exceptions in the WTO Agreements', *Interpreting WTO Agreements: Problems and Perspectives* (2nd edn, Cambridge University Press 2015) <http://ebooks.cambridge.org/ref/id/CBO9781107337992> accessed 23 July 2018. p.170

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narrowly and considered that this argued against flexible interpretation of Article XI:2(c)(i)".[115] However, later the Appellate Body re-interpreted the narrow interpretation and argued that

> *"…In much the same way, merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation".*[116]

This approach by the Appellate Body was also discussed by Joost Pauwelyn who pointed out that Articles 31-32 of the Vienna Convention do not call for a restrictive interpretation of derogating norms or exceptions.[117]

Furthermore, one should weigh that the choice in terms of interpretation to some extent depends on the politics, which is prescribed by the institutional choices. On this point Joost Pauwleyn and Manfred Elsig concluded that

> *"…a tribunal, can, at times, use a textual approach for the same (strict or expansive) purpose it could use an intent-type approach. Therefore, systematically suggesting causal arguments when it comes to the dominant hermeneutic seems a difficult task because the same type of hermeneutic can be used for different objectives".* [118]

[115] 'Canada- Import Restrictions on Ice Cream and Yogurt, Report of the Panel, L/6568 - 36S/68' <https://www.wto.org/english/tratop_e/dispu_e/gatt_e/88icecrm.pdf>. para.59

[116] *European Communities — Measures Concerning Meat and Meat Products (Hormones), DS 26* [1998] WTO WT/DS26/AB/R, WT/DS48/AB/R. para.104

[117] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) <https://www.cambridge.org/core/product/identifier/9780511494550/type/book> accessed 10 April 2019. p.156

[118] See on this Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press 2012) <https://www.cambridge.org/core/product/identifier/CBO9781139107310A029/type/book_part> accessed 14 August 2018. p.469

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To sum up, the basis for the interpretation of exceptions by WTO Panels and the Appellate Body is prescribed in Articles 31-33 of the VCLT. Following this, the context of the treaty in light of its object and purpose, any subsequent agreement between parties, any subsequent practice in application of the treaty and relevant rules of international law will be taken into account. Moreover, recourse could be made to the supplementary means of interpretation such as preparatory work of the treaty and the circumstances of its conclusion. Last, taking into account that the wording from the GATT should not be read in clinical isolation from public international law, Panels and the Appellate Body in their interpretation might seek guidance from other international courts and tribunals.[119] In light of this, the Chapter will proceed with discussion of the negotiation history of the GATT security exception which could inform the interpretation and look at the structure of Article XXI of the GATT.

GATT ARTICLE XXI

To remind, Article XXI of the GATT reads:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(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.[120]

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[119] For the use of public international law in the WTO see Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 The American Journal of International Law 535.

[120] WTO, Analytical Index: GATT 1994, available at: WTO, 'WTO Analytical Index, GATT Article XXI' <https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art21_gatt47.pdf> accessed 20 June 2018.

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Drafting history of the GATT Article XXI

A short overview of the drafting history of the GATT Article XXI can shed some light on its present structure and the rationale behind it.[121] Moreover, the value of negotiation history of the GATT Article XXI is important for the purpose of interpretation under Article 32 of the Vienna Convention which states that

> *"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstance of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Aarticle 31:*
> *(a) Leaves the meaning ambiguous or obscure; or*
> *(b) Leads to a result which is manifestly absurd or unreasonable."*[122]

To this end, the main stages in evolution of the GATT Article XXI will be analysed below in a chronological order. The national security exception first appeared in Article 32 and 49(2) of the US Suggested Charter. In the London and New York Drafts it was moved to Article 37 of the ITO Charter. In the Geneva draft the national security exception was put under Article 94. Last, the national security exception was put under Article 99 of the Havana Draft which is almost identical to Article XXI in the GATT.

First, the wording of the security exception was prepared by a member of the US Delegation, Edmund H. Kellogg, during the negotiations of the International Trade Organization (ITO) Charter in Geneva.[123] His draft provoked internal US debates at the July 2

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[121] The drafting history of the GATT Article XXI was summarized by the GATT Secretariat in 1987 See Negotiating Group on GATT Articles, 'Article XXI, Note by the Secretariat, MTN.GNG/NG7/W/16' <https://www.wto.org/gatt_docs/English/SULPDF/92020251.pdf>. It was also discussed by, for example, M.Hahn Michael J Hahn, 'Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception' (1991) 12 Michigan Journal of International Law 558. pp.565-569 The more recent publication reviewing the drafting history of the GATT Article XXI is Ji Yeong Yoo and Dukgeun Ahn, 'Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?' (2016) 19 Journal of International Economic Law 417. pp.418-426

[122] 'Vienna Convention on the Law of Treaties (with Annex). Concluded at Vienna on 23 May 1969' (n 112).

[123] Kenneth J Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties* (Oxford University Press 2017) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780190679576.001.0001/acprof-9780190679576> accessed 26 October 2018. p.146

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and 4, 1947 US delegation meetings.[124] For example, Howard Neff, sought to change the draft and make it more unrestrained for States.[125] However, a very broad unrestrained language was criticized by John M. Leddy, John Evans, Robert Terrill and Clair Wilcox and in the end the proposal by Clair Wilcox was voted for by a majority of the US Delegation.[126] The United States presented Clair's Wilcox proposal in the "Suggested Charter for the International Trade Organization of the United Nations" in September 1946 ("the US Suggested Charter").[127] In her detailed analysis of the US internal debates during the negotiations on the national security, Mona Pinchis-Paulsen concluded that *"the US delegates were willing to sacrifice (some) sovereignty for the benefits generated in multilateral result."*[128]

As to the text of the security exception under the US Suggested Charter, the national security exception was scattered into two articles: Article 32 under the General Commercial Policy chapter and Article 49 (2) as an exception to the intergovernmental commodity arrangements chapter. For example, Article 32 under the title "*General exceptions to Chapter IV*" stated:

> *"Nothing in Chapter IV of this Charter shall be construed to prevent the adoption of enforcement by any Member of measures:*
>
> a. *necessary to protect public morals*
> b. *necessary to protect human, animal or plant life and health*
> c. *relating to fissionable materials*
> d. *relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment*

[124] For a detailed account of the US delegation internal discussions see Mona Pinchis-Paulsen, 'Trade Multilateralism and National Security: Antinomies in the History of the International Trade Organization' [2019] SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353426>. p.11-25

[125] For changes proposed by Howard Neff see Vandevelde (n 123). p.147

[126] To be precise, 10 members of a delegation voted for a proposal by Clair Wilcox while 3 members were in favour of language proposed by Howard Neff. ibid. p.149

[127] Although as the first proposals mentioning the security exception could be considered the Proposal of the United States of November 1945, where Section G, named General Exceptions had paragraphs similar to those included in present Article XXI of the GATT 'Department of State, the United States of America, Proposal for Expansion of World Trade and Employment' <http://www.worldtradelaw.net/misc/ProposalsForExpansionOfWorldTradeAndEmployment.pdf.download>. p.18

[128] Pinchis-Paulsen (n 124). p.33

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e. in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member
f. relating to the importation or exportation of gold or silver
g. necessary to induce compliance with laws or regulations which are not inconsistent with the provisions of Chapter IV, such as those relating to customs enforcement, deceptive practices, and the protection of patents, trade-marks and copyrights;
h. relating to prison-made goods;
i. imposed for the protection of national treasures of artistic, historic or archeological value
j. relating to the conservation of exhaustible natural resources if such measures are taken pursuant to international agreements or are made effective in conjunction with restrictions on domestic production or consumption
k. undertaken in pursuance of obligation under the United Nations Charter for the maintenance or restoration of international peace and security; or
l. imposed in accordance with a determination or recommendation of the Organization formulated under paragraphs 2,6, or 7 of Article 55." [129]

It is worth noting a connection between the International Court of Justice and the Commercial Policy Chapter which contained Article 32. The Suggested Charter in Article 76 (2) provided that the Organization, could, with the authorization of the General Assembly of the United Nations, "refer any question concerning the interpretation of this Charter to the International Court of Justice with a request for an advisory opinion thereon".[130] This wording suggests that the national security exception was subject to review rather than a self-judging provision.

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[129] See United States Dept of State, *Suggested Charter for an International Trade Organization of the United Nations ...* (Department of State 1946).
[130] ibid.

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During the negotiations in London, the Representative of the United Kingdom, Mr.Rhydderch proposed to insert an introduction to Article 32 in order to prevent abuse of exceptions. He proposed the following wording:

> *"The undertakings in Chapter IV of this Charter relating to import and export restrictions shall not be construed to prevent the adoption or enforcement by any Member of the following measures, provided that they are not applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."*[131]

The national security provisions in the London[132] and New York[133] drafts were moved to Article 37.[134]

Moving further to the Geneva draft,[135] at least two important changes occurred with the above-mentioned Article 37 of the London and New York draft.[136] First, the provisions of Article 37 of the New York draft were split into two parts, with general exceptions (presently Article XX) included in Article 43 and security exceptions (presently Article XXI) included in Article 94. In practical terms it meant that provisions of Article 43 were applicable to the commercial policy chapter, while provisions in Article 94 were applicable to the whole Charter.[137] Second, the wording of the provisions under Article 94 (security exceptions) was

[131] 'Committee II. Technical Sub-Committee. - Ninth Meeting Held on Wednesday, 13 November 1946 at 10.30 a. m.' <https://www.wto.org/gatt_docs/English/SULPDF/90210262.pdf>. p.7
[132] 'United Nations - Economic and Social Council - Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment' <https://docs.wto.org/gattdocs/q/UN/EPCT/33.PDF>.
[133] Note that apart from the New York Draft of the ITO that is mentioned above, there was the New York Draft of the GATT where the provisions on general exceptions appeared under Article XX For the New York Draft of the ITO see "United Nations, Restricted Economic and Social Committee Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34," March 5, 1947, https://www.wto.org/gatt_docs/English/SULPDF/92290038.pdf.
[134] It should be noted that the text of the present Article XXI was scattered in Article 37 (c) –(e), Article 45 and Article 59
[135] Two drafts are considered here -of 4 July 1947 (proposal from the United States) and of 30 August 1947 (final Geneva Draft)
[136] 'United Nations - Economic and Social Council - [Preparatory Committee of the United Nations Conference on Trade and Employment] - Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Draft Charter - [Delegation of the United States of America - Proposals for the Amendment of Chapters I and II, Together with Suggestions with Regard to Arrangement of the Articles of the Charter as a Whole, and with Regard to the Constitution of a New Chapter to Be Called "Miscellaneous"], E/PC/T/W/236' <https://docs.wto.org/gattdocs/q/UN/EPCT/W236.PDF>.
[137] This explanation was given by the GATT Secretariat Negotiating Group on GATT Articles (n 121). p.2

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changed following the proposal from the United States[138] and "*it considers necessary*" was inserted into the introductory paragraph of Article 94. [139] Article 94 was named "General exceptions" and read as follows:

> *Article 94. General Exceptions:*
>
> *Nothing in this Charter shall be construed*
>
> *(a) to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or*
> *(b) to prevent any Member 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;*
> *(i)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;*
> *(i)taken in time of war or other emergency in international relations; or*
> *(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.*[140]

[138] For a proposal of the United States see 'United Nations - Economic and Social Council - [Preparatory Committee of the United Nations Conference on Trade and Employment] - Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Draft Charter - [Delegation of the United States of America - Proposals for the Amendment of Chapters I and II, Together with Suggestions with Regard to Arrangement of the Articles of the Charter as a Whole, and with Regard to the Constitution of a New Chapter to Be Called "Miscellaneous"], E/PC/T/W/236' (n 136). p.13
[139] For a discussion of appearance of "considers" in the GATT Article XXI see Simon Lester, 'The Drafting History of GATT Article XXI: Where Did "Considers" Come From?' (*International Economic Law and Policy Blog*, 13 March 2018) <http://worldtradelaw.typepad.com/ielpblog/2018/03/draft-of-gatt-security-exception-considers.html>.
[140] 'Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, 19 August 1947, E/PC/T/186 (Geneva Draft Charter)' <https://www.wto.org/gatt_docs/English/SULPDF/92290240.pdf>.

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The United States in Preliminary Summary of the Geneva Draft of the ITO Charter explained the changes of the wording as "…*They [the national security exceptions] have been so worded as to make it clear that members will be able to apply them as they themselves determine. (Senate Finance Committee*)."[141] In the final Geneva Draft of 30 August 1947 Article 94 became Article 99 and following additional re-wording "*it considers*" was moved to sub-paragraphs of Article 99.[142]

Finally, during the Havana conference the sub-committee composed of Australia, Costa Rica, Czechoslovakia, Guatemala, Iraq, India, Pakistan, South Africa, the UK and the US made some modifications. In particular, the sub-committee changed that the action can be taken by a single Member or a group of Member states. Moreover, they indicated more clearly that "the sub-paragraphs refer to "action" and not to "essential security interests". Consequently, the part of General exceptions which referred to national security exception read as follows:

> *"Nothing in this Charter shall be construed [...]*
>
> *(b) to prevent a Member from taking, either singly or with other states, any action which it considers necessary for the protection of its essential security interests, where such action:*
>
> *(i) relates to fissionable materials or the materials from which they are derived;*
>
> *(ii) relates 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 of the Member or of any other country;*

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[141] 'Preliminary Summary of Geneva Draft of ITO Charter, Changes from New York Draft' <http://worldtradelaw.typepad.com/files/wilcox-xxi.pdf>. p.14

[142] 'United Nations - Economic and Social Council - [Preparatory Committee of the United Nations Conference on Trade and Employment] - Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Draft Charter - [Delegation of the United States of America - Proposals for the Amendment of Chapters I and II, Together with Suggestions with Regard to Arrangement of the Articles of the Charter as a Whole, and with Regard to the Constitution of a New Chapter to Be Called "Miscellaneous"], E/PC/T/W/236' (n 136).

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> *(iii) is taken in time of war or other emergency in international relations; [...]"*[143]

During the Havana negotiations one of the representatives addressed the fact that the national security exception was perceived to be justiciable. Namely, it is stated that

> *"Some representatives felt that consideration of political interests fell within the scope of the United Nations and was outside the scope of the Trade Organization. One representative considered that while consideration of political interests was outside the Trade Charter, the Organization should be able to examine whether Members were not trying to cover economic interests under disguise of political interests."*[144]

As is seen, the initial draft contained a language which allowed States to take measures "either singly or with other States", while in the present wording of the GATT Article XXI this phrase is missing. As it is known, the Havana Charter[145] never went into force and only textual developments under Article XXI of the GATT remained. [146]

All things considered, three ideas could be inferred from the negotiating history of the GATT: first, the Contracting Parties of the GATT wanted to give States an opportunity to act for protection of their national interests in cases of emergency in international relations.[147] Second, the security exceptions intended to give more deference to States in matters of national security compared to other non-trade values by including "*it considers*" wording in the text of the security exception. Third, some comments from the representatives of the delegations as

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[143] 'United Nations - Conference on Trade and Employment - Sixth Committee: Organization - Report of Sub-Committee I (Article 94)' <https://docs.wto.org/gattdocs/q/UN/ECONF2/C6-93.PDF>.
[144] 'United Nations - Conference on Trade and Employment - Sixth Committee: Organization - Sub-Committee I (Article 94) - Notes of the First Meeting - Held Tuesday, 7 January 1948, at 10.30 a.m., E/CONF.2/C.6/W.26' <https://docs.wto.org/gattdocs/q/UN/ECONF2/C6-W26.PDF>.
[145] Note that the US Congress refused to ratify the Havana Charter, however, the GATT 1947 contracting parties decided to observe general principles embodied in the Havana Charter. See on this Mary Footer, 'The Relation Of This Agreement To The Havana Charter' in Peter-Tobias Stoll, Rüdiger Wolfrum and Holger Hestermeyer (eds), *WTO - Trade in Goods* (Brill 2010) <http://booksandjournals.brillonline.com/content/books/10.1163/ej.9789004145665.i-1228.279> accessed 26 October 2018.
[146] For an overview of a history of the Havana Charter see Sacerdoti, 'Havana Charter (1948)' (n 33).
[147] Krzysztof Pelc also mentioned in this regard "*Much of the drafting history of the Article testifies to the desire to create a space for political matters within an inherently economic agreement*" Pelc, *Making and Bending International Rules* (n 89). pp.96-98

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well as initial drafts where States had an opportunity to challenge the measures adopted under national security exception in front of the ICJ, point out to the fact that the national security exception was perceived to be justiciable.

Structure of the GATT Article XXI

The GATT security exception could be subdivided in different parts. For example, one approach distinguishes three elements in security exceptions: the nexus between the measure and the permissible goal (e.g. "*necessary*"), the scope of the clause (e.g. "*nothing in this Agreement*"), and the permissible objective (e.g. "*for the protection of its essential security interests*").[148] Under the second approach, Holger Hestermeyer distinguishes three separate parts of Article XXI of the GATT: an introductory sentence applicable to the whole provision ("*nothing in this Agreement shall be construed*"), the security exceptions *stricto sensu* (lits *a* and *b*) and the paragraph on the relationship with the UN Charter *(c)*.[149]

The analysis of this thesis will be concentrated on the subparagraph (iii) of Article XXI (b) as the most used by States.[150] Indeed, States referred to Article XXI (b) (iii) in eight out of ten cases where the security exception has been invoked during the GATT and WTO era.[151] Two points are worth noting with regard to subparagraph (b) (iii) of Article XXI of the GATT in comparison to other subparagraphs. First, subparagraphs (i) and (ii) refer to materials and types of goods relating to which any action could be adopted. In turn, subparagraph (iii) refers to specific situations which could lead to adoption of the measures, i.e. "emergency" or "other emergency in international relations". Second, subparagraph (b) (iii) entails two requirements as to "any action": (i) necessary for the protection of essential security interests[152] and (ii) taken

[148] The framework is borrowed from Frederic G Sourgens and Michael D Nolan, 'The Limits of Discretion? Self-Judging Emergency Clauses in International Investment Agreements' in Karl P Sauvant (ed), *Yearbook of International Investment Law and Policy* (Oxford University Press 2011).
[149] Hestermeyer, 'Security Exceptions' in Peter-Tobias Stoll, Rüdiger Wolfrum and Holger Hestermeyer (eds), *WTO - Trade in Goods* (Brill 2010) <http://booksandjournals.brillonline.com/content/books/10.1163/ej.9789004145665.i-1228.216> accessed 16 June 2018. p. 577.
[150] It should be mentioned that Article XXI (b) para (i) and (ii) have also been discussed in view of recent cases. See Balan (n 13). On para (i) and (ii) see pp.10-13 For a discussion of para (i) and (ii) of Article XXI of the GATT see also Hahn (n 121). pp.585-587
[151] The cases are the following: (i)during the GATT-era: US-Czechoslovakia (1951), Peru-Czechoslovakia (1954), EC, Australia, Canada – Argentina (1982), US-Nicaragua (1983), US-Nicaragua (II) (1985), EEC-Yugoslavia (1992), WTO-era: Nicaragua-Colombia, 2000 (DS188), Nicaragua -Honduras, 2000 (DS201), the first country mentioned is the respondent State in the case) as specified by Yoo and Ahn (n 121). pp.431, 434
[152] Hestermeyer (n 149). p.585 Hestermeyer (n 119). p.585

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in time of "war" or "other emergency in international relations".[153] With these points in mind, I will conduct the analysis of Article XXI (b) (iii) of the GATT. This analysis is aimed to shed some light on the way the Panel might interpret these provisions.

Focus on Article XXI (b) (iii)

"Nothing in this Agreement shall be construed …

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

… (iii) taken in time of war or other emergency in international relations…"

An introductory paragraph (*the chapeau*)

The introductory paragraph of Article XXI of the GATT "*nothing in this Agreement shall be construed*", i.e. *the chapeau*, defines the scope of the Article. The wording "*nothing in this Agreement*" means that States can derogate from any GATT provision subject to fulfilment of the requirements embedded in subparagraphs (a), (b) and (c). In other words, the measures justified by reference to Article XXI will prevail over any other GATT obligations.

Such conclusion could be also confirmed by comparison with the interpretation of the *chapeau* of GATT Article XX which states:

> *"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures…"*[154]

[153] The difference of subparagraph (iii) with the subparagraphs (i) and (ii) is that the latter establish a connection between measures and types of materials or goods, e.g. "fissionable materials" rather than situations like the former. It is also clarified that the fields in subpara (i) and (ii) are related to "action" rather than "essential security interests" given an interpretation stemming from the Spanish version of the GATT which uses the words "*relativas*" and therefore grammatically pointing to "*las medidas*" ibid. p.585

[154] To note that the object of the chapeau, as mentioned by the Appellate Body in the US-Gasoline "*the prevention of abuse of the exceptions specified in the paragraphs of Article XX.*" *US-Gasoline, ABR* (n 111).*United States — Standards for Reformulated and Conventional Gasoline, AB Report, WT/DS2/AB/R* [1996] Appellate Body DS2.

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It is evident from the wording of the chapeau of the GATT Article XX that the phrase "*nothing in this Agreement...*" is the same in both Articles. The interpretation of this phrase in view of GATT Article XX was done by the Appellate Body in the *US-Gasoline* case:

> *"...the chapeau says that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ..." The exceptions listed in Article XX thus relate to all of the obligations under the General Agreement: the national treatment obligation and the most-favoured-nation obligation, of course, but others as well. Effect is more easily given to the words "nothing in this Agreement", and Article XX as a whole including its chapeau more easily integrated into the remainder of the General Agreement, if the chapeau is taken to mean that the standards it sets forth are applicable to all of the situations in which an allegation of a violation of a substantive obligation has been made and one of the exceptions contained in Article XX has in turn been claimed.*"[155]

In line with the interpretation of the Appellate Body above and given the similar wording of "*nothing in this Agreement*" in the *chapeau* of Article XXI, it is safe to conclude that Article XXI of the GATT is an exception from all obligations under the GATT Agreement.

Having said that, the question may arise as to whether Article XXI of the GATT is able to justify the violations of other WTO Agreements. The restricted interpretation of wording "nothing in this Agreement" would suggest that Article XXI is available to justify violations in the GATT Agreement only. However, one could argue that other Agreements like the Safeguard Agreement or Anti-Dumping Agreement represent the parts of inseparable package of rights and disciplines that are provided by Article XIX of the GATT (safeguards) or Article VI of the GATT (anti-dumping).

Some guidance on the possibility of the GATT Article XXI to justify the violations under other agreements could be drawn from *China-Raw Materials* case where the Appellate Body considered a possibility to justify a violation of China's Protocol of Accession by Article XX

[155] *ibid.* p.24

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of the GATT. China argued that if its export taxes and charges are not applied in accordance with Article VIII of the GATT, they violated both Article VIII of the GATT and paragraph 11.3 of its Protocol of Accession which China argued to require that export taxes and charges be applied in conformity of with the provisions of Article VIII of the GATT 1994. Consequently, China claimed that if its measure violates Article VIII of the GATT, it might justify it measures under Article XX of the GATT.[156] Although the Appellate Body concluded that Article VIII of the GATT does not cover export duties, it left open the possibility of that the measures inconsistent with Article VIII may be justified under Article XX of the GATT even in case they are challenged under another Agreement.

"Any action"

The wording "any action" refers to types of measures which a State can adopt and then justify by recourse to Article XXI. The word "any" implies that types of measures may include, for example, tariffs, import quotas, export controls, full embargo, suspension of trade concessions or economic sanctions. Sanctions are among most widely used coercive measures justified by recourse to the GATT Article XXI. Andreas Lowenfeld defines economic sanctions as

> *"economic measures – in contrast to diplomatic or military ones – taken by states to express disapproval of the acts of the target state or to induce that the state has to change some policy or practice or even its governmental structure".*[157]

Restrictive measures could be imposed with regard to "a) bilateral government programs, such as foreign assistance, fishing rights, and aircraft landing rights; b) exports from the sender State(s); c) imports from the target country or other target entity; d) private financial transactions, such as bank deposits and loans; and e) the economic activities of international financial institutions such as the World Bank, IBRD or IMF".[158]

The scope of economic sanctions could be so broad that they can be harmful to a broader society. As put by Mergen Doraev, "political elites tend to forget that any economic sanction

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[156] *China - Measures Related to the Exportation of Various Raw Materials, DS394* (Appellate Body report). para.289

[157] Andreas F Lowenfeld, *International Economic Law* (2. ed., Repr, Oxford Univ Press 2009). p.850

[158] Barry E Carter, 'Economic Sanctions', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2011).

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could be used not only to sue for peace, but rather to inflict economic suffering".[159] Moreover, there could also be a harm to the State which will adopt sanctions - Maarten Smeets calls it "shooting [themselves] in the foot".[160] Nonetheless, economic sanctions remain to be an important tool of international diplomacy and it is hard to exclude their use. Therefore, it is particularly relevant to draw a line between sanctions, i.e. trade-restrictive measures adopted as a matter of foreign policy *and* other trade-restrictive measures which are adopted for other reasons than protection of national security.

- *"for the protection of…" - the purpose of the measure*

"Any action" covered by Article XXI of the GATT has to be adopted for a specific aim i.e. for protection of essential security interests. This conclusion stems form (i) the drafting history of the GATT and (ii) the structure of exceptions under the GATT.

First, the intention of the drafters of Article XXI of the GATT has been to protect essential security interests. The rationale behind the security exception was creation of an antithesis to "commercial escape clauses". Consequently, the security exception addresses "political-military conditions…. outside of the regular scope of the GATT".[161] Indeed, during the negotiations of the GATT a representative of the USA made a distinction between commercial and security purposes by saying that

> "*…these words [meaning the security exceptions] had appeared in the original United States draft Charter as it was thought that some latitude must be granted for security as opposed to commercial purposes*". [162]

Second, the question arises whether economic purposes could be covered by national security purposes. As a matter of fact, there are specific Articles in the GATT which address measures adopted for economic purposes. For instance, economic emergency measures are covered by Article XIX of the GATT on Safeguards which together with the Safeguards

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[159] Mergen Doraev, 'The Memory Effect of Economic Sanctions against Russia: Opposing Approaches to the Legality of Unilateral Sanctions Clash Again Comment' (2015) 37 University of Pennsylvania Journal of International Law 355.
[160] Maarten Smeets, 'Can Economic Sanctions Be Effective?' (World Trade Organization (WTO), Economic Research and Statistics Division 2018) <https://EconPapers.repec.org/RePEc:zbw:wtowps:ersd201803>.
[161] Hahn (n 121). p.580
[162] Economic and Social Council, 'Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development, Summary Record of the 33rd Meeting of Commission, Held on Thursday, 24th July, 1947, at 2.30 p m. in the Palais Des Nations, Geneva, E/PC/T/A/SR/33' <https://www.wto.org/gatt_docs/English/SULPDF/90250049.pdf>. p.3

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Agreement address the injury to domestic industries caused by the imports of particular products.[163] Hence, it is hard to claim that purely economic purposes fall under primary focus of the security exception. That suggests that a wide definition of security interests can cover economic security as it, for example, has been seen in the Argentinian ISDS cases.[164] For example, in *Continental Casualty* the ICSID Tribunal said:

> *"it is well known that the concept of international security of States in the Post World War II international order was intended to cover not only political and military security but also the economic security of States and of their population"*.[165]

Therefore, under a broad interpretation of national security the economic interests which are related to the security of State can also be covered by the essential security interests. purposes.

Essential security interests

To consistently analyse the "essential security interests" wording, this section first elucidates on "security interests" and then defines what type of interests could be deemed as "essential".

- *Security interests*

(i) a notion of security and type of interests

- *Security*

The notion of security as defined by the Oxford Dictionary is "the state of being free from danger or threat".[166] Since *security* stems from security of a single State, it is normally referred to "national" or "State" security, which goes to the core sovereignty of the State.[167] It is a

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[163] For a WTO jurisprudence on GATT Article XIX see 'WTO Analytical Index, GATT 1994 - Article XIX (Jurisprudence)' <https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art19_jur.pdf>.
[164] For an extensive discussion on this see WJ Moon, 'Essential Security Interests in International Investment Agreements' (2012) 15 Journal of International Economic Law 481.
[165] *Continental Casualty Company v the Argentine Republic, Award, ICSID Case No ARB/03/9* (ICSID). para.175
[166] 'Security' <https://en.oxforddictionaries.com/definition/security>.
[167] Moreover, given the fact that the State consists of individuals, individual security should not be overlooked. In this regard some scholars even claimed that we have to put more emphasis on State since it acts as the nexus between State and individual in terms of security. Georg SøRensen, 'Individual Security and National Security: The State Remains the Principal Problem' (1996) 27 Security Dialogue 371. p.384

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challenging task to draw a line between national and state security, with some scholars using these terms interchangeably. Since the "national security" term has got its prominence in legislation, security interests of a State are usually drawn from its national security. Oxford Dictionary defines national security as "the safety of a nation against threats such as terrorism, war, or espionage".[168]

- *type of interests*

Further we have to define what type of interests might be threatened under the notion of "security".[169] From the outset, it is worth mentioning that security is an elastic notion and type of security interests may vary depending on time, country and context. For example, recently we encountered the emergence of new threats like, for example, cybersecurity threats.[170]

With regard to the list of security interests, some scholars claim that it is desirable to limit the number of "security industries" to a very short list and include only security industries which are connected to political and/or military threats rather than economic. [171] Other scholars propose a broad view on security as "systemic security" that includes some individual, national and international dimensions of the concept.[172] This approach will consequently broaden the list of industries: any interest could fall under a security interest as far as it is connected to the military capacity of a State. One extreme example is the case when in 1963 Nikita Khrushchev said that "even a button is strategic since it can be sewn on a soldier's pants".[173] At last, some interests may fall into a "grey area" where it is hard to draw a line when a security interest flows into a commercial interest. On the whole, , the determination of one or another interest will

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[168] 'National Security' <https://en.oxforddictionaries.com/definition/national_security>.

[169] In this regard Lydia Davies-Bright defines an objective of security as "to protect State from a perceived existential threat" *Lydia Davies-Bright* Terrorism: A Threat to Security? *in* Mary Footer and others (eds), *Security and International Law* (Hart Publishing 2016). p.219

[170] For a discussion of the cybersecurity threats in light of GATT Article XXI see S-y Peng, 'Cybersecurity Threats and the WTO National Security Exceptions' (2015) 18 Journal of International Economic Law 449. It is worth noting that the WTO Member States have also discussed the regulation dealing with cyberthreats as barriers to trade. China was mentioned as one of the States maintaining such regulations. ON its part, China explained that "the measures aim at safeguarding national security" WTO, 'Members Debate Cyber Security and Chemicals at Technical Barriers to Trade Committee' <https://www.wto.org/english/news_e/news17_e/tbt_20jun17_e.htm>. For an expansion of the concept of security see Hitoshi Nasu, 'The Expanded Conception of Security and International Law: Challenges to the UN Collective Security System' [2011] Amsterdam Law Forum; Vol 3, No 3 (2011): Summer Issue <http://amsterdamlawforum.org/article/view/225>.

[171] Holger Hestermeyer claimed that we should limit a number of industries to a very few, otherwise it will lead to the "slippery slope" situation Hestermeyer (n 149). p.583

[172] Barry Buzan, *People, States and Fear: The National Security Problem in International Relations* (University of North Carolina Press 1983). p.247

[173] Claude Lachaux, 'Trade Restrictions: Economic Necessity or Political Weapon? A Western View' in Christopher T Saunders (ed), *East-West Trade and Finance in the World Economy* (Palgrave Macmillan UK 1985) <http://link.springer.com/10.1007/978-1-349-06074-0_15> accessed 22 June 2018. p.296

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depend on the context of a particular State. For example, for a one small geographically locked State even the food security might be essential at a certain point of time due to its characteristics of a size, dependence on other States with regard to certain products and its geographical position.

Essential [security interests]

The notion of security can include a wide range of interests, but the wording of Article XXI delimits the scope of security interests to "essential". "Essential" as defined by the Oxford Dictionary means: "absolutely necessary; extremely important".[174] The threshold for including certain security interests as essential, is low, as pointed out by Holger Hestermeyer.[175] In this regard one could expect that State will refer to those interests which are embodied in the core functions of the State and will be highly concerned about protection of its territory and citizens from external threats. Moreover, in case of grave economic crisis, the State should be equally prepared to maintain its public order.

It is found that the notion of "essential" security interests is elastic, globally-connected and context-dependent. Historically, "essential security interests" have been centered on the use of military force to preserve national sovereignty, not to mention a nation itself.[176] Then essential security interests expanded beyond pure military interests, and started to cover science, technology, and education, which were the sources on which the armed forces might ultimately depend on.[177] The expansion of global economic interdependence makes a concept of security interests more vulnerable.[178] It is safe to claim that the nature of security depends on a particular country, its size and international context.[179]

As it was mentioned above, during both GATT and WTO eras, no Panel interpreted the "essential security interests" in the context of security exception.[180] The interpretation of the term "essential" was done by a WTO Panel in the context of the wording "essential product to

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[174] 'Essential' <https://en.oxforddictionaries.com/definition/essential>.
[175] Hestermeyer (n 149). p.583
[176] Donald N Zillman, 'Energy Trade and the National Security Exception to the GATT International Energy Trade' (1994) 12 Journal of Energy & Natural Resources Law 117. p.124
[177] ibid. p.126
[178] Christian Fjäder, 'The Nation-State, National Security and Resilience in the Age of Globalisation' (2014) 2 Resilience 114. p.128
[179] For example, Judge James Crawford claimed James Crawford *"The extent to which a given interest is 'essential' depends on all the circumstances and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole* .United Nations and James Crawford (eds), *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge University Press 2002). p.183
[180] See on interpretation of exceptions in WTO Agreements generally Qureshi (n 114).

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the exporting Member" in *China-Raw Materials*. In particular, the Panel stated that the determination of whether the product is essential to a particular Member should

> *"…take into consideration the particular circumstances faced by that Member at the time when a Member applies a restriction or prohibition under Article XI:2(a)".*[181]

Drawing from the statement of the Panel above, one could claim that the interpretation of the essential security interests should be made taking into account specific circumstances of the case. Accordingly, Andrew Guzman and Joost Pauwelyn in this regard noted that "the proper response to a national security concerns depends on factors that vary from country to country, product to product and time to time."[182] In its interpretation the Panel might look for the interpretation of essential security interests done by other international tribunals.

Insights from the drafting history of the GATT

The question as to the meaning of the "essential security interests" in the GATT Article XXI was firstly raised as early as during the negotiations on the security exception in 1947. In particular, the representative of the Netherlands at that time, Mr. Antonius B.Speekenbrink, argued that he finds "*that kind of exception very difficult to understand and therefore possibly a very big loophole in the whole Charter.*"[183] To which the representative of the United States, Mr. John Leddy, responded:

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[181] The Panel stated: "*The Panel does not consider that the terms of Article XI:2, nor the statement made in the context of negotiating the text of Article XI:2 that the importance of a product 'should be judged in relation to the particular country concerned', means that a WTO Member may, on its own, determine whether a product is essential to it. If this were the case, Article XI:2 could have been drafted in a way such as Article XXI(b) of the GATT 1994…*" It should be clarified that the Panel did not interpret "essential security interests" of Article XXI of the GATT but used the wording of Article XXI of the GATT to show a difference between "it considers"(without saying its relation to other words like "any action") and the wording under Article XI:2 of the *GATT China - Measures Related to the Exportation of Various Raw Materials, DS394, Panel Report. para.7.276* See on this Graham Cook, 'Words and Phrases Considered', *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (Cambridge University Press 2015) <http://ebooks.cambridge.org/ref/id/CBO9781316212691> accessed 24 July 2018. p.336 For the approach of the Appellate Body in China-Raw Materials see Ilaria Espa, 'The Appellate Body Approach to the Applicability of Article XX GATT In the Light of China – Raw Materials: A Missed Opportunity?' [2012] Journal of World Trade 1399.

[182] Andrew T Guzman and Joost Pauwelyn, *International Trade Law* (2nd ed, Wolters Kluwer Law & Business 2012). pp.28-29

[183] 'Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report of the 33rd Meeting of Commission, Held on Thursday, 24th July, 1947, at 2.30 p m. in the Palais Des Nations, Geneva, E/PC/T/A/PV/33' <https://docs.wto.org/gattdocs/q/UN/EPCT/APV-33.PDF>. p.19

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> *"We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: "by any Member of measures relating to a Member's security interests," because that would permit anything under the sun. Therefore, we thought it well to draft provisions which would take care of really essential security interests and, at the same time, so far as we could, to limit the exceptions and to adopt that protection for maintaining industries under every conceivable circumstance…"*[184]

In other words, the drafters intended to include only interests which are essential for the State as contrary to any conceivable interest which has a connection to security.

Since the concept of essential security interests is present in other areas of public international law, it would be worth looking at its interpretation.

Other case-law

International Court of Justice ("ICJ")

The International Court of Justice interpreted the concept of essential security interests in some of cases. For example, in the *Nicaragua* case, the ICJ observed that

> *"the concept of essential security interests certainly extends beyond the concept of an armed attack and has been subject to very broad interpretations in the past."*[185]

The ICJ also touched upon interpretation of "essential security" in the *Oil Platforms* case. While the ICJ did not provide a precise definition of what fell under the scope of essential security interests, it noted that

> *"…some of the interests referred to by the United States—the safety of United States vessels and crew, and the uninterrupted*

[184] ibid. p.20

[185] *Military and Paramilitary Activities In and Against Nicaragua* (ICJ). para.224

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> *flow of maritime commerce in the Persian Gulf — as being reasonable security interests of the United States."*[186]

According to this interpretation, the concept of essential security interests also includes economic interests,[187] e.g. the flow of maritime commerce along with territorial or military interests. William Burke-White and Andreas von Staden underline that such interpretation of the essential security interests by the ICJ is a very broad reading.[188] At the same time, given specific circumstances of the State and the context of the situation, economic interests could go to the core of national security and therefore fall under the category of essential security interests.

"War"

The term war is difficult to define, given the divergence and heterogeneity of involved stakeholders and the views they hold on it. [189] According to the Black's Law Dictionary war is

> *"A state of forcible contention; an armed contest between nations; a state of hostility between two or more nations or states."*[190]

Some non-hostile situations such as reprisals, interventions, pacific blockade which might lead to the war can obfuscate the term "war".[191] The war presupposes an armed conflict and it

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[186] ICJ, 'Islamic Republic of Iran v United States of America, (Oil Platforms), Judgment of 6 November 2003' <https://www.icj-cij.org/files/case-related/90/090-20031106-JUD-01-00-EN.pdf>. para.73

[187] On international economic security see Vincent Cable, 'What Is International Economic Security?' (1995) 71 International Affairs 305.

[188] William W Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' [2008] Virginia Journal of International Law 307. pp.350-351

[189] For definitions of war from different perspectives see Cathal Nolan, 'War' <http://www.oxfordbibliographies.com/display/id/obo-9780199743292-0049> accessed 15 October 2018. Defining one or another situation as "war" is important in international law since it draws a line between the application of the law of peace and the law of war. In other words, the differentiation should be made between application of human rights law (law of peace) or international humanitarian law (law of war). For an overview of the relationship between these two systems see A Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 European Journal of International Law 161.

[190] 'What Is War?' <https://thelawdictionary.org/war/>. For a classical text on war see Stephen C Neff (ed), 'What Is War? What Is Law?', *Hugo Grotius On the Law of War and Peace* (Cambridge University Press 2012) <https://www.cambridge.org/core/product/identifier/CBO9781139031233A011/type/book_part> accessed 15 October 2018.

[191] Arnold D McNair, 'The Legal Meaning of War, and the Relation of War to Reprisals' (1925) 11 Transactions of the Grotius Society 29. p.34 More on the concept of war see Christopher Greenwood, 'The Concept of War in Modern International Law' (1987) 36 The International and Comparative Law Quarterly 283.

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does not matter whether it is declared or not.[192] Panel could also use relevant rules of international law applicable in the relations between the Members under Article 31 (c) of the VCLT. For instance, the relevant rules could be found in the Geneva Conventions of Humanitarian Law of 1949 and the additional protocols. In Article 2 of the General Provisions it is stipulated that its rules

> *"shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."*[193]

As is seen, terms 'war' or 'any other armed conflict' are used as synonyms. Thus, it means that the war could also cover various modes of armed conflicts. Armed conflicts in its turn might include the aggression, which is defined in the UNGA Resolution "On definition of aggression" as:

> *"…the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."*[194]

"Other emergency of international relations"

At first, we should find an ordinary meaning of this wording. Deriving from the fact that there is the term "war or other emergency in international relations", the intention of the drafters of the treaty was to cover other emergency situations, distinct from war. A basic meaning of the term "emergency" is "*a serious, unexpected, and often dangerous situation requiring immediate action"*.[195] In turn, international relations is defined as

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[192] See also the definition of aggression 'United Nations General Assembly Resolution 3314 (XXIX) (Definition of Aggression)' <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement>.
[193] 'The Geneva Conventions of 1949' <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf>.
[194] 'United Nations General Assembly Resolution 3314 (XXIX) (Definition of Aggression)' (n 192).
[195] 'Emergency' <https://en.oxforddictionaries.com/definition/emergency>.

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> *"the way in which two or more nations interact with and regard each other, especially in the context of political, economic, or cultural relationships".*[196]

Consequently, emergency in international relations may be interpreted as an unexpected dangerous situation between two countries which requires immediate actions. Therefore, not *any* tension between two countries can be considered as an emergency in international relations. Subsequently, the wording "grave" appear in Spanish and French versions of the GATT where it is used as "grave tensión internacional" and/or "grave tension internationale".[197] However, even the term "grave tension in international relations" may cover various situations, starting from violation of human rights, such as in case of the US sanctions against Cuba (Helms-Burton Act) and ranging to alignment with communist dictatorial regimes such as Czechoslovakian case in 1949 (US trade-restrictive measures against Czechoslovakia).[198] Indeed, during the discussion of the case US-Trade measures against Nicaragua (1985), the representative of India mentioned that *"…the scope of the term 'other emergency in international relations', was very wide".*[199] Still some scholars, like Holger Hestermeyer, propose to limit "emergency" to situations which arise unexpectedly and require urgent action.[200]

The definition of emergency in international relations was debated during the GATT negotiations when the delegate from the Netherlands, Dr. Speekenbrink noted:

> *"In time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member". I have, I may say, read that phrase many times, and still I cannot get the real meaning of it. What do we mean "emergency in international relations"? Is that "immediate",*

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[196] 'International Relations' <https://en.oxforddictionaries.com/definition/international_relations>.
[197] Article 33 of VCLT states – Interpretation of Treaties in Two or More Languages "1.When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail".
[198] Gustavo Adolfo Guarin Duque, 'Interpreting WTO Rules in Times of Contestation (Part 2): A Proposed Interpretation of Article XXI(b)Ii–Iii of the GATT 1994 in the Light of the Vienna Convention of the Law of the Treaties' [2019] Global Trade and Customs Journal 31. p.43
[199] Council General Agreement on Tariffs and Trade, 'Minutes of Meeting Held in the Centre William Rappard on May 29, 1985' <https://www.wto.org/gatt_docs/English/SULPDF/91150029.pdf> accessed 21 June 2018.
[200] Hestermeyer (n 149). p.588

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> *through a war? - or what is the "emergency in international relations"*
>
> *For instance, I might say that at present we have a time of emergency as a number of Peace Treaties have not yet been signed and that therefore it might still be essential to have as much food in my country as possible. This would then force us to do everything to develop our agriculture, notwithstanding all of the provisions of this Charter. This example might be a little far-fetched, but I only give it here to prove what is really worrying me about this subparagraph of which I still cannot get the proper meaning.*[201]

As could be noted, there were solid doubts as to the precise definition of emergency in international relations at the negotiations stage. However, it does not mean that the term is not susceptible to an objective determination. For example, the notion of emergency was connected to the war or threat of war in Article 11 of the Covenant of the League of Nations:

> *"Any war or threat of war, whether immediately affecting any of the members of the League or not, is hereby declared a matter of concern to the whole League ... [i]n case any such emergency should arise ...".*[202]

From the wording above, it is evident that not any emergency between two States is covered by the "emergency in international relations" but rather the emergency which is close to the armed conflict.

- *Taken in time*

"Taken in time" wording implies that there should be a timing coincidence between the measures taken and the situation of war or other emergency in international relations. Contrariwise, the timing requirement should not be interpreted strictly since it is obvious that a

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[201] 'Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33' <https://docs.wto.org/gattdocs/q/UN/EPCT/APV-33.PDF>. p.19

[202] 'The Covenant of the League of Nations, Including Amendments Adopted to December, 1924' <http://avalon.law.yale.edu/20th_century/leagcov.asp>.

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mere coincidence in time of conflict which is taking place in another part of the world and does not have any connection to the State which adopts measures, would not survive the review.[203]

"It considers necessary"

"*It considers necessary*" wording can be subdivided into three parts: "it", "considers" and "necessary". Certainly, "it" refers to the State at hand which adopts measures. "Consider", according to the Oxford Dictionary means "think carefully about (something), typically before making a decision."[204] The ordinary meaning of "necessary" is "needed to be done, achieved, or present; essential."[205] "*It considers*" wording prompts a debate on two issues: (1) justiciability of the security exception as such and (2) a discretion which the Panel should provide to the State in case the security exception is justiciable. The wording "it considers" is at the crux of debate on justiciability of the GATT Article XXI and the question arises which parts of the GATT Article XXI it qualifies.

Distinction between justiciability and jurisdiction

Given the fact that justiciability sometimes is confused with jurisdiction, an explanation on these two concepts is in order. Jurisdiction, in a narrow sense, is the competence of a court to decide over a case before it.[206] Justiciability relates to the competence of a court to hear a specific issue before it. Consequently, a court might have jurisdiction over the case, however it

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[203] Balan (n 13). p.14

[204] 'Oxford Living Dictionary, Consider' <https://en.oxforddictionaries.com/definition/consider>.

[205] 'Necessary' <https://en.oxforddictionaries.com/definition/necessary>.

[206] In a broad sense, from a perspective of a State, we can differentiate between jurisdiction to legislate, jurisdiction to adjudicate and jurisdiction to enforce. Joel Trachtman, 'Jurisdiction in WTO Dispute Settlement' in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) <https://www.cambridge.org/core/product/identifier/CBO9780511754340A025/type/book_part> accessed 11 October 2018. p.132 Similarly, Yuval Shany differentiated the following concepts of jurisdiction in international law in a broad sense: as a policy tool, as a delegated authority, as a power constraint on international courts. Yuval Shany, *Questions of Jurisdiction and Admissibility before International Courts* (Cambridge University Press 2016) <http://ebooks.cambridge.org/ref/id/CBO9781139839525> accessed 27 July 2018. pp.5-46 On this note, Joost Pauwelyn who, with regard to the WTO, distinguished between jurisdiction of the WTO as an international organization (legislature) and jurisdiction of the WTO as deciding on trade disputes (judiciary). Joost Pauwelyn, Joel P Trachtman and Debra P Steger, '[The Jurisdiction of the WTO Is Limited to Trade]' (2004) 98 Proceedings of the Annual Meeting (American Society of International Law) 135. p.135

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might have a non-justiciable issue before it.[207] In other words , justiciability allows a court to reject a claim on discretionary grounds, i.e. to exercise judicial economy.[208]

In this regard a preliminary guidance could be drawn from the practice of other international tribunals which dealt with the security exception in other international agreements.

For example, a comparison with the International Court of Justice cases such as *Military and Paramilitary Activities* could be relevant to this matter. In this case in para. 222 the Court made a comparison of the security exception of the US-Nicaragua FCN Agreement with Article XXI of the GATT:

> *"This article [Article XXI of 1956 FCN Treaty] cannot be interpreted as removing the present dispute as to the scope of the Treaty from the Court's jurisdiction. ....Article XXI defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court as contemplated in Article XXIV. That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear a contrario from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be*

[207] The difference between jurisdiction and justiciability in international law has been made by the International Court of Justice in *Burkina Faso v Mali*:*"there is a distinction between the question of the jurisdiction conferred upon it by the Special Agreement concluded between the Parties, and the question whether "the adjudication sought by the Applicant is one which the Court's judicial function permits it to give", a question considered by the Court in the case concerning the Northern Cameroons, among others (I.C.J. Reports 1963, p. 31).* As it also stated in that case*, "even if the Court, when seized, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction" (ibid, p. 29). But in the absence of "considerations which would lead it to decline to give judgment" (I.C.J. Reports 1974, p. 271, para. 58), the Court is bound to fulfil the functions assigned to it by its Statute." Burkina Faso v Republic of Mali* (ICJ).para.45 This note was pointed by Lorand Bartels in footnote 48 Lorand Bartels, 'The Separation of Powers In the WTO: How To Avoid Judicial Activism' (2004) 53 International and Comparative Law Quarterly 861. p.869

[208] Daniel Lovric, *Deference to the Legislature in WTO: Challenges to Legislation* (Wolters Kluwer Law & Business ; Kluwer Law International ; Sold and distributed in North, Central and South America by Aspen Publishers 2010). p.35 Note that the author uses concept of justiciability in two senses, one of which means jurisdiction. This thesis does not intend to address the judicial economy extensively, see A Alvarez-Jimenez, 'The WTO Appellate Body's Exercise of Judicial Economy' (2009) 12 Journal of International Economic Law 393.

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> *construed to prevent any contracting party from taking any action which it "considers necessary for the protection of its essential security interests", in such fields as nuclear fission, arms, etc. The 1956 treaty, to the contrary, speaks simply of "necessary" measures. not of those considered by a party to be."* [209]

As an illustration, in *Oil Platforms* Case the ICJ interpreted Article XX (1) (d) of the Treaty of Amity between the US and Iran which states

> *"The present Treaty shall not preclude the application of measures: …(d) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests*." [210]

The ICJ interpreted it by saying that

> "…*It accordingly takes the view that Article XX, paragraph 1 (d), [the security exception] does not restrict its jurisdiction in the present case, but is confined to affording the Parties a possible defence on the merits to be used should the occasion arise*." [211]

In other words, the International Court of Justice held that invocation of the security exception did not constitute a bar on jurisdiction, but rather related to a matter for review at the merits stage. As is seen, Article XX(1)(d) differs from Article XXI of the GATT since it has "necessary" wording instead of "it considers necessary". This difference was interpreted by Dapo Akando and Sope Williams as having an impact on interpretation of the clause.[212]

The above mentioned security exception provision in the US-Iran Treaty of 1955 was recently tested in the case brought by Iran against the United States to the ICJ in July 2018 following the US revocation of the sanctions relief provided by the Joint Comprehensive Plan for Action.[213] In its decision on provisional measures as of October 3, 2018, the International

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[209] *Military and Paramilitary Activities* (n 185).
[210] "Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran," August 15, 1955, https://www.state.gov/documents/organization/275251.pdf.
[211] *Oil Platforms (Islamic Republic of Iran v United States of America), Preliminary Objections* (International Court of Justice).para.20 p.881
[212] Dapo Akande and Sope Williams, 'International Adjudication on National Security Issues: What Role for the WTO' (2003) 43 Virginia Journal of International Law 365. p.380
[213] See, for example, 'Request for the Indication of Provisional Measures by Iran' <https://www.icj-cij.org/files/case-related/175/175-20180716-REQ-01-00-EN.pdf>. For a short overview of the case see Dentons, 'ICJ Issues Provisional Measures in Iran Sanctions Case'

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Court of Justice rejected the US' argument which suggests that the Court lacks jurisdiction. The Court then stated:

> *"Article XX, paragraph 1, defines a limited number of instances in which, notwithstanding the provisions of the Treaty, the Parties may apply certain measures. Whether and to what extent those exceptions have lawfully been relied on by the Respondent in the present case is a matter which is subject to judicial examination and, hence, forms an integral part of the material scope of the Court's jurisdiction as to the "interpretation or application" of the Treaty under Article XXI, paragraph 2."*[214]

In its comment to the decision of the Court, Federica Paddeu pointed out that "the Court simply asserted that Article XX(1) was a defence on the merits and other then appeal to its prior case-law, once again, it declined to offer any justification for this choice."[215] This omission by the Court explains its choice of characterization of Article XX(1) as a defence on merits leaves unaddressed the distinction between substance and procedure.[216] Such distinction, as explained by Federica Paddeu, is crucial in relation to the concepts of justification and excuse. Justification is related to properties or characteristics of acts and relates to the question of whether any conduct is wrongful or lawful. In turn, excuse is related to properties of actors and goes to the question of whether any given actor is responsible for its wrongful conduct.[217] Against this backdrop, the security exception works as a justification for the act which is normally wrongful, unless it can be justified by the security exception.

<https://www.dentons.com/en/insights/alerts/2018/october/11/icj-issues-provisional-measures-in-iran-sanctions-case>.

[214] 'Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (Islamic Rep. of Iran v. U.S.), Order' <https://www.icj-cij.org/files/case-related/175/175-20181003-ORD-01-00-EN.pdf>. para.42

[215] Federica Paddeu, 'Non-Precluded Measures Clause: Substance or Procedure? A Comment on Certain Iranian Assets' (*EJIL Talk! Blog of the European Journal of International Law*, 6 March 2019) <https://www.ejiltalk.org/non-precluded-measures-clause-substance-or-procedure-a-comment-on-certain-iranian-assets/>.

[216] ibid.

[217] Paddeu (n 92). p.27

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Jurisdiction of the WTO Panel

Jurisdiction of a Panel over a specific case is an essential element for a Panel to adjudicate the case. From Article 1.1 of the DSU follows that a Panel has a jurisdiction over a trade dispute between the WTO Member States arising under any of the covered agreements.[218] The importance of the jurisdiction was underlined by the Appellate Body in the case the *United States - Anti-Dumping Act of 1816* by saying that "*The vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings.*"[219] The Appellate Body further explained the authority of Panels in *Mexico-Corn Syrup* by claiming that

> *"…For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed."* [220]

While the jurisdiction of a Panel over all cases in general is clear, the jurisdiction of a Panel over the security exception of the GATT expected to be established further.

Jurisdiction over the GATT security exception

Arguments in favour of the WTO jurisdiction over national security issues could be drawn from the WTO legislation.[221] For example, Lorand Bartels in this regard claims that the

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[218]Article 1.1. of the DSU states the following: "*The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements")….*" 'Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the WTO Agreement' (n 110).

[219] *United States — Anti-Dumping Act of 1916, DS136, Appellate Body Report.* para.54

[220] *DS132: Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 215 of the DS, AB Report* (WTO Appellate Body). para.36

[221]One might also draw some evidence in favour of the WTO jurisdiction over national security issues from the negotiation history of the GATT. A guidance could be inferred from para.3 Article 86 of the New York Draft of the International Trade Organization that dealt with Interpretation and Settlement of Disputes and stated the following:*"… Any justiciable issue arising out of a ruling of the Conference with respect to the interpretation of sub-paragraphs(c),(d) (e),or(k)of Article 37 or of paragraph 2 of Article 59 may be submitted by any party to the dispute to the International Court of Justice,…. The Members accept the jurisdiction of the Court in respect of any dispute submitted to the Court under this Article."* Since Article 37 (e) of the New York Draft was reflecting para XXI (b) (iii) of the modern GATT, one could draw a conclusion by analogy that the Members had an intention to accept jurisdiction over "any justiciable issue" under Article 37 (e).See 'United Nations, Economic and Social

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jurisdiction of the Panel over the security exception is based on: a) Article 1.1. DSU, b) Article XXIII of the GATT and is corroborated by (c) Decision Concerning Article XXI of the General Agreement and (d) Panel's terms of reference.[222] These provisions will be overviewed below.

First, referring to Article 1.1. of the DSU, the WTO has a jurisdiction with regard to "disputes brought pursuant to the consultation and dispute settlement provisions of WTO covered agreements".[223] Given the fact that GATT Article XXI is included into the WTO "covered agreements", it falls within the jurisdiction of the WTO as well.

Second, Article XXI of the GATT does not amount to a jurisdictional defence since there is no exception for application of Article 1.1. of the DSU under GATT Article XXIII, which states that:

> *"1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of …(a) the failure of another contracting party to carry out its obligations under this Agreement".*

Third, the jurisdiction of a Panel over Article XXI of the GATT is corroborated by the GATT Decision Concerning Article XXI of the General Agreement which states that "*when action is taken under Article XXI, all contracting parties affected by such action retain full rights under the General Agreement*".[224]

Committee Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34' (n 133).

[222] Bartels (n 207). pp.868-871

[223] The Appellate Body interpreted "covered agreements" in *Mexico-Soft Drinks* "*Mexico's arguments, as well as its reliance on the ruling in Factory at Chorzów, is misplaced. Even assuming, arguendo, that the legal principle reflected in the passage referred to by Mexico is applicable within the WTO dispute settlement system, we note that this would entail a determination whether the United States has acted consistently or inconsistently with its NAFTA obligations. We see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes. Article 3.2 of the DSU states that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements". Mexico — Tax Measures on Soft Drinks and Other Beverages* WTO DS308, 6 March 2006.

[224] 'Decision Concerning Article XXI of the General Agreement, L/5426' <https://www.wto.org/gatt_docs/english/SULPDF/91000212.pdf>. This Decision constitutes part of the GATT 1994 under para 1(b)(iv) of the language incorporating the GATT 1994 into the WTO Agreement, given the fact that it was meant to be binding on all of the Contracting Parties. See footnote 50 in Bartels (n 207). p.870

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Last, whereas the above-mentioned provisions establish a potential jurisdiction,[225] the actual jurisdiction of a Panel stems from its standard terms of reference, unless parties to a dispute agree on their own terms of reference.[226] To remind, standard terms of reference are set out in Article 7.1. DSU as follows:

> *"To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."*[227]

Therefore, as seen from Articles presented above, the jurisdiction of the WTO Panel over the security exception does not provoke a lot of doubts. Thus, merely having a jurisdiction is not enough, since a specific matter should be justiciable before a Panel.

Justiciability of the security exception of the GATT

The debate on justiciability or non-justiciability of the GATT Article XXI originates from the "*it considers [necessary]*" wording in Article XXI of the GATT as opposed to "*necessary*" wording in Article XX of the GATT. In short, the debate could be canvassed into two strands: on the one hand, there is an opinion that "it considers" wording gives the full deference to States under Article XXI and thereby excludes review by a Panel.[228] On the other hand, there is a position that "it considers" wording gives a wide deference to States in choice of a measure but does not preclude review of the clause on the whole.[229]

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[225] It should be noted that the Panel was precluded from reviewing the security exception in case United States-Trade Measures Affecting Nicaragua, by its own terms of reference. This scenario was possible in the pre-WTO era. *L/6053, United States – Trade Measures Affecting Nicaragua, Report by the Panel.*
[226] Bartels (n 207). p.870
[227] 'Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the WTO Agreement' (n 110).
[228] For example, such position is supported by the United States Robert Lighthizer, 'Statement by Ambassador Robert E. Lighthizer on Retaliatory Duties' <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/june/statement-ambassador-robert-e>.
[229] The European Union claims for review of Article XXI European Commission, 'European Union Third Party Written Submission, Russia-Measures Concerning Traffic in Transit (DS512)' <http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156602.pdf>.

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Antonio Perez claims that the opposing views on the GATT security exception could be attributed to opposing views of the WTO Members at the WTO as an institution. For example, Antonio Perez presents two conceptions of the WTO: WTO as an agreement which is limited to certain issues prescribed in this agreement and the WTO as a legal order to which States conceded a quasi-constitutional authority for regulation of measures which affect trade interests. Under the first conception the issues of foreign policy and national security fall beyond the WTO. On the contrary, under the second conception the WTO is capable of limiting States' conduct in the sphere of national security which affects trade matters.[230]

"*It considers*" wording is believed to be a label of "self-judging" clauses which are pertinent to other areas of law beyond trade and have been defined by Stephan Schill and Robyn Briese as

> *"...provisions in international legal instruments by means of which states retain their right to escape or derogate from an international obligation based on unilateral consideration and based on subjective appreciation of whether to make use of and invoke the clause via-a-vis other states or international organizations*". [231]

However, a label of "self-judging" with regard to the whole security exception provision might be misleading due to the fact that a provision could have some "self-judging" elements, but it would not place it beyond the review of the Panel as such. Allocation of one or another element as "self-judging" might have an impact on the standard of review i.e. the level of discretion given by the Panel to the State. In this regard, for example, the Judge Kooijmans of the International Court of Justice in his separate opinion in *Oil Platforms* case stated:

> *"The evaluation of what essential security interests are and whether they are in jeopardy is first and foremost a political question and can hardly be replaced by a judicial assessment. Only when the political evaluation is patently unreasonable (which might bring us close to an "abuse of authority") is a judicial ban appropriate. And although the choice of means to be*

[230] Antonio F Perez, 'WTO and U.N. Law: Institutional Comity in National Security' (1998) 23 Yale Journal of International Law 301. p.306

[231] Stephan Schill and Robyn Briese, '"If the State Considers": Self-Judging Clauses in International Dispute Settlement' (2009) 13 Max Planck Yearbook of United Nations Law Online 61. p.68

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> *taken in order to protect those interests will also be politically motivated, that choice lends itself much more to judicial review and thus to a stricter test, since the means chosen directly affect the interests and rights of others".*[232]

As the passage above shows, even though Judge Kooijmans claimed that the evaluation of essential security interests might be left to the full discretion of States, he still admitted a possibility for a judicial ban in cases related to an abuse of authority. In search for a conclusive evidence on justiciability of the GATT Article XXI, some case-law and scholarly opinions will be given a short account.

Guidance on justiciability of the GATT security exception from a WTO case-law

Starting from the case-law, we can draw some evidence from the Panel report (unadopted) in the case brought by Nicaragua against the United States in 1985.[233] In that case the United States imposed a complete export and import embargo on Nicaragua and declared a national emergency due to the extraordinary threat to national security posed by Nicaragua's policies and actions. Nicaragua argued that the US violated "both the general principles and certain specific provisions of the GATT 1947."[234] In its response the representative of the United States said the US' measures had been taken for national security reasons, and "that they fell squarely within the national security exception of the General Agreement as contained in Article XXI, specifically its paragraph (b)(iii)."[235] Moreover, the United States sustained that the Panel could not examine the validity of invocation of Article XXI(b)(iii) of the GATT within its terms of reference.[236]

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[232] See ICJ, 'Islamic Republic of Iran v United States of America, (Oil Platforms). Separate Opinion of Judge Kooijmans' <http://www.icj-cij.org/files/case-related/90/090-20031106-JUD-01-05-EN.pdf>. para.44

[233] Note that there were two cases brought by Nicaragua against the United States: one Panel report was adopted on 13 March 1984 'United States- Imports of Sugar from Nicaragua, Report of the Panel Adopted on 13 March 1984 - (L/5607 - 31S/67)' <https://www.wto.org/english/tratop_e/dispu_e/gatt_e/83sugar.pdf>. and the second one on 13 October 1986. For an overview of these cases see Pelc, *Making and Bending International Rules* (n 89). pp.107-114 or Hahn (n 121). pp.607-610

[234] 'Council - Minutes of Meeting - Held in the Centre William Rappard on 29 May 1985, C/M/188' <https://docs.wto.org/gattdocs/q/GG/C/M188.PDF>. p.2

[235] ibid 188. p.4

[236] *L/6053, United States – Trade Measures Affecting Nicaragua, Report by the Panel* (n 225). Para.4.6

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In this case the Panel had limited terms of reference and it was not authorized to examine the justification for the United States' invocation of Article XXI of the GATT. In this regard the Panel noted:

> *"The Panel concluded that, as it was not authorized to examine the justification for the United States' invocation of a general exception to the obligations under the General Agreement, it could find the United States neither to be complying with its obligations under the General Agreement nor to be failing to carry out its obligations under that Agreement."*[237]

While the Panel has not decided on a consistency of the measures, it referred to a possibility of review in *obiter dictum* of unadopted report:

> *"...If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the Contracting Parties ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in this provision?"*[238]

This wording by the Panel refers to a possibility of review in order to prevent abusive use of the security exception.[239]

Looking further, we can draw some evidence for GATT Article XXI justiciability by comparing it with similar clauses in the GATT. In this regard the interpretation of Article 22.3 (b) and 22.3 (c) of the DSU which deals with suspension of concessions and contains the wording "*if that party considers*" might be useful.[240] Although one should be cautious when

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[237] ibid. para.5.3
[238] *ibid.* para.5.17
[239] For example, Anthony Cassimatis claims that a *legality* of invocations of Article XXI could be reviewed which will accord a wide deference to States which invoke the Article. Anthony Cassimatis, *Human Rights Related Trade Measures under International Law the Legality of Trade Measures Imposed in Response to Violations of Human Rights Obligations under General International Law* (2007) <http://dx.doi.org/10.1163/ej.9789004163423.i-476> accessed 13 October 2018. p.307
[240] Article 22.3 of the DSU states: "…*In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures: (a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s)*

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making a strong inference from this interpretation, given a difference between Article XXI of the GATT and Article 22.3 DSU: *the chapeau* of Article 22 DSU has a mandatory language "*shall*": "*The complaining party shall apply the following principles and procedures…*" and less strong wording "*may seek*" which points to a possibility "*the party may seek*".[241] Nonetheless, these elements were interpreted by arbitrators in *EC-Bananas III* case by giving some possibility of review:

> *"It follows from the choice of the words "if that party considers" in subparagraphs (b) and (c) that these subparagraphs leave a certain margin of appreciation to the complaining party … However, it equally follows from the choice of the words 'in considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures' in the chapeau of Article 22.3 that such margin of appreciation by the complaining party concerned is subject to review by the Arbitrators..."*[242]

From the two instances as interpreted by GATT/WTO Panels above it follows that at least some elements of GATT Article XXI are justiciable. This thesis submits that Article XXI of the GATT is justiciable and can not be left to the complete deference of WTO Member States.

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as that in which the panel or Appellate Body has found a violation or other nullification or impairment; (b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement; (c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;…" 'Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the WTO Agreement' (n 110). Some scholars like Peter Lindsay also compared "it considers" with *"…each Member has the right to determine what constitutes a national emergency or other circumstance of extreme urgency*" embodied in the Declaration on the TRIPS Agreement and Public Health. However, the context of TRIPS and GATT is different. See Peter Lindsay, 'The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure Note' (2003) 52 Duke Law Journal 1277. pp.1283-1285

[241] It was also extensively discussed by Lindsay (n 240). pp.1288-1292

[242] *European Communities — Regime for the Importation, Sale and Distribution of Bananas, Recourse to Arbitration by the European Communities under Article 226 DSU,WT/DS27/ARB/ECU*. para.52

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State practice with regard to justiciability of the GATT security exception

There is a division between States which support justiciability of Article XXI of the GATT and those who claim to the contrary. The United States represents a clear example of a State which considers Article XXI of the GATT to be non-justiciable. As stated above, the US argued for a non-justiciability of the GATT Article XXI in the case brought by Nicaragua against the US trade-restrictive measures.[243] Similarly, Ghana claimed non-justiciability of the GATT Article XXI upon Portugal's accession to the GATT.[244]

Conversely, Argentina claimed for justiciability of the GATT Article XXI in the case when trade-restrictive measures were imposed on it by the European Communities, Canada and Australia amid the Falklands War.[245]

Further confusion over this matter was brought by some WTO Members who had taken different opinions on justiciability of the GATT Article XXI in different cases. For example, the European Union claimed that Article XXI was not justiciable in 1982 when the EEC adopted measures against Argentina amidst Falklands War. In this regard the Representative of the EEC stated the following: *"…in effect, this procedure showed that every contracting party was - in the last resort - the judge of its exercise of these rights"*. [246] However, in 1996 the European Communities brought the case against the United States measures under the Helms-Burton Act.[247] Indeed, the United States pointed out to the change of their opinions by some WTO Members. The United States at the meeting of the DSB on 21 November 2018 argued that :

[243] The United States stated "*This provision [GATT Article XXI], by its clear terms, left the validity of the security justification to the exclusive judgement of that contracting party taking the action. The United States could therefore not be found to act in violation of Article XXI.*" *L/6053, United States – Trade Measures Affecting Nicaragua, Report by the Panel* (n 225). para.4.6, p.9

[244] *"It should be noted that under this Article each contracting party was the sole judge of what was necessary in its essential security interests. There could therefore be no objection to Ghana regarding the boycott of goods as justified by its security interests "*GATT Contracting Parties, 'Summary of the Record of the Twelfth Session, Held at the Palais Des Nations, Geneva, December 9,1961, SR/19/12' <https://docs.wto.org/gattdocs/q/GG/SR/19-12.PDF> accessed 8 August 2018. Mr.Arkaah, on behalf of Ghana, p.196

[245] The representative of Argentina pointed out*"…It would appear that trade restrictions could be adopted without having to be justified or approved and, on the basis that a reason of domestic security did not have to be explained, anyone could now have recourse to that magnificent safeguard clause".* 'Minutes of Meeting Held in Centre William Rappard on 7 May 1982, General Agreement on Tariffs and Trade, C/M/157' <https://docs.wto.org/gattdocs/q/GG/C/M157.PDF>. p.12

[246] 'Minutes of Meeting Held in Centre William Rappard on 7 May 1982, C/M/157, Council' <https://docs.wto.org/gattdocs/q/GG/C/M157.PDF>. p.10

[247] *DS38, United States — The Cuban Liberty and Democratic Solidarity Act*. See the request of establishment of the Panel by the European Communities dated 08 October 1996. Following the EEC complaint, the US agreed to amend the provisions of the Act and the EU in turn suspended the Panel proceedings. The European Union at the DSB meeting, as a response to the concern of Cuba that the EU abandoned the case, emphasized that *"…the*

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> *"The position of the United States remains the same in 2018 as the United States expressed in 1982, 1949, and indeed during the negotiation of the GATT itself. Nothing has changed in the text of Article XXI since 1982. But the European position has changed completely*." [248]

As could be seen, the views on the justiciability of the security exception of GATT are changing among the WTO Members which can be explained by circumstances of the particular case and a political context. The practice of the WTO Members might be referred by the Panel in respect of Article 31(3)(b) under the Vienna Convention on the Law of the Treaties as "any subsequent practice in the application of the treaty…". That said, the statements of some States like Ghana which have been made during the accession of Portugal do not have the same weight since at that time Portugal did not take any obligations under the GATT.

Scholarly views on justiciability of the GATT security exception

There is a prevailing number of scholars which argue in favour of justiciability of Article XXI. For example, Lorand Bartels affirms that Article XXI is justiciable since it contains "*at least some judicially manageable standards"*.[249] He claims that a Panel will be able (i) to define whether "war" or "other emergency in international relations" exist and (ii) to review whether the WTO Member in fact considered the necessity of the measures using a good faith standard and conducting a "necessity test" as it is done under Article XX of the GATT.[250]

By contrast, there are opposing views on justiciability of the GATT Article XXI. Scholars which claim that Article XXI is non-justiciable support their views, among others, by appealing to the sensitivity of the national security. In this regard Todd Piczak says that "*it is not unreasonable to say that a dispute settlement panel should defer to the judgment of the*

Community had not withdrawn its request for the establishment of a panel nor had it terminated the work of the panel but had asked for the suspension of the panel's work pursuant to Article 12.12 of the DSU. It had done so due to the fact that it had continued negotiations with the United States…" Dispute Settlement Body WTO, 'Dispute Settlement Body, Minutes of Meeting, Held in the Centre William Rappard on 22 June 1998, WT/DSB/M/46' <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=25175&CurrentCatalogueIdIndex=0&FullTextHash=1&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True>.

[248] US Mission Geneva, 'Statements by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, November 21, 2018' <https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov21.DSB_.Stmt_.as-deliv.fin_.public.pdf>.

[249] Bartels (n 207). p.871

[250] ibid. p.871

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contracting party in an area of such sensitivity and importance as national security."[251] Other scholars pointed to unrestricted use of economic diplomacy.[252]

The prominent place among issues connected to non-justiciability is taken by a political question doctrine which is used in the US administrative law.[253] In this regard the US Supreme Court Justice Mr.Brennan in the case *Baker v Carr* 369 (U.S. 186 (1962)) developed six-factor test which has become the standard for political question analysis:

> "*Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments*".[254]

[251] C Todd Piczak, 'The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, the National Security Exception to the GATT and the Political Question Doctrine Comment' (1999) 61 University of Pittsburgh Law Review 287. p.320 Similarly, Bernard Hoekman and Michel Kostecki underline the sensitiveness of the matter by putting exceptions among "holes and loopholes" and state that: *"The national security exemptions are particularly ill-suited for dispute settlement, as in such cases panels would have to judge whether trade restrictions are necessary to protect national security. This can obviously be a very sensitive issue, especially as the language of the national security exceptions are particularly vague"* Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System* (Oxford University Press 2001) <http://www.oxfordscholarship.com/view/10.1093/019829431X.001.0001/acprof-9780198294313> accessed 26 June 2018. p.53, Oxford Scholarship Online, Merit Janow argues that the security exception is "*deemed to be non-justiciable and outside the competence of the WTO*" M.Janow, *Commentary on Natalie McNelis' Paper*, in Thomas Cottier, Petros Mavroidis and Patrick Blatter (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (University of Michigan Press 2003) <http://www.press.umich.edu/17801> accessed 14 July 2018. p.248 K.Pelc explains self-judging nature of the security exception from a political science perspective: *"Article XXI is not actionable. Because of its self-judging nature, because of countries' insistence on never allowing judges to rule on this self-judging aspect of the exception, and because of judges' possible reluctance to do so even if they were given the opportunity, Article XXI cannot be formally challenged"* Pelc, *Making and Bending International Rules* (n 89). p.122

[252] Franck Thomas M., Political Questions Judicial Answers, Does the Rule of Law Apply to Foreign Affairs? (Berlin, Boston: Princeton University Press, 2012), https://doi.org/10.1515/9781400820733. p.247

[253] See, generally, Hersch Lauterpacht, 'The Doctrine of Non-Justiciable Disputes in International Law' [1928] Economica 277.

[254] Generally, see Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 The Yale Law Journal 597. The political question doctrine also was discussed in the context of the Helms-Burton Act in Piczak (n 251)., see

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Roger Alford says that Article XXI establishes a domain "beyond WTO judicial review" and "by adopting these exceptions the WTO recognized certain trading behavior as the international equivalent of a political question".[255] The political question doctrine was also referred to by international courts and tribunals. For example, in *Advisory Opinion Legality of the Use by a State of Nuclear Weapons in Armed Conflict* the ICJ rejected a doctrine by saying:

> *"Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law."*[256]

In the EU law the political question doctrine was perceived by some scholars as a tool to avoid rather controversial questions.[257] For example, Maartje de Visser argued that in situations when the political question doctrine is invoked in front of the ECJ, it reduces a court's involvement in "controversial or sensitive ... issues" and allows them to protect themselves from "potential political backlash".[258]

As far as the review of trade-restrictive measures taken by a WTO Member State for protection of its essential security interests is concerned, this thesis suggests that the political question doctrine is not suitable for application at the WTO. This position is underpinned by the fact that there is always a political aspect to measures taken for protection of essential security interests. In other words, it is hard to avoid dealing with political issues when national security is involved. That said, if the national security measures have an impact on trade, then a WTO Panel should have a possibility to decide whether such trade-restrictive measures are contrary to the WTO rules.

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above. On a separate note, Tomas Cottier claims that the political question doctrine could be used as a tool which domestic courts can use to refer the case to the WTO. See Thomas Cottier "The Role Of Domestic Courts In The Implementation Of WTO Law: The Political Economy Of Separation Of Powers And Checks And Balances In International Trade Regulation" in Amrita Narlikar, MJ Daunton and Robert M Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press, USA 2012). at p.17 Oxford Books Online.

[255] Roger P Alford, 'The Self-Judging WTO Security Exception' (2011) 3 Utah Law Review 697. pp.698-699.

[256] *Advisory Opinion Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (ICJ). para.16

[257] For an extensive discussion on the political question doctrine in the EU law see Graham Butler, 'In Search of the Political Question Doctrine in EU Law' [2018] Legal Issues of Economic Integration 329.

[258] Maartje de Visser, 'A Cautionary Tale: Some Insights Regarding Judicial Activism from the National Experience' in Mark Dawson, Bruno de Witte and Elise Muir (eds), *Judicial activism at the European Court of Justice* (Edward Elgar Publishing Limited 2013). p.196

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Eventually, some scholars connect non-justiciability of the security exception of the GATT to the fact that WTO Member States have a complete competence to interpret the provision. For example, Richard Sutherland Whitt stated

> "…*Thus, the provision mandates a unilateral interpretation and fails to raise even the possibility of a statutory stigma attached to its blatant misuse*."[259]

This argument was criticized as unfounded by Hannes Schloemann and Stefan Ohlhoff who expressed the concern claiming that the key to assess the relevance of the national security exception for the WTO's jurisdiction lies in the distinction between the *authority to interpret* and the *authority to define*. Whereas the authority to define could be vested in a WTO Member, the authority to interpret belongs to a Panel.[260] In view of this, the State, for example, can define its essential security interests, but the Panel in its interpretation of the GATT security exception can only review whether the State interpreted a notion of essential security interests in good faith. This is to say that the Panel can check whether the State's definition is within the limits of interpretation established under the general rule of interpretation under the VCLT.

The burden of proof

Definitions of burden of proof, prima facie case and standard of proof

From the outset it should be mentioned that the burden of proof deals with facts rather than laws since the tribunal knows the law (*iura novit curia*).[261] Four points are worth mentioning as to the burden of proof.

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[259] For example, Richard Sutherland Whitt stated "…*Thus, the provision mandates a unilateral interpretation and fails to raise even the possibility of a statutory stigma attached to its blatant misuse*."Richard Sutherland Whitt, 'The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua Student Note' (1987) 19 Law and Policy in International Business 603. p.16 It should be also mentioned that other scholars like Anthony Cassimatis raised a relevant point by saying that even if Article XXI is non-justiciable, it does not mean that the WTO dispute resolution is excluded. In other words, he claimed that there is a possibility to bring a non-violation complaint under Article XXIII of the GATT. See Cassimatis (n 239). p.307 and pp.310-311 See also on this Lindsay (n 240). pp.1293-1294

[260] Schloemann and Ohlhoff (n 12). p.426

[261] In this regard Joost Pauwelyn points out that if we can dissect the decision-making in three steps, i.e. (i) determining the facts, (ii) determining what the law is and (iii) application the law to the facts. The burden of proof, in turn, is related only to the first and the third step. Joost Pauwelyn, 'Defenses and the Burden of Proof in International Law' in Lorand Bartels and Federica Paddeu, *Exceptions in International Law* (Oxford University Press 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2863962>. p.18

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First, the notion of the burden of proof brings about a lot of confusion which might derive from its different meanings in common law and civil law countries.[262] In common law it is used in two connotations: (i) burden of persuasion and (ii) duty of producing sufficient evidence to justify the judge to pass the issue to the jury or to allow to proceed with hearing if there is no jury. [263] In civil law the burden of proof means "the duty of parties to prove their allegations" (i.e. the burden of persuasion).[264] This notion was adopted by international tribunals, including the WTO dispute settlement system.[265]

Second, the distinction should be made between different types of burden. Joost Pauwelyn differentiates five types of burden placed on parties or a tribunal: (i) burden of raising a claim, (ii) burden of production of evidence and (iii) burden of persuasion (i.e. real burden of proof) (iv) standard of proof and (v) standard of review. [266] The implications of differentiation between these burdens is that even if the real burden of proof may lie with one party, it does not absolve another party from the burden of evidence production.

Third, the burden of proof has a related notion – a notion of the *prima facie* case, which might be as well ambiguous due to its use in various context in civil law and common law.[267] As defined by Motjaba Kazari, *prima facie* means evidence that "unexplained or uncontradicted is sufficient to maintain the proposition affirmed".[268] In turn, establishing the *prima facie* case means that a claimant has established a required threshold of proof.[269]

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[262] For a burden of proof in civil law see James Headen Pfitzer and Sheila Sabune, 'Burden of Proof in WTO Dispute Settlement: Contemplating Preponderance of the Evidence' (ICTSD 2009) <https://www.ictsd.org/themes/trade-law/research/burden-of-proof-in-wto-dispute-settlement-contemplating-preponderance-of>. p.9

[263] Joost Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement. Who Bears the Burden?' (1998) 1 Journal of International Economic Law 227. p.229

[264] It corresponds to *actori incumbit probation*. See ibid. p.229 David Unterhalter claims that the burden of proof asks two questions: which party must satisfy the tribunal as to the issue once all evidence was provided (incidence) and second, what is the standard of proof (quantum of proof).However, the WTO case-law has mainly focused on the incidence of proof. David Unterhalter, 'Allocating the Burden of Proof in WTO Dispute Settlement Proceedings' (2009) 42 Cornell International Law Journal 209. p.209

[265] Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement. Who Bears the Burden?' (n 263). p.231

[266] It seems that the last type of burden – i.e.standard of review is on tribunal. See Pauwelyn, 'Defences and the Burden of Proof' (n 261). p.3

[267] For example, in the common law two senses of the *prima facie* case could be found: in one sense "prima facie case" means "having presented enough evidence to withstand a motion for directed verdict." The other use of "prima facie" equals "with a presumption that a plaintiff is entitled to prevail on his cause of action. However, some courts apply pima facie in a way which confuses two meanings. See Georg Nils Herlitz, 'The Meaning of the Term "Prima Facie"' (1994) 55 The Meaning of the Term 'Prima Facie' 391. pp.393-394

[268] Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (Kluwer Law International 1996). p.328

[269] John J Barcelo, 'Burden of Proof, Prima Facie Case and Presumption in WTO Dispute Settlement' (2009) 42 Cornell International Law Journal 23. p.35. As to the level of sufficient evidence, the Appellate Body said the

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Last, burden of proof is related to the standard of proof. The concept of standard of proof is sometimes referred as a threshold of proof and means *"…degree or level of proof demanded in a specific case….*"[270] Therefore, one should not confuse a standard of proof with a burden of proof.[271]

Burden of proof and prima facie case as applied by WTO Panels and the Appellate Body

The starting point of reference for the concept of 'burden of proof' in the GATT/WTO case-law is the paragraph of the Appellate Body in the *US-Shirts and Blouses:*

> *"…it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."* [272]

At first sight, the paragraph above seems to be clear, but application of the concept of burden of proof and *prima facie* case by Panels and the Appellate Body in the case-law caused some confusion which has been pointed out by scholars.[273]

The first matter of the confusion arises from the way the burden of proof is dealt with by Panels and the Appellate Body. In this regard, the Appellate Body establishes two sets of rules on the burden of proof: for the complainant and defendant focusing on obligations of litigating

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US-Wool Shirts and Blouses: " *… precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case.*" *DS33: United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India, AB Report*. p.14

[270] Bryan A Garner and Henry Campbell Black (eds), 'Black's Law Dictionary'. p.1441

[271] For an extensive overview of the standard of proof in WTO see Graham Cook, 'Defining the Standard of Proof in WTO Dispute Settlement Proceedings: Jurists' Prudence and Jurisprudence' (2012) 1 Journal of International Trade and Arbitration Law.

[272] US-*Wool Shirts and Blouses*, *DS33, US-Wool Shirts and Blouses, ABR* (n 269). p.14

[273] See, for example, Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement. Who Bears the Burden?' (n 263).

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parties.[274] This distinction was criticized by Michelle Grando as "artificial differences" and the Appellate Body was reproached as "neglecting the basics" i.e. responding to *why* the burden of proof should be allocated to one or another party.[275]

The second matter of the confusion, in turn, is related to *the prima facie* case. The requirement to establish a *prima facie* case arguably stems from application of the presumption technique. Such presumption technique is normally used by a tribunal in *evaluation of evidence* submitted by parties.[276] However, the Appellate Body connected the *prima facie* case to *the shift of the burden of proof* from one party to another. In this matter Joost Pauwelyn raised the concern that the Appellate Body confused the evaluation of evidence for determining whether the burden of proof had been discharged with determination of the party which bore the burden of proof.[277] For example, in the *EC-Hormones case*, the Appellate Body uses the notion of the *prima facie* case in relation to the shift of the burden of proof from the defendant to complainant:

> *"…The initial burden lies on the complaining party, which must establish a prima facie case of inconsistency with a particular provision ... on the part of the defending party .... When that prima facie case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency…"*[278]

The Appellate Body went even further by saying:

[274] ibid. p.241

[275] Michelle T Grando, 'Allocating the Burden of Proof in WTO Disputes: A Critical Analysis' (2006) 9 Journal of International Economic Law 615. p.655

[276] Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement. Who Bears the Burden?' (n 263). p.246, p.235

[277] ibid. p.235 Then the Appellate Body in *Japan-Agricultural Products II* clarified the prima facie case as: *"…panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a prima facie case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the SPS Agreement, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party."DS76: Japan — Measures Affecting Agricultural Products, AB Report*. para.129 Moreover, the Appellate Body uses different methods to define the prima facie standard to the burden of proof-shifting analysis. See Headen Pfitzer and Sabune (n 262). p.17

[278] *EC-Hormones, AB Report* (n 116). para.98

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> "*...in the absence of effective refutation by the defending party, requires a panel, as matter of law, to rule in favour of the complaining presenting the prima facie case."*[279]

Put simply, it appears that the Appellate Body uses the *prima facie* case as a standard of proof i.e. the amount of evidence the party must provide to win the case.[280] As to the standard of proof, the Appellate Body noted the following in the *US-Wool Shirts and Blouses*:

> "*... precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case*."[281]

Upon analysis of the WTO case-law dealing with the standard of proof Graham Cook concluded that a number of rulings of Panels and the Appellate Body pointed in the direction of "the balance of probabilities" as a standard of proof.[282] Similarly, Joost Pauewelyn favours the use of such standard of proof as "preponderance of the evidence" or "balance of probabilities" if there are no compelling reasons to use other standard. He claims that a *prima facie* evidence as a standard of proof is a very low standard.[283] Leaving the ambiguities aside, let us apply the above concepts with regard to the security exception of the GATT.

Burden of proof with regard to the security exception

From the outset there is a need to differentiate between the exception and exemption. To this aim we have to specifically determine a type of claim[284] since each type of claim corresponds to a particular burden of proof.[285] The security exception should not be confused

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[279] ibid. para.104
[280] Pauwelyn, 'Defences and the Burden of Proof' (n 261). p.24
[281] *DS33, US-Wool Shirts and Blouses, ABR* (n 269). p.14
[282] Cook, 'Defining the Standard of Proof in WTO Dispute Settlement Proceedings: Jurists' Prudence and Jurisprudence' (n 271).
[283] Pauwelyn, 'Defences and the Burden of Proof' (n 257). pp.24-25 Note also Headen Pfitzer and Sabune proposed to use the standard of preponderance of evidence in the WTO dispute settlement and explained that "*in conducting a preponderance of the evidence analysis, all the evidence is bundled and considered at one time clearly for the purposes of determining whether the burden of persuasion has been met.* " Headen Pfitzer and Sabune (n 262).p.25
[284] i.e. defences the respondent makes
[285] According to Joost Pauwelyn there could be "six claims in defense": "(*i) objections to jurisdiction, (ii)objection to admissibility, (iii)exemptions/alternative rules, (iv)absence of breach, (v)exceptions, and (vi)defenses under secondary rules. Consequently, these claims in defense correspond to the five types of "burden" on the parties or tribunal: (i)burden of raising a claim in defense (ii)burden of production of evidence, (iii) burden of persuasion (or real burden of proof); (iv) standard of proof and (v) standard of review*." Pauwelyn, 'Defences and the Burden of Proof' (n 261). p.27

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with “exemption” since it has an influence on who bears the burden of proof: in the case of the exemption it lies with the claimant while with regard to the exception it lies with the respondent.[286] Moreover, the distinction between two notions has two other implications apart from the burden of proof.

To start with, review of the exception requires the tribunal at first to determine whether the rule is breached (for example, Article I of the GATT) and then to determine whether an exception can justify the breach.[287] On the contrary, with regard to the exemption, the tribunal at first should determine whether the exemption applies, which will evidently exclude application of a general rule.[288]The implications of this rule for a burden of proof are the following: the claimant has to prove that the defendant breached the primary rule and then, in turn, the defendant bears the burden of proof with regard to the facts which are necessary for the exception to be complied with.[289] In other words, the claimant makes an affirmative claim and the respondent makes an affirmative defence and respectively each party bears the burden of proof with regard to the claim or defence it has made.[290]

Second, the exemption clause functions as an alternative to a general rule and its violation can lead to a liability. At the same time, the exception allows to deviate from rules when certain conditions are met and therefore it cannot be violated as such.[291] In the worst scenario, if the conditions foreseen by an exception are not complied with by the respondent, breach of the primary rule will not be justified. The Appellate Body clarified this matter with regard to the general exception of the GATS, Article XIV (a) in the *US-Gambling*:

> *“In the context of affirmative defences, then, a responding party must invoke a defence and put forward evidence and arguments in support of its assertion that the challenged measure satisfies the requirements of the defence….”*[292]

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[286] ibid. p.14
[287] ibid. p.15
[288] ibid. p.16
[289] ibid. p.18
[290] The Appellate Body in *US-Wool Shirts and Blouses* explained the burden of proof with regard to an affirmative defence as *“…the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.” DS33, US-Wool Shirts and Blouses, ABR* (n 269). p.14
[291] Pauwelyn, ‘Defences and the Burden of Proof’ (n 261). p.14
[292] *DS285: United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services, AB Report*. para.282

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Given the similarity between Article XX and Article XXI of the GATT, the comparison between the two provisions could be made. Jorge Viñuales described Article XX of the GATT as exception *stricto sensu* and mentioned that the Panel should do two types of inquiries:

> *"one relating to the breach of primary norm (which would be excluded if a carve-out in the primary norm were available) and the other focusing on whether the breach can be justified".*[293]

In light of above, Article XXI of the GATT could be also considered as an exception which means that a defence arises only when a measure has been found to be inconsistent with a primary rule of the GATT. In terms of the burden of proof, the claimant sustaining the breach of a primary rule bears the burden of proof to bring the sufficient evidence to prove that the rule has been breached. Then the burden of proof as to justification of the breach rests with the respondent who refers to the exception and consequently bears the burden of proof to bring sufficient evidence in order to show that it has complied with requirements to the exception. In other words, a State invoking Article XXI of the GATT should make a *prima facie* case and bring solid evidence to that it meets the requirements of Article XXI of the GATT.

Systemic importance of the GATT security exception

Article XXI of the GATT has a "systemic importance" for the WTO system. The status of the security exception in the WTO system is elevated due to the sensitivity of the issue i.e. the security of states. The mere fact of dealing with security under the auspices of the WTO makes contrasting views possible. On the one hand, dealing with security under the WTO dispute settlement system bears the risk of the WTO politicization. On the other hand, leaving the decision on the security exception at the States' discretion will contradict the aims of the WTO dispute settlement system.[294]

The politicization of the WTO is related to the fact that the WTO Panel might have to address issues with a "political flavour" while reviewing Article XXI of the GATT.[295] It is an

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[293] Viñuales (n 95). p.10

[294] As defined by para.2 of Article 3 of the DSU

[295] Note, looking at politics and law in the WTO from broader perspective, Armin von Bogdandy proposed a model of the coordinated interdependence in order to unease relationship between politics and law in the WTO. He explained that the thrust of approach is *"...to give high priority to the regulatory autonomy of WTO members, to focus substantive WTO law on concretizing the principle of non- discrimination, and, in situations of normative vagueness, to interpret WTO provisions in a procedural way: to force a state to take account of the*

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arduous task to discern politics from law and a certain degree of politics is always present when balancing trade and non-trade values. James McCall underlines this matter:

> *"Despite its formal powers, the Appellate Body in my view occupies a precarious position within the WTO. ….it has an unambiguous duty to hear and resolve all disputes, no matter how politically sensitive; and the obstacles to decision making among WTO members invite governments to pursue in litigation what they fail to achieve in political negotiations."*[296]

On the contrary, allowing States to get away with any trade-restrictive measure under the umbrella of the security exception will contradict the aims of the dispute settlement system such as to provide security and predictability to the multilateral trade system.[297] Put simply, leaving adoption of the security exception measures to the full deference of States means non-justiciability of the exception which will move the ball in the court of States and lead to "stalemate on those issues".[298] The only option to prevent the deadlock on these issues is for States to exercise caution in invocation of the security exception what they have been successfully doing for the last 70 years. However, with new policy by the US President and with new geopolitical conflicts, the "trust" and caution seem to be gone. In this regard some scholars mentioned that "even though an erosion of trust in trade cannot be established empirically, there are indications that an erosion of trust may be underway".[299]At the same time, one could claim States' approach in this regard could be changed over time and that *status quo* is only temporary.

Indeed, due to the mixed nature of politics and law embodied in the security exception, States throughout the history of the GATT/WTO were hesitating to invoke the exception and

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legitimate foreign interests which otherwise have no standing in the domestic political and legal processes."Armin von Bogdandy, 'Law and Politics in the WTO - Strategies to Cope with a Deficient Relationship' [2001] Max Planck Yearbook of United Nations Law 609. p.671

[296] James McCall Smith, 'WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings' (2003) 2 World Trade Review 65. p.66

[297] In this regard Article 3.2 of the DSU states *"… The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system."* To put differently, if the WTO Members were able to invoke Article XXI to circumvent the system their conduct would go contrary to the aim of strengthening of the WTO system as foreseen by Article XXIII of the GATT Schloemann and Ohlhoff (n 12). p.440

[298] Steve Charnovitz, 'WTO Appellate Body Roundtable' (2005) 99 Proceedings of the Annual Meeting (American Society of International Law) 175. p.186, a comment from James Bacchus

[299] Peter van den Bossche and others (eds), 'Restoring Trust in Trade: Introduction', *Restoring trust in trade: liber amicorum in honour of Peter van den Bossche* (HART Publishing 2018). p.5

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to put forward their favoured interpretation.[300] The States were reluctant due to various reasons including the fear to provide a precedent for other member states, and a conventional wisdom that it is better to deal with those kinds of issues through diplomatic channels.[301] The rationale behind fear of the precedent was that any decision on interpretation of the security exception would be hard to accept for States: a broad interpretation might give a *carte blanche* for its use in a very loose manner while the narrow interpretation may have encroached on the sovereignty of States. That said, the need for exceptions was clearly stated during negotiations of the GATT by the Delegate of the United States Mr.J.M.Leddy

> "*We have got to have some exceptions. We cannot make it too tight, because wo cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose."* [302]

The first time the security exception was referred to as justification for trade-restrictive measures imposed by the United States in early years of the GATT happened in 1949 in the Czechoslovakian case. By comparing the GATT and WTO as an institution, its dispute settlement and a political environment, I will describe below the Czechoslovakian case and its relevance for understanding why the security exception was not interpreted in 1949 and why it might be interpreted in 2018.

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[300] This phenomenon gave the possibility to some scholars claim that in absence of constraints for use of flexibility provisions like one similar to the GATT security exception, the outcome is their disuse rather than abuse. See Pelc, *Making and Bending International Rules* (n 89). p.4Pelc (n 77). p.4

[301] In this regard Krzysztof Pelc pointed that countries did not invoke the security exception due to their fear to establish the precedent ibid. p.136 Other commentators also claimed that it was not abused due to the fact that States recognized that prudence rather than political expediency should guide any government's decision to invoke GATT Article XXI for justifying its raise of trade barriers. Daniel Ikenson, 'The Danger of Invoking National Security to Rationalize Protectionism' (*Cato Institute*, 15 May 2017) <https://www.cato.org/publications/commentary/danger-invoking-national-security-rationalize-protectionism>.

[302] 'Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report of the 33rd Meeting of Commission, Held on Thursday, 24th July, 1947, at 2.30 p m. in the Palais Des Nations, Geneva, E/PC/T/A/PV/33' (n 183) 33.

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The Security Exception in the Context: The Czechoslovakian case

In 1947 when the Cold War was still in its initial phase, the United States of America offered help to the Soviet Union under the Marshall Plan.[303] The Soviet Union, though, rejected to participate in the Marshall Plan.[304] At the same time, following the Soviet Union's *coup d'état* in Czechoslovakia in 1948,[305] the United States imposed export licensing requirements on the Soviet bloc countries including Czechoslovakia.[306] Export controls were imposed as a matter of foreign policy of the US in order to isolate "rogue regimes".[307] The resistance to the Soviet regime is evident from the Memorandum of the UK Secretary of State for Foreign Affairs, Ernest Bevin:

> *It has really become a matter of the defence of western civilisation, or everyone will be swamped by this Soviet method of infiltration.*[308]

The US trade-restrictive measures were adopted according to the Economic Cooperation Act of 1948 (section 112)[309] and Comprehensive Export Schedule No. 26 of 1 October 1948.[310] Czechoslovakia challenged the US trade-restrictive measures and claimed that they were inconsistent with the GATT provisions,[311] in particular, Article I (MFN principle) and Article

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[303] More on politics behind see Geoffrey Roberts, 'Moscow and the Marshall Plan: Politics, Ideology and the Onset of the Cold War, 1947' (1994) 46 Europe-Asia Studies 1371. It should be mentioned that there were proposals to engage the Soviet Union, instead of blocking trade with it. See X., 'The Sources of Soviet Conduct' (1947) 25 Foreign Affairs 566. On political context of the case from the view of Czechoslovakia see Laura Cashman, 'Remembering 1948 and 1968: Reflections on Two Pivotal Years in Czech and Slovak History' (2008) 60 Europe-Asia Studies 1645. p.1647

[304] One should not oversee the impact of the Marshall Plan on successful outcome of the GATT talks in 1947. See more on this Roy Santana, 'GATT 1947: How Stalin and the Marshall Plan Helped to Conclude the Negotiations' (2017) 9 Trade, Law and Development 1.

[305] Ivo Duchacek, 'The February Coup in Czechoslovakia' (1950) 2 World Politics 511.

[306] More on the context of the case see Karel Krátký, 'Czechoslovakia, the Soviet Union and the Marshall Plan' in Odd Arne Westad, Sven Holtsmark and Iver B Neumann (eds), *The Soviet Union in Eastern Europe, 1945–89* (Palgrave Macmillan UK 1994) <http://link.springer.com/10.1007/978-1-349-23234-5_2> accessed 30 July 2018. On the extraterritorial enforcement of the Export Control Act of 1949 see Paul H Silverstone, 'The Export Control Act of 1949: Extraterritorial Enforcement' (1959) 107 University of Pennsylvania Law Review 331.f

[307] R.Bhala mentions three policy rationales behind the US export controls: protection of commodities in short supply, national security and advancement of US foreign policy aims. He puts the Cold War export controls under national security rational, although the line between the latter two is blurred. Raj Bhala, *International Trade Law: Interdisciplinary Theory and Practice* (3rd ed, LexisNexis 2008). pp.606-607

[308] Ernest Bevin, 'Ernest Bevin's Third Force Memos' (2007) 8 Democratiya 131. p.144

[309] 'Foreign Assistance Act of 1948 Economic Cooperation Act of 1948, 80th Congress, 20 Session, Chapter 169 April 3,1948 (Foreign Assistacne Act 1948)' <https://www.cia.gov/library/readingroom/docs/1948-04-03b.pdf> accessed 3 August 2018.

[310] Tamotsu Aoi, 'Historical Background of Export Control Development in Selected Countries and Regions U.S., U.K., Germany, France, Hungry, Russia, Ukraine, Japan, South' (Center for Information on Security Trade Controls Contributing to World peace and Promoting Effective Security Export Control) <http://www.cistec.or.jp/english/service/report/1605historical_background_export_control_development.pdf>.

[311] On export controls in GATT see Michael Rom, 'Export Controls in GATT' [1984] Journal of World Trade 125.

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XIII (non-discriminatory administration of quantitative restrictions).[312] Not surprisingly, the US invoked the security exception of the GATT - Article XXI (b) (ii) for justification of its export controls. To recall, Article XXI (b) (ii) states the following:

> *"Nothing in this Agreement shall be construed…*
>
> *(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests*
>
> *(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"*

Due to certain vague notions such as "military establishment", the representative of Czechoslovakia, Mr. Zdenek Augenthaler, mentioned that "the notion 'war or military' potential is extremely elastic"[313] and

> *"…the United States Government had used and interpreted the expression 'war material' so extensively that no one knew what it really covered.*[314]

In response to this, a representative of the United States maintained that only 200 group items out of 3,000 were affected by export controls and therefore there were no grounds to claim that Article XXI was extended to cover all products.[315] In its request for a decision under Article XXIII, Czechoslovakia requested a decision on "whether or not US regulations conform to the provisions of Article I."[316] However, the Proposal for a Working Party[317] to examine the issue did not win support during the discussions of the Contracting Parties and the question was

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[312] 'Statement by the Head of the Czechoslovak Delegation Mr. Zdenek Augenthaler to Item: 14 of Agenda, GATT, Third Session, 30 May 1949, GATT CP3/33' <https://www.wto.org/gatt_docs/English/SULPDF/90320183.pdf>. p.2.
[313] ibid. p.5
[314] 'GATT Contracting Parties, Third Session, Summary Record of the Twenty-Second Meeting, CP.3/SR22 - II/28, 8 June 1949' <https://www.wto.org/english/tratop_e/dispu_e/gatt_e/49expres.pdf>. p.2
[315] ibid. p.3
[316] ibid. p.3
[317] The way the Panels were named back then, the members of such Working Parties were representatives of all interested Contracting Parties, including the parties to the dispute

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answered only by the voting of the Contracting Parties. In its decision the GATT Members modified the original question put by Czechoslovakia by saying that:

> *"the question was not appropriately put because the United States Government had defended its actions under Articles XX and XXI which embodied exceptions to the general rule contained in Article I."*[318]

Subsequently, the question was formulated in a broader way by asking whether the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licenses.[319] This technique fits into description proposed by Robert Hudec stating that wise diplomatic response to a question which did not have a good answer was "to try change the question into one that could be answered."[320] At the end, the response to the question was not in favour of Czechoslovakia since 17 countries had voted "no" and 3 had abstained from voting.[321] The Members of the GATT supported the United States' position based on their political views rather than legal arguments. Their attitude is reflected in the speech of the Canadian delegate to the GATT L. Couillard:

> "*The fact remains . . . that in this particular case it was the United States which was under attack and that the political considerations involved were such that no other decision was possible. The vast majority of the Contracting Parties, therefore, gave at least voting support to the United States'*

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[318] 'GATT Contracting Parties, Third Session, Summary Record of the Twenty-Second Meeting, CP.3/SR22 - II/28, 8 June 1949' (n 246). This phrase allowed some scholars to infer that "Article I MFN is excepted so too would be the other duties" See Bhala, *International Trade Law* (n 307). p.581 Moreover, the US in its third-party submissions in the case Russia- Goods in Transit (DS512) claims that Article XXI is self-judging, which makes it non-justiciable before the Panel. However, this conclusion is far-reaching since in its statement the Chairman referred to GATT Article XX as well and it is well-established fact that it is not self-judging. See US Trade Representative, 'Third Party Executive Summary of the United States of America, DS512, Russia- Measures Concerning Traffic in Transit' <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Exec.Summ.fin.%28public%29.pdf>.

[319] GATT Contracting Parties (n 17).

[320] Robert E Hudec, 'GATT Dispute Settlement after the Tokyo Round: An Unfinished Business' (1980) 13 Cornell International Law Journal 145. p.167

[321] "No"- from Australia, Belgium, Brazil, Canada, Ceylon, Chile, China, Cuba, France, Netherlands, New Zealand, Norway, Pakistan, S. Rhodesia, South Africa, United Kingdom, United States voted against, three countries abstained: India, Lebanon, Syria, and two were Absent: Burma Luxembourg. The outcome of the case as to the GATT security exception permitted some scholars to claim that this case cannot be seen as a proper legal debate about the scope of Article XXI (b) (ii) Daniel Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford University Press 2009). p.133

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position in spite of weakness of that position in certain respects.”[322]

The voting behavior of the GATT Members and the atmosphere during discussion of the matters brought by Czechoslovakia could be explained in the context of the GATT characteristics from the institutional and dispute settlement system perspectives. Moreover, one should not disregard political arrangements at the time of voting.

GATT 1949: Institution, Dispute Settlement Procedure and Political Climate

Describing the institutional structure of the GATT should begin with the fact that the GATT in its roots constituted a part of the Havana Charter of the International Trade Organization (ITO) and therefore was not intended to be an international institution. It was rather “a stopgap solution to implement tariff concessions”, as stated by Gabrielle Marceau et al.[323] This feature had an evident impact on the dispute settlement procedures after the Czechoslovakian complaint became the third case in the history of the GATT.[324]

As far as the GATT dispute settlement is concerned, all disputes were resolved by diplomats. In other words, in the early years of the GATT, disputes were solved by the delegates who had negotiated the GATT itself . The diplomats assumed that everybody would understand what they meant under those provisions and that there is no problem of neutrality.[325] Some critics argued that the GATT stood for “Gentlemen’s Agreement of Talk and Talk”.[326] The panel proceedings were not developed yet in 1949 since the first “Panel on complaints” was

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[322] Cited in Francine McKenzie, ‘GATT and the Cold War: Accession Debates, Institutional Development, and the Western Alliance, 1947–1959’ (2008) 10 Journal of Cold War Studies 78. p.90

[323] As is well known, the ITO has never come into force and the GATT existed in a state of provisional application Gabrielle Marceau and others, ‘Introduction and Overview’ in Gabrielle Marceau (ed), Roberto Azevedo, *A History of Law and Lawyers in the Gatt/Wto* (Cambridge University Press 2015) <https://www.cambridge.org/core/product/identifier/9781316048160%23CT-bp-1/type/book_part> accessed 9 August 2018. p.3

[324] Although during this case the extensive discussion took place not only between the disputants but among all GATT contracting parties which is different from previous two cases. See Christina Schroder, ‘Early Dispute Settlement in the GATT’ in Gabrielle Marceau and others (eds), *A History of Law and Lawyers in the Gatt/Wto* (Cambridge University Press 2015) <https://www.cambridge.org/core/product/identifier/9781316048160%23CT-bp-1/type/book_part> accessed 9 August 2018. p.142

[325] Robert E Hudec, ‘The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure’ in Jagdish Bhagwati and Mathias Hirsch (eds), *The Uruguay Round and Beyond: Essays in Honour of Arthur Dunkel* (Springer-Verlag 1998).

[326] Kevin C Kennedy, ‘The GATT-WTO System at Fifty’ (1997) 16 Wisconsin International Law Journal 421. p.442

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established in 1952.[327] The GATT formal dispute resolution under Article XXIII[328] was not yet developed and the legal reasoning of the decisions was not available in 1949 either. Panel proceedings under the GATT began to be structured as a series of legal arguments only in 1960.[329] These features of the GATT dispute settlement where the States had control over the Panel's decisions were perceived as playing to the detriment of the rule of law and the use of the system by economically weak states.[330] In general, little legalism in the GATT Agreement was intertwined with the defects of the GATT. [331]

The State-controlled dispute settlement procedure under the GATT can explain to some extent why the struggle between Czechoslovakia and the US has not been neutral at all.[332] As was mentioned before, the matter was influenced by the struggle against the Soviet regime as posing threats to the international security. In his response to the Czechoslovakian complaint a US delegate assured all GATT Contracting Parties that they would have more secure future for their countries due to the US making use of the security exceptions.[333] Therefore, the neutrality of the Contracting Parties of the GATT in their vote against Czechoslovakia is questionable. The lack of neutrality in that case apart from the general structure and the dispute settlement system could be explained by political climate that was set in the GATT back then.

In 1949 the general political climate of the GATT's membership was strongly influenced by the Cold War.[334] The American government viewed the GATT as ''an arrow in the Western world's quiver, much like the Marshall plan."[335] This feature makes some scholars conclude that the decision in the Czechoslovakian case was motivated by political concerns since GATT Members were reluctant to attack the most powerful member of the nascent GATT.[336]

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[327] Marceau and others (n 323). p.13

[328] It was perceived as "unfriendly step". See ibid. p.12

[329] Amelia Porges, 'The New Dispute Settlement:From the GATT to the WTO' (1995) 8 Leiden Journal of International Law 115. p.116

[330] In particular, the consent of the parties as to the initiation of the disputes and acceptance of the Panels decisions.Weiler (n 66). p.192

[331] Sungjoon Cho, 'GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?' (1998) 39 Harvard International Law Journal 311. p.315

[332] Hudec (n 325). p.106, footnote 6

[333] Contracting Parties Third Session, 'Reply by the Vice Chairman of the United States Delegation, Mr. John W. Evans, to the Speech by the Head of the Czechoslovak Delegation under Item 14 on the Agenda, GATT, CP.3/38'.

[334] More on influence of the Cold War see McKenzie (n 322).

[335] David Vogel, 'Global Trade Linkages: National Security and Human Security' in Vinod K Aggarwal and Kristi Govella (eds), *Linking Trade and Security*, vol 1 (Springer New York 2013) <http://link.springer.com/10.1007/978-1-4614-4765-8_2> accessed 27 June 2018.

[336] Alan S Alexandroff and Rajeev Sharma, 'The National Security Provision—GATT Article XXI' in Patrick FJ Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic*

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Moreover, the relations between the US and Czechoslovakia were already tense since Czechoslovakia had blocked Western Germany accession to the GATT.[337] The political climate of the GATT had a particular influence over the security exception interpretation.[338] The possibility of vague interpretation and abuse of the security exception was noted back then by the Delegate for the Netherlands, Dr. Speekenbrink, who said that

> *"…I find that kind of exception very difficult to understand, and therefore possibly a very big loophole in the whole Charter."*[339]

The perception as to the check against abuse was expressed by the Chairman, Mr. E. Colban, who claimed that:

> *"…the spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuse."*[340] *You need to offer these quotes much earlier, above when you describe negotiating history of XXI*

While there were no decisions on Article XXI confirming its abusive application, the mere fact of leaving it untouched, gave a possibility for States to interpret it in a way they preferred. In other words, the Czechoslovakian case introduced an element of chaos and disorder which has been dormant till late 2017. On its face, the Czechoslovakian attempt at interpreting the GATT Article XXI did not work since the matter was resolved politically. However, by not resolving the issue in 1949 and keeping it dormant till 2017, the push for a judicial outcome is even stronger now and the disruption caused to the WTO system may be significantly worse. To this end, the next section will briefly discuss the chaotic nature of handling the security exception with the reference to selected cases.

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and Political Analysis (Springer US 2005) <http://link.springer.com/10.1007/0-387-22688-5_35> accessed 14 June 2018. p.1574

[337] McKenzie (n 322). p.89

[338] Interestingly enough, national security officials and not trade experts made the ultimate decision regarding the Geneva round when the security exception has been negotiated. Thomas W Zeiler, 'GATT Fifty Years Ago: U.S. Trade Policy and Imperial Tariff Preferences' (1997) 26 Business and Economic History 709. p.714

[339] 'Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report of the 33rd Meeting of Commission, Held on Thursday, 24th July, 1947, at 2.30 p m. in the Palais Des Nations, Geneva, E/PC/T/A/PV/33' (n 183). p.19

[340] Economic and Social Council (n 162). p.3

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Dealing with GATT Security Exception till 2018

As David Knoll mentions, the Czechoslovakian case established "the loophole" which was "given full play" by further disputes.[341] Indeed, the further disputes during the GATT era did not lead to an adopted Panel report on the GATT security exception.[342] The cases were solved either under the political influence reigned in the GATT or by the diplomatic means. In some cases, States simply abandoned the issue and did not pursue the case further.[343]

While it was believed that the spirit of the GATT might help to prevent abusive use of the security exception, throughout the record of use of GATT Article XXI the only case where it seemed that "spirit" of the GATT helped to prevent an abuse was the *Sweden-Import Restrictions on Certain Footwear*.[344] In short, in November 1975 Sweden introduced a global import quota system for certain footwear. Consequently, the Swedish Government considered its measure to be consistent with GATT Article XXI. In this case the GATT Members expressed their concern as to justification of import restrictions under Article XXI and reserved their rights under the GATT to consult with Sweden. Under diplomatic pressure Sweden withdrew its measures in 1977.[345]

The example of a solution of the case by diplomatic means during the WTO era dealing with the security exception was the EU complaint which challenged the US boycott of goods from Cuba introduced under the US Helms-Burton Act.[346] Following the EU complaint, the US

[341] David D Knoll, 'The Impact of Security Concerns upon International Economic Law' (1984) 11 Syracuse Journal of International Law and Commerce 567. p.591

[342] The GATT Article XXI record of use was extensively discussed elsewhere. See Pelc, *Making and Bending International Rules* (n 89). p.101 and Hahn (n 121). pp.569-578

[343] Note that the security exception was also debated during trade policy review of some WTO Members. The following instances where the discussion on the security exception has occurred - United States v. Czechoslovakia (1949), United States – Suspension of Obligations with Czechoslovakia (1951), United States – Imports of Dairy Products (1951), United States – Section 232 of the Trade Expansion Act (1968), Austria – Penicillin and Other Medicaments (1970), Sweden – Import Restrictions on Certain Footwear (1975), European Communities v. Argentina (1982), United States – Imports of Sugar from Nicaragua (1983), European Communities v. Czechoslovakia (1985), United States v. Nicaragua (1985), European Communities v. Yugoslavia (1991), Nicaragua v. Honduras and Colombia (1999), India v. Pakistan (2002), United States v. Brazil (2003), European Union v. Brazil (2013), United States v. Cuba (1962-1996), United States v. Cuba (including Helms-Burton Act) (1996-2016)

[344] In November 1975 Sweden introduced a global import quota system for certain footwear. The Swedish Government considered its measure to be consistent with GATT Article XXI. On the use of the security exception by Sweden see Raj Bhala, 'National Security and International Trade Law: What the GATT Says, and What the United States Does Symposium on Linkage as Phenomenon: An Interdisciplinary Approach' (1998) 19 University of Pennsylvania Journal of International Economic Law 263. pp.272-273

[345] GATT Contracting Parties, 'Sweden – Import Restrictions on Certain Footwear (17 November 1975) L/4250, 3' <http://sul-derivatives.stanford.edu/derivative?CSNID=90920073&mediaType=application/pdf>.

[346] For a discussion of this case see Klinton W Alexander, 'The Helms-Burton Act and the WTO Challenge: Making a Case for the United States under the GATT National Security Exception' (1997) 11 Florida Journal of

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agreed to amend the provisions of the Act and the EU in turn suspended the Panel proceedings.[347] As a result, the dispute was resolved in a diplomatic way[348] and the authority of the Panel lapsed in 1998.[349] On the whole, Article XXI remained untouched both during GATT and the WTO periods and left a lot of unclarity and unanswered questions for many years ahead. It can be seen that the Czechoslovakian case created a precedent where the security exception was left uninterpreted, i.e. remined as a "gap stop". This trend survived throughout the WTO years, since all cases that dealt with the security exception showed that the loophole was still there.[350] As mentioned above, the statements made by GATT Members during the discussion of the matters where the security exception was referred to may be used by Panels and the Appellate Body for the purposes of interpretation under Article 31 (3)(b) of the Vienna Convention on the Law of the Treaties.

The GATT Article XXI came into a question again back in 2016 when Ukraine brought a case against the Russian restrictions on traffic of goods in transit. In its defence Russia invoked Article XXI.[351] The difference is that the GATT Article XXI should be dealt with under WTO system, which is different from the GATT in 1949 in terms of institutional arrangements, dispute settlement procedure and political climate. The next section will provide an overview of these elements one by one.

WTO in 2018: Institution, Dispute Settlement and Political Climate

Currently the WTO is an international institution, as compared to the GATT which was an agreement.[352] The institutional framework of the WTO is reflected in Article III of the WTO

International Law 559. and Riyaz Dattu and John Boscariol, 'GATT Article XXI, Helms-Burton and the Continuing Abuse of the National Security Exception' (1997) 28 Canadian Business Law Journal 198.

[347] The European Union at the DSB meeting, as a response to the concern of Cuba that the EU abandoned the case, emphasized that "…the Community had not withdrawn its request for the establishment of a panel nor had it terminated the work of the panel but had asked for the suspension of the panel's work pursuant to Article 12.12 of the DSU. It had done so due to the fact that it had continued negotiations with the United States…" Dispute Settlement Body WTO (n 247). p.18

[348] Stefaan Smis and Kim van der Borght, 'The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts' (1999) 93 The American Journal of International Law 227.

[349] Taking into account the fact that the Panel was established on 20 February 1997 See *US-Helms Burton* (n 247). DS38/3, Communication by the DSB Chairman dated 20 February 1997

[350] Although it sparked a discussion among scholars. See Alford (n 255). , Hahn (n 121).

[351] *Russia-Traffic in Transit* (n 7).

[352] For an overview of the history of the WTO see Pieter Jan Kuijper, 'WTO Institutional Aspects' in DL Bethlehem and others (eds), *The Oxford handbook of international trade law* (Oxford University Press 2009).

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Agreement.[353] In this regard Yves Bonzon differentiates the following functions: "implementation' function, a 'forum' function', 'dispute settlement' function, a 'monitoring' function', and a 'cooperation' function".[354] The institutional framework of the WTO gave rise to discussions of the constitutionalization of the WTO.[355] At the same time, it sparked the debate about an appropriate model of governance to ensure the WTO legitimacy: whether it is constitutionalization or global subsidiarity.[356] The WTO could be described as 'continuing' or 'living' instrument[357] not only in terms of its structure but in terms of its membership as well. As of June 2018, the WTO consists of 164 states, while in 1949 there were only 23.[358] With the growth of the number of the Members, the negotiations have become more contentious. Besides, changes in relations among WTO Members were considerably affected by major shifts

[353] Article III of the Marrakesh Agreement states the following: *"1.The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.2.The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.3.The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the "TPRM") provided for in Annex 3 to this Agreement. 5.With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies."* See 'Marrakesh Agreement Establishing the World Trade Organization' <https://treaties.un.org/doc/Publication/UNTS/Volume%201867/volume-1867-A-31874-English.pdf>.
[354] Yves Bonzon, 'The WTO Institutional Structure', *Public Participation and Legitimacy in the WTO* (Cambridge University Press 2014) <http://ebooks.cambridge.org/ref/id/CBO9781107705609> accessed 11 August 2018. More on institutional framework William J Davey, 'Institutional Framework' in Patrick FJ Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer US 2005) <https://doi.org/10.1007/0-387-22688-5_4>.
[355] Deborah Z Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press 2005).
[356] See, for example, Robert Howse and Kalypso Nicolaidis, 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?' (2003) 16 Governance 73.
[357] Mary E Footer, 'The WTO as a "Living Instrument": The Contribution of Consensus Decision-Making and Informality to Institutional Norms and Practices' in Thomas Cottier and Manfred Elsig (eds), *Governing the World Trade Organization* (Cambridge University Press 2011) <https://www.cambridge.org/core/product/identifier/CBO9780511792502A025/type/book_part> accessed 11 August 2018. p.217
[358] As of 29 June 2016, according to the WTO website (n 51). As to the democracy and foreign policy conditionalities for joining the WTO see Christina L Davis and Meredith Wilf, 'Joining the Club: Accession to the GATT/WTO' (2017) 79 The Journal of Politics 964.

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in the positions of other founding members of the GATT.[359] For instance, having joined the WTO, China gained a powerful role in the organization as well.[360]

The dispute settlement system in 2018 is more juridified as compared to 1949. Indeed, it has been transformed from the diplomatic forum to the "quasi-judicial" system. Under the WTO Dispute Settlement system the disputes are decided by Panels and Appellate Body which provide the structured legal reasoning in their reports.[361] The important feature which differentiates the WTO dispute settlement from the GATT is new, more precise rules as to the dispute settlement procedure.[362] In particular, the Panel report could be modified by the Appellate Body and it is subject to adoption by the Dispute Settlement Body. The adoption is automatic unless there is a consensus not to adopt[363] – so-called reversed consensus - which is different from the process under GATT when the party that lost the dispute could have blocked the adoption of the Panel report.[364] The WTO dispute settlement system has been praised for its features and achievements not just to solve the trade disputes between two states, but also to provide certainty to other Members. [365] Notwithstanding debates among scholars as to the effectiveness of the WTO system,[366] the WTO has more tools to solve the trade conflicts than were available during the GATT period. If the WTO was to be considered "the crown", its dispute settlement could be the "jewel in the crown".[367]

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[359] He points out the decline of Quad countries (Canada, the European Union, Japan and the United States) and rise of emerging economies (Brazil, China, India, Indonesia, Malaysia, Mexico, South Africa and Turkey) which made the relationships more quarrelsome and complicated than it had been the case in the GATT period. See VanGrasstek (n 32).

[360] On China's rise at the WTO see Gregory Shaffer and Henry Gao, 'China's Rise: How It Took on the U.S. at the WTO' [2018] University of Illinois Law Review 115.

[361] For a concise historical overview of the WTO dispute settlement system see Davey (n 59). For an overview of the transition from the GATT to WTO dispute settlement system see Arie Reich, 'From Diplomacy to Law: The Juridicization of International Trade Relations' (1997) 17 Northwestern Journal of International Law & Business 775.

[362] For example, Article 6(1) of the DSU states that "after the period of consultations, the complaining party can request the establishment of a panel which 'shall be established at the latest the second time the matter appears on the agenda of the DSB, unless by consensus the WTO Members decide not to do so". See 'Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the WTO Agreement' (n 110).

[363] Joel P Trachtman, 'Domain of WTO Dispute Resolution, The' (1999) 40 Harvard International Law Journal 333. p.336

[364] John H Jackson, 'Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects' in Anne O Krueger and Chonira Aturupane (eds), *The WTO as an international organization* (University of Chicago Press 1998). p.167

[365] Porges (n 329). p.131

[366] As to the effectiveness of the WTO dispute settlement system see. Reich (n 63). It was noted that the judicialization in some cases may provide more "drag" than lift. John D Greenwald and Lynn Fischer Fox, 'The WTO's Emphasis on Adjudicated Dispute Settlement May Be More Drag than Lift' (2007) 24 Arizona Journal of International and Comparative Law 133.

[367] P Lamy, 'WTO Disputes Reach 400 Mark' <https://www.wto.org/english/news_e/pres09_e/pr578_e.htm>.

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The political climate among WTO Members in 2018 is completely different from what it had been during the infant years of the GATT. First and foremost, in 2018 the US does not have the same support from the Members States it had in 1949. For example, now WTO Members fiercely object to the US trade-restrictive measures and bring the cases.[368] At the same time, the rise of China altered the balance in the world trade system. These changes, plus blockade of the negotiations in WTO, in turn, encouraged other countries to look for bilateral treaties, opposite to multilateralism the GATT was aiming at.[369] In other words, the political climate and changes in the global relations shaped the world trade system which were illuminated by invocation of the security exception in 2017.

To sum up, the main takeaway from discussing the differences between the GATT in 1949 and WTO in 2018, in light of the Czechoslovakian case, is that the time to revisit and to evaluate the security exception has finally come. It is found that underlying issues in disputes where the security exception has been invoked are related to geopolitical conflicts or to political issues. Notably those conflicts could be presented by cases such as where Czechoslovakia turned from West to the Soviet regime, Ukrainian conflict with Russia over Crimea or the Gulf diplomatic crisis. In other words, all disputes although different in their underlying issues, represent highly politicized matters which put Panels in an intricate situation by bringing in front a necessity to make a balanced decision at the edge of trade and security. Due to the absence of a case-law on the GATT security exception similar to the case-law under GATT Article XX, the question arises how to review, i.e. what a framework of review to use. To this end, in the next Chapter, I will lay out a framework of review for the GATT Article XXI.

Concluding Remarks

This chapter started from an argument that a rules-based system of the GATT/WTO was created in the aftermath of the World War II with an underlying idea that trade independence between countries may prevent wars. A rules-based system of the WTO could be perceived through its two main principles: reciprocity and non-discrimination. In order to enforce the rules, there should be a possibility to challenge their violation. To this aim the WTO dispute

[368] Reuters Staff, 'Over 40 Countries Object at WTO to U.S. Car Tariff Plan' *Reuters* (3 July 2018) <https://www.reuters.com/article/us-usa-trade-autos-wto/over-40-countries-object-at-wto-to-u-s-car-tariff-plan-idUSKBN1JT2KA>.
[369] On threats of regionalism to multilateralism see, for example, Pascal Lamy, 'Is Trade Multilateralism Being Threatened by Regionalism?' (2014) 54 Adelphi Series 61.

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settlement system was created. Consequently, a rules-based system of the WTO dispute-settlement system are intertwined.

A rules-based order of the WTO is currently under strain, mainly due to the crisis at the WTO Appellate Body. The current crisis could lead to the situation of "fragmented authority" when there will be no possibility to check if the WTO Members are compliant with such rules. With this in mind, the option of fragmented authority could be treated as step back to the "pre-Westphalian system". In a general way, there is a tendency to revert to power-based relations, resembling a chaos rather than order.

The current crisis at the WTO is exacerbated by the national security exception cases. The national security exception was inserted into the GATT as a response to the need of States to have a possibility to adopt measures necessary for protection of their essential security interests. A vague wording of the security exception, though, brings a lot of controversy and might put an additional strain on the WTO dispute settlement system and bring unpredictability to the WTO system.

An extensive analysis of the GATT security exception and its place in a broader picture of exceptions in international shows that there is a need to strike a balance between the necessity to preserve the WTO system and sovereignty of States. The analysis of GATT Article XXI shows that a mere possibility of dealing with it under the WTO system may have systemic implications for the WTO system. These features might contribute to the explanation why the States have been reluctant to invocation of the GATT security exception which led to the situation that Article XXI of the GATT has not been interpreted by GATT/WTO Panels yet. The Czechoslovakian case of 1949 exemplifies how the security exception was dealt in early years of the GATT. The comparison of the GATT dispute settlement system and WTO dispute settlement system reveals that due to the difference between two systems and current political atmosphere, the security exception of the GATT might be finally interpreted. In this regard the question arises: how much deference the WTO Panels should provide to States in review of the national security measures? In other words, the question boils down to the framework of review for the security exception of the GATT which will be discussed in the next Chapter.

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2. Chapter 2: In Search for a Framework of Review

Introduction

The rationale behind negotiating a clause for protection of national security was to provide States with a "wiggle room" for protection of their essential security interests. At that time the conventional wisdom was that the atmosphere (a diplomatic setting) would deter States from abusive use of the national security exception. "The atmosphere" indeed, worked well for 70 years, since during this quite a long period States rarely had invoked the national security exception. Consequently, the Panel has not interpreted the national security exception from its inception into the GATT (the predecessor of the WTO) in 1947.

The option of keeping the national security exception beyond the review by the Panel is not possible anymore due to the transformation of the dispute settlement system of the WTO in 1995 and a changed political setting. First, due to a more judicial-like dispute settlement procedure the Panel, broadly speaking, should address the argument which a State invokes in its defence.[370] Second, the Panel has standard terms of reference if the parties did not agree otherwise, contrary to the necessity for a consensus on terms of reference during the GATT times. In addition, a State cannot anymore block adoption of a Panel's report due to the reverse consensus rule. At last, a political setting is different from the one was present during the GATT negotiations period. To mention the least, United States may not have the same political power it had before to put pressure on other States to agree on a diplomatic solution.[371]

The mere review of the national security exception might provoke States to attack the WTO. On the one hand, a review by the Panel will be met with a backlash from the United

[370] In this regard the Appellate Body said: "*... We believe that a panel comes under a duty to address issues in at least two instances. First, as a matter of due process, and the proper exercise of the judicial function, panels are required to address issues that are put before them by the parties to a dispute. Second, panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. In this regard, we have previously observed that "[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings." For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction — that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues — if necessary, on their own motion — in order to satisfy themselves that they have authority to proceed*. DS132: Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DS, AB Report (WTO Appellate Body). para.36

[371] Note that the WTO dispute settlement procedure allows States to find a mutually acceptable solution at any stage of the case. In this regard Article 3.7 of the DSU states: *"...The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred..."*

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States with a claim that the natural security exception is non-justiciable. On the other hand, leaving the national security non-reviewable and hoping that "the atmosphere" will prevent its abuse, is a vain hope because the United States has already adopted trade-restrictive measures justified by rather broad interpretation of the national security exception. If this broad interpretation remains unchecked by the Panel, then it will give a *carte blanche* to other States to adopt any restrictive measures under the pretext of the national security exception.

On balance, the Panel's review of the national security exception appears to be the "best of the worst" scenarios if the Panel crafts its decision in a very delicate way. On the one hand, in its review the Panel should not give a lot of deference to a State because by doing so a State can adopt any measure under the umbrella of the national security exception. On the other hand, the Panel should not be too intrusive in its review since it will then unduly encroach on the national sovereignty of the State. Against this background, the Panel should find a delicate framework of review which would allow from one side to draw a line between genuine national security measures and other measures, protectionist measures as such, but from another side not to be too intrusive to encroach on state sovereignty. In this regard this Chapter will analyse a framework of review which includes various standards of review and substantive requirements which will allow to accommodate the sensitivity of national security matters. Since in majority of the cases States invoke Article XXI (b) (iii) of the GATT, the Chapter will focus on a framework of review for this particular subparagraph of Article XXI of the GATT.

This Chapter will proceed as follows: first it will lay out the steps of review by the Panel which precede the review under Article XXI of the GATT. Then it will explain theoretical premises for the standard of review and discuss various standards of review in order to find which level of deference might suit a specific element of review. Then it will outline the framework of review and explain why a particular element appeals to a particular standard of review, and finally the chapter will try to match a specific element with a relevant standard of review.

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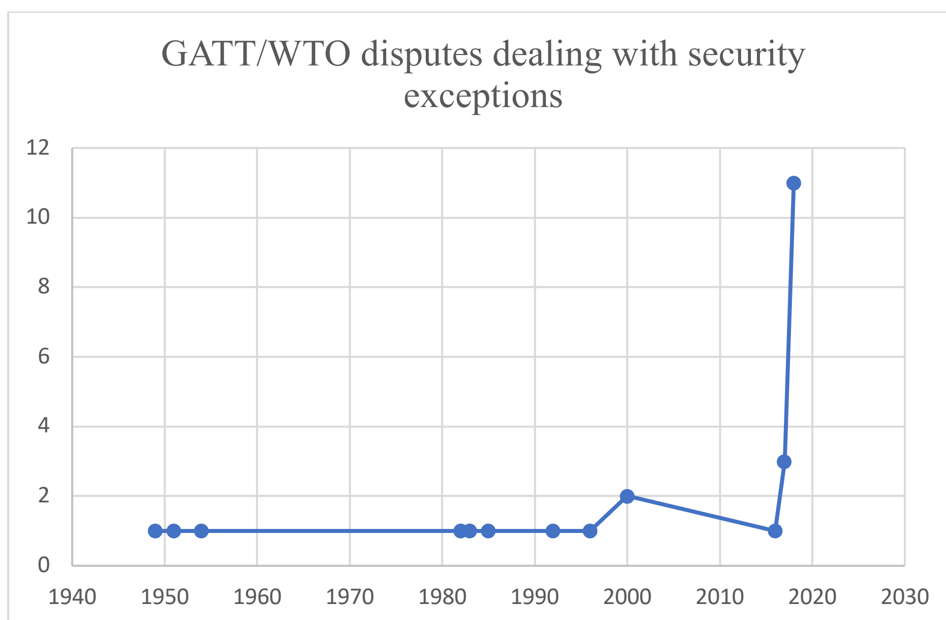
Preliminary review by a Panel

The below table shows a recent surge of cases dealing with the security exception which bring at the forefront the interpretation of the security exception. [372] This section concentrates on a framework of review for Article XXI (b) (iii), since as noticed above, it is the most used paragraph of Article XXI GATT.



The text of Article XXI (b) (iii)

To recall, Article XXI (b) (iii) states as follows:

"Nothing in this Agreement shall be construed

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests …

(iii) taken in time of war or other emergency in international relations;…"

[372] See the table below which reflects the cases starting from the GATT period and up to October 2018. Please note that the cases filed against Section 232 tariffs are counted as single complaints according to their DS number. For a list of cases till 2018 see Yoo and Ahn (n 121). p.431, 434

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Framework of review

Determination of the measure and establishing whether it violates substantive GATT provisions.

As discussed in the Chapter 1, GATT exceptions function as a defence for violation of substantive obligations of the GATT. Accordingly, before coming to the review under Article XXI of the GATT, first Panel has to determine whether measures at hand violate substantive obligations of WTO Members. Consequently, at this stage the Panel has to define a measure and then to determine whether it is in breach of WTO obligations.

The determination of the measure is important given the fact that in some cases there is a debate between the parties to the dispute as to the essence of the measure as such. For instance, the issue of determination of measures came up in a recent *Indonesia – Iron or Steel Products* case. In short, in this case both parties agreed that the measures were safeguards, but both Panel and the Appellate Body did not agree with such determination. The Appellate Body mentioned that the substantive content of the measure, rather than national legislation used to adopt it, will be determinative in defining the measure.[373] The Appellate Body concluded:

> *"Having reviewed the design, structure, and expected operation of the measure at issue, together with all the relevant facts and arguments on record, we find that this measure does not present the constituent features of a safeguard measure for purposes of the applicability of the WTO safeguard disciplines."*[374]

Therefore, notwithstanding a legal determination by a State, the Panel is able to analyse a measure at issue and decide as to its nature since it has an obligation to make an objective assessment under Article 11 DSU.

Measures which States claim to introduce under the umbrella of "national security measures" can vary from tariffs, quotas, tariff-rate quotas to a complete ban on specific

[373] The Appellate Body mentioned: "*A panel is not precluded from determining the applicability of a particular covered agreement in cases where the issue has not been raised by the parties. Indeed, the duty to conduct an "*objective assessment of the matter" may, at times, require a panel to depart from the positions taken by the parties and determine for itself whether a measure falls within the scope of a particular provision or covered agreement. Moreover, the description of a measure proffered by a party and the label given to it under municipal law are not dispositive of the proper legal characterization of that measure under the covered agreements." *DS496: Indonesia — Safeguard on Certain Iron or Steel Products, Appellate Body Report*. para.6.3

[374] ibid. para.6.7

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products. It goes beyond the scope of this research to discuss all possible measures, but most of the measures might fall under the scope of quantitative restrictions. Having decided on the type of measure, the Panel has to proceed with determination of whether such measure violates the substantive WTO obligations.

I. Breach of substantive obligations

The determination of the nature of the measure is crucial for defining violations of the GATT articles or any other WTO agreement. Depending on the type of the measure, the national security measures can violate the Protocols of Accession, Safeguards Agreement, GATS Agreement, TRIPS Agreement and so on. For example, if we assume that a State adopted tariffs as national security measure, the two most common violations of the GATT Agreement are Article I of the GATT – MFN principle and Article XI of the GATT – prohibition on quantitative restrictions. I will briefly analyze these two Articles below.

Article I:1 of the GATT, so-called MFN principle, is a non-discrimination rule of the WTO which states that if a WTO Member provides a benefit or a privilege to one WTO Member, then it should extend such benefit or privilege unconditionally and immediately to all other WTO Members. It reads as follows:

> *"With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."*

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The Appellate Body called the MFN principle as 'pervasive', a 'cornerstone of the GATT', and 'one of the pillars of the WTO trading system'.[375] In order to determine whether a measure violates the MFN principle, Panels apply a four-tier test which includes cumulative elements. In particular, a Panel should establish that:

1) a measure is covered by Article I:1 of the GATT (border measures and internal measures)
2) a measure grants an advantage, favour or privilege to one WTO Member(a broad meaning in case-law)
3) a measure is applied to a like product (defined on a case-by-case basis)
4) an advantage, favour of privilege is given immediately or unconditionally (no time lapse and no conditions).[376]

As soon as a Panel finds a violation of Article I:1 of the GATT, it should proceed to further investigation on whether any other Articles of the GATT have been violated as well.

Another violation by national security measures could be Article XI:1 of the GATT which prohibits quantitative restrictions such as import or export licenses or quotas and reads as following:

> *"Article XI: General Elimination of Quantitative Restrictions*
>
> *1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."*

Article XI:I of the GATT covers *de jure* and *de facto* restrictions, applies only to internal measures and should be attributed to governments. The Appellate Body in *China-Raw Materials* clarified the terms "prohibition" and "restriction" and stated that:

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[375] *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries, DS246, AB Report. The Appellate Body stated: "It is well settled that the MFN principle embodied in Article I:1 is a "cornerstone of the GATT" and "one of the pillars of the WTO trading system", which has consistently served as a key basis and impetus for concessions in trade negotiations.", para.101*

[376] *DS54: Indonesia — Certain Measures Affecting the Automobile Industry*. para.14.138

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> *"The term 'prohibition' is defined as a 'legal ban on the trade or importation of a specified commodity'. The second component of the phrase '[e]xport prohibitions or restrictions' is the noun 'restriction', which is defined as '[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation', and thus refers generally to something that has a limiting effect."*[377]

One example of trade-restrictive measures which fall under Article XI:I of the GATT are quotas which constitute limits on amount of product. The Panel in *Japan - Trade in Semi-conductors* stated that the wording "quotas, imports or export licenses or other measures" covers a wide range of measures:

> *"…all measures instituted or maintained by a contracting party prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges."*[378]

Consequently, it is important to correctly determine the measure in order to understand whether it is covered by Article XI:1 of the GATT. Articles I:1 and XI:1 of the GATT are only two examples of violations, although national security measures could violate other Articles of the GATT or even other Agreements.

To sum up, the Panel in its stage of review preceding the review of justification under Article XXI of the GATT should (1) determine the nature of the measure and (2) determine whether the measure violates the GATT or other WTO Agreement. Then the Panel can proceed with a review of whether such violations can be justified by a recourse to the GATT Article XXI. One of the questions which arises in review of Article XXI is how much deference the Panel should provide to States. In other words, what standard of review the Panel should apply with regard to different elements of GATT Article XXI. To this end, the next section will lay out theoretical premises of a standard of review.

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[377] *DS394: China — Measures Related to the Exportation of Various Raw Materials, AB Report*. para.319
[378] *Japan-Trade in Semi-Conductors, L/6309 - 35S/116, Panel Report*. para.104

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Standard of Review: Theoretical Premises

The standard of review has its origins in national legal systems and is defined as "the degree of deference that a reviewing court gives to the actions or decisions under review".[379] As can be seen, the key word is "deference" which is the essence of a standard of review. The concept of a standard of review has been developed by municipal courts and further transposed to the international level.[380] The standards of review are claimed to be "the bread and butter"[381] or "essential language"[382] at the appellate level of municipal courts since there is a perception that different standards of review could lead to different outcomes of a case.[383] Similarly, one could claim that international courts by giving less deference to States would make it harder for States to pass the strict scrutiny applied by the Court. Since the essence of a standard of review is deference, the following standards of review could be differentiated according to their level of deference:

- *de novo* review (an independent determination of issues by the court)[384]
- clearly erroneous review (requires substantial deference by the court)[385]
- reasonableness review (whether a reasonable person could have reached such decision)
- arbitrary and capricious review (the review of agency's explanation of its decision and whether it can be reasoned from the evidence)[386]
- abuse of discretion review (a very deferential standard)[387]

[379] Martha S Davis, 'A Basic Guide to Standards of Judicial Review' (1988) 33 South Dakota Law Review 469. p.469
[380] The term "municipal" is used to refer to domestic courts. The concept of a standard of review may be used in two contexts: (i) the constitutional review of actions by other branches of government or compliance by governmental bodies with their delegated authority and (ii) scrutiny applied by a higher court with regard to the decision of a lower court. See Lukasz Gruszczynski and Wouter Werner (eds), 'Introduction', *Deference in International Courts and Tribunals* (Oxford University Press 2014) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198716945.001.0001/acprof-9780198716945-chapter-1> accessed 21 October 2018. p.1
[381] Jeffrey C Dobbins, 'Changing Standards of Review' (2016) 48 Loyola University Chicago Law Journal 205. p.207
[382] Steven Alan Childress and Martha S Davis, *Federal Standards of Review* (3rd ed, Lexis Pub 1999). p.ix
[383] There is a perception that applying different standards of review to a case in municipal courts might lead to the reversal of that case. The recent research, though, shows that the standards of review do not influence reversal rates at large, but reflect the understanding about certain types of institutions in particular case. Dobbins (n 381). p.205
[384] Davis (n 379). p.475
[385] ibid. p.476
[386] ibid. p.480
[387] ibid. p.481

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- no review (a complete deference).[388]

Notwithstanding the fact that a deference is a crucial element of standards of review, the concept of deference sometimes is overlooked by scholars and the research is mostly concentrated on specific standards of review without going into discussion of rationale behind the specific level of deference. To this end, it is worth looking into a concept of deference in more details.

Deference

To start with, Black's Law Dictionary defines deference as:

> *"1. Conduct showing respect for somebody or something; courteous or complaisant regard for another.*
>
> *2. A polite and respectful attitude or approach, esp. toward an important person or venerable institution whose action, proposal, opinion, or judgment should be presumptively accepted."*[389]

Gary Lawson and Guy Seidman call this definition as "linguistic rather than legal concept, describing rather old-fashioned courteous social conduct" and propose their understanding of the term of deference as

> *"the discretionary decision by one fully competent agency of government to shift the power to make a decision ("to say what the law is") to another interpretative agent".* [390]

In case the Court gives a full deference to the governmental authority in review of its decision, it means that the governmental authority has a full discretion in adoption the decision. So, the standard of review has two sides of one coin – the intensity of review which corresponds to the degree of deference the Court gives to the governmental authority which function like

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[388] ibid. p.471 Similarly, Kevin Casey et al. differentiate four standards of review: "*de novo review (is the decision right?), clearly erroneous review (is the decision wrong?), review for substantial evidence (is the decision unreasonable?), and review for abuse of discretion (is the decision irrational?)*" See Kevin Casey, Nancy Wright and Jade Camara, 'Standards of Appellate Review in the Federal Circuit: Substance and Semantics' (2001) 11 The Federal Circuit Bar Journal 279. p.283

[389] Bryan A Garner and Henry Campbell Black (eds), *Black's Law Dictionary* (Tenth edition, Thomson Reuters 2014). pp.513-514

[390] Gary Lawson and Guy Seidman, 'Deference and National Courts in the Age of Globalization: Learning, Applying, and Deferring Foreign Law' (2017) 8 Comparative Law Review, University of Perugia. p.5

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less deference means more intensive review. In turn, more deference means less intensive review.

The deference with regard to cases which involve national security of States has to be crafted in a very delicate way. To be sure, national security cases appeal for a broad deference due to various reasons like the expertise of national governmental authorities which are able to recognize threats to national security. In other words, due to the proximity of national authorities, there is a risk that Panels can get the issues wrong. At any rate, national security is the core of state sovereignty and this is why WTO Panels should give a broad deference to States on these matters in order not to infringe on national sovereignty of States. Considering above, in search of a standard of review a flexible standard of review will be researched, which on the one side provides deference to States but on the other side permits Panels to prevent abusive use of the security exception by States.

Standard of review in WTO law

The definition of a standard of review in WTO law has no substantive difference with definition in national legal systems. In WTO law the standard of review was aptly defined by Jan Bohanes and Nicolas Lockhart as:

> *"…the degree of deference or discretion that the court accords to legislators and regulators; or, looked at from the other perspective, the degree of intrusiveness or invasiveness into the legislator's or regulator's decision-making process."*[391]

[391] Jan Bohanes and Nicolas Lockhart, 'Standard of Review in WTO Law' in DL Bethlehem (ed), *The Oxford handbook of international trade law* (Oxford University Press 2009). p.2

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Whereas the standard of review in WTO law is extensively addressed by scholars,[392] the concept of standard of review as such is absent in WTO Agreements.[393] In this regard some scholars claim that standard of review is a rhetorical device:

> "'*standards of review' have little proper formal place in the wider body of WTO law beyond trade remedies. Standards of review may serve well informally as values to release the tensions associated with commitment to a highly effective multilateral trade system requiring the surrender of full sovereign control over national policies in sensitive areas, but they are essentially, and should remain, chiefly rhetorical devices.*"[394]

When discussing a standard of review in WTO law the reference is always made to Article 11 of the DSU. In particular, the relevant part of Article 11 of the DSU says:

> *"…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, …"*[395]

As is seen, Article 11 DSU refers to the "objective assessment" which evokes a sense of fairness and even-handedness of Panels rather than deference or intrusiveness. What is more, an "objective assessment" could be present in any standard of review and applied to any level

[392] For example, the first article to discuss a standard of review in WTO law was by Steven P Croley and John H Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments' (1996) 90 The American Journal of International Law 193. Then Matthias Oesch devoted an entire book to the standard of review in WTO law. See Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (Oxford University Press 2003) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199268924.001.0001/acprof-9780199268924> accessed 4 July 2018. In addition, Ross Becroft also published a book on the standard of review in 2012. See Ross Becroft, The Standard of Review in WTO Dispute Settlement (Edward Elgar Publishing, 2012), https://doi.org/10.4337/9781781002247 . Other scholarship includes Andrew Guzman, 'Determining the Appropriate Standard of Review in WTO Dispute Resolution' (2009) 42 Cornell Journal of International Law 45. and Stefan Zleptnig, 'The Standard of Review in WTO Law – An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority' [2002] European Business Law Review 427.
[393] Notwithstanding its absence in legal texts of the GATT 1994, the discussion of the standard of review was a highly contentious topic during the Tokyo Round negotiations and "the deal-breaker" during the Uruguay Round Negotiations. Oesch (n 392). p.61 for the Uruguay Round Negotiations see pp.72-77
[394] CE Foster, 'Adjudication, Arbitration and the Turn to Public Law "Standards of Review": Putting the Precautionary Principle in the Crucible' (2012) 3 Journal of International Dispute Settlement 525. p.544
[395] 'Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the WTO Agreement' (n 110).

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of deference.[396] Consequently, Article 11 DSU does not reflect a standard of review in its conventional meaning, but rather provides a guidance as to objective assessment of facts. In this regard the Panel in the *US-Shirts and Blouses* noted:

> *"…although the DSU does not contain any specific reference to standards of review, we consider that Article 11 of the DSU which describes the parameters of the function of panels, is relevant here…"*[397]

Further evidence to the argument that Article 11 DSU does not contain a specific standard of review can be found in the case-law where States appealed the findings of the Panel claiming that the Panel failed to make an objective assessment of facts.[398] The Appellate Body succinctly summarized its approach when assessing whether Panel breached Article 11 of DSU in *EC-Large Civil Craft:*[399]

> *"The Appellate Body has repeatedly emphasized that Article 11 of the DSU requires a panel to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence." Within these parameters, "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings", and panels "are not required to accord to factual evidence of the parties the same meaning and weight as do the parties". In this regard, the Appellate Body has stated that it will not "interfere lightly" with a panel's fact-finding authority, and*

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[396] Jan Bohanes and Nicolas Lockhart, 'Standard of Review in WTO Law' in Daniel Bethlehem and others (eds), *The Oxford handbook of international trade law* (Oxford University Press, Oxford Scholarship Online) <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199231928.001.0001/oxfordhb-9780199231928-e-14>. pp.5-6

[397] *DS33: United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India, Panel Report*. para.7.16

[398] For example, the Appellate Body found that the Panel acted inconsistently with its obligations under Article 11 DSU in *DS437: United States — Countervailing Duty Measures on Certain Products from China, AB Report*. paras. 4.188-4.190 and 4.196. and in *DS479: Russia — Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy, AB Report*. *see* paras. 5.127-5.128. Also the Appellate Body found that the Panel failed to make an objective assessment of facts in *DS353: United States — Measures Affecting Trade in Large Civil Aircraft — Second Complaint, AB Report*. See paras.1143-144

[399] Here the deference given by the Appellate Body to the Panel's decisions comes into play as well but it should not be confused with the standard of review applied by the Panels. The discussion on the standard of review applied by the Appellate Body goes beyond the scope of this thesis.

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> *has also emphasized that it "cannot base a finding of inconsistency under Article 11 simply on the conclusion that {it} might have reached a different factual finding from the one the panel reached". Instead, for a claim under Article 11 to succeed, the Appellate Body must be satisfied that the panel has exceeded its authority as the trier of facts. As an initial trier of facts, a panel must provide "reasoned and adequate explanations and coherent reasoning". It has to base its findings on a sufficient evidentiary basis on the record, may not apply a double standard of proof, and a panel's treatment of the evidence must not "lack even-handedness".*[400]

As could be derived from the passage above, Article 11 DSU deals mostly with the reasoned and adequate explanation rather than with the level of deference, i.e. standard of review. Indeed, there is no specific guidance in WTO Agreements on how much deference Panels should provide to States. A quote by the Appellate Body from *EC-Hormones* is the best illustration in this respect:

> *"the applicable standard is neither de novo review as such, nor "total deference", but rather the "objective assessment of the facts".*[401]

A vague wording above could be attributed to the fact that the Panel should have a flexibility in choosing the level of deference since it might depend on a specific task performed by a Panel and a type of WTO Agreement. In this regard Andrew Lang mentions that the Appellate Body has developed a "jurisprudential style specifically designed to maintain its flexibility and freedom to respond appropriately as the context changes".[402]

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[400] *DS316: European Communities — Measures Affecting Trade in Large Civil Aircraft, Appellate Body Report*.para.1317

[401] *EC-Hormones, AB Report* (n 116). para.117

[402] P.1101 Andrew Lang Judicial Sensibility Andrew Lang, 'The Judicial Sensibility of the WTO Appellate Body' (2016) 27 European Journal of International Law 1095.

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Andrew Guzman explained that different levels of deference serve as a tool to address different situations.[403] To this end, Andrew Guzman considers alternative levels of review in WTO law:

- *de novo* review of questions of law, all relevant factors (formal and substantive review,[404] objective evidence-economic data);
- intermediate review (questions involving judgment and discretion)[405]
- deferential review (science risk and risk assessment -SPS-TBT)
- the special case of the Anti-Dumping Agreement (as discussed above in light of the US Chevron doctrine).[406]

Given the fact that there is a range of various standards of review, the question arises how to choose an appropriate level of deference for each case. Andrew Guzman frames a debate on choosing an appropriate standard of review as a contest between expertise and neutrality. The standard of review born out of this deliberation can make use of the definitions which might fit for the need to respect different policies of various States.[407] Consequently, such approach implies that in cases where it is possible to evaluate relevant facts without expertise of States a more intrusive standard should be applied. In turn, in cases where there is a need for a local expertise, the more deference should be provided for local decision-makers. The dilemma is, though, that if a case fits in the middle of two extremes, it is harder to find the precise point for deference. One could claim that the security exception falls into category of intermediate review since national security issues appeal for a wide deference. At the same time, given the sensitivity of the matters of national security, the standard of review for the security exception might also have "a special case" similarly to the Anti-Dumping Agreement. Another method of looking at different standards of review could be looking at tasks performed by the Panel.

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[403] Along the same lines, Matthias Oesch connects varying stringency of review with a power shift: for example, under *de novo review*, the national authority transfers its power to review to the WTO Panel. Oesch (n 392). pp.23-24

[404]As it was established in the *US-Lamb*, *United States — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand, Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R*. paras.103-104

[405] See paras 129-131 in *Argentina — Safeguard Measures on Imports of Footwear, DS121, Appellate Body Report*.

[406] Guzman (n 392). pp.57-73 The US pays a particular attention as to the standard of review in ADA US General Accounting Office, 'World Trade Organization, Standard of Review and Impact of Trade Remedy Rulings' (2003) Report to the Ranking Minority Member, Committee on Finance, US Senate, <https://www.gao.gov/assets/240/239180.pdf>.

[407] Guzman (n 392). p.54

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Different standards of review depending on tasks performed by the Panel

Standards of review might differ depending on tasks performed by the Panel. The Panel could perform three tasks in its review: legal determination, factual review, and review of domestic law. [408]

First, when Panel makes a review of legal determinations by national authorities in cases like the SPS cases, it applies a *de novo review* to a determination made by national authorities. This strict standard of review derives from different roles attributed to national authorities and WTO Panels.[409] The Appellate Body stated on this in *EC-Hormones*:

> *"In so far as legal questions are concerned…a standard of review not found in the text of the SPS Agreement itself cannot absolve a panel (or the Appellate Body) from the duty to apply the customary rules of interpretation of public international law…"*[410]

To recall, Article 3.2 DSU states that the dispute settlement of the WTO serves "…to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The Appellate Body has confirmed that the relevant customary rules for interpretation are codified in the Vienna Convention on the Law of Treaties (Articles 31 and 32).[411] Thus, the Panel can conduct a *de novo review* of legal determinations made by national authorities and use public international law in its interpretation.

Second, with regard to review of facts, a Panel's standard of review depends on a type of a WTO Agreement. In particular, the process of adoption of a measure under national legislation plays an important role in this regard. For example, in Agreements where there is no prior formal national process before adoption of a measure, a Panel will conduct a *de novo review* as a trier of facts. On the contrary, in Agreements where there is a clear procedure to be followed, a Panel will provide more deference to States. For example, Jan Bohanes and Nicolas Lockhart claim that Article XX of the GATT should be reviewed by a Panel applying a *de novo* review since no one else examined the measures before the Panel. [412]

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[408] Note that this section reviews only the Panel's standards of review since the thesis is primarily concerned with the first stage review, although there are also standards of review for the Appellate Body, see Jan Bohanes and Nicolas Lockhart (n 396). pp.40-50
[409] ibid. p.8
[410] WTO, 'European Communities — Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R' <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm>. para.118
[411] *US-Gasoline, ABR* (n 111). p.17
[412] Jan Bohanes and Nicolas Lockhart (n 396). p.34

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Third, with regard to review of domestic law there is no clear guidance on applicable standard of review. First the question arises whether to treat a domestic law as an issue of law or as an issue of fact. In general, a domestic law is considered as an issue of fact,[413] which means following the same approach as to a standard of review of facts. What is being said, Panels are not experts on domestic law of WTO Members which requires to grant deference to WTO Members.[414] The Panel interpreted this issue in the *US-Section 301 Act case*

> *"…any Member can reasonably expect that considerable deference be given to its views on the meaning of its own law."*[415]

Against this backdrop Jan Bohanes and Nicholas Lockhart claim that a better approach would be to treat the review of municipal law as "weighing and balancing the reliability and credibility of the evidence and the meaning of municipal law".[416]

As it has been shown, standards of review differ depending on the tasks performed by Panel and applied agreements, respectively. In these instances the standard of review plays a procedural role. That being said, we have to understand that standard of review, apart from being a procedural tool during the review of evidence, plays broader functions at the WTO system.

Functions of the standard of review

The functions of a standard of review are multifaceted.[417] First and foremost, as mentioned above, standard of review primary has procedural functions.[418] For instance, Claus-Dieter Ehlermann and Nicolas Lockhart make an example with the "no go areas" as a line for division of powers. They claim that the standard of review defines "no go" areas for judges, within which the decision-maker has the authority to make a choice. On the contrary, beyond "no go" areas –

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[413] To note, that the Appellate Body treated domestic law as "evidence of compliance" and in this context the unique situation arises when the meaning of municipal law is simultaneously a finding of fact and a finding of law. *US-Section 211 Appropriations* Act, the Appellate Body stated "*Our rulings in these previous appeals are clear: the municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations. Under the DSU, a panel may examine the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement. Such an assessment is a legal characterization by a panel. And, therefore, a panel's assessment of municipal law as to its consistency with WTO obligations is subject to appellate review under Article 17.6 of the DSU. United States — Section 211 Omnibus Appropriations Act of 1998, DS176, Appellate Body Report*. para.105

[414] Jan Bohanes and Nicolas Lockhart (n 396). p.36

[415] *DS152: United States — Sections 301–310 of the Trade Act 1974, Panel Report*. para.7.19

[416] Jan Bohanes and Nicolas Lockhart (n 396). p.39

[417] For an extensive discussion of functions of standards of review see Oesch (n 392). pp.23-40.

[418] See Hélène Ruiz Fabri, 'The WTO Appellate Body or Judicial Power Unleashed: Sketches from the Procedural Side of the Story' (2016) 27 European Journal of International Law 1075. p.1078

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the judge has the authority to review the legal validity of the decision.[419] At the same time, there are other scholars who claim that

> "*when we rely on the concept of a 'standard of review', or a margin of appreciation, or the notion of deference, we run the risk of hollowing out rather than strengthening public international law, and the adjudicatory function under public international law*".[420]

Apart from procedural functions, standards of review are believed to perform the following functions at the international level: (1) allocation of power between States and international organizations (2) separation of expertise between courts and national authorities and (3) prompting adoption of consistent decisions.[421]

Allocation of power between States and international organizations

One of the main functions of the standard of review is allocation of power between States and international organizations. Allocation of power in the realm of WTO is crucial due to the sovereignty of States. On this subject John H. Jackson writes that "the standard of review question has become something of a touchstone regarding the relationship of 'sovereignty' concepts to the GATT/WTO rule system".[422]

Panels must be very cautious in choosing too intrusive or too deferential standard of review since it might change the division of power as has been prior agreed by WTO Members. Moreover, applying inappropriate standard of review can violate WTO law and could be later sanctioned by the Appellate Body.[423]

The sovereignty has another side of the coin since States might use it as a "trump card" to claim for more deference from the WTO. In this regard Joel P. Trachtman points out that the standard of review is one of the points of influence by WTO Members over dispute settlement

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[419] CD Ehlermann and Nicolas Lockhart, 'Standard of Review in WTO Law' (2004) 7 Journal of International Economic Law 491. p.493
[420] Foster (n 394). p.558
[421] Valentina Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (Edward Elgar Publishing 2018). p.191
[422] Croley and Jackson (n 392). p.194
[423] Oesch (n 392). p.24

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process.[424] For instance, the United States used the standard of review in anti-dumping cases as one of the reasons in its blocking of the appointment of the WTO Appellate Body Members.[425]

Separation of expertise between courts and States

Standard of review is believed to play a role in the separation of expertise between Panels and national authorities through the concept of subsidiarity. The rationale behind the subsidiarity in the WTO is "that the rules are better applied at a local level due to their proximity to the object of policy-making and expertise".[426] To illustrate, on this point the Appellate Body mentioned that the standard of review applicable to the SPS Agreement "must reflect the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves".[427]

Strive for consistent decisions

The adoption of coherent standards of review is believed to improve the fairness, enhance integrity and predictability of the system.[428] That said, this argument should be treated with a caution since Natalie McNelis showed that two different outcomes in quite similar cases concerning ban on beef products (by the ECJ[429] and the WTO Appellate Body[430]) could not be fully attributed to application of different standards of review. In these two similar cases the ECJ upheld the ban introduced by the European Commission while the Appellate Body struck down the ban. The ECJ applied a "manifest error" standard of review while the WTO Appellate

[424] Joel P Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 Harvard International Law Journal 333. p.345
[425] 'From the Board: The US Attack on the WTO Appellate Body' (2018) 45 Legal Issues of Economic Integration 1. p.6 and on the conundrum of interpretation of Article 17.6 of the ADA see Donald McRae, 'Treaty Interpretation by the WTO Appellate Body: The Conundrum of Article 17(6) of the WTO Antidumping Agreement', *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) <http://www.oxfordscholarship.com/10.1093/acprof:oso/9780199588916.001.0001/acprof-9780199588916-chapter-10>. In this regard recent proposals are coming from scholars in the context of dealing with crisis in the WTO, Robert McDougall, 'Crisis in the WTO. Restoring the WTO Dispute Settlement Function' <https://www.cigionline.org/sites/default/files/documents/Paper%20no.194.pdf>. nd Comparative Law Quarterly 441.
[426] Tomer Broude, 'Selective Subsidiarity and Dialectic Deference in the World Trade Organization' (2016) 79 Law and Contemporary Problems 53. p.69
[427] *EC-Hormones, AB Report* (n 116). para.115
[428] Vadi (n 421).
[429] 'Press Release No.31/98, Judgments of the Court in Cases C-157/96 and C-180/96' <https://curia.europa.eu/en/actu/communiques/cp98/cp9831en.htm>.
[430] *EC-Hormones, AB Report* (n 116).

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Body applied "objective assessment standard". However, the ECJ upheld the EU's ban not simply because its hands were tied by the "manifest error" standard of review, but because of specific relationship between the Court and its institutions. To put it differently, in *EC-Hormones* the WTO Appellate Body, the standard of review did not play a crucial role and even if it had applied "manifest error" as a standard of review, it would have found a ban inconsistent with the WTO obligations.[431]

The contrasting outcomes in similar cases could be instead attributed to the relationship of the judge and the "judged". Natalie McNelis submits that despite of its wording, the actual relationship of the judge and the 'judged' has an impact on the outcome of the case. She explains that the ECJ was judging an act of one of "its sister institutions" - i.e. the Commission. On the contrary, in the *EC-Hormones* case we have the WTO Appellate Body judging the act of one of its Members. To this end, the relationship between the ECJ and the Commission is an "insider-looking-in" while the relationship between the WTO Appellate Body and its Member States is an "outsider-looking-in".[432] That being said, we have to remember that the WTO is not the EU and the comparison should not be taken too far. Namely, the difference between the two systems lies in sovereignty, direct effect of the EU law and a goal of a closer union which are pertinent to the European Union.[433] In light of above, the argument that application of similar standards of review leads to the consistent findings should be taken cautiously given the relationship between the international organization and its Member States.

To sum up, standard of review apart from being a procedural tool, performs broader functions such as allocation of power between WTO and its Member States, separation of expertise between States and the WTO, and finally, has practical implications for consistency of decisions.

Interpretation of the standards of review by Panels and the Appellate Body

[431] N McNelis, 'The Role of the Judge in the EU and WTO. Lessons from the BSE and Hormones Cases' (2001) 4 Journal of International Economic Law 189. p.199
[432] ibid. p.200
[433] ibid. p.205

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US-Wool Shirts

In order to see how the standard of review is dealt with in the WTO case-law, two landmark cases *United States – Wool Shirts* and *EC-Hormones* will be briefly overviewed below.[434]

The United States-Wool Shirts was the first case which dealt with the standard of review.[435] In that case the United States imposed a transitional safeguard measure on imports of woven wool shirts and blouses from India. India brought a case against the United States and claimed that the US safeguard measures had violated the Agreement on Textile and Clothing (the "ATC"). In the course of review the issue of a standard of review arose and the parties expressed their views on that.

India proposed to use good faith standard and objectively review the matter in accordance with Article 11 DSU:

> *"In the view of India, there was no standard of reasonableness foreseen in the ATC and given the highly exceptional character of the ATC's safeguard provisions, it would be legally inadmissible to "import" into the ATC the standard of review included at the request of the United States in the Anti-Dumping Agreement ... The task of the Panel was, consequently, to ascertain whether the United States had carried out its obligations under Article 6 of the ATC in good faith. India was not requesting the Panel to conduct a de novo review of the matter and to replace the United States' determination by its own, but was asking the Panel to objectively assess, in accordance with Article 11 of the DSU, whether the United States had made its determination in accordance with its obligations under Article 6 of the ATC."*[436]

[434] For an overview of other case-law with regard to the standard of review in Article 11 DSU see 'WTO, Analytical Index, DSU-Article 11 (Jurisprudence)' 11 <https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art11_jur.pdf>.
[435] For a short overview of how the standard of review was interpreted see Peter Lichtenbaum, 'Procedural Issues in WTO Dispute Resolution' (1998) 19 Michigan Journal of International Law 1195. pp.1237-1244
[436] *DS33, US-Wool Shirts and Blouses,Report of the Panel* (n 397). para.5.7

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On its part, the United States proposed to use reasonableness and good faith standard for a review of data:

> *"The United States reiterated that the appropriate standard of review was one of reasonableness and good faith examination of the data. The principle of "good faith" application of treaties was relevant, but it was argued that this principle was integral to the standard of reasonableness. One resulted from the other."*[437]

However, in the end the Panel did not address the issue of standard of review explicitly and referred to Article 11 DSU:

> *"We note that the ATC does not establish a standard of review for panels. However, although the DSU does not contain any specific reference to standards of review, we consider that Article 11 of the DSU which describes the parameters of the function of panels is relevant here.*
>
> *Therefore, pursuant to Article 11 of the DSU, the function of this Panel, established pursuant to Article 8.10 of the ATC and Article 6 of the DSU, is limited to making an objective assessment of the facts surrounding the application of the specific restraint by the United States (and contested by India) and of the conformity of such restraint with the relevant WTO agreements."*[438]

As is seen, in *US-Wool Shirts*, the Panel avoided interpretation of the specific standard of review by a mere reference to Article 11 DSU.

EC – Hormones

In *EC-Hormones* the United States brought a case against the European Communities' ("EC") measures prohibiting or restricting imports of meat and meat products from the United

[437] *DS33, US-Wool Shirts and Blouses, Report of the Panel*. para.5.12
[438] *ibid.* paras.7.16, 7.17

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States. The Panel found that the EC ban on imports of these products was inconsistent with certain provisions of the SPS Agreement. [439]

In its appeal, the EC brought up the issue of a standard of review and claimed that the Panel had to adopt a "deferential reasonableness standard". In this regard the EC claimed that the standard of review in Article 17.6 of the Anti-Dumping Agreement "reasonable deference standard of review" had to be applied to all complex factual situations like the present case.[440]

On its part, the United States did not agree with the EC position. The US claimed that the "reasonableness standard of review" was not applicable to the SPS Agreement. Instead, the Panel had to review whether the evidence submitted by the EC as a Member maintaining the measure was "sufficient for maintaining that measure".[441]

As a result, the Appellate Body rejected the EC argument as to the standard of review. The Appellate Body said that WTO Agreements, apart from Article 17.6 of the Anti-Dumping Agreement, did not prescribe a specific standard of review. The Appellate Body then stipulated that Article 11 DSU

> *"…bears directly on this matter and, in effect, articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and legal characterization of such facts under the relevant agreements".*[442]

The Appellate Body went further and clarified that with regard to factual issues, the standard of review was neither "de novo review" nor "total deference", but rather the "objective assessment of the facts."[443] As to the legal issues, Panels must apply the customary rules of interpretation of public international law, and make an "objective assessment of the matter , including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."[444]Accordingly, the Appellate Body rejected the EC argument for a more deferential standard of review and concluded that the Panel did follow the

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[439] For a further discussion on this case see J Pauwelyn, 'The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes. EC - Hormones, Australia - Salmon and Japan - Varietals' (1999) 2 Journal of International Economic Law 641.
[440] *EC-Hormones, AB Report* (n 116). paras.14-15
[441] *ibid.* paras.41-42
[442] *ibid.* para.116
[443] *ibid.* para.117
[444] *ibid.* para.118

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rules under Article 11 DSU and there was no "egregious error that calls into question the good faith of the panel". [445]

The precise standard of review was left unaddressed by the Appellate Body in this case as well. For example, Axel Desmedt claims that the actual findings in the case remind a general remark on the standard of review which means that deference is not excluded.[446] The crux of the unresolved issue, i.e., how much deference, was succinctly summarized by Peter Lichtenbaum:

> *"…There is a wide spectrum of possible standards of review, varying from de novo review at one end to "total deference" at the other. The Appellate Body's decision in EC-Beef Hormones narrows the spectrum somewhat by holding that panels are not required to defer to any "reasonable" factual finding, but significant uncertainty still remains regarding the appropriate standard of review."* [447]

The issue of a proper standard of review in SPS Agreement also came up in other cases later, e.g. *Australia-Apples* and *US-Continued Suspension*, although without further clarifications.[448]

To sum up, WTO Panels and the Appellate Body did not clarify the definition of a standard of review by claiming that it is neither "*de novo review*" nor "*total deference*". The crux of the matter remains to be unanswered – how much deference should be provided by Panel to national authorities in a specific case. As mentioned above, the national security matters require a wide level of deference and at the same time States should not be left with a full discretion in order to prevent the abuse of security exception. It is hard to state a precise level of deference which would be optimal for review of security exception. The one thing is clear that it should not be a total deference or a *de novo review*. The deference must be at the level which allows States a space to adopt measures for protection of national security and at the same time prevents a disguised use of the security exception for other reasons. By abuse

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[445] *ibid.* para.133
[446] G Desmedt, 'Hormones: "objective Assessment" and (or as) Standard of Review' (1998) 1 Journal of International Economic Law 695. p.698
[447] Lichtenbaum (n 435).
[448] Jacqueline Peel, 'Of Apples and Oranges (and Hormones in Beef): Science and the Standard of Review in WTO Disputes under the SPS Agreement' (2012) 61 International and Comparative Law Quarterly 427.

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here is meant the invocation of the security exception for justification of the measures which are adopted for reasons other than national security.

On this note Tsai-fang Chen states that there is no universal threshold of judicial intervention, i.e., each provision should be provided a different level of margin of discretion.[449] Tsai-fang Chen claims that in order to determine the appropriate standard of review, a Panel should first determine whether *de novo* review should be excluded. In the case the de novo review is excluded the review should be conducted as to (i) the "essential security interests" and (ii) the timing element ("in time of war or other emergency in international relations"). The standards of review are different for these elements: an abuse of discretion (*abus de droit*) for necessity of protection of "essential security interests" and a full review for the timing element.[450]

Similarly, Zhu Wang points out that "*The history and interpretations of the Article XXI exception indicates a standard of review that waivers somewhere between highly deferential to non-justiciable.*"[451]

As is seen, in one way or another there is an appeal for different levels of deference, i.e. to various standards of review. In this regard the next section will review different standards of review along with general principles of law which are used for review.

Overview of various standards of review

Having in mind reasons for an optimal level of deference discussed above, the present section will examine the standards which are used in review. First it has to be noted that the line is blurred between standards of review per se and general principles of law which are used for review as well.

Panels refer to general principles of law as developed by other tribunals in their review. As far as the WTO dispute settlement is concerned, from the perspective of inherent powers,[452]

[449] Tsai-fang Chen, 'To Judge the Self-Judging Security Exception under the GATT 1994 - A Systematic Approach Special Issue: Trump's Trade Policy: Legal Assessment of Trump's Certain Trade and Economic Approaches' (2017) 12 Asian Journal of WTO and International Health Law and Policy 311. Although the proposal by T.Chen claiming that Article 11 DSU should be followed by Member States when adopting a decision seems to be misplaced – normally it is addressed to Panels instead of Member States.
[450] ibid. pp.341-345
[451] Zhu (Judy) Wang, 'CFIUS under Review: National Security Review in the US and the WTO' [2016] Journal of World Trade 193. p.216
[452] As stated by Andrew Mitchell and David Heaton, inherent jurisdiction in international law, "*recognizes the practical needs of an international dispute settlement system by giving an international tribunal the powers it*

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general principles of law that are not included in any WTO-covered agreement can be considered in WTO disputes within the meaning of Article 38 (1) (c) of the ICJ Statute.[453] In this regard Andrew Mitchell and David Heaton note that inherent jurisdiction allows WTO Panels to apply international law rules which are (i) necessary for Panels to exercise their adjudicatory function, (ii) the rule in question does not have a content itself and (iii) the application is consistent with WTO covered agreements.[454]

The principle that Panels and the Appellate Body are allowed to refer to and apply any source of international law, not only the WTO covered agreements, finds its confirmation in a number of panel and Appellate Body reports. The Appellate Body sets the tone in its first report *US—Reformulated Gasoline*:

> *"That direction [to apply customary rules of interpretation in order to clarify the covered agreements] reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law."*[455]

This statement has formed the starting point and general justification for frequent references to public international law rules and principles in many Panels and Appellate Body reports.[456] Therefore, it is generally agreed that Panels and the Appellate Body are granted competence to interpret by use of international law other than WTO provisions in order to properly apply WTO law. Joost Pauwelyn summarizes the current practice succinctly as follows: "The jurisdiction of WTO panels is limited. The applicable law before them is not."[457]

One could list the following general principles of law which are used by international tribunals in their review of measures as substantive requirements: good faith and its particularisations such as abuse of rights, clean hands doctrine and reasonableness. Moreover, international tribunals use the concept of margin of appreciation which is essentially the tool

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needs to discharge its judicial function" Andrew D Mitchell and David Heaton, 'The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function' (2010) 31 Michigan Journal of International Law 559. p.562

[453] To note, Son Tan Nguyen discussed general principles of law from perspective of inherent powers rather than explicit treaty language. Son Tan Nguyen, 'The Applicability of Comity and Abuse of Rights in World Trade Organisation Dispute Settlement' (2016) 35 University of Tasmania Law Review 95.

[454] Mitchell and Heaton (n 452). p.563

[455] *US-Gasoline, ABR* (n 111). p.17

[456] Oesch (n 392). p.209

[457] Pauwelyn, *Conflict of Norms in Public International Law* (n 117).p.299

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for providing a deference to States. In order to see whether some of them could be indeed suitable for review of the security exception, the analysis will follow below.

National margin of appreciation

Origin and content

National margin of appreciation is widely referred to by different tribunals in review of State actions so that some scholars even discussed it as a general doctrine of international law.[458] At the outset, the difference between the terms "national margin of appreciation" ("NMA") and "margin of appreciation" should be clarified. Saïda El Boudouhi has rightly pointed out that the "margin of appreciation" is a concept similar to discretion or leeway and is available for any entity, judge or State when interpreting indeterminate norms and therefore refers to a margin of appreciation in a broader sense. The "national margin of appreciation", on the contrary, is a doctrine that allows for discretion available to States before an international tribunal. Hence, a doctrine of the national margin of appreciation refers to the margin of appreciation *stricto sensu*.[459]

Since this thesis deals with the margin of appreciation which might be accorded by a WTO Panel to States under GATT Article XXI, it will refer to the doctrine of the margin of appreciation and therefore to the term "national margin of appreciation".[460] For example, the EU in its third party written submission in *Russia – Measures Concerning Traffic in Transit* submits that "Article XXI of GATT 1994, and in particular Article XXI (b) accords in one of the components of its wording a certain margin of discretion to the invoking Member […]". As

[458] This part is partly based on the article, published by the author. See Viktoriia Lapa, 'National Margin of Appreciation as a Standard of Review for Economic Sanctions: In Search of the Golden Fleece?' [2017] Italian Yearbook of International Law <https://brill.com/view/title/54225>. Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 European Journal of International Law 907.
[459] Saïda El Boudouhi, 'A Comparative Approach of the National Margin of Appreciation Doctrine Before the ECtHR, Investment Tribunals and WTO Dispute Settlement Bodies' <http://cadmus.eui.eu/bitstream/handle/1814/35660/RSCAS2015_27.pdf?sequence=1&isAllowed=y>. p.1
[460] There is also another view by Jean-Pierre Cot, who differentiates between the margin of appreciation as a doctrine and as a standard of review. In his view, a standard of review implies a degree of review and a doctrine reflects the degree of flexibility in international law. If compared with Saïda El Boudouhi's view, it seems that Jean-Pierre Cot's margin of appreciation as a doctrine corresponds to Saïda El Boudouhi's notion of margin of appreciation as a concept. In turn, Cot's margin of appreciation as a standard of review corresponds to Saïda El Boudouhi's view of NMA as a doctrine where the Court gives flexibility for States. Jean-Pierre Cot, 'Margin of Appreciation', *Max Planck Encyclopedia of Public International Law* (2007) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1438?rskey=YoxVF6&result=3&prd=EPIL>.

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has been seen, the EU refers to the margin of appreciation as leeway which is given to its member states deciding what measures under Article XXI they can impose.

To fully grasp the nature of the NMA, one should not lose sight of its origins. As argued by Meinhard Hilf and Tim Salomon "ancestry will regularly be able to provide guidance […]".[461] It is common knowledge that the concept of NMA has its origins in national legal systems.[462] For example, at national level the doctrine was used in French jurisprudence as "*marge d'appreciation*" as well as in administrative law in civil law countries.[463] At the supranational level, the national margin of appreciation was mainly developed and used by the ECHR, notwithstanding the fact that it was not mentioned anywhere in the European Convention on Human Rights (ECHR). In this regard the ECHR could be considered as a native realm for the NMA. Though this thesis does not analyse the use of NMA by the ECtHR,[464] its native area will be useful for description of its content.

Given the fact that the NMA has no basis in the legal norm[465] and was constructed through case-law, it has no clear definition. There are numerous descriptions of the concept, ranging from freedom to act and elbow room, to latitude that the government enjoys in applying treaties, to room for manoeuvre and area of discretion. The common point in all definitions of the NMA is the deference which is given to states by the Court.[466] As Jan Kratochvil clarifies,

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[461] Meinhard Hilf and Tim René Salomon, 'Margin of Appreciation Revisited: The Balancing Pole of Multilevel Governance' in Marise Cremona and others (eds), *Reflections on the Constitutionalisation of International Economic Law* (Brill 2013) <https://brill.com/view/title/21644>. p.49

[462] For the common law discussion on judicial deference see Richard Clayton, 'Principles for Judicial Deference' [2006] Judicial Review 109.

[463] More on this in Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002).

[464] As to the national margin of appreciation by the ECtHR, see, for example, Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe Publishing 2000).;Oddný Mjöll Arnardóttir, 'Rethinking the Two Margins of Appreciation' (2016) 12 European Constitutional Law Review 27.

[465] Although it is implemented in Article 1 of Protocol No. 15 of 24 June 2013, it is not ratified by all Members of the Council of Europe. The Protocol is available at <Council of Europe, 'Protocol No. 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms'. >. As of 05 March 2018, 41 Members of the Council of Europe acceded/ratified the Protocol. The status is available at: <'Chart of Signatures and Ratifications of Treaty 213, Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms' <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=TL0w5vIR>. >.

[466] For a recent critique of deference employed by margin of appreciation see Clare Ryan, 'Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights' (2018) 56 Columbia Journal of Transnational Law 467. On the contrary, some scholars addressed the critique of the margin of appreciation Dominic McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee' (2016) 65 International and Comparative Law Quarterly 21.

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> *"…the Court, to a certain degree, defers to States in assessing, inter alia, whether the measure was proportionate, whether there was a pressing social need, whether the right balance was struck between competing interests, and whether the factual circumstances fall within a definition in the Convention"*.[467]

Notwithstanding its broad nature, the doctrine has some distinguishable features. For example, it grants discretion to States that depends on the level of consensus among States, on significance of the right at stake for society and the individual, and on particular facts of the case.[468] Since the width of the NMA varies, the European consensus is used by the ECtHR to justify the width of the margin of appreciation.[469] Still, the ECtHR has never provided a definition of what it concretely understands as "consensus".[470]

There have been attempts by scholars to delineate the elements of the national margin of appreciation,[471] although their work has not led to delineating precise elements. Even some ECtHR judges agree that its nature is vague, acknowledging that the limits of the margin of appreciation are incapable of an abstract definition.[472] One could claim that the margin of appreciation is "context-dependent" and its limits can be drawn only within a specific case.[473] In one way or another, the frames of margin of appreciation are not clear. Indeed, Meinhard Hilf and Tim Salomon argue that "it would be desirable to find … at least abstract rules on the use of margin of appreciation".[474]

The abstract shape of the NMA enables some scholars to claim that "it is not an independent standard of review but a variation of a unique 'reasonableness' – or proportionality

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[467] Jan Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 Netherlands Quarterly of Human Rights 324. p.330

[468] Matthias Goldmann and Mona Sonnen, 'Soft Authority Against Hard Cases of Racially Discriminating Speech: Why the CERD Committee Needs a Margin of Appreciation Doctrine' [2016] Goettingen Jounral of International Law 131. p.145

[469] Kanstantsin Dzehtsiarou, 'European Consensus: A Way of Reasoning' [2009] SSRN Electronic Journal <http://www.ssrn.com/abstract=1411063> accessed 1 October 2018.

[470] Daniel Regan, 'European Consensus': A Worthy Endeavor for The European Court of Human Rights?' (2011) 14 Trinity College Law Review 51. p.53

[471] For discussion on content of the margin of appreciation, for example, see Matthew Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' [2015] Human Rights Law Review ngv027.

[472] For instance, Bernhardt, "Thoughts on the Interpretation of Human-Rights Treaties", in Franz Matscher, Gérard J Wiarda and Herbert Petzold (eds), *Protecting human rights: the European dimension: studies in honour of Gérard J. Wiarda = Protection des droits de l'homme: la dimension européenne* (Heymanns 1988). P.65

[473] Nicholas Lavender, 'The Problem of the Margin of Appreciation' (1997) 2 European Human Rights Law Review. p. 382.

[474] Hilf and Salomon (n 461). p.48

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– a standard of review the application of which depends on the facts of each case”.[475] Against this background Julian Arato goes so far to claim that the margin of appreciation does not embody a particular standard of review. He claims that

> *“…the margin of appreciation is essentially contentless. And indeed, as constructed by the ECtHR, the doctrine is contentless by design”.*[476]

While at first sight it seems that margin of appreciation has a substance, at the end it appears to be not more than a reflection of deference which courts provide to States. Indeed, since there is no precise content of review, the NMA has been criticised for being the “very cause” of incoherence of judgment.[477] To this end Jeffrey Brauch goes even further by stating that the Court “must abandon the margin of appreciation” and use other tools, available under the Vienna Convention and failure to do so “will threaten the rule of law itself”.[478]

The abstract nature of the NMA makes it hard to transplant it to other areas of law. For example, Giovanni Zarra points precisely to this problem by stating that authors who support the use of the margin of appreciation outside of the ECHR context never discuss the possibility of applying its features as technically developed by the ECtHR.[479]

The relevance of the NMA for review of the GATT security exception can be drawn from the fact that its use within the ECHR emerged in cases concerned with the possibility of derogating from some obligations under the ECHR in time of “public emergency threatening the life of nation” under ECHR Article 15. This point holds true for GATT Article XXI as well: it can be invoked “in time of war or other emergency in international relations”. Nonetheless, there are certain differences crucial for application of the NMA. To start with, Article 15 of the ECHR mentions the proportionality of the measures, i.e. that their extent is “strictly required by the exigencies of the situation”. What is more, the ECHR imposes a general condition (“the compliance with other obligations under international law”) and a general limit (i.e. non-violation of an untouchable core of individual rights, e.g.: right to life, except as a result of

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[475] See El Boudouhi (n 459). p. 5.
[476] Julian Arato, ‘The Margin of Appreciation in International Investment Law’ (2014) 54 Virginia Journal of International Law 545. p.558.
[477] Michael R Hutchinson, ‘The Margin of Appreciation Doctrine in the European Court of Human Rights’ (1999) 48 International and Comparative Law Quarterly 638.
[478] Brauch Jeffrey A., ‘The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law’ (2005) 11 Columbia Journal of European Law.
[479] Giovanni Zarra, ‘Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of Philip Morris v. Uruguay’ (2017) 14 Revista de Direito Internacional <https://www.publicacoes.uniceub.br/rdi/article/view/4624> accessed 1 November 2018.p.113

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lawful acts of war; or the right not to be tortured).[480] Apart from that, there is an obligation to notify the Secretary General of the Council of Europe stemming from the paragraph 3 of Article 15 of the ECHR. Yet, in GATT Article XXI there is no requirement for the proportionality of the measures and no explicit limit to the measures. The notification requirement is mentioned in the Decision Concerning Article XXI of 1982 and not in GATT Article XXI itself; moreover, such notification provides only a partial obligation with regard to the notification – referring to the exception mentioned in Article XXI: (a).[481] The upshot is that the ECHR contains more safeguards in the derogatory clause against its misuse. Use of the NMA in the context of Article 15 of the ECHR is possible since its contours are delimited by the provision itself. On the contrary, use of the NMA within the GATT security exception framework leads to confusion and unpredictability since there are no safeguards in the article itself.

The question of the difference between the derogatory clauses in the ECHR and WTO law boils down to the difference of the regimes as such. For example, in this regard Saïda El Boudouhi refers to the political and structural differences between the ECHR and the WTO which preclude importing the NMA standard by the respective tribunals.[482]

Dominik Eisenhut refers to the use of the margin of appreciation in review of the element of "necessary" in security exceptions (not self-judging). On the contrary, in self-judging "it considers" security exceptions he proposes to limit judicial review to their application in good faith.[483]

National margin of appreciation beyond the ECHR

Due to its universality and flexibility the NMA has been referred to by other international courts.[484]For example, in public international law the margin of appreciation doctrine was expressly invoked before the ICJ by Japan in its dispute with Australia.[485] To recall, in the *Whaling in the Antarctic* Japan claimed that it had competence to issue a special permit to kill, take and treat whales for the purpose of scientific research under Article VIII, para. 1, of the

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[480] Ester Herlin Karnell and Massimo Fichera, 'The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?' (2013) 19 European Public Law. p.779.
[481] 'Decision Concerning Article XXI of the General Agreement, L/5426' (n 224).
[482] See 'Decision Concerning Article XXI of the General Agreement, L/5426' (n 205). P.17
[483] Dominik Eisenhut, 'Sovereignty, National Security and International Treaty Law. The Standard of Review of International Courts and Tribunals with Regard to "Security Exceptions"' (2010) 48 Archiv des Völkerrechts 431. p.465
[484] Although most of the time the courts use the term "margin of appreciation" instead of "national margin of appreciation", from the substantive point of view they seem to discuss the "national margin of appreciation" as doctrine. The same applies to use of "margin of appreciation" by some scholars.
[485] *Whaling in the Antarctic, Japan v Australia: New Zealand intervening* (ICJ). p.226

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International Convention for the Regulation of Whaling (ICRW). Japan based its defence on the "margin of appreciation" and claimed that it provides to every state party of that Convention the discretion to determine the meaning of the notion of "scientific research" and the activities related to that purpose. Conversely, Australia and New Zealand opposed the use of the margin of appreciation and stressed that the ICJ should avoid "importing" the doctrine of "margin of appreciation" and should "only rely on its own principles of interpretation and application".[486] The Court in its judgment did not use the "margin of appreciation" for review of the measures imposed by Japan, and instead used "an objective one" standard of review.[487] Enzo Cannizzaro commented that the Court had tacitly dismissed the margin of appreciation doctrine as having a general scope, but had given it a narrower role.[488]

Another example of application of the NMA could be drawn from investment arbitration cases. In *Philip Morris v. Uruguay*, Philip Morris challenged the two tobacco-control measures enacted by the Uruguayan government for the purpose of protecting public health. Such measures consisted of a "single presentation" requirement[489] and an increase in the size of health warnings on cigarette packaging from 50 to 80% of the lower part of each of the main sides of a cigarette package. The claimants argued, among other things, that the measures were unfair and inequitable. The tribunal upheld the legality of both measures. In rejecting the argument that the challenged measures were arbitrary, the majority of the tribunal considered that the "margin of appreciation" as developed in the jurisprudence of the ECtHR applied equally to disputes arising under BITs, and that tribunals "*should pay great deference to governmental judgments of national needs*".[490]

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[486] Theodore Christakis "The 'Margin of Appreciation' in the Use of Exemptions in International Law: Comparing the ICJ Whaling Judgment and the Case Law of the ECtHR", in M Fitzmaurice, Dai Tamada and Kōbe Daigaku (eds), *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment* (Brill Nijhoff 2016). pp.139-159

[487] See *Whaling in the Antarctic* (n 485). paras.67-68

[488] In his article Enzo Cannizzaro develops an argument that the margin of appreciation might come as a part of assessment of proportionality: Enzo Cannizzaro, 'Proportionality and Margin of Appreciation in the Whaling Case: Reconciling Antithetical Doctrines?' (2016) 27 European Journal of International Law 1061.

[489] Meaning that tobacco manufacturers may not produce more than one variant of a single brand family of cigarettes.

[490] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay, Case No ARB/10/7*. Award of 8 July 2016, para. 85 (emphasis added).

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However, Arbitrator Gary Born in his dissenting opinion rejected applicability of the margin of appreciation[491] in the BIT context and stated that the single presentation requirement breached the FET standard,[492] being arbitrary and irrational. In particular, he mentioned:

> *"The reasons that led to acceptance of the 'margin of appreciation' in the context of the ECHR are not necessarily transferable to other contexts, including specifically to a BIT between Switzerland and Uruguay. Rather, just as the meaning of Article 3(2)'s 'fair and equitable' treatment guarantee must be determined by interpretation of the BIT, so the standard of review and degree of deference to state regulatory and legislative judgments must be determined by interpretation of the BIT, not of the ECHR and decisions interpreting that instrument international courts which have addressed the issue."*[493]

As is seen, opinions as to the use of the margin of appreciation differ among arbitrators and it comes as no surprise that views of scholars also vary. While some scholars like William Burke-White and Andreas von Staden support the use of the margin of appreciation "as the most appropriate standard for resolution of public-law-type disputes,"[494] others call it "an aberration in international law" and claim that it has in fact diminished in importance in international law.[495] For example, Kassi Tallent claims that the use of NMA is inappropriate

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[491] However, Gary Born mentioned that there is only one award which appears to have adopted a "margin of appreciation" based upon ECtHR jurisprudence: *Continental Casualty v. Argentina*, where the was an express mention of the "public order" and "essential security interests". See para. 188 Gary Born, 'Concurring and Dissenting Opinion Mr. Gary Born, Arbitrator, Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay, ICSID Case No. ARB/10/7' <https://www.italaw.com/sites/default/files/case-documents/italaw7428.pdf>.

[492] Fair and equitable standard is intended to protect investors against serious instances of arbitrary, discriminatory or abusive conduct by host States.

[493] See Born (n 491). para. 185.

[494] William Burke-White and Andreas von Staden, 'The Need for Public Law Standards of Review in Investor-State Arbitrations' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199589104.001.0001/acprof-9780199589104-chapter-22> accessed 3 November 2018. p.719

[495] Erik Bjorge, "Been There, Done That: The Margin of Appreciation and International Law," *Cambridge Journal of International and Comparative Law* 4, no. 1 (2015): 181–90, https://doi.org/10.7574/cjicl.04.01.181. P.181

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and "it would restrict a full review of state measures".[496] In line with this, Julian Arato also argues that:

> *"... the import of the margin of appreciation into international investment law does active harm. Absent institutional centralization, the invocation of this open-ended doctrine tends to obstruct that process of dialogue essential to working out a more consistent approach to the standard of review over time."*[497]

Giovanni Zarra, while discussing the margin of appreciation in the international investment law, calls recourse to it "inappropriate" and "useless" as deference to Sates might be achieved by applying proportionality principle.[498] Along these lines, Andreas Follesdal, when discussing the margin of appreciation, seems not to encourage its use in trade and investment courts by saying that in these areas each State has more at risk. He even points out the fact that the doctrine first should be far more precisely defined to be adopted by other international courts and tribunals.[499] On the same note, Jose Alvarez and Kathryn Khamsi state that the problems of the margin of appreciation doctrine itself, different goals of the investment regime and the ECHR regime and the risk of duplicating already-present forms of balancing are solid reasons to not import the margin of appreciation for interpretation of Article XI of the US-Argentina BIT (the security exception provision).[500]

NMA in the WTO case-law

The NMA has not been widely used by WTO Panels, apart from episodic references by arbitrators in the *EC-Bananas* case where the arbitrators mentioned that the wording "if that party considers", leaves "a certain margin of appreciation to the complaining party concerned in arriving at conclusions in respect of an evaluation of certain factual elements ...".[501] In

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[496] Kassi D Tallent, 'The Tractor in the Jungle: Why Investment Arbitration Tribunals Should Reject A Margin of Appreciation Doctrine' (2010) 3 Investment Treaty Arbitration and International Law. p.135.
[497] See Arato (n 476). p.578.
[498] See Zarra (n 479). p.108
[499] Andreas Follesdal, 'Appreciating the Margin of Appreciation' in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press 2018) <http://www.oxfordscholarship.com/10.1093/oso/9780198713258.001.0001/oso-9780198713258>.
[500] José E Alvarez and Kathryn Khamsi, 'The Argentine Crisis and Foreign Investors - A Glimpse into the Heart of the Investment Regime' in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2008-2009* (2009).
[501] See *European Communities — Regime for the Importation, Sale and Distribution of Bananas, Recourse to Arbitration by the European Communities under Article 22.6 DSU,WT/DS27/ARB/ECU* (n 242). para.52

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essence, Panels or arbitrators refer to the margin of appreciation to say that the States have some discretion, but not as a standard of review.

NMA for review of the security exception?

Coming back to the NMA for the review of the security exception, one might test whether it can be useful: (i) to review measures that a State has taken and their necessity (ii) to review whether such measures have been taken in time of "war" or "other emergency in international relations". The "margin of appreciation" of the State is wider in the first case with regard to the choice of measures it can take and their necessity due to the "any measures it considers necessary" wording. The review of necessity, notwithstanding the wording "it considers", is still possible and some scholars claim that it could be exercised under the proportionality or good faith test.[502] There is also a view that "necessity" is a "self-judging" element, taking into account the difference between GATT Article XX and Article XXI.[503] In the second case the State has the discretion to decide whether it is a situation of "war or other emergency in international relations". In this regard the Panel has a wide margin for review since delineation of the situations of emergency and war could be defined at the international level any time by referring to the contemporary documents of international organisations like the UN.[504] Nonetheless, the question of the substance of review remains open since the precise framework of the NMA is not established yet. Hence, it seems that the national margin of appreciation simply stands for the concept of deference in both cases. The misleading nature of the NMA has been noticed by Julia Möllenhoff, who noted that the

> *"… reference to the margin of appreciation is often misleading … and it is necessary to uncover the underlying criteria which determine the ECtHR's assessment instead of focusing on the 'margin of appreciation' alone"*.[505]

Yuval Shany, on the contrary, supports the use of NMA and claims that the doctrine serves for those norms that are "intrinsically uncertain or consciously sacrifice legal certainty

[502] The proportionality along with other standards/principles of review in this regard was discussed by Schill and Briese (n 231). p.108.
[503] Akande and Williams (n 212). p. 387.
[504] ibid. p. 400.
[505] Julia Möllenhoff, 'Framing the "public Morals" Exception after EC - Seal Products with Insights from the ECTHR and the GATT National Security Exception' 72 p. p.22

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for pluralism (standard-type norms, discretionary norms and result-oriented norms)".[506] Against this background, the GATT security exception, by having the "it considers" wording, falls within the discretionary type of norms. It seems that combined, the vagueness of the NMA doctrine and the discretionary character of the security exception might bring even more confusion. Cora Feingold develops this line of thought by arguing that

> "*perhaps the reliance on the doctrine represents a politically motivated choice of action by a Commission and Court …*".[507]

To conclude, the NMA, while being flexible, remains very vague in terms of content and rather is Europe-centered. Indeed, Gary Born in *Philip Morris v Uruguay* was on solid grounds to suggest that the rationales offered for the margin of appreciation as a term of European law are geographically and temporally specific.[508] The vagueness of the NMA means it is of no use in clarifying application of the security exception. The orientation of the ECtHR towards the European consensus complicates the use of NMA in the WTO system since there is no similar consensus within the WTO system. These traits combined make it hard to transpose this doctrine into other systems. That being said, it does not mean that the tribunals other than ECtHR do not recourse to the NMA.

As is shown above, international tribunals use the NMA as a tool to provide deference to State authorities in adoption of measures. Consequently, one could claim that NMA represents nothing else but the deference given by international courts and tribunals to State authorities. While there is a need for deference in review of the national security measures, the standard of review should not be contentless. Since the NMA is contentless by its design, it would not be helpful for review of the security exception of the GATT. Moving further, it is worth looking at other general principles of law to see whether they can be suitable for the review of the security exceptions.

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[506] Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (n 458). p.939
[507] Cora S Feingold, 'Doctrine of Margin of Appreciation and the European Convention on Human Rights' (1977) 53 Notre Dame Law Review 90. p.106
[508] See Born (n 491)., para. 85

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Good faith

General principle of international law

Good faith is a basic principle of international law, which underpins many international legal rules.[509] Notwithstanding its wide use, a definition of good faith remains obscure. [510] As mentioned by Bin Cheng, "…what exactly this principle implies is perhaps difficult to define… [it] can be illustrated."[511] However, certain characteristics of good faith could be delineated. For example, Robert Kolb distinguished three aspects of good faith as a general principle of international law: protection of legitimate expectations of treaty parties; prohibition of abuse of rights and non-loyal conduct.[512] In the same vein, good faith can be expressed through various obligations, e.g., to settle disputes in good faith, to negotiate in good faith, to fulfil obligations in good faith, or to exercise rights in good faith.[513] Similarly, Andreas Ziegler and Jorun Baumgartner posit following concretizations of good faith: legitimate expectations, *pacta sunt servanda*, estoppel, acquiescence, equity, clean hands and abuse of rights.[514] Thus, good faith could be explained through its various notions. For example, one of the main manifestations of the principle of good faith is the requirement to perform treaties in good faith which arises out of Article 26 of the Vienna Convention on the Law of Treaties and states that *"…every treaty in force is binding upon the parties to it and must be performed by them in good faith."*[515] One

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[509] ICJ referred to a good faith in Nuclear Tests case as: *"One of the basic principles governing the creation and performance of legal obligations, whatever their source, …." Nuclear Tests Case (Australia v France), Judgement* [1974] ICJ Rep 253. para.46 Good faith as a principle of international law was extensively discussed elsewhere See, for example, Steven Reinhold, 'Good Faith in International Law' [2013] UCL Journal of Law and Jurisprudence 40. Robert Kolb, *Good Faith in International Law* (Hart Publishing 2017). Markus Kotzur, 'Good Faith (Bona Fide)', *Max Planck Encyclopedia of Public International Law* (2009) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1412>. JF O'Connor, *Good Faith in International Law* (Dartmouth 1991).

[510] In this regard Markus Kotzur claimed that an abstract nature of a principle of good faith can have a risk of a judicial activism, however, it is hard to define obligations of international actors in a formalistic manner See Kotzur (n 509).

[511] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Steven & Sons Limited 1953). p.105

[512] Robert Kolb, 'Principles as Sources of International Law (With Special Reference to Good Faith)' (2006) 53 Netherlands International Law Review 1. pp.17-18

[513] Andrew D Mitchell, *Legal Principles in WTO Disputes* (Cambridge University Press 2008) <http://ebooks.cambridge.org/ref/id/CBO9780511674556> accessed 25 June 2018. p.345

[514] Andreas R Ziegler and Jorun Baumgartner, 'Good Faith as a General Principle of (International) Law' in Andrew D Mitchell, M Sornarajah and Tania Voon (eds), *Good Faith and International Economic Law* (Oxford University Press 2015) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198739791.001.0001/acprof-9780198739791-chapter-2> accessed 22 September 2018.

[515] 'Vienna Convention on the Law of Treaties (with Annex). Concluded at Vienna on 23 May 1969' (n 112).

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could claim that since exceptions are included in agreements, their invocation and use should be done in good faith as well.

Good faith sometimes is confused with a standard of review, however, given its characteristics, it does not seem to be a standard of review in its conventional meaning. In this regard Andrei Mamolea claims that good faith is treated as a question of fact and when international courts and tribunals decide to examine evidence of bad faith, they apply a *de novo review*. To this end, good faith seems to be a substantive requirement to evaluate the State's intent in establishing a breach rather than a standard of review.[516] Indeed, Andrei Mamolea mentions that good faith does not have different standards of intrusiveness, i.e. standards of review.

Good faith was used in the case-law of investment arbitration tribunals for establishing the breach by a State. For example, in *Neer v United Mexican States* case, the US-Mexico Claims Commission set out "international minimum standard" for the treatment of aliens. In this case the Commission pointed out to the elements which can help to establish the breach. The Commision said that

> *"in order to constitute an international delinquency, the treatment of an alien should amount to an 'outrage', 'bad faith', 'wilful neglect of duty', or to an 'insufficiency of governmental action…that every reasonable and impartial man would readily recognize"*.[517]

As is seen, good faith is aimed at recognition of breach by State. One of the logical steps in discovering State's breach could be establishing whether State's subjective intent is improper. On this point Andrei Mamolea underlined three ways to find that State's subjective intent is improper. Against this backdrop the State intent might be found as improper if (1) it is discriminatory, or (2) it falls outside of permissible intents described in a specific clause of the treaty; or (3) it can be described as arbitrary and unreasonable.[518]

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[516] Andrei Mamolea, 'Good Faith Review' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals* (Oxford University Press 2014) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198716945.001.0001/acprof-9780198716945-chapter-5> accessed 23 July 2018. p.75

[517] Sourgens and Nolan (n 148). p.61

[518] To note, that Andrei Mamolea claims that : "…once a court decides to examine evidence of bad faith, the State is afforded no deference." Mamolea (n 516). p.75

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One could claim that a discriminatory intent is the easiest way to find a bad faith in relation to the national security measures. In order to find a discriminatory intent, the Panel must review the operation of a measure and evidence which lies behind introduction of the measure. One example of the source of evidence might be parliamentary debates, statements of ministers, Presidents or any other governmental authorities involved in adoption of the measure. might be helpful. In *S.D.Myers Inc. v Canada* case the arbitration tribunal found that Canada had discriminated againt foreign owneres taking into account the evidence brought by claimant. In particular, the claimant showed that statements of Canadian ministers made before parliament explaining their policy were intended to protect Canadian industries. For example, the tribunal explicitly referred to the statement of the Canadian Minister for the Environment who mentioned that:

> "*It is still the position of the government that the handling of PCBs should be done in Canada by Canadians"*.[519]

From the statement of the Minister above it is clear that "by Canadians" aims to protect national industry. In light of this evidence, NAFTA tribunal found Canada to be in violation of Article 1105 (1) of the NAFTA Agreement which required a minimum standard of treatment.[520] In sum, in order to find a discriminatory intent, Panels should look for intent of State authorities and agencies.

With regard to the substance of good faith review, some scholars like Frederic Sourgens and Michael Nolan claim that good faith review involves two basic elements: honesty/fair dealing and reasonableness.[521] The element of honesty and fair dealing requires a State to make a subjective decision that its measure was in fact necessary to achieve the objective as stated in the treaty. In other words, it embodies the necessity for a link between the means (measure) and ends (an objective). In turn, the element of reasonableness requires a State to adopt measures

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[519] *SD Myers, Inc v Government of Canada, Partial Award UNCITRAL* (NAFTA tribunal). para.136

[520] *"Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security".* 'North American Free Trade Agreement between Canada, United Mexican States and United States of America' <https://www.italaw.com/sites/default/files/laws/italaw7679.pdf>.

[521] See Judge Keith in his separate opinion in Djibouti v France has added with regard to "honesty-in-fact" that there must have been no extraneous reasons for denial of request. For discussion of good faith as applied by the ICJ in Djibouti v France see Briese and Schill (n 99).

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that have a rational basis and do not frustrate the object and purpose of the treaty. [522] In words of the International Law Commission "…the obligation must not be evaded by a mere literal application of the clauses."[523]

International courts and tribunals used good faith in review of security exceptions. First, the International Court of Justice in *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* has mentioned that good faith obligation as reflected in Article 26 of the Vienna Convention "*obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized*."[524] As is seen, the main focus has been put on application of measures in a reasonable way.

Second, the ICJ referred to good faith in *Djibouti v France.*[525] In short, the case concerned the death of the French judge, which France claimed to have been killed by the Djiboutian authorities. During the criminal investigation, opened by Djibouti, France rejected the Djiboutian request for a legal assistance by reference to Article 2 (c) of the Mutual Assistance Convention between France and Djibouti which stipulated that a judicial assistance

> "*…may be refused [...] if the requested State considers that the execution of the request is likely to impair its sovereignty, security, public policy or other essential interests*."[526]

The Court claimed that the wording "the [requested] State considers" provides discretion to the State, but *" …exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties"*.[527] It went further to explain that such analysis *"… requires it to be shown that the reasons for refusal to execute the letter rogatory fell within those allowed for in Article 2 [of the Mutual Convention]."*[528]

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[522] For an extensive overview of two elements see Otabek Ismailov, 'The Necessity Defense in International Investment Law' (Faculty of Law, University of Ottawa 2017) <https://ruor.uottawa.ca/bitstream/10393/35860/1/Ismailov_Otabek_2017_thesis.pdf>. pp.311-324
[523] International Law Commission, 'Draft Articles on the Law of Treaties with Commentaries' <http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf>. p.211
[524] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ 692. para.142
[525] For a case summary see J Craig Barker, Robert Cryer and Ioannis Kalpouzos, 'International Court of Justice. Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France), Judgement of 4 June 2008' (2010) 59 International and Comparative Law Quarterly 193. For an overview of the fact that the substance of a standard remains unresolved see Schill and Briese (n 231). p.116
[526] "Convention between the Government of the French Republic and the Government of Djibouti Concerning Judicial Assistance in Criminal Matters (Adopted 27 September 1986, Entered into Force 1 August 1992) 1695 UNTS 297." (Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations, 1992), https://treaties.un.org/doc/publication/UNTS/Volume%201695/v1695.pdf. p.304
[527] *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters, Djibouti v France* (ICJ). para.145
[528] *Djibouti v France*. para.145, p.229

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Although the Court did not provide an extensive analysis of elements falling under a good faith review, some clarifications could be drawn from the Separate Opinion of Judge Keith. Judge Keith stated that the reasons given in the refusal to exercise request by the French judge should be considered "against the principles of good faith, abuse of rights and *détournement de pouvoir*" (excess of power).[529] Michael Nolan and Frederic Sourgens in their comments on the decision of the Court mentioned that both the judgement and the Separate Opinion of Judge Keith stated that "*… there must be a showing, not a mere assertion, that the reasons given fall within the scope of the "self-judging" clause*".[530] In other words, the evidence should be provided as to reasons for invocation of an exception.

Third, good faith was used by international investment tribunals in review of security exceptions in BITs in those cases which arose from the Argentinian financial crisis of 2001-2002.[531] The ICSID tribunals interpreted the security exception clause in the US-Argentina BIT (Article XI). Article XI of Argentina-US BIT reads as follows

> "*This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests".* [532]

For example, in *LG&E v Argentina*, the tribunal pointed out that

> *"…were the Tribunal to conclude that the provision is self-judging, Argentina's determination would be subject to a good*

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[529] 'Declaration of Judge Keith, Questions of Mutual Assistance, Djibouti v France' <https://www.icj-cij.org/files/case-related/136/136-20080604-JUD-01-06-EN.pdf>.para.5 p.279 See for discussion on this Sourgens and Nolan (n 148).
[530] Sourgens and Nolan (n 148).
[531] For an extensive overview of good faith in investment arbitration see Emily Sipiorski, *Good Faith in International Investment Arbitration* (1st edition, Oxford University Press 2019).
[532]See 'Argentina - United States of America BIT, Entered into Force 20 October 1994' <http://investmentpolicyhub.unctad.org/Download/TreatyFile/127>. Cases include, for example, *Continental Casualty Company v. the Argentine Republic, Award, ICSID Case No. ARB/03/9* (n 165). para.182, *Sempra Energy International v the Argentine Republic, Award, ICSID Case No ARB/02/16* (ICSID). para.388 and *Enron Corporation and Ponderosa Assets, LP v Argentine Republic, ICSID Case No ARB/01/3, Award, (also known as: Enron Creditors Recovery Corp and Ponderosa Assets, LP v the Argentine Republic)* (ICSID). para.339 For an overview of good faith review in emergency clauses in BITs see also Sourgens and Nolan (n 148). For general discussion on good faith in investment arbitration see Munir Maniruzzaman, "The Concept of Good Faith in International Investment Disputes," *Kluwer Arbitration Blog* (blog), April 30, 2012,http://arbitrationblog.kluwerarbitration.com/2012/04/30/the-concept-of-good-faith-in-international-investment-disputes-the-arbitrators-dilemma-2/. For a discussion of BIT protections in economic crisis see G Sacerdoti, 'BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity' (2013) 28 ICSID Review 351.

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> *faith review anyway, which does not significantly differ from the substantive analysis presented here."*[533]

As is seen, the ICSID tribunal mentioned that good faith would be applicable even in case of self-judging clauses. Similarly, in *Sempra Energy International v Argentina*, in their expert evidence Dean Anne-Marie Slaughter and Professor William Burke-White claimed that even though Article XI of the US-Argentina BIT was self-judging, it was subject to a determination of good faith by tribunals.[534] On the contrary, Professor Jose Alvarez in his opinion in *Sempra* claimed that Article XI is "not either self-judging or subject to a mere *good faith* interpretative test."[535]

Notwithstanding contrasting views of scholars on good faith, it remains attractive for review of security exceptions since it has very vague boundaries which allow to accommodate it for review of different issues. William Burke-White and Andreas Von Staden described good faith review as applied by investment tribunals as

> *"…an extremely lenient standard. It allows states to balance conflicting rights and interests and defers to the state's own resolution of that balancing as long as the state's determination was made in good faith and was reasonable."*[536]

Having briefly analysed application of good faith by ICJ and ICSID tribunals, it is worth looking at its use by Panels and the Appellate Body in WTO case-law.

Good faith principle in the WTO jurisprudence

The principle of good faith is pertinent to the WTO jurisprudence throughout the history of GATT/WTO.[537] Marion Panizzon determined three categories of the principle of good faith:

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[533] *LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc .v Argentine Republic, ICSID Case No ARB/02/1, Decision on Liability*. para.214

[534] See *Sempra Energy International v. the Argentine Republic, Award, ICSID Case No. ARB/02/16* (n 532). para.366

[535] See 'Opinion of Jose E.Alvarez, Case No. ARB/02/16 and ARB/03102, between Sempra Energy International & Camuzzi International, S.A. and the Republic of Argentina' <https://www.italaw.com/sites/default/files/case-documents/ita0994.pdf>. para.8, p.3

[536] William W Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' [2010] Yale Journal of International Law 283. p.312

[537] Marion Panizzon, *Good Faith in the Jurisprudence of the WTO : The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Hart Publishing 2006) <http://www.bloomsburycollections.com/book/good-faith-in-the-jurisprudence-of-the-wto-the-protection-of-legitimate-expectations-good-faith-interpretation-and-fair-dispute-settlement> accessed 23 July 2018. p.365

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(i) substantive good faith, (ii) interpretative good faith and (iii) procedural good faith. First, the substantive good faith derives from a principle of public international law. It was interpreted under Articles II and III[538] of the GATT in the light of protection of legitimate expectations with regard to conditions of the competition. Second, the interpretative good faith in WTO law was used as a "good faith interpretation" stemming from Article 31 (1) of the VCLT. Third, the procedural principle of good faith in WTO law manifests itself in procedural requirements to resolve trade disputes, to engage in fruitful disputes and to pursue consultations in good faith.[539]

Moreover, good faith in the WTO jurisdictional reach has implications in three instances: as a tool of influence on the scope of WTO jurisdiction, as *pacta sunt servanda* limits to the content of certain norms and as pro-trade limits to substantive content.[540]

For the purpose of our research, good faith as *pacta sunt servanda* limit to normative content is of particular interest. Under this strand good faith functions as "a gate keeper" of the level of trade liberalization as interpreted under Article XX of the GATT.[541] For example, the Appellate Body applied good faith in its particularization as abuse of rights in the *US-Shrimp case* in the light of interpretation of the chapeau of Article XX of the GATT:

> *"The chapeau of Article XX is, in fact, but one expression of the principle of good faith..."*[542]

In this case the Appellate Body concluded that the Panel's determination as to the United States as about not having acted in good faith was erroneous and hence rejected it.

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[538] To recall, Article II of the GATT deals with the schedule of concessions and Article III of the GATT deals with the national treatment principle

[539] Panizzon (n 537). pp.365-367. Marion Panizzon argued that only two manifestations of good faith such as the prohibition of abuse of rights and *pacta sunt servanda* arguably could be the part of positive treaty law, while good faith principle in general has not been recognized as separate obligation under WTO law. ibid. p.372

[540] Marion Panizzon mentioned on this that Panels applied good faith as broad protection of competitive opportunities under negotiated tariff concessions, (EEC-Oilseeds *European Economic Community — Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*.) or the predictability of future trade patents (India -Patents *DS50: India — Patent Protection for Pharmaceutical and Agricultural Chemical Products*.)

[541] Panizzon (n 537). pp.368-371

[542] *US-Shrimp* (n 113). para.158 In this regard Tomas Cottier and Krista Schefer mention that by linking the chapeau in Article XX of the GATT to the principle of good faith and abuse of rights the Appellate Body seems to apply the doctrine "as a matter of substantive law of the chapeau of Article XX GATT, expounding the essence and specific function of this elusive provision" Thomas Cottier and Krista N Schefer, 'Good Faith and the Protection of Legitimate Expectations in the WTO', *New directions in international economic law: essays in honour of John H. Jackson* (Kluwer Law International 2000). p.65

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The nature of good faith is normally referred to as an obligation in accordance with Article 26 of the Vienna Convention, but WTO Panels and Appellate Body interpreted it as a "presumption". [543] For example, in the *EC-Sardines* the Appellate Body pointed out that

> *"…We must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of pacta sunt servanda articulated in Article 26 of the Vienna Convention. And, always in dispute settlement, every Member of the WTO must assume the good faith of every other Member."*[544]

Then in the *US/Canada-Continued Suspension* the Appellate Body clarified that the presumption of good faith attaches to the actor rather than action:

> *"…However, the presumption of good faith attaches to the actor, but not to the action itself. Thus, whilst the presumption of good faith concerns the reasons for which a Member acts, such a presumption does not answer the question whether the measure taken by the implementing Member has indeed brought about substantive compliance.*"[545]

The practical implication of considering good faith as a presumption is its impact for the burden of proof. The State which claims that another State breached the rule should have a burden of proof as to a bad faith. Consequently, a claimant should prove that the respondent acted in bad faith.

Good faith as a substantive requirement in review of security exception?

As is shown above, good faith is widely used by many international courts. Due to its flexibility and leniency a good faith was cited as a possible substantive requirement for the security exceptions review. In other words, scholars view good faith review as a minimum threshold a State has to pass in order to survive review. For example, Dapo Akande and Sope Williams claim that even though a Panel may not review whether a measure taken by a State is

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[543] Graham Cook, 'Good Faith', *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (Cambridge University Press 2015) <http://ebooks.cambridge.org/ref/id/CBO9781316212691> accessed 24 July 2018. p.165

[544] *DS231: European Communities — Trade Description of Sardines*. para.278.

[545] *DS321: Canada — Continued Suspension of Obligations in the EC — Hormones Dispute*. Para.315

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necessary, it can review whether a State "genuinely – or – in fact – subjectively – considers there is some threat to its security interests which need protecting".[546]

The obligation to act in good faith was also noted by the Appellate Body in the *United States — Continued Dumping and Subsidy Offset Act of 2000*:

> *"…performance of treaties is also governed by good faith. Hence, Article 26 of the Vienna Convention, entitled Pacta Sunt Servanda, to which several appellees referred in their submissions, provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." The United States itself affirmed "that WTO Members must uphold their obligations under the covered agreements in good faith".*
>
> *Clearly, therefore, there is a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith.*
>
> *Nothing, however, in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion."* [547]

In light of above, in order to show bad faith, the claimant should provide proof and motive. Dapo Akande and Sope Williams state that such requirements are grounded in evidence. The Panel could find evidence that measures were taken for other purpose than protection of essential security interests by looking at, for example, parliamentary debates.[548] In assessment of the evidence, States enjoy a wide discretion due to at least two facts:

[546] They have also mentioned problems which can arise with good faith standard, in particular, the requirement of proof or motive. At the same time, they claim that such requirement has its basis in evidence and there could be evidence that the measures were taken for other purpose rather than security, e.g. parliamentary debates. Akande and Williams (n 212). pp.389-390

[547] *DS217: United States — Continued Dumping and Subsidy Offset Act of 2000*. paras.296-298

[548] *Akande and Williams (n 212). pp.392-393*

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prohibition of propensity evidence[549] and prohibition to draw adverse inferences from refusal to produce evidence of subjective intent.[550] However, it does not mean that it is impossible to determine the intent of State. It should not be an unattainable task to find the documents of an institution that adopted national security measures. Similarly, the genuine intent may be drawn from the public authority comments, speeches of ministers, deputies and public hearings when adopting the decision, and could be considered in understanding the basis for their adoption. Moreover, Prabhash Ranjan claims that ''good faith'' review should examine whether the country considered (genuinely believed) the measure to be taken necessary to tackle its essential security threat.[551]

Against this background, one could claim that good faith can serve as a substantive requirement for review of the measures which are claimed by a State to be taken for protection of essential security interests. The Panels should check the honesty of a State and reasonableness of measures in relation to the situation at hand. Reasonableness serves as one of the elements of good faith review and will be analysed below.

Reasonableness

The Oxford Dictionary defines reasonableness as "sound judgment, fairness" and "the quality of being based on good sense".[552] In spite of wide use of reasonableness in municipal law,[553] its substance is still obscure.[554] In the words of Olivier Corten, reasonableness is

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[549] Andrei Mamolea defines propensity evidence as "proof that a respondent State has exhibited certain behaviours in the past and is thus most likely to have exhibited the same behaviours during the specific events at issue in a trial." p.84

[550] Andrei Mamolea, 'Good Faith Review' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals* (Oxford University Press 2014) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198716945.001.0001/acprof-9780198716945-chapter-5> accessed 31 October 2018. pp.86-87

[551] Ranjan (n 103). p.51

[552] 'Reasonableness' <https://en.oxforddictionaries.com/definition/reasonableness>.

[553] It should be mentioned that in some instances the WTO Panel avoided the reference to "reasonableness" due to its origin in municipal law. For example, in the context of setting its standard of review, the WTO Panel in *US-Cotton Yarn* used a term "justifiable" rather than "reasonableness". See Graham Cook, 'Municipal Law', *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (Cambridge University Press 2015) <http://ebooks.cambridge.org/ref/id/CBO9781316212691> accessed 24 July 2018. p.188 The Panel stated that *"We have recourse to this term also in order to avoid terms such as 'reasonableness' or 'wide margin of discretion' which are used in national systems of administrative law and which inevitably carry with them many connotations from these national legal systems"*. See *United States — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, Panel Report*. Footnote 193

[554] Ryan Robb by analysis of previous literature that claims that reasonableness is not a clear standard of review, shows to the contrary Ryan D Robb, 'The Clarity of Reasonableness Since Dunsmuir: Mission (Mostly)

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"inherently incompatible with any attempt at objective definition" and therefore its content depends on specific circumstances of each case.[555]

Reasonableness is considered to be one of the two elements of good faith review, but sometimes it is used as a separate standard.[556] Due to its vagueness there are diverging views as to whether we can call reasonableness as a separate standard of review or whether it is an element of good faith review.[557] Such feature is considered to be beneficial since it allows to use reasonableness in a variety of situations. Some scholars like Jan Wouters and Sanderijn Duquet posit that in global administrative law "the open-endedness of reasonableness makes it fit for use as a standard of judicial review at different layers of governance".[558] As a standalone standard of review it got a prominent role, for example, in Canadian administrative law[559] or in the US criminal law.[560] Brian Griffey defines that reasonableness as a standard of review

> *"…imposes a limit on government discretion, and the breadth of that limit determines the extent to which a supervisory body can*

Accomplished' (Western University 2015) <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=4957&context=etd>.

[555] Olivier Corten, 'Reasonableness in International Law', *Max Planck Encyclopedia of Public International Law* (2013) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1679?prd=EPIL>. For an extensive overview see ibid. And Olivier Corten, 'The Notion of "Reasonable" in International Law: Legal Discourse, Reason and Contradictions' (1999) 48 International and Comparative Law Quarterly 613. It was also discussed in international law of the sea. Chester Brown, '"Reasonableness" in the Law of the Sea: The Prompt Release of the Volga' (2003) 16 Leiden Journal of International Law 621.

[556] For example, reasonableness was used as a separate standard in investment law. Valentina Vadi succinctly defines three functions of reasonableness: (1)constraining State behavior, (2)requiring a reasoned analysis from the decision-makers and (3) delimiting the legitimate exceptions of investors. Vadi (n 421). See also Federico Ortino, 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing' (2017) 30 Leiden Journal of International Law 71.

[557] Stephen R Tully, '"Objective Reasonableness" as a Standard for International Judicial Review' (2015) 6 Journal of International Dispute Settlement 546. p.551

[558] Jan Wouters, 'The Principle of Reasonableness in Global Administrative Law' [2013] SSRN Electronic Journal <http://www.ssrn.com/abstract=2867419> accessed 19 September 2018.

[559] For example, in Canada the seminal case is *Dunsmuir v. New Brunswick* , for discussion see Paul Daly, 'Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness' (2016) 62 527. There are also variations of the reasonableness such as "patent reasonableness" which is the highest degree of deference and "reasonableness simpliciter" -less deference by the reviewing court to the tribunal. See Matthew Lewans, 'Deference and Reasonableness Since Dunsmuir' (2012) 38 Queen's Law Journal. Notwithstanding claims that the reasonableness is not clear as a standard of review, there is a recent research that shows to the contrary that reasonableness is clear and coherent standard of review. See Robb (n 440). For recent developments with regard to standard of review in the Canadian administrative law see Shaun Fluker, 'The Great Divide on Standard of Review in Canadian Administrative Law, Case Commented On: Canada (Canadian Human Rights Commission) v Canada (Attorney General), 2018 SCC 31 (CanLII)' (*Ablawg.ca, University of Calgary, Faculty of Law*, 23 July 2018) <http://ablawg.ca/wp-content/uploads/2018/07/Blog_SF_CHRC_July2018.pdf>.

[560] See, for example, Ramadan Hisham M., 'Reconstructing Reasonableness in Criminal Law: Moderate Jury Instructions Proposal' (2003) 29 Journal of Legislation 233.

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> *examine and prescribe the measures adopted by policymakers to implement their legal obligations."*[561]

As discussed by Giovanni Sartor et al., reasonableness is used in various instances in international law: (i) in light of expectations of parties in a contractual relationship; (ii) as a way to assess behavior in the context of criminal and civil liability, (iii) in order to characterize the jurisdiction of institutional power or (iv) the use of public resources by institutions and, lastly, as (v) a legal standard through which a balancing of different options under different circumstances could be done.[562]

The example of the recent discussion on reasonableness as the standard of review by the International Court of Justice is the case *Whaling in the Antarctic*(Japan v Australia, New Zealand intervening).[563] In short, the case concerned the Japanese whaling programme (JAPRA II) which allowed its nationals to kill whales for the purposes of scientific research. Australia claimed that JAPRA II violated certain provisions of the International Convention for the Regulation of Whaling (ICRW). Japan, in turn, justified its programme by recourse to the exception in ICRW - Article VIII, which allowed[564] to issue permits for killing whales for the purposes of scientific research. The main issue here was whether Japan could effectively justify JAPRA II by recourse to Article VIII, i.e. whether the killing of whales was for purposes of scientific research.[565] Three countries involved in that case put forward their views on the applicable standard of review. Australia claimed that the "Court's power of review should not be limited to scrutiny for good faith". To be precise, Australia claimed that objective elements

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[561] Brian Griffey, 'The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11 Human Rights Law Review 275. p.304

[562] Giovanni Sartor, Giorgio Bongiovanni and Chiara Valentini, 'Reasonableness in International Law' <http://www.oxfordbibliographies.com/display/id/obo-9780199796953-0127> accessed 2 November 2018. For a reasonableness in interdisciplinary perspective see Giorgio Bongiovanni (ed), *Reasonableness and Law* (Springer 2009).

[563] The reference to reasonable standard by the ICJ sparked divergent views on this standard by scholars see, for example, Enzo Cannizzaro, 'Margin of Appreciation and Reasonableness in the ICJ's Decision in the Whaling Case', *Les limites du droit international - Essais en l'honneur de Joe Verhoeven"* (Bruylant 2014).

[564] Article VIII, para.1 of the ICRW reads as follows: "*1. Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.*" 'The International Convention for the Regulation of Whaling' <https://iwc.int/convention>.

[565] Makane Moise Mbengue, 'Between Law and Science: A Commentary on the Whaling in the Antarctic Case' (2015) 14 Questions of International Law, Zoom-In 3. p.3

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such as "design and implementation of the whaling programme, as well as any results obtained" should be taken into account in evaluation of whether a special permit had been granted for purposes of scientific research.[566] New Zealand proposed a standard of review similar to the Australian one and mentioned that the evaluation of whether programme was for purposes of scientific research could be done with reference to its "methodology, design and characteristics".[567] Japan, on its part, called for the limited review by the Court and stated that the Court should evaluate whether the process following which the special permit was granted "was "arbitrary or capricious", "manifestly unreasonable" or "made in bad faith." Later Japan modified its proposal and claimed for application by the Court

> *"…the test as being whether a State's decision is objectively reasonable, or 'supported by coherent reasoning and respectable scientific evidence and … in this sense, objectively justifiable'".*[568]

In the end, the Court applied the standard which it called "an objective one":

> "…*by examining whether, in the use of lethal methods, the programme's design and implementation are reasonable in relation to achieving its stated objectives. This standard of review is an objective one."*[569]

Upon application of this standard, the Court found that Japanese programme was not for the purpose of scientific research and therefore it could not be justified by Article VIII of the ICRW.

The standard applied by the Court in *Whaling in the Antarctic* led to different commentaries from scholars. On the one hand, some scholars like Asier Muñoz claimed that "objective standard" was "reasonableness" and it is relevant for determination of the applicable standard of review[570] since it is based on good faith and proportionality.[571] Asier Muñoz claims that the objective reasonableness could serve as a basic conceptual tool that facilitates judicial

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[566] *Whaling in the Antarctic* (n 485).para.63
[567] *ibid.* para.64
[568] *ibid.* paras.65-66
[569] *ibid.* para.67
[570] Asier Garrido-Muñoz, 'Managing Uncertainty: The International Court of Justice, "Objective Reasonableness" and the Judicial Function' (2017) 30 Leiden Journal of International Law 457. p.458
[571] ibid. p.459

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review in complex cases.[572] On the other hand, Stephen Tully posits that the ICJ's approach was specific to one case and ought not be followed.[573] Stephen Tully claims that reasonableness is vague, highly dependent on a context of a case and offers little clear or practical guidance.[574] Moreover, he adds that the reasonableness test is not grounded either in public international law or the ICJ practice.[575] Curiously, by making a comparison between the functions of the ICJ and WTO Panels, Stephen Tully claims that the ICJ should not exercise review functions like it is done by WTO Panels.[576]

One could claim that reasonableness requires a decision to be based on a good sense. Against this backdrop, the reasonableness as a substantive requirement for review of State actions is flexible and depends on a particular case at hand. Due to vagueness of the concept of reasonableness, its application by courts has received opposing commentaries by different scholars.

Reasonableness in WTO case-law

Graham Cook extensively described reasonableness in the WTO law and its functions in three instances (i) as a part of interpretation of legal terms, (ii) as a legal test and (iii) in the context of treaty interpretation. In the context of interpretation, it was used in "reasonable period of time", "reasonable administration of the laws, "reasonable terms and conditions". In terms of legal tests, it was applied in "reasonable relationship" tests, "reasonable expectations" in the context of examining "non-violation" claims under Article 26 of the DSU and Article XXIII:1(b) of the GATT. With regard to treaty interpretation, irrational distinctions and inverted outcomes were regarded as unreasonable.[577] For example, in cases *EC-Tube or Pipe Fittings* and *EC-Countervailing Measures on DRAM Chips* the Panel referred to reasonableness in the context of "reasonable and objective authority".[578] In *EC-Asbestos* and *US-Softwood Lumber* the Panel referred to reasonableness in the context of whether the authority or decision-

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[572] Asier Muñoz mentioned two following innovative elements: a broad application as covering "necessity" and "adequacy" and a partial reversal of burden of proof and procedural reasonableness.
ibid. p.457
[573] Tully (n 557). p.546
[574] ibid. p.552
[575] Stephen Tully claimed that the ICJ used the concept of reasonableness not as a standard for reviewing discretionary acts
[576] Tully (n 557). p.558
[577] Graham Cook, 'Reasonableness', *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (Cambridge University Press 2015) <http://ebooks.cambridge.org/ref/id/CBO9781316212691> accessed 24 July 2018. See pp.229-232
[578] ibid. pp.227-228

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maker might “reasonably conclude”.[579] Moreover, WTO Panels used reasonableness for review of factual findings by investigating authorities in anti-dumping and countervailing investigations.[580]

Two types of reasonableness are of particular interest for a review of security exceptions: reasonable regulator/government and reasonable relationship between means and ends. For this purpose, these two notions are reviewed below.

Reasonable regulator/government

The notion of “reasonable government/regulator” is useful for scrutinizing actions of the government or its authorities when adopting measures. One element which stems from the notion of “reasonable government” is that the government should “genuinely believe” in the necessity of action as related to the aim. In this regard reasonableness intertwines with good faith. Catherine Button explains that the “reasonable regulator” standard sets a maximum level of intrusiveness while DSU Article 11 simply provides minimum standards for review. For example, if a reasonable regulator might conclude that there is a scientific basis for an impugned measure, then the panel should not overturn it. From a practical perspective, “reasonable regulator” standard of review as applied in the *EC-Asbestos* case provides clear guidance on how intense scrutiny is to be done in the context of scientific evidence. It should be noted that Catherine Button differentiates between “reasonableness” and “reasonable regulator” by saying that the latter one is a new standard while reasonableness was used before in other cases. [581]

The notion of reasonable government was proposed for review in the context of security exceptions. For example, Raj Bhala in his analysis of the security exception claims that the

[579] ibid. p.228 In the EC-Hormones the Appellate Body also referred *to “*deferential reasonableness” as requiring *“to determine whether th[e] risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable*”. See *EC-Hormones, AB Report* (n 116). para.590

[580] The Appellate Body also referred to the reasonableness in the context of examination whether a Panel’s actual finding was “unreasonable” in light of claims under Article 11 DSU. [580] For example, the Appellate Body referred to reasonableness in cases Mexico-Anti-Dumping Measures on Rice, *US-Upland Cotton, EC-Hormones and US-Offset Act* (Byrd Amendment) Cook, ‘Reasonableness’ (n 577). pp.228-229. Michael Trebilock mentions that we can claim that “deferential reasonableness” is a subset of the “objective assessment” test under Article 11 of the DSU. See Tracey Epps and Michael J Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Elgar 2013). p.170

[581] Catherine Button, ‘Developing the WTO’s Standard of Review in Health Cases’, *The Power to Protect : Trade, Health and Uncertainty in the WTO* (Hart Publishing 2004) <http://www.bloomsburycollections.com/book/the-power-to-protect-trade-health-and-uncertainty-in-the-wto> accessed 22 August 2018. Catherine Button, “Developing the WTO’s Standard Of Review in Health Cases,” in *The Power to Protect : Trade, Health and Uncertainty in the WTO* (Hart Publishing, 2004), 1193–1226, https://doi.org/10.5040/9781472563187. p.218

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standard should be an objective one - "whether a "reasonable" government facing the same circumstances would invoke Article XXI.[582]

Reasonable relationship between means and ends

The notion of reasonableness in the context of a reasonable relationship between means and ends is used to define whether means (measure) fit ends (an objective). In particular, reasonable relationship is used in the review of the SPS measures to see the relationship between the SPS measure and risk assessment.[583] Petros Mavroidis calls this notion as a rational basis test. In his explanation he refers to the *EC-Hormones case* where the Appellate Body determined whether a rational relationship of means and ends existed between the regulatory measure at issue and the purpose for which it had been adopted. If such a rational relationship exists, the Appellate Body will not pursue its investigation.[584] Natalie Mc Nails stated that the test applied by the Appellate Body was close to the reasonableness since the Appellate Body even used the word "reasonably":

> *". . . the results of the risk assessment must sufficiently warrant – that is to say, reasonably support – the SPS measure at stake. The requirement that an SPS measure be 'based on' a risk assessment is a substantive requirement that there be a rational relationship between the measure and the risk assessment. "*[585]

Similarly, in the case of applying reasonable relationship between means and ends under the security exception, a Panel can review whether there is a reasonable relationship between, for example, imposed measures and the aim of protection of essential security interests of a State.

As is seen above, reasonableness can have different notions: meaning that the decision should have good sense to be adopted by a reasonable regulator and means (measure) should have a reasonable relationship with its objective (end).

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[582] Bhala, 'National Security and International Trade Law: What the GATT Says, and What the United States Does Symposium on Linkage as Phenomenon: An Interdisciplinary Approach' (n 344). p.279
[583] See Panizzon (n 537). p.53 See also World Trade Organization (ed), *WTO Analytical Index* (2nd ed, Cambridge University Press 2007). Volume 1, p.391
[584] Petros C Mavroidis, *The Regulation of International Trade* (The MIT Press 2016). p.502
[585] McNelis (n 431). P.198, para.193, Appellate Body Report in EC-Hormones

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Abuse of rights

Abuse of rights is another notion of good faith and in some instances these concepts are used simultaneously. Abuse of rights originated from civil law countries but later got its prominence in common law countries as well.[586] Alexandre Kiss defined abuse of rights as

> *"…a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State."*[587]

Abuse of rights is mentioned explicitly in some international treaties along with good faith. For example, Article 300 of the Law of the Sea Convention simultaneously deals with good faith and abuse of rights:

> *"States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."*[588]

In practice, application of the doctrine of abuse of rights is aimed at exercising legal rights of one State in a way that takes into account rights of other States affected by its conduct.[589]

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[586] For example, the Spanish Civil Code refers to abuse of rights, para.2 of Article 7 stipulates "*The law does not support abuse of rights or antisocial exercise thereof.*" See Bernardo M Cremades, 'Good Faith in International Arbitration' [2012] American University International Law Review 761. p.768 Abuse of rights could be also found in the Greek Civil Code, Article 281 or Luxembourgish Civil Code, Article 6-1 For a more extensive overview of abuse of rights in the EU law and law of the EU Member States see Annekatrien Lenaerts, 'The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law' [2010] European Review of Private Law 1121.

[587] Alexandre Kiss, 'Abuse of Rights', *Max Planck Encyclopedia of Public International Law* (2006) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1371>. To note, In the words of Bin Cheng abuse of rights could be characterized as follows:"*…the exercise of a right - or supposed right, since the right no longer exists - for the sole purpose of causing injury to another is thus prohibited. Every right is the legal protection of a legitimate interest. An alleged exercise of a right not in furtherance of such interest, but with the malicious purpose of injuring others can no longer claim the protection of the law... The principle of good faith [...] requires every right to be exercised honestly and loyally. Any fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated*." Cheng (n 511). pp.122-123

[588] 'United Nations Convention on the Law of the Sea' <http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf>.

[589] In Oppenheim's International Law an abuse of rights was explained as
"A ... restraint on the freedom of action which a state in general enjoys by virtue of its independence, and territorial and personal supremacy, is to be found in the prohibition of the abuse by a state of a right enjoyed by

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Consequently, abuse of rights aims to prevent harm inflicted by one State to another State.[590] In this regard Michael Byers points out that abuse of rights is supplemental to good faith – it draws a threshold where lack of good faith gives rise to violation of international law.[591] In search of establishing clear cases where abuse of rights can be found, some scholars pointed to circumstances in which it may take place. For instance, Steven Reinhold mentions that abuse of rights may take place in three distinct sets of circumstances:

1. a State exercises its right in such a way as to hinder another State enjoying its own rights;
2. a State exercises a right for an end which it was not intended for (improper purposes);
3. arbitrary exercise of a right causing injury to another party."[592]

As to the scope of application of abuse of rights, it is believed that it applies to matters which are within domestic jurisdiction of States. In this regard, in the 5th report on State Responsibility F.V. Garcia-Amador pointed out that

> *"... it is necessarily true that the doctrine of the abuse of rights finds its widest application in the context of 'unregulated matters', that is, matters which 'are essentially within the domestic jurisdiction' of States."*[593]

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it by virtue of international law. ... Such an abuse of rights occurs when a state avails itself of its right in an arbitrary manner in such a way as to inflict upon another state an injury which cannot be justified by a legitimate consideration of its own advantage. ... The Permanent Court of International Justice expressed the view that, in certain circumstances, a state, while technically acting within the law, may nevertheless incur liability by abusing its rights — although, as the Court said, such an abuse cannot be presumed." Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law : Volume 1 Peace* (9th edn, Oxford University Press 2008) <http://opil.ouplaw.com/view/10.1093/law/9780582302457.001.0001/law-9780582302457> accessed 24 September 2018. p.407
To note, Yuval Shany also considered the doctrine of abuse of rights for the purposes of governing situations of competing jurisdictions Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press 2004) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199274284.001.0001/acprof-9780199274284> accessed 25 September 2018.

[590] Nguyen (n 453). Some scholars note that abuse of rights is similar to some extent to the *ultra vires* although there is a sharp line between them – in case of *ultra vires* the State had no right to perform the act, while in case of abuse of rights the State acts within its power. Pulkit Dhawan, 'Abuse of Right in International Law' (*Berkley Journal of International Law Blog*) <http://berkeleytravaux.com/abuse-right-international-law/>.

[591] Michael Byers, 'Abuse of Rights: An Old Principle, a New Age' (2002) 47 McGill Law Journal 389. p.411

[592] Reinhold (n 509). p.49 citing Kiss (n 587).

[593] FV Garcia-Amador, Louis B Sohn and RR Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Oceana Publications 1974).

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The Permanent Court of International Court (the predecessor of the International Court of Justice) applied abuse of rights in *Free Zone of Upper Savoy and the District of Gex.* In that case France instituted a control cordon between France and Switzerland during the war of 1914-1918. In its decision the Court stated:

> *"A reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon. But an abuse cannot be presumed by the Court."*[594]

As is seen, the Court did not presume the abuse of rights which one could interpret as the need to be proved by one of the parties through providing necessary evidence. This characteristic has implications for the burden of proof which is discussed further in the light of WTO law.

Another example of application of abuse of rights[595] is the case *the North Atlantic Coast Fisheries Case* (Great Britain v the United States) where the Permanent Court of Arbitration stated:

> *"…Treaty obligations are to be executed in perfect good faith, therefore excluding the right to legislate at will concerning the subject-matter of the Treaty, and limiting the exercise of sovereignty of the States bound by a treaty with respect to that subject-matter to such acts as are consistent with the treaty;…"*[596]

In this instance the Court emphasized the limits for exercise of rights and such perception seemed to be prevalent in application of abuse of rights.

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[594] 'Free Zones of Upper Savoy and the District of Gex, France v Switzerland, Order, (1929) PCIJ Series A No 22, ICGJ 262 (PCIJ 1929), 19th August 1929, League of Nations (Historical) [LoN]; Permanent Court of International Justice (Historical) [PCIJ]' <http://opil.ouplaw.com/view/10.1093/law:icgj/262pcij29.case.1/law-icgj-262pcij29>.

[595] It is argued that here abuse of rights is connected to reasonableness, for a concise overview of abuse of rights in relation to reasonableness see Vitaliy Pogoretskyy, *Freedom of Transit and Access to Gas Pipeline Networks under WTO Law* (Cambridge University Press 2017) <http://ebooks.cambridge.org/ref/id/CBO9781316681497> accessed 2 November 2018. pp.219-223

[596] *The North Atlantic Coast Fisheries Case (Great Britain, United States)* (1910) XI Rep Int Arbitr Awards (Permanent Court of Arbitration). p.188

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Apart from its use by the ICJ, ICSID tribunals also apply abuse of rights.[597] Namely, in the investment law *abuse of rights* is mostly applied to determine a change of corporate structure by an investor in order to gain protection of an investment treaty and is called as an *abuse of process*. In this regard in one of the recent cases, *Philip Morris v Australia*, the Tribunal stated:

> *"…the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable."*[598]

In other words, the abuse of rights is applied with respect to the actions of an investor. However, in case of WTO law we are interested in abused of rights by State. In international investment law the investment tribunals found a breach of abuse of rights by States in view of violation of fair and equitable treatment. Thus, the Tribunal in the ICSID case *Tecmed v Mexico* pointed out:

> *"The Arbitral Tribunal finds that the commitment of fair and equitable treatment included in Article 4(1) of the Agreement is an expression and part of the bona fide principle recognized in*

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[597] Abuse of process was also referred to as a part of abuse of rights in case *Phoenix v. Czech Republic* where in para.143 the Tribunal said "…*All the elements analyzed lead to the same conclusion of an abuse of rights. The abuse here could be called a "détournement de procédure", consisting in the Claimant's creation of a legal fiction in order to gain access to an international arbitration procedure to which it was not entitled…." Phoenix Action, Ltd v The Czech Republic, ICSID Case No ARB/06/5, Award* (ICSID). p.56 On analysis see Filip Černý, 'Short Flight of the Phoenix: A Few Thoughts on Good Faith, Abuse of Rights and Legality in Investment Arbitration' [2012] Czech Yearbook of International Law 183. There were also proposals to extend application of abuse of rights to (i)misuses of the international investment regime by an investor, (ii)to cases where investors exercise a right in a bad faith and (ii)to cases of misconduct by an investor. See Ksenia Polonskaya, 'Abuse of Rights: Should the Investor-State Tribunals Extend the Application of the Doctrine?' (Master Thesis, University of Toronto 2014) <https://tspace.library.utoronto.ca/bitstream/1807/67948/2/Polonskaya_Ksenia_201411_LLM_thesis.pdf>.

[598] *Philip Morris Asia Limited v The Commonwealth of Australia, UNCITRAL, PCA Case No 2012-12, Award on Jurisdiction and Admissibility* (ICSID). para.554 At the same time, the Tribunal in *Philip Morris Ltd v Australia* mentioned that a threshold established by the abuse of rights is high. ibid. para.539

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> *international law, although bad faith from the State is not required for its violation.”*[599]

In this case the Tribunal found that the Respondent (Mexico) violated a fair and equitable principle by saying that

> *“the conduct of the Respondent between the date of execution of the Agreement (in view of the Respondent’s determination to ratify it subsequently) and the effective date thereof, is incompatible with the imperative rules deriving from Article 4(1) of the Agreement as to fair and equitable treatment.”*

In its review the Tribunal stated that

> *“The refusal to renew the Permit in this case was actually used to permanently close down a site whose operation had become a nuisance due to political reasons relating to the community’s opposition expressed in a variety of forms, regardless of the company in charge of the operation and regardless of whether or not it was being properly operated.”*[600]

Since it is not crystal-clear what elements are involved in good faith review, the Arbitration Tribunal in each case makes an evaluation bearing in mind specific circumstances of the case.

Tribunal might also find a violation of its obligations by State through the principle of legitimate expectations of investor. For example, in *International Thunderbird Gaming Corporation v Mexico case*, the Tribunal referred to legitimate expectations of investor in light of good faith review:

> *“Having considered recent investment case law and the good faith principle of international customary law, the concept of ‘legitimate expectations’ relates, within the context of the NAFTA*

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[599] *Técnicas Medioambientales Tecmed, SA v The United Mexican States, Award* [2003] ICSID ICSID Case No. ARB (AF)/00/2. Para.153

[600] ibid. para.154

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> *framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages."*[601]

Although in this case the Tribunal decided in favour of State, it is an example of application of legitimate expectations of investor in search of the violation by State.

One more way to find a violation of abuse of rights by States was proposed by Frederic Sourgens and Michael Nolan. They discussed the applicability of abuse of rights analysis in light of non-precluded measures in investment agreements by using a balancing test.[602] In particular, they proposed to compare the non-precluded measures with the corresponding loss of rights by the investor, taking into account relative contributions of all actors to an event, the reaction of international community and the reaction of investors and contribution of investors.[603] To be precise, a framework for the analysis of invocation of non-precluded measures should take into account the following:

(1) Does the invocation of a clause frustrate the object and purpose of the treaty in contravention of Article 26 of the Vienna Convention?
(2) Does the invocation of the clause evade obligations under the treaty solely on account of a literal application of its terms?
(3) Does the invocation of the clause unreasonably prejudice the rights of investors under the treaty?[604]

The framework proposed by Frederic Sourgens and Michael Nolan could serve as a starting point to review whether a State did not abuse its right to adopt trade-restrictive measures for protection of its essential security interests. That being said, a difference between the State/investor relationship and State/State relationship at the WTO requires to be cautious when applying concepts from other areas of law.

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[601] *International Thunderbird Gaming Corporation v The United Mexican States, UNCITRAL*. para.147
[602] To recall, non-precluded measures in investment agreements correspond to security exceptions in trade law.
[603] Sourgens and Nolan (n 148).
[604] ibid.

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Abuse of rights in WTO law

The abuse of rights principle is not stipulated in WTO law. However, Hersch Lauterpacht expressed his doubts as to application of abuse of rights in trade relations when discussing limits on trade boycotts by states as early as 1933. Hersch Lauterpacht claimed that trade policy is a matter of exclusive jurisdiction of State:

> *"The* commercial *and tariff policies of a State are regarded as the most cherished objects of exclusive jurisdiction of the State, but the history of international relations abounds in examples of official protests and remonstrances of Governments against measures of economic protection and discrimination, in a manner deemed to be unfairly injurious to the interests of the citizens of the complaining States. Such protests have frequently come from countries whose governments have traditionally attached considerable importance to the exclusiveness of national sovereignty in these matters."*[605]

There are contrasting views as to application of abuse of rights in WTO law. On the one hand, Son Tan Nguyen mentions that application of abuse of rights is challenging in WTO law since the adjudicator has to determine a test in order to draw a line between abusive and non-abusive exercise of rights.[606] On the other hand, Lorand Bartels has determined three possible applications of the doctrine of abuse of rights in the light of chapeau of Article XX of the GATT to: (1) any measure that is adopted for an improper purpose, i.e. bad faith, (2)measures that are adopted without a good purpose which leads to failure of compliance with the requirement to be adopted for a legitimate purpose under subparagraphs of the general exceptions and (3) measure that unnecessarily harms or discriminates a WTO Member.[607]

The Appellate Body referred to abuse of rights in the light of the interpretation of chapeau of Article XX of the GATT in the *US-Shrimp* case:

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[605] *See* Hersch Lauterpacht, *The Function of Law in the International Community* (1st pbk. ed, Oxford University Press 2011).

[606] Nguyen (n 453). p.126

[607] In the end Lorand Bartels claims that *"…whichever of these interpretations of the doctrine of abuse of rights is most appealing, the doctrine cannot serve to delimit the chapeau from the subparagraphs of the general exceptions".* Lorand Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' (2015) 109 The American Journal of International Law 95. pp.103-104

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> *"The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of abus de droit, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably". An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting."*[608]

Such application of abuse of rights by the Appellate Body was met with certain criticism from scholars. For example, Thomas Cottier and Krista Schefer argued that by linking the chapeau in Article XX of the GATT to the principles of good faith and abuse of rights the Appellate Body applied the doctrine "as a matter of substantive law of the chapeau of Article XX GATT, expounding the essence and specific function of this elusive provision".[609]

Notwithstanding the fact that abuse of rights was not widely used by the WTO, it could still be useful in review of national security measures. For example, bad faith can be found in cases where a State breaches its WTO obligations and by doing that it hinders enjoyment of rights by other States. Second, a State may impose measure under the umbrella of national security protection, so to hide a real purpose of its measures. Third, a State may exercise its right to impose national security measures in arbitrary way by, for example, imposing measures which do not correspond to the possible threat from another State. Therefore, abuse of rights, as a particularization of good faith could be used to check whether the State did not circumvent its WTO obligations by invoking the security exception.

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[608] *US-Shrimp* (n 113). para.158
[609] Cottier and Schefer (n 542). p.65

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Clean hands doctrine

Clean hands doctrine stems from Roman law and the principle of equity.[610] As mentioned by Justice Margaret White, equity, in general terms, … "tends to suggest justice attained through what is fair."[611] Application of the doctrine in municipal legal systems varies across countries , but in general terms it requires that the party which asks for a relief has acted in accordance with equitable, just principles.[612]

The essence of the doctrine, as stated by Gerald Fitzmaurice, is as follows:

> *"He who comes to equity for relief must come with clean hands. Thus a State which is guilty of illegal conduct may be deprived of the necessary locus standi in judicio for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short were provoked by it."*[613]

Clean hands doctrine was referred to in the context of diplomatic protection in order to preclude a State from exercising diplomatic protection if the individual for whom the

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[610] For an overview of the doctrine see Stephen M Schwebel, 'Clean Hands, Principle', *Max Planck Encyclopedia of Public International Law* (2013) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e18>. Ori Pomson, 'The Clean Hands Doctrine in the Yukos Awards: A Response to Patrick Dumberry' (2017) 18 The Journal of World Investment & Trade 712.C Draghici, 'L'applicazione della dottrina "clean hands" all'esercizio della protezione diplomatica (The Application of the "Clean Hands" Doctrine to the Exercise of Diplomatic Protection)' in Lina Panella (ed), *La protezione diplomatica: sviluppi e retrospettive : Messina, 13-14 giugno 2008* (G Giappichelli 2009). For an overview of equity in WTO law see Anastasios Gourgourinis, *Equity and Equitable Principles in the World Trade Organization: Addressing Conflicts and Overlaps between the WTO and Other Regimes* (Routledge 2015).

[611] Margaret White, 'Equity - A General Principle of Law Recognised by Civilised Nations?' (2004) 4 QUT Law Review <https://lr.law.qut.edu.au/article/view/177> accessed 2 November 2018. p.103 See also Francesco Francioni, 'Equity in International Law', *Max Planck Encyclopedia of Public International Law* (2013) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1399?prd=EPIL>.

[612] Alexandr Shapovalov, 'Should a Requirement of "Clean Hands" Be a Prerequisite to the Exercise of Diplomatic Protection? Human Rights Implications of the International Law Commission's Debate.' (2005) 20 American University International Law Review 829. p.835

[613] Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' in Miguel A Marin (ed), *Collected Courses of the Hague Academy of International Law*, vol 92 (1957) <http://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*-ej.9789028612921.629_754> accessed 1 October 2018. p.119 Similarly, in the case Good Return and Medea, United States/Ecuador, in his Opinion the Commissioner, Mr. Hassaurek stated: "…*A party who asks for redress must present himself with clean hands. His cause of action must not be based on an offense against the very authority to whom he appeals for redress…" Cases of the Good Return and the Medea, opinion of the Commissioner, Mr Hassaurek, of 8 August 1865*. p.107

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protection was sought had been injured due to his/her own wrongful conduct.[614] Further the doctrine was referred to by the ICJ in such cases as *The Diversion of Water from the Meuse* where in his Individual Opinion Judge Hudson noted:

> "*It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non- performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.*"[615]

Then in the *Oil Platforms case,* the US claimed that its actions in Iran was prompted by the violation on the Iranian side, i.e. Iran did not have "clean hands". In response, Iran stated that

> "*the concept of "clean hands" underlying these arguments of the United States, "while reflecting and incorporating fundamental principles of law inspired by good faith, is not an autonomous legal institution". It contends that the concept of "clean hands" requires the operation of other institutions or legal rules for its implementation. Iran argues that the "plaintiff s own wrongful conduct" as a ground for inadmissibility of a claim relates to claims arising in the context of diplomatic protection and concerns only a foreign individual's "clean hands", but that such a principle is irrelevant in direct State-to-State claims. According to Iran, as far as State-to-State claims are concerned, such principle may have legal significance only at the merits stage, and only at the stage of quantification of damages, but does not deprive a State of locus standi in judicio.*"[616]

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[614] John Dugard, 'Diplomatic Protection. Document A/CN.4/546, Sixth Report on Diplomatic Protection by Special Rapporteur' <http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_546.pdf&lang=EFSX>.See also Shapovalov (n 612). Recently it was also discussed in light of humanitarian intervention Ori Pomson and Yonatan Horowitz, 'Humanitarian Intervention and the Clean Hands Doctrine in International Law' (2015) 48 Israel Law Review 219.

[615] 'Diversion of Water from the Meuse, Individual Opinion of Judge M.Hudson' <https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_AB/AB_70/06_Meuse_Opinion_Hudson.pdf>. p.77

[616] In this case ICJ (n 186). para.28

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Similarly, Israel raised the clean hands doctrine in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* by saying that

> "*…Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the Court a remedy for a situation resulting from its own wrong- doing. In this context, Israel has invoked the maxim nullus commodum capere potest de sua injuria propria, which it considers to be as relevant in advisory proceedings as it is in contentious cases. Therefore, Israel concludes, good faith and the principle of "clean hands" provide a compelling reason that should lead the Court to refuse the General Assembly's request.*"

The Court, though, rejected this argument by saying that "it is not pertinent".[617]

Another example of use of clean hands doctrine could be the ICJ *Military and Paramilitary Activities* case where in his dissenting opinion Judge Schwebel sustained that the Court had to apply clean hands doctrine against Nicaragua:

> *"Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible—but ultimately responsible—for large numbers of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through the false testimony of its Ministers, Nicaragua's claims against the United States should fail."*[618]

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (ICJ). paras.63-64

[618] 'Dissenting Opinion of Judge Schwebel, Military and Paramilitary Activities' <https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-09-EN.pdf>. para.268-272

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The Court did not address this principle and in the end the United States lost the case.[619]

Notwithstanding references to clean hands doctrine by international courts and tribunals, the status of clean hands doctrine in public international law is subject to debate.[620] Indeed, in the Report a Special Rapporteur, Mr. John Dugard, after considering clean hands principle concluded that "the evidence in favor of clean hands is inconclusive" and "whether the doctrine is applicable at all to claims involving diplomatic protection is highly questionable".[621]

Clean hands doctrine in the WTO case-law

The inconclusive evidence as to the use of clean hands doctrine in international law is also mirrored in WTO case-law. In point of fact, in WTO jurisprudence clean hands doctrine has been mentioned only once "in a non-technical way".[622] In particular, the Panel in *EC and certain member States — Large Civil Aircraft case* stated:

> *"…We consider that the contrary interpretation suggested by the EC – that Article 6.4 is the exclusive basis for a finding of displacement or impedance for purposes of Article 6.3(b) – would lead to the absurd result that the SCM Agreement establishes a remedy for displacement or impedance of exports in third country markets only in situations where the complaining Member's product is demonstrated to be unsubsidized – effectively, a sort of "clean hands" requirement for complaining Members as a prerequisite to a claim under Article 6.3(b). Not only is there no basis in the text for such a requirement, but, as a practical matter, such a requirement would enormously complicate the task of panels considering claims under Article 6.3(b)."*[623]

[619] For an overview of the case see Monroe Leigh, 'Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) 1986 ICJ Rep. 14' (1987) 81 The American Journal of International Law 206.
[620] See, for example, the discussion in Samuel Moss, 'Does a Doctrine of "Clean Hands" Exist in International Law?' (Master Thesis, Graduate Institute of International and Development Studies 2009) <http://repository.graduateinstitute.ch/record/2552>.
[621] Dugard (n 614).
[622] See also on this Ziegler and Baumgartner (n 514). p.30
[623] *DS316: European Communities — Measures Affecting Trade in Large Civil Aircraft, Panel Report*. para.7.1770

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The use of clean hands doctrine in the light of the security exception of the GATT was referred to by Brandon Rice with regard to the Ukraine/Russia conflict.[624] However, due to a questionable status of clean hands doctrine in international law, Brandon Rice concluded that "it would be improper for WTO to find an implied requirement of clean hands in Article XXI (b) (iii)."[625]

In this regard one could claim that based on very scant application of clean hands doctrine in public international law and very limited reference in WTO law, it does not seem to be attractive for review of measures under Article XXI of the GATT.

Having analyzed various standards of review and general principles of law which are used in review of State measures, there is a need to clearly state the elements of review. Afterward the elements of review could be matched with appropriate level of deference, i.e. standards of review. To this end, the next section will outline the framework of review.

Framework of review under Article XXI of the GATT

I. *The Panel must differentiate between objective, subjective or "grey area" elements of the provision.* The difference between subjective and objective elements is that as to subjective elements the Panel has a very little margin for review, while with regard to objective elements the Panel has more discretion in its review. Accordingly, the division between subjective and objective elements is not cast in stone since some elements like "emergency in international relations" and "war" are hard to label as one or another, since the perception of these situations at the end depends on the view of the WTO Member. Such elements could be called "grey area" elements.

To differentiate between elements of review, the Panel should textually interpret a provision. The ordinary meaning of the word "it" and "its" means belonging to a State since Article XXI stipulates that "nothing in this Agreement shall be construed to prevent *any contracting party*" – i.e. a State. With this interpretation in mind, two subjective elements are "any action" and "essential security interests", which is explained by the wording "any action *it considers*" and "*its* essential security interests". With regard to these elements Panel can

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[624] In short, Brandon Rice pointed out that the Russian invocation of Article XXI (b) (iii) might be problematic since Russia is believed to have played some part contributing to the emergency in international relations with regard to the situation in Ukraine.

[625] Brandon Rice, 'Russia and the WTO: Is It Time to Pierce the Article XXI(b)(Iii) Security Exception?' [2015] SSRN Electronic Journal <http://www.ssrn.com/abstract=2695936> accessed 18 August 2018. pp.29-30

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check whether the WTO Member acted in good faith when imposing the measure and determining its essential security interests.

Other elements in para. (iii) of Article XXI of the GATT – i.e. "taken in time of war or other emergency in international relations" which are not preceded by wording "it" can be considered as "grey elements". From one side, one could claim that these situations are completely objective, and the Panel can determine their meaning. However, a certain discretion should be given to the parties of the dispute since the perception of war to some extent depends on their subjective perception of the situation at hand. The importance of taking into account the subjective perception by the State was underlined by the Advocate General Jacobs in the case *Greece v Commission*:

> *"What the Court must decide is whether in the light of all the circumstances, including the geopolitical and historical background, Greece could have had some basis for considering, from its own subjective point of view, that the strained relations between itself and FYROM could degenerate into armed conflict. I stress that the question must be judged from the point of view of the Member State concerned. Because of differences of geography and his- tory each of the Member States has its own specific problems and preoccupations in the field of foreign and security policy. Each Member State is better placed than the Com- munity institutions or the other Member States when it is a question of weighing up the dangers posed for it by the conduct of a third State. Security is, moreover, a matter of perception rather than hard fact. What one Member State perceives as an immediate threat to its external security may strike another Member State as relatively harmless.*[626]

As is seen, the division between objective and subjective elements is connected to "it considers" wording. There are at least two more contrasting views on this matter: US' position

[626] *Opinion of Advocate General Jacobs, Commission v Greece* [1995] ECJ C-120/94. para.54

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and EU position which they expressed in their written submissions in *Russia-Goods in Transit* case.

It considers: opposing views of the EU and US

At one extreme the US claims that "it considers" wording qualifies the whole provision of Article XXI and therefore it is not justiciable before the WTO Panel. The United States claims that Article XXI is a self-judging provision due to "it considers" wording. At the outset the US mentions that the ordinary meaning of the text indicates that it is the Member ("which it") that must regard ("considers") an action as having the quality of being necessary.[627] As is seen, the United States refers to "action" but leaves untouched other requirements of subparagraph (iii) such as "taken in time of war or other emergency in international relations". The US further supports its view by the recourse to the context of Article XXI.

First, the US points to the difference between paras. of Article XXI. Article XXI (c) and Article XXI (b) have "it considers" wording, while para (c) does not contain "it considers" wording. In light of this, the United States claims that *"the use of 'which it considers" in Article XXI (b) should be given meaning and should not be reduced to inutility"*.[628]

Second, the US makes a comparison with Article XX of the GATT where there is no "it considers necessary" wording but only "necessary". Since Article XX of the GATT is subject to review by Panels, the US sustains that, on the contrary, Article XXI does not require review of a Member's action.[629]

Third, the US points to other provisions of the GATT 1994 and other provisions of WTO Agreement which contain "*it considers*" wording. Through this comparison the US show that "*it considers*" refers to the judgements by the named actor. The United States mentions various provisions like "*Member considers*", [630] "*the Appellate Body considers*"[631]. For example, DSU Article 3.3 stipulates:

[627] 'Third-Party Oral Statement of the United States of America, Russia-Measures Concerning Traffic in Transit (DS512)' <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Stmt.%28as%20delivered%29.fin.%28public%29.pdf>. p.4

[628] ibid. p.5

[629] ibid. p.5

[630] Article 18.7 of the Agriculture Agreement "*Any Member may bring to the attention of the Committee on Agriculture any measure which it considers ought to have been notified by another Member*"

[631] DSU Art. 17.5 "*When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report*"

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> *"The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members"*[632]

Moreover, the US made a contrast with Article 26.1 DSU where it claims the judgment is expressly subject to review by way of the following wording:

> *"Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following ..."*

The US maintains that there was an additional check added to "it considers" wording:

> *"…in this provision, Members explicitly agreed that "where ... [a] party considers ... that" is not enough, and they subjected the non-violation complaint to the additional check that "a panel or the Appellate Body determines that"* [633]

By referring to such provisions the United States makes it clear that in these cases – the named actor: be it a Member, the Appellate Body, the Committee, the Council – remains a judge of the last resort as to whether to pursue a specific action.[634]

[632] 'Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the WTO Agreement' (n 110).
[633] 'Third-Party Oral Statement of the United States of America, Russia-Measures Concerning Traffic in Transit (DS512)' (n 627). p.7
[634] ibid. p.8

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At the other extreme the European Union claims that the words "it considers" in Article XXI (b) qualify only the word "necessary" rather than subparagraphs (i) to (iii) which the Panel must separately and objectively assess.[635] The European Union points out:

> *"These terms imply that, in principle, it is for each Member to assess by itself whether a measure is 'necessary'. However, once again, this does not mean that Members enjoy unfettered discretion and that panels must accord complete deference to a Member asserting the necessity of the measure.*
>
> *Panels must review, within the analytical framework described above, whether invoking Member can plausibly consider that the measure is necessary. This limited review is necessary in order to ensure that the exception is applied in good faith by the invoking Member and prevent abuses."*[636]

In sum, both US and EU opinions show the difference in views on interpretation of "it considers" wording. Ultimately, the Panel would have to decide on how to interpret "it considers" wording. Given the negotiation history of the GATT Article XXI and previous record of use, it is more likely that the Panel would decide that Article XXI is justiciable. Therefore, the Panel should interpret the terms of the GATT Article XXI and decide how much deference to provide to States. In this regard, the framework of review will be discussed further.

II. *The Panel must establish whether objective elements of Article XXI (b) (iii) have been met by the State.* The Panel should start with review of objective elements since if objective elements are not met by State, there is no even need to proceed with review of subjective elements. Consequently, the Panel should:

- determine whether there is a situation of war or other emergency in international relations

[635] European Commission, 'European Union Third Party Written Submission, Russia-Measures Concerning Traffic in Transit (DS512)' (n 229). para.39
[636] Ibid. para.61

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- whether a measure was taken *in time* of war or other emergency in international relations.

III. *The Panel must review the satisfaction of subjective elements by State.* As mentioned above, subjective elements are “any measure” and “essential security interests”. The subjectiveness of these elements would imply that the State has a wide deference in choosing the type of the measures and determination of its essential security interests, but it should do so in good faith. In other words, the Panel should provide a wide deference to States.

Matching standards of review with elements of the GATT Article XXI

	Objective/subjective element	Standard of review/substantive requirements
Nothing in		
this Agreement		
shall be construed		
to prevent *any contracting party* from taking		
any action which it considers necessary	subjective	good faith obligation
for the protection		
of its essential security interests	subjective	good faith obligation
taken in time	objective	
war	objectively/subjective	
other emergency in international relations	objectively/subjective	

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Table-Framework of Review

Step	Action	Tasks
	Preliminary stage	
1.	Whether the measure falls under scope of the WTO Agreement and whether it violates any WTO Articles	1.To determine the measure and 2. To establish a violation of GATT Articles
	Article XXI review	
2.	Whether the measure was taken in time of "war" or "other emergency in international relations" If yes- proceed with a further analysis	1. To interpret the terms "war or other emergency in international relations" 2. To determine whether there is a coincidence in time between the measure and the situation of war or other emergency in international relations
3	Whether a WTO Member satisfied subjective elements – passing a good faith review	This stage includes the following steps 1. To review whether the WTO Member determined its "essential security interests" in good faith 2. To review whether measures have been adopted in good faith (i.e. whether there is a (reasonable) connection between a measure and essential security interests) given situation at hand

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Concluding remarks

This chapter illuminates on the possible framework of review for the GATT security exception. The framework for review is focused on GATT Article XXI (b) (iii). In order to construct a framework of review there is a need to bear in mind a rationale behind choosing a standard of review with regard to a specific element of the provision. Since the essence of the standard of review is deference given to the WTO Members by the Panel, the Chapter identified underlying reasons for deference in national security cases. Such reasons could include: (i) deferring to democratic decision-making, (ii) deferring to expertise of the WTO Member, (iii) deferring to sovereignty and (iv) risks associated with getting wrong an interpretation provided by State.

In view of deference being the essence of a standard review, I analysed theoretical premises of standards of review. Having done that, I discussed the standard of review in WTO law. As a matter of fact, the standard of review as such is absent in WTO law, but it is dealt with under Article 11 of the Dispute Settlement Understanding which stipulates functions of Panels and refers to an "objective assessment" by Panels. Following the analysis of the GATT/WTO case-law interpreting standard of review in WTO law, it appears that there is no clear approach with respect to the standard of review. In search for a standard of review for elements of national security exception, the chapter reflected upon specific standards of review like national margin of appreciation and substantive criterion like good faith, and its particularizations such as reasonableness, abuse of rights, and clean hands doctrine.

The Chapter proposed the framework of review which consists of the following steps. The first step of review is a preliminary stage where the Panel has to decide whether the measure falls under scope of the WTO Agreement and whether it violates any WTO Articles. The second step of the review is to determine which elements of GATT Article XXI (b) (iii) are objective, subjective or whether they could be put in "grey" area. The marker for differentiation between elements of the GATT Article XXI is the wording "it". For example, "any action it considers necessary" and "its essential security interests" mean that the choice of a measure and determination of essential security interests are up to the WTO Member and the Panel has little discretion in its review. On the contrary, the wording "in time of war or other emergency in international relations" seems to be amenable to an objective determination. However, the Panel should also provide a certain level of discretion to States since the perception of war or emergency in international relations depends on State's view to a certain extent. As to the

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sequence of review, it seems reasonable for the Panel to proceed first with review of objective elements - a situation of emergency or international relations and a timing element. If there is a coincidence in time between a measure and the situation of war or other emergency in international relations, then the Panel can proceed with review of other elements. In particular, the Panel could see whether the actions of the State have reasonable connection with regard to the situation at hand.

To conclude, guidelines can certainly be drawn from standards of review as discussed in this chapter. In order to see how they can work out in practice, their application to two cases is simulated in the next chapter.

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3. Chapter 3 Testing the framework of review: case-studies and broader insights

The security exception of the GATT was "dormant" till 2017. It has been awakened in recent trade disputes which have arisen either as a result of geopolitical conflicts (for example, the Russia/Ukraine case or the Gulf diplomatic crisis)[637]or in cases where States pointed to the invocation of the security exception with regard to the cases of trade-restrictive measures which have been adopted for protection of the national security (the US Section 232 tariffs). This Chapter will discuss these two sets of cases and will analyse how the framework of review singled out in Chapter 2 may play out in these cases. The standard of review might help to de-politicize geopolitical conflicts and differentiate between trade protectionist measures and national security measures. Moreover, the second strand of research conducted in this Chapter shows that invocation of the security exception is pertinent not only to the WTO disputes discussed in this Chapter. The rise of the security exceptions cases points out to other broader underlying issues which characterize a current global order and reveal new developments in international economic law.

Geopolitical conflicts

Among the cases where States invoke the security exception, there is a category of trade disputes which arise from broader geopolitical conflicts. As amply documented, geopolitical conflicts might consist of various specific disputes: maritime, territorial, gas, investment and trade, etc. In other words, a trade dispute represents a part of a broader geopolitical conflict. Moreover, the pertinence of a trade dispute to a geopolitical conflict might have an impact on the litigation strategy of States. [638]

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[637] This thesis focuses on the Russia-Ukraine case since it is at more advanced stage of the Panel proceedings. However, a brief overview of the Gulf diplomatic crisis will be provided.

[638] Some scholars claim that in these cases the WTO dispute settlement mechanism has peace-related functions. See Ole Kristian Fauchald who in his analysis of peace-related functions of the WTO dispute settlement mechanism, uses the notion of the positive peace which is related to the effects of the WTO dispute settlement mechanism (DSM) on the level of "'*structural violence' as related to social justice and satisfaction of human needs within or among states"*. He explores the relationship of DSM to negative peace only with regard to contribution of the DSM to reduction of the risk of armed conflict. Ole Kristian Fauchald, 'World Peace through World Trade? The Role of Dispute Settlement in the WTO' in Cecilia Marcela Bailliet and Kjetil Mujezinovic Larsen (eds), *Promoting Peace Through International Law* (Oxford University Press 2015) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198722731.001.0001/acprof-9780198722731-chapter-10> accessed 28 June 2018. p.193 Ole Kristian Fauchald identified 25 peace-related cases among the WTO disputes brought till 2014. Among identified disputes one cluster is related to cases where measures at stake are related to core of national sovereignty. For example, such cases include, among other: *EC-Bananas* (DS16,27,105,158,361,364), *EU-Herring* (Denmark) (DS469), *China-Audiovisual Publications* (DS363), *EC-Tariff Preferences* (India) (DS246). ibid. p.204 The analysis conducted by Ole Fauchald revealed that the WTO dispute settlement mechanism might reduce interstate conflict and benefit smaller and weaker

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An example of such a trade dispute arising from geopolitical conflict could be the Russia/Ukraine trade disputes at the WTO, arising from a broader geopolitical conflict with an underlying territorial conflict over the Crimea.[639] Likewise, trade disputes between Qatar and some of the Gulf Cooperation Council countries were initiated as a result of a diplomatic crisis in the Gulf region.[640]

The litigation strategy of States involved in broad geopolitical conflicts has two main characteristics: (i) the States can agree on an amicable solution at any stage; (ii) in case of geopolitical dispute the States "divide" the case by pursuing it in different courts. At the same time, one should take into account various types of geopolitical conflicts. For example, the conflict between Russia and Ukraine could be called as asymmetrical where the legal disputes do not a lot of political weight.[641] On the contrary, the disputes like China/United States or US/USSR can be called as symmetrical and here the legal disputes might have more political influence on the behavior of a rival.

First, given the intertwinement of geopolitical conflicts with other issues, the parties to the dispute might be trying to find an amicable solution over the course of the WTO dispute.[642] According to Article 3.7 of the DSU

> *"The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred."*[643]

States. However, the effects are opposite for internal conflicts: the level of conflict might increase and benefit bigger and more powerful States. ibid. p.207

[639] For example, both States introduced trade-restrictive measures against each other which led to trade disputes at the WTO – DS512, DS525 and DS532

[640] The Gulf Cooperation Council includes Bahrain, Kuwait, Oman, Qatar, UAE and Saudi Arabia, according to the Charter entered into by above-mentioned States in 1981. See 'Charter of the Co-Operation Council for the Arab States of the Gulf (with Rules of Procedures of the Supreme Council, of the Ministerial Council and of the Commission for Settlement of Disputes).' <https://treaties.un.org/doc/publication/unts/volume%201288/volume-1288-i-21244-english.pdf>.

[641] Christoph Mitchell claimed that asymmetrical conflicts are more complex conceptions than power imbalance CR Mitchell, 'Classifying Conflicts: Asymmetry and Resolution' (1991) 518 The Annals of the American Academy of Political and Social Science 23.

[642] Christina L Davis, 'Deterring Disputes: WTO Dispute Settlement as a Tool for Conflict Management' [2016] Prepared for presentation to the Annual Meeting of the International Political Economy Society <https://scholar.harvard.edu/files/cldavis/files/davis2016.pdf>.

[643] To facilitate the amicable solutions, Article 5.1 of the DSU provides for good offices, conciliation and mediation on a voluntarily basis. Moreover, the Panel can suspend its work under Article 12.12 of the DSU and to give parties an opportunity to find an amicable solution.

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In this regard one should not overlook the importance of consultations stage at the WTO dispute resolution. As Joost Pauwelyn succinctly puts it:

> *"... the consultation phase ...may serve as a safety valve to let off domestic pressure to take a dispute seriously. Requesting formal WTO consultations demonstrates the resolve of the complaining WTO Member, both towards its own domestic constituency and the defendant. Even if the complainant does not genuinely want to pursue a dispute all of the way up to litigation, requesting formal consultations may, therefore, serve useful purposes and even settle the dispute."*[644]

Second, the States involved in a big geopolitical dispute often pursue parts of such a dispute in different courts, i.e. "piecemeal" dispute resolution approach.[645] Chipping away at the dispute scope appears to be necessary in terms of the restricted scope of each tribunal. For example, the scope of the WTO dispute settlement is set out in Article 1 of the DSU and limited to the WTO "covered agreements" listed in Annex I to the DSU. Moreover, even if the measure at issue is covered by the WTO agreement, there could be an adjacent trade-related matter. The cases where Article XXI of the GATT is invoked represent a situation where there is a need to deal with trade-related issues. The issues which are not explicitly covered by WTO agreements should not lead to reports of the Panel which add or diminish rights and obligations of the WTO Members.[646] According to Article 3.2. DSU, the Dispute Settlement Body cannot add or diminish rights and obligations of the parties as foreseen in covered agreements as far as the rights of parties under WTO agreements are not affected.[647] There are contrasting views on this provision: on the one side, there is nothing in the WTO agreements which prevents the Panel

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[644] Joost Pauwelyn, 'The Limits of Litigation: Americanization and Negotiation in the Settlement of WTO' (2003) 19 Ohio State Journal on Dispute Resolution 121. p.133

[645] Michaela Mattes, '"Chipping Away at the Issues": Piecemeal Dispute Resolution and Territorial Conflict' (2018) 62 Journal of Conflict Resolution 94. p.112

[646] For example, Petros Mavroidis stated that in the US- Softwood Lumber when the Appellate Body reversed the Panel report by saying that one could use other benchmarks. "By doing that, however, it *added* a right which had not been contemplated in the original bargain."Petros Mavroidis, 'Legal Eagles? A Look Into 10 Years of AB Case-Law' [2007] Discussion Paper No.49, Discussion Paper Series APEC Study Center Columbia University <https://www8.gsb.columbia.edu/apec/sites/apec/files/files/discussion/49MavroidisEagles.pdf>. pp.11-12

[647] Mitsuo Matsushita and others, *The World Trade Organization: Law, Practice, and Policy* (Third edition, Oxford University Press 2015). p.88

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from applying the rules of other international agreements and customary international law.[648] On the other side, it is not within inherent powers of WTO Panel to apply the rules which are not covered by the WTO Agreement.[649] For instance, the Panel might have been required to address the issues adjacent to the WTO-covered agreements in the US-Helms Burton Act case.[650] In this case the United States adopted sanctions against Cuba which had an effect on all companies dealing with Cuba (secondary sanctions). EU, in turn, challenged the US sanctions. The United States justified its measures by the recourse to the GATT Article XXI and claimed that it was non-justiciable. The Panel did not have a chance to review the US argument since the parties came to a diplomatic solution. If the WTO panel had to decide the case, it would have required to address the questions of public international law such as non-intervention and extraterritorial jurisdiction.[651]

The Ukraine v. Russia case and Qatar/Gulf countries case represent geopolitical conflicts intertwined with other disputes including trade.[652] On 31 July 2017 Qatar requested consultations at the WTO with the United Arab Emirates, Saudi Arabia and Bahrain.[653] A brief overview of these cases would be provided below.

The Gulf diplomatic crisis

To start with, one should note the relationships between the Gulf countries are very intricate on a geopolitical note. The rivalry between Qatar and UAE dates back to 1995 when the crown prince of Qatar overthrown his father from the throne.[654] UAE provided an asylum to a deposed emir of Qatar.[655]

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[648] See, generally, Joost Pauwelyn, 'The Application of Non-WTO Rules of International Law in WTO Dispute Settlement' in Patrick FJ Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer US 2005) <http://link.springer.com/10.1007/0-387-22688-5_31> accessed 23 November 2018.

[649] Joel Trachtman claims that WTO Panels should apply only WTO law. See on this point in Pauwelyn, Trachtman and Steger (n 206). pp.139-142 See also on this Guzman and Pauwelyn (n 182). pp.416-417

[650] For the analysis of the case see Dattu and Boscariol (n 346).

[651] For a discussion of this case see, for example, or

[652] In the case brought by Ukraine against Russia, Russia invoked the security exception during the panel stage process. In Qatar's case brought against UAE, UAE pointed out to the security exception as a justification for its trade-restrictive measures at the consultations stage.

[653] See 'Qatar Files WTO Complaints against the United Arab Emirates, Bahrain and Saudi Arabia' <https://www.wto.org/english/news_e/news17_e/ds526_7_8rfc_04aug17_e.htm>. See DS 526, DS 527 and DS 528, respectively

[654] See, generally, See, generally, Kristin Smith Diwan, 'Qatar's Domestic Agenda and the Gulf Crisis' (*Lawfareblog*, 25 February 2018) <https://www.lawfareblog.com/qatars-domestic-agenda-and-gulf-crisis>.

[655] Simon Henderson, 'The Palace Intrigue at the Heart of the Qatar Crisis' *Foreign Policy* (30 June 2017) <https://foreignpolicy.com/2017/06/30/the-palace-intrigue-at-the-heart-of-the-qatar-crisis-saudi-uae-al-thani/>

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The Gulf diplomatic crisis erupted in 2017 between Qatar and the Arab Quartet (Saudi Arabia, Egypt, United Arab Emirates and Bahrain).[656] The dispute evolved as follows: on 5 June 2017 Saudi Arabia, the UAE, Egypt and Bahrain severed their relations with Qatar, stating that it had been financing terrorism.[657] In particular, the four Gulf States accused Qatar of supporting Islamist groups such as the Muslim Brotherhood and disapproved of Qatar's relations with Iran. Yemen, the Maldives and Libya followed with their restrictions as well.[658] On 22 June 2017 Qatar was requested to comply with a list of 13 demands presented to it by Saudi Arabia. The demands, *inter alia*, included: closure of the news outlets sponsored by the Qatar's government; payments of reparations for loss, caused by the Qatar's police; cessation of funding of all groups that have been designated as terrorist by the UAE and other countries. Qatar refused to comply with above-mentioned demands, asserting that it would not agree to any measures that threaten its sovereignty or violate international law.[659] The Gulf countries responded by imposing an air, sea and land blockade on Qatar.[660] The blockade was justified as a response to Qatar's purported violation of a 2014 agreement by Gulf Cooperation Council member states, which requires that the nations "not undermine the 'interests, security, and stability' of each other."[661] The measures imposed on Qatar had a significant impact on its economy, given its geographically-determined dependence on trade with its neighbours.[662]

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[656] The Gulf region is intertwined with many conflicts in the past, see, for example, on the war in 1990-1991 Fred Halliday, 'The Gulf War 1990–1991 and the Study of International Relations' (1994) 20 Review of International Studies 109. In 2014 there was another rift between Qatar and 3 Gulf countries-UAE, Saudi Arabia and Bahrain. See Sami Aboudi and others, 'Saudi Arabia, UAE and Bahrain End Rift with Qatar, Return Ambassadors' (16 November 2014) <https://www.reuters.com/article/us-gulf-summit-ambassadors/saudi-arabia-uae-and-bahrain-end-rift-with-qatar-return-ambassadors-idUSKCN0J00Y420141116>.

[657] For a concise overview of the conflict see 'Why Gulf Countries Are Feuding with Qatar' *The Economist* (21 June 2018) <https://www.economist.com/special-report/2018/06/21/why-gulf-countries-are-feuding-with-qatar>.

[658] For a timeline of the dispute see 'Qatar-Gulf Crisis: All the Latest Updates' *Al Jazeera* (2 August 2018) <https://www.aljazeera.com/news/2017/06/qatar-diplomatic-crisis-latest-updates-170605105550769.html>. and BBC News, 'Qatar Crisis: What You Need to Know' *BBC News* (19 July 2017) <https://www.bbc.com/news/world-middle-east-40173757>.

[659] For demands of the Arab states see 'Arab States Issue 13 Demands to End Qatar-Gulf Crisis' *Al Jazeera* (12 July 2017) <https://www.aljazeera.com/news/2017/06/arab-states-issue-list-demands-qatar-crisis-170623022133024.html>.

[660] Habib Al Mulla, 'December 2017 Overview l Qatar Diplomatic Crisis - Where Are We Now?' <https://www.bakermckenzie.com/-/media/files/insight/publications/qatar/al_uae_december2017overviewqatardiplomaticcrisis_dec17.pdf?la=en>.

[661] 'United States and Qatar Sign Memorandum of Understanding Regarding Terrorism Financing' (2017) 111 American Journal of International Law 1023. p.1024

[662] On economic implications of the Gulf crisis see Nader Kabbani, 'The High Cost of High Stakes: Economic Implications of the 2017 Gulf Crisis' *Brookings* (15 June 2017) <https://www.brookings.edu/blog/markaz/2017/06/15/the-high-cost-of-high-stakes-economic-implications-of-the-2017-gulf-crisis/>.

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It is clear that Saudi Arabia, the UAE and their allies used economic means to put political pressure on Qatar. Moreover, some of those means like the closure of media outlets, manifest an intervention into the sovereign affairs of Qatar. One might claim that Saudi Arabia uses the "financing of terrorism argument" only as a sham to pursue its ultimate goal of undermining the sovereignty of Qatar. Others point out that for Saudi Arabia this conflict is "a strategic smoke screen to deflect attention from the simmering tension inside their own insular borders".[663] The Gulf conflict of 2017 is claimed to be "worthy of an ancient Gulf power drama".[664] Some commentators argue that the underlying issue of this dispute is the diverging views of the threat that modernity poses to Arab states.[665]

The geopolitical dispute provoked different disputes in other international tribunals. Qatar submitted the case to the International Court of Justice against the United Arab Emirates under the Convention on the Elimination of all Forms of Racial Discrimination ("CERD").[666] On 23 July 2018 the International Court of Justice issued an order as to preliminary measures requesting the United Arab Emirates to ensure that (i) families including a Qatari that separated by the UAE measures to be reunited (ii) Qatari students are given the opportunity to complete their education in the UAE and (iii) Qatari citizens affected by the UAE measures are allowed access to courts in the UAE.[667] Furthermore, Qatar filed complaints to the International Civil Aviation Organization ("ICAO") Council against Bahrain, United Arab Emirates, Saudi Arabia and Egypt under Article 84 of the Chicago Convention concerning the interpretation and application of the Chicago Convention on Civil Aviation. In essence, Qatar is trying to force

[663] Ayaan Hirsi Ali, 'The Plot Behind Saudi Arabia's Fight With Qatar' (4 December 2017) <https://www.nytimes.com/2017/12/04/opinion/saudi-arabia-qatar-reform.html>.
[664] Declan Walsh, 'Tiny, Wealthy Qatar Goes Its Own Way, and Pays for It' *New York Times* (22 January 2018) <https://www.nytimes.com/2018/01/22/world/middleeast/qatar-saudi-emir-boycott.html>.
[665] Mohammad Al-Rumaihi, 'Historical Assessment of the Current Gulf Crisis' (*The Gulf International Forum*, 15 February 2018).
[666] See Simeon Kerr, 'Qatar Says It Is Taking UAE to International Court of Justice' *Financial Times* (11 June 2018) <https://www.ft.com/content/310d6636-6d8c-11e8-852d-d8b934ff5ffa>. For an official application instituting proceedings see *Application Instituting Proceedings, Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (The State of Qatar v the United Arab Emirates)* (International Court of Justice).Qatar brought a complaint only against the UAE due to the fact that Saudi Arabia, Bahrain and Egypt adopted reservations to the ICJ's jurisdiction under Article 22 of the CERD upon ratification. See more on this Alexandra Hofer, 'Sanctioning Qatar Continued: The United Arab Emirates Is Brought before the ICJ' (*EJIL Talk! Blog of the European Journal of International Law*, 22 June 2018) <https://www.ejiltalk.org/sanctioning-qatar-continued-the-united-arab-emirates-is-brought-before-the-icj/>. CERD is available here 'International Convention on the Elimination of All Forms of Racial Discrimination' <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>.
[667] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates) - Request for the indication of provisional measures, Order* (International Court of Justice). p.27

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the blockading countries to open its airspace to Qatari planes. On 29 June 2018 the ICAO issued its Decision that it will hear the complaint brought by Qatar. Saudi Arabia, Egypt, Bahrain and United Arab Emirates appealed the Decision of the ICAO at the ICJ claiming that the ICAO has no competence over Qatar's application.[668]

Trade disputes involving the security exception

As mentioned above, Qatar's diplomatic crisis is an example where the trade dispute has arisen from a broader geopolitical conflict. On 31 July 2017 Qatar requested consultations at the WTO with the United Arab Emirates, Saudi Arabia and Bahrain.[669] Two of the three cases are at the stage of consultations (Bahrain's and Saudi Arabia's case), while in the case against the United Arab Emirates, the Panel was composed on 3 September 2018. In this regard it is worth looking at States' arguments in Qatar v. UAE case.[670]

In its request for consultations Qatar challenges all measures adopted "in the context of coercive attempts at economic isolation imposed by the UAE against Qatar".[671] The measures include: the UAE's closure of its maritime borders with Qatar, prohibition on Qatari aircraft from accessing its airspace, the UAE's closure of certain service suppliers. Qatar claims that the real purpose of the measures was commercial, rather than security-related and "allegations regarding Qatar were total fabrications".[672] In its defence the United Arab Emirates pointed out to justification of its measures by recourse to the security exception provisions – namely, Article XXI of the GATT, Article XVI bis of the GATS and Article 73 of the TRIPS Agreement. In this context the UAE claims non-justiciability of the security exception of the GATT and

[668] 'Joint Application by the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates v. State of Qatar' <https://www.icj-cij.org/files/case-related/173/173-20180704-APP-01-00-EN.pdf>. For a short note on the cases see Zainab Fattah, 'Countries Boycotting Qatar Want Flying-Rights Case Moved to ICJ' *Bloomberg* (27 June 2018) <https://www.bloomberg.com/news/articles/2018-06-27/countries-boycotting-qatar-want-flying-rights-case-moved-to-icj>.
[669] See 'Qatar Files WTO Complaints against the United Arab Emirates, Bahrain and Saudi Arabia' (n 653). See DS 526, DS 527 and DS 528, respectively
[670] To note that 25 countries reserved their rights as the third parties to this dispute, which shows a strategic importance of the case - According to the document DS526/2 these countries joined as the third parties: Afghanistan, Australia, the Kingdom of Bahrain, Brazil, Canada, China, Egypt, the European Union, Guatemala, Honduras, Japan, Kazakhstan, the Republic of Korea, Malaysia, Mexico, Norway, the Philippines, the Russian Federation, the Kingdom of Saudi Arabia, Singapore, Chinese Taipei, Turkey, Ukraine, the United States, and Yemen.
[671] From Qatar's request for establishment of the Panel, DS 526/2, for all documents see here *United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, Request for Consultations by Qatar, WT/DS526/1* (n 8).
[672] WTO, 'Qatar Seeks WTO Panel Review of UAE Measures on Goods, Services, IP Rights' (23 October 2017) <https://www.wto.org/english/news_e/news17_e/dsb_23oct17_e.htm>.

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maintains that the issue concerns the foreign policy matter rather than the trade issue and therefore the WTO is not the right forum to hear the case. [673] Likewise, in the case brought by Qatar against Saudi Arabia, Saudi Arabia refused to participate.[674]

The United States, as a third party to the dispute, sided with the UAE as to non-justiciability of Article XXI of the GATT. The United States stated that the measures are of political nature and do not fall under the WTO review and should be discussed “outside the context of WTO dispute settlement.” In this regard the United States pointed to the possibility of the parties to request assistance from the Director-General or from another person or WTO Member in which the parties have confidence.[675] It appears that the US is in favour of the diplomatic solution to the dispute.[676] The cases are pending before the Panel so it is to be seen how the Panel will solve them.[677] Since the Ukraine v. Russia trade dispute is one which is at the advanced stage of proceedings, it will be analysed in light of the framework of review discussed in the previous Chapter.

The Russia-Ukraine crisis

The Russia-Ukraine geopolitical conflict is another example of the case where trade disputes have arisen from a broader geopolitical conflict. The relations between Russia and Ukraine were not going smoothly before, but they started to deteriorate in the last five years.[678]

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[673] For a short discussion of this case see Johannes Fahner, ‘Qatar under Siege: Chances for an Article XXI Case?’ (*European Journal of International Law*, 9 January 2018) <https://www.ejiltalk.org/qatar-under-siege-chances-for-an-article-xxi-case/>.

[674] ‘Saudi Arabia Refuses to Engage in WTO Dispute Brought by Qatar’ *Al Jazeera* (4 December 2018) <https://www.aljazeera.com/news/2018/12/saudi-arabia-refuses-engage-wto-dispute-brought-qatar-181204141931031.html?utm_source=dlvr.it&utm_medium=twitter>.

[675] US Mission Geneva, ‘Statements by the United States at the October 23, 2017, DSB Meeting’ (24 October 2017) <https://geneva.usmission.gov/2017/10/24/statements-by-the-united-states-at-the-october-23-2017-dsb-meeting/>.p.5

[676] One possible explanation of the US’ favouring the diplomatic solution to the case might be the fact that Qatar hosts al-Udeid airbase, the largest American military facility in the Middle East. At the same time, due to the fact that President Trump has business in Saudi Arabia and Turkey, he tries to maintain friendly relationship with both Saudi Arabia and Qatar. See Ali al-Shihabi, ‘Saudi Crown Prince US Visit Likely to Emphasize Economics over Politics’ *Al Arabiya English* (19 March 2018) <https://english.alarabiya.net/en/views/news/middle-east/2018/03/19/Saudi-Crown-Prince-US-visit-likely-to-emphasize-economics-over-politics.html>. and ‘United States and Qatar Sign Memorandum of Understanding Regarding Terrorism Financing’ (n 661). p.1024 See also US Department of State, ‘Joint Statement of the Inaugural United States-Qatar Strategic Dialogue’ <https://www.state.gov/r/pa/prs/ps/2018/01/277776.htm>.

[677] The Panel was established on 03 September 2018 in DS526 *United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, Request for Consultations by Qatar, WT/DS526/1* (n 8).

[678] For example, there were Russo-Ukrainian gas disputes starting from 2005 Reuters Staff, ‘TIMELINE: Gas Crises between Russia and Ukraine’ *Reuters* (11 January 2009) <https://www.reuters.com/article/us-russia-

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As a matter of fact, Russia and Ukraine have entered in a large geopolitical controversy in 2014.[679] The recent 2014 conflict evolved as following: the then Ukrainian President, Viktor Yanukovych, refused to sign the EU-Ukraine Association Agreement in November 2013.[680] This move of the President was met with protests which led to the so-called "Euromaidan revolution" in Ukraine. Following a political crisis in Ukraine, Crimea, which was a semi-autonomous part of Ukraine, acceded to Russia after having the referendum in March 2014.[681]

The accession of Crimea to Russia was seen by the international community as a violation of public international law by Russia.[682] The General Assembly of the United Nations adopted a Resolution on territorial integrity of Ukraine in 2014.[683] On its part, the European Union responded to the involvement of Russia in undermining the territorial integrity of Ukraine by imposing sanctions on Russia.[684] The sanctions include restrictions in banking and energy

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ukraine-gas-timeline-sb/timeline-gas-crises-between-russia-and-ukraine-idUSTRE50A1A720090111>., The intense one erupted in 2009, for a comprehensive review see Simon Pirani, Katja Yafimava and Jonathan Stern, 'The Russo-Ukrainian Gas Dispute of January 2009: A Comprehensive Assessment' (2009) Oxford NG 27 <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2010/11/NG27-TheRussoUkrainianGasDisputeofJanuary2009AComprehensiveAssessment-JonathanSternSimonPiraniKatjaYafimava-2009.pdf>.

[679] For the Ukraine crisis timeline see (up to 9 February 2017)'The Ukraine Crisis Timeline' *The Centre for Strategic and International Studies* (9 February 2017) <http://ukraine.csis.org/#514>. Although Russia and Ukraine are interdependent on each other in terms of trade, see Rilka Dragneva-Lewers and Kataryna Wolczuk, 'Ukraine and Russia: Managing Interdependence', *Ukraine between the EU and Russia: the integration challenge* (Palgrave Macmillan 2015). the relationships between two countries led to the military conflict. See Sean Case and Klement Anders, 'Putin's Undeclared War Summer 2014 Russian Artillery Strikes against Ukraine' (2016) A Bellingcat Investigation <https://www.bellingcat.com/wp-content/uploads/2016/12/ArtilleryAttacks_withCover_EmbargoNote.pdf>.

[680] Ian Traynor and Olga Grytsenko, 'Ukraine Suspends Talks on EU Trade Pact as Putin Wins Tug of War' *The Guardian* (21 November 2013) <https://www.theguardian.com/world/2013/nov/21/ukraine-suspends-preparations-eu-trade-pact>.

[681] The Russian involvement in the referendum was acknowledged by the President Vladimir Putin in 2015. See Shaun Walker, 'Putin Admits Russian Military Presence in Ukraine for First Time' *The Guardian* (17 December 2015) <https://www.theguardian.com/world/2015/dec/17/vladimir-putin-admits-russian-military-presence-ukraine>.

[682] On the Crimea crisis generally see Christian Marxsen, 'The Crimea Crisis from an International Law Perspective' (2016) 0 Kyiv-Mohyla Law and Politics Journal 13. and on the Russian national legislation as to the accession of Crimea – Ilya Nuzov, 'National Ratification of an Internationally Wrongful Act: The Decision Validating Russia's Incorporation of Crimea' (2016) 12 European Constitutional Law Review 353. UN responded to this situation by adopting the Resolution, see UN General Assembly, '68/262, Resolution Adopted by the UN General Assembly, Territorial Integrity of Ukraine, 68th Session, 80th Plenary Meeting, A/RES/68/262' <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/262>. On difference of views from Russian and Western scholars on the Crimean crisis see Maria Issaeva, 'The Case of Crimea in the Light of International Law: Its Nature and Implications' (2015) 3 Russian Law Journal 158.

[683] UN General Assembly (n 682). Later on the General Assembly in its report on the situation in Crimea condemned "the temporary occupation of Crimea by the Russian occupation authorities". See 'UN General Assembly, Resolution Adopted by the General Assembly on 19 December 2016, 71/205. Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol (Ukraine)' <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/205>.

[684] The overview of the EU sanctions is available at 'EU Sanctions against Russia over Ukraine Crisis' *European Union Newsroom* <https://europa.eu/newsroom/highlights/special-coverage/eu-sanctions-against-russia-over-

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sector and embargoes on the import and export of arms to and from Russia. The United States also responded to the Russian involvement in the Ukrainian crisis.[685] The US, among other, adopted sanctions and targeted, inter alia, a number of Russian entities, imposed restrictions on certain transactions in financial and defence sector.[686] Moreover, the US prohibited investments in Crimea and imposed a trade embargo on trade with Crimea. [687] Some other countries, like Canada and Australia, also adopted sanctions against Russia.[688] In turn, Russia responded to the EU and US sanctions by its countermeasures which included the import ban on beef, diary, vegetables, poultry and other products.[689]

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ukraine-crisis_en>. On a need to re-shape the EU sanctions see Roman Sohn and Ariana Gic, 'Russia Sanctions: Test of EU Commitment to International Law' (*EU Observer*, 23 July 2018) <https://euobserver.com/opinion/142434>.

[685] For a short overview of the US policy response see Steven Pifer, 'Ukraine, Russia and the U.S. Policy Response, Testimony' *Brookings* (5 June 2014) <https://www.brookings.edu/testimonies/ukraine-russia-and-the-u-s-policy-response/>. There is an argument that the EU and US should align their Russian sanctions policy Ivan Paul, 'The US and the EU Need a Stronger Dialogue on Russia Sanctions. EPC Commentary, 2 May 2018' [2018] Archive of European Integration <http://www.epc.eu/pub_details.php?cat_id=4&pub_id=8517>.

[686] The list of the US sanctions is available at United States Government, 'Ukraine-/Russia-Related Sanctions' <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx>.

[687] For the opinion of the Russian scholars on the legality of the US measures against Russia see National Research University "Higher School of Economics" and others, 'Legitimacy of Anti-Russia Sanctions and Response Measures within the Membership in the WTO' (2016) 10 Actual Problems of Economics and Law <http://apel.ieml.ru/archive/show/9454> accessed 26 June 2018.

[688] The Canadian sanctions are available at Global Affairs Canada, 'Canadian Sanctions Related to Russia' <http://www.international.gc.ca/sanctions/countries-pays/russia-russie.aspx?lang=eng>.The Australian sanctions are available here Australian Government, 'Sanctions Regimes, Russia' <https://dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/Pages/russia.aspx> accessed 22 August 2018.

[689] The official text of the Executive Order of the Russian President is available here President of the Russian Federation, 'Edict of the President of the Russian Federation No.560' <http://kremlin.ru/acts/bank/38809>.(in Russian), the English summary is available at President of the Russian Federation, 'Executive Order on Special Economic Measures to Protect Russia's Security' <http://en.kremlin.ru/events/president/news/46404>. On the compatibility of the Russian ban see in Michael Lux, 'Embargo as a Trade Defense against an Embargo: The WTO Compatibility of the Russian Ban on Imports from the EU' [2015] Global Trade and Customs Journal 2. Russia claimed that the Western sanctions pose threat to its national security. Consequently, Russia used an opportunity to impose counter-sanctions against the EU and US sanctions as an excuse to securitize its economy. In this context, the scholars claim that the Russian approach exemplifies the reinforcement of the political economy system rather than its change. See Richard Connolly, *Russia's Response to Sanctions: How Western Economic Statecraft Is Reshaping Political Economy in Russia* (1st edn, Cambridge University Press 2018) <https://www.cambridge.org/core/product/identifier/9781108227346/type/book> accessed 24 August 2018. p.195 For an interview of the head of the Russian State Duma (the Russian Parliament) on the draft Law imposing sanctions see Vyacheslav Volodin, '"Sanctions Are Imposed on Those[States] Which Become Stronger and More Successful" [Vyachelsav Volodin: Sankcii Primenyatsya k Tem Kto Stanovitsa Lychshe, Narashchivaet Yspex"]' *State Duma of the Russian Federation* (17 April 2018) <http://duma.gov.ru/news/26782/>.

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Ukraine responded to the Russian involvement in Crimea by adopting personal sanctions against certain Russian citizens and legal entities.[690] The list of sanctions included, *inter alia*, freezing of assets, restrictions on exit of capital, and trade operations.[691]

The Russia-Ukraine geopolitical conflict led to various disputes in international courts.[692] Ukraine started to "piecemeal" the dispute in different tribunals: International Court of Justice,[693] European Court of Human Rights[694] and UNCLOS.[695] Some scholars even started to speak about the possibility of bringing by Ukraine the case over territorial dispute to the WTO.[696] Moreover, the Ukrainian investors brought claims against Russia under the Russia-

[690] For a discussion of the economic sanctions related to the Ukrainian conflict in light of GATT Article XXI, see, for example, Alexandr Svetlicinii, 'The Economic Sanctions over the Ukraine Conflict and the WTO: "Catch-XXI" and the Revival of the Debate on Security Exceptions' [2015] Journal of World Trade 891.

[691] The Ukrainian sanctions legislation include - 'Law of Ukraine "On Sanctions" No. 1644-VII' <http://zakon.rada.gov.ua/laws/show/1644-18?lang=en>. The Proposals as to sanctions are made by the Government of Ukraine. For example, the initial sanctions in 2014 were proposed by 'Decree of the Government of Ukraine No.829-p' <http://zakon.rada.gov.ua/laws/show/829-2014-p>. Then the National Defense and Security Council adopts sanctions 'The Decision of the National Security and Defense Council of Ukraine "On Application of Personal Economic Sanctions and Other Restrictive Measures"' <http://zakon.rada.gov.ua/laws/show/n0014525-15>. Last, the President of Ukraine by his decree enforces sanctions 'Decree of the President of Ukraine No.549/2015 "On the Decision of the National Defense and Security Council" Dated 2 September 2015 "On Application of Economic Sanctions and Other Restrictive Measures"' <http://zakon.rada.gov.ua/laws/show/549/2015>.

[692] For an overview of cases between Russia and Ukraine up to March 2016 see Gaiane Nuridzhanian, 'Ukraine vs. Russia in International Courts and Tribunals' (*EJIL Talk! Blog of the European Journal of International Law*, 9 March 2016) <https://www.ejiltalk.org/ukraine-versus-russia-in-international-courts-and-tribunals/>.

[693] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination, Ukraine v Russia, Application instituting proceedings* (ICJ).

[694] See applications Ukraine v. Russia (application no. 20958/14), Ukraine v. Russia (IV) (no. 42410/15), Ukraine v. Russia (V) (no. 8019/16), Ukraine v. Russia (VI) (no. 70856/16) and Ukraine v. Russia 38334/18

[695] For a concise overview of the last developments in the Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation) see Valentyn Schatz and Dmytro Koval, 'Insights from the Bifurcation Order in the Ukraine vs. Russia Arbitration under Annex VII of UNCLOS' (6 September 2018).

[696] For example, some scholars claimed that an annexation of Crimea by Russia caused certain trade barriers for Ukraine that are contrary to Article II and Article XI:1 of the GATT 1994. In turn, Russia should bear responsibility under Article XXVI:5 (a) of the GATT 1994.[696] The main idea behind this argument is that Russia should maintain Ukraine's-WTO-regime with respect to Crimea and not Russia's WTO-regime. Nataliya Haletska, 'Guest Post on Annexation of Ukrainian Territory' (*International Economic Law and Policy Blog*, 24 November 2015) <http://worldtradelaw.typepad.com/ielpblog/2015/11/guest-post-on-annexation-of-ukrainian-territory.html>. While this argument might be worth of an academic discussion, its feasibility in practice is debatable. Bringing a dispute with regard to the country's customs territories seems to be relevant at the time of accession rather than post-accession. See, generally, Dylan Geraets, *Accession to the World Trade Organisation: A Legal Analysis* (Edward Elgar Publishing 2018). For example, at the time of the Russian accession to the WTO, Georgia brought an issue as to the disputed customs territory in Georgia. For a concise overview of situation see Isabel Gorst and Stefan Wagstyl, 'Russia/WTO: What's in It for Georgia?' *Financial Times* (2 November 2011) <https://www.ft.com/content/ac6ace76-b53a-3bf9-ad26-7ef439d4f12b>. For a more extensive analysis of the situation see Daniel Warner, 'Moving Borders: Russia's Creative Entry into the World Trade Organization (WTO)' (2014) 39 Alternatives: Global, Local, Political 90.

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Ukraine bilateral investment treaty.[697] On its part, Russia brought a case against Ukraine over 3 bln USD sovereign-debt bond in the English court.[698] Moreover, some cases have been brought under arbitration rules with regard to the armed conflict in Donbas.[699]

Ukraine and Russia also brought cases against each other at the WTO. However, neither US nor Russia have brought the cases against each other at the WTO. Similarly, neither EU nor Russia brought cases against each other. Again, here the notion of "symmetrical conflict" has to be mentioned -given the fact that both Russia and US could be considered as symmetrical powers, they make a strategic choice of bringing the case against another asymmetrical power rather than symmetrical one. Moreover, both US and EU are aware of the fact that underlying dispute is a conflict over Crimea, and they do not want to put a highly politicized dispute in front of the WTO.

With regard to cases between Russia and Ukraine, the first type of cases at the WTO deals with sanctions applied by both countries. For example, in 2017 Russia brought a case before the WTO against the Ukrainian economic sanctions (DS525).[700] Ukraine, on its part, brought a case against the Russian trade restrictions in the WTO.(DS532).[701] Both cases are still at the consultations stage as of 2018.

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[697] Dilevka Sergejs, 'Arbitration Claims by Ukrainian Investors under the Russia-Ukraine BIT: Between Crimea and a Hard Place?' (*CIS Arbitration Forum*, 17 February 2016) <http://www.cisarbitration.com/2016/02/17/arbitration-claims-by-ukrainian-investors-under-the-russia-ukraine-bit-between-crimea-and-a-hard-place/>.

[698] On a sovereign bond see W C., 'What Ukraine Owes Russia. A Short History of the World's Wackiest Bond.' *The Economist* (8 September 2015) <https://www.economist.com/free-exchange/2015/09/08/a-short-history-of-the-worlds-wackiest-bond>. The last decision opened a door to a review on substantial matters. See *Ukraine (Represented by the Minister of Finance of Ukraine acting upon the instructions of the Cabinet of Ministers of Ukraine) - and - The Law Debenture Trust Corporation PLC* [2018] The Court Of Appeal (Civil Division), Royal Court of Justice Case No: A4/2017/1755. On the concise overview of decision see Robin Wigglesworth and Kate Allen, 'UK Ruling Sets Stage for Ukraine-Russia "Odious Debt" Battle' *Financial Times* (20 September 2018) <https://www.ft.com/content/0149e0a2-bb46-11e8-94b2-17176fbf93f5>.

[699] Oleh Marchenko, 'Ukraine' [2019] The European Arbitration Review 2019 115.

[700] *DS525, Ukraine — Measures relating to Trade in Goods and Services, Request for consultaions, 19 May 2017*. On this in the news TASS, Russian News Agency, 'Moscow Urges WTO to Investigate Ukraine's Sanctions against Russia' (20 May 2017) <http://tass.com/economy/946807>. However, in 2014 Russia claimed to bring a case to the WTO against the US over its sanctions See 'Russia will challenge the US sanctions in the WTO' *Kommersant* (16 April 2014) <https://www.kommersant.ru/doc/2454002>. (in Russian) The Russian strategy of bringing the case against Ukraine is an example of a good tactic creating precedents in WTO. For example, the EU attacked on safeguards Argentina first (Argentina-Footwear) *Argentina — Footwear (EC)* (n 405)., then Korea-Dairy *DS98: Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products, Appellate Body Reports*. in order to build precedents to attack the US on Wheat Gluten. *DS166: United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, Appellate Body Report*. On politics of a precedent see Krzysztof J Pelc, 'The Politics of Precedent in International Law: A Social Network Application' (2014) 108 American Political Science Review 547.

[701] See *DS532: Russia — Measures Concerning the Importation and Transit of Certain Ukrainian Products, Request for consultations by Ukraine*.

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The second type of trade disputes between Ukraine and Russia goes beyond the sanctions-related cases. For example, Russia challenged the Ukrainian anti-dumping measures on ammonium nitrate in May 2015 (DS493). Ukraine brought the case against Russia under GATT and TBT Agreements concerning measures imposed by Russia on the importation of a railway equipment (DS499) in October 2015.[702] Finally, Ukraine brought the case against the Russian restrictions on traffic in transit from Ukraine through the Russian Federation to third countries (DS512) in September 2016.[703] It is in the latter case concerning restrictions on traffic in transit that Russia justified its measures by recourse to the GATT Article XXI and this case will be analysed below.

Case-study 1 – Russia –Traffic in Transit (DS512)

Facts of the case

Ukraine challenged the Russian restrictions on traffic in transit of goods from Ukraine to the Republic of Kazakhstan and Kyrgyz Republic through the territory of the Russian Federation in September 2016.[704] In particular, Ukraine divided the Russian measures into two groups. The first type of measures at issue, among other, consist of:

- the requirement for a road and railway transit of goods from Ukraine to the Republic of Kazakhstan and Kyrgyz Republic[705] through the territory of the Russian Federation to be carried out only from the territory of the Republic of Belarus along with an obligation to use special identification means (seals) and certain registration cards for drivers during the trip;[706]
- ban on transit of goods which have the tariff rates higher than zero according to the Common Customs Tariff of the Eurasian Economic Union.[707]

[702] For an overview of Russia/Ukraine claims see Olesia Kryvetska and Nataliia Isakhanova, ‘Trade Restrictions and WTO Disputes in Ukraine–Russia Trade Relations’ (2018) Getting the Deal Through, Trade&Customs 2019.
[703] Ukraine, ‘DS512: Russia — Measures Concerning Traffic in Transit, Request for Consultations by Ukraine, WT/DS512/1’ <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm>.
[704] Note that Ukraine also addressed these questions during the Trade Policy Review of Russia ‘Trade Policy Review:Russia, Minutes of the Meeting,WT/TPR/M/345’ <https://www.wto.org/english/tratop_e/tpr_e/tp445_e.htm>. paras.4.140-4.142, p.28
[705] Decree of the President of the Russian Federation No.319 of 1 July 2016
[706] Decree of the President of the Russian Federation No.1 of 1 January 2016
[707] Resolution of the Government of the Russian Federation No.778 of 7 August 2014

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The second group of measures includes:

- The prohibition of transit of goods subject to veterinary and phytosanitary surveillance pursuant to the Resolution of the Government of the Russian Federation No.778 of 7 August 2014. The list of goods includes, among other, bovine meat, fish and crustaceans, milk and dairy products, vegetables, fruits and nuts, sausages and similar products, food or prepared food, salt and plant products. The transit of such goods is only allowed through the checkpoints located at the Russian part of the external border of the Customs Union. Moreover, the transit of the above-mentioned goods must be carried on upon receipt of permits issued by the Committee of Veterinary Control and Surveillance of the Ministry of Agriculture of the Republic Kazakhstan and the transit of goods to third countries can take place only upon permits issued by Rosselkhoznadzor (the Federal Service for Veterinary and Phytosanitary Surveillance of the Ministry of Agriculture of the Russian Federation);
- restrictions on traffic in transit from Ukraine to international transit of goods to other countries in Central/Eastern Asia and Caucasus.

Ukraine claimed that the above-mentioned restrictions have led to decrease of the Ukrainian exports to the Central/Eastern Asia and Caucasus in January-June 2016 in amount of 35.1% in comparison with the same months of 2015.[708] Moreover, the above-mentioned requirements for transit routes through the territory of Belarus impose additional burden for length and duration of trips.

Ukraine considered that the Russian measures were contrary to:

1. Article V:2 of the GATT 1994 and paragraph 2 of the Part I of the Protocol on the Accession of the Russian Federation which incorporates commitments in paragraph 1161 of the Report of the Working Party on the Accession of the Russian Federation since Russia has denied freedom of transit through its territory via the routes most convenient for international transit;
2. Article V:3 of the GATT 1994 and paragraph 2 of the Part I of the Protocol on the Accession of the Russian Federation because Ukraine was subject to unnecessary delays and restrictions as a result of the Russian restrictions;

[708] Ukraine (n 703). p.2

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3. Article V:4 of the GATT 1994 and paragraph 2 of the Part I of the Protocol on the Accession of the Russian Federation because the charges and regulations by Russia were not reasonable and did not take into account the conditions of traffic;
4. Article V:5 of the GATT 1994 and paragraph 2 of the Part I of the Protocol on the Accession of the Russian Federation because by adopting the measures at issue Russia accorded the less favourable treatment to traffic in transit from the territory of Ukraine than to any other third country;
5. Article X:1 of the GATT and paragraph 2 of the Part I of the Protocol on the Accession of the Russian Federation which incorporates commitments in paragraph 1161, 1426 and 1427 of the Report of the Working Party because Russia did not publish promptly its laws and regulations;
6. Article X:2 of the GATT 1994 which incorporates commitments in paragraph 1161, 1426, 1427 and 1428 of the Report of the Working Party because Russia imposed measures before they have been published;
7. Article X:3 (a) because Russia did not administer its laws and regulations in a uniform and impartial manner;
8. Article XI:1 of the GATT 1994 because the measures at issue constituted quantitative restrictions;
9. Article XVI:4 of the Marrakesh Agreement establishing the WTO because Russia did not ensure the conformity of its laws with its obligations as foreseen in the annexed Agreements.
10. Paragraph 2 of the Part I of the Protocol on the Accession of the Russian Federation which incorporates the commitments with regard to traffic in transit.[709]

Russia, in turn, justified its measures by recourse to Article XXI (b) (iii) of the GATT, i.e. the security exception of the GATT, as evident from the third parties' submissions.[710] This thesis will not analyse the Russian measures in light of Articles V, X and XI of the GATT but rather concentrate on the Russian defence – Article XXI of the GATT.

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[709] Most of the measures have been introduced by 'Decree of the President of the Russian Federation No.1 "On Measures to Ensure Economic Security and National Interests of the Russian Federation in International Cargo Transit from the Territory of Ukraine to the Territory of Kazakhstan or Kyrgyz Republic through the Territory of the Russian Federation", as Amended 01.07.2016 No.319, 30.12.2017 No.643 and 29.06.2018 No.380' <http://kremlin.ru/acts/bank/40394>.

[710] US Trade Representative, 'Responses of the United States of America to Questions From the Panel and Russia to Third Parties, Russia – Measures Concerning Traffic in Transit, (DS512)' <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.As.Pnl.and.Rus.Qs.fin.%28public%29.pdf>. p.7

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The case was joined by 18 WTO Members as the third parties, including, for example, Australia, Bolivia, Brazil, Canada, Chile, China, EU, India, Japan, Saudi Arabia and United States. The high interest in joining as the third parties points out to a strategic signaling of "systemic interest" of the case to involved parties.[711]

The submissions of Australia, European Union and United States are publicly available as of time of writing and I will discuss them in what follows. It is worth mentioning that the Russian Federation reacted to the publication of the written submissions by the European Union and asked the EU "to withdraw all publicly available statements that contain information of confidential nature relevant to the present dispute…"[712] The European Union in its reply stated that it has disclosed its position in accordance with the second sentence of Article 18.2 of the DSU which Russia incorrectly interpreted.[713]

The case is pending before the WTO as of time of writing and the Panel communicated that due to the complexity of the case it expects to issue a final report in the first quarter of 2019.[714]

Russia – Traffic in Transit: views on justiciability of Article XXI

The European Union, United States and Australia made publicly available their third party submissions in the above-mentioned case. Before reviewing the submissions, the views on justiciability of the GATT Article XXI will be briefly mentioned.

The United States claims that the Panel does not lack jurisdiction as such, but the dispute contains a non-justiciable issue, i.e. security exception of the GATT.[715] By claiming that Article

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[711] See Marc L Busch and Eric Reinhardt, 'Three's a Crowd: Third Parties and WTO Dispute Settlement' (2006) 58 World Politics 446. p.452

[712] European Union, 'Comments from the European Union on Russia's Request of 14 March 2018 Regarding the Publication of EU Statements by the European Union in Russia — Measures Concerning European Union Traffic in Transit (DS512)' <http://trade.ec.europa.eu/doclib/docs/2018/june/tradoc_156914.pdf>. p.1 para.1

[713] ibid. p.3, para.13-14 To recall, Article 18.2 of the DSU states: "*2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.*"

[714] See Communication from the Panel, DS512/6. Note that according to its previous communication, dated 17 November 2017, the Panel was planning to issue the report by the end of 2018. See the DS512/5 dated 17 November 2017 *Russia-Traffic in Transit* (n 7).

[715] The US clarifies its position with regard to difference between jurisdiction and justiciability by saying that "The United States is of the view that the Panel does possess jurisdiction over this dispute, but that the dispute presents a non-justiciable issue for which the Panel cannot make findings or provide a recommendation."
US Trade Representative, 'Responses of the United States of America to Questions From the Panel and Russia to Third Parties, Russia – Measures Concerning Traffic in Transit, (DS512)' (n 710). para.17

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XXI is non-justiciable, the United States sides with Russia.[716] That being said, on a geopolitical note, the United States supports Ukraine in its territorial dispute with Russia which is evidenced by broad US sanctions against Russia. The US position is understandable from the fact that there are pending Section 232 cases against it at the WTO where the US might invoke Article XXI of the GATT.[717] However, the position of Russia does not square with its strategy in case against the United States with regard to the US Section 232 tariffs which the United States justifies by the GATT Article XXI.[718]

In support of its position as to non-justiciability of the GATT Article XXI, the United States refers to the wording “it considers”.

> *“The self-judging nature of Article XXI is established through use of the crucial phrase: “which it considers necessary for the protection of its essential security interests.” The ordinary meaning of “considers” is “regard (someone or something) as having a specified quality” or “believe; think”. The “specified quality” for the action is that it is “necessary for” the protection of a Member’s essential security. Thus, reading the clause together, the ordinary meaning of the text indicates it is the Member (“which it”) that must regard (“considers”) an action as having the quality of being necessary. “*[719]

Then the United States refers to the drafting history of the GATT Article XXI and historical understanding of the essential security interests by Members.

The EU, on the contrary, maintains that the provisions of the GATT XXI are justiciable based on the following reasons.[720] First, the European Union claims that Article XXI of the GATT is an affirmative defence which could be invoked to justify otherwise inconsistent

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[716] US Trade Representative, ‘Third Party Executive Summary of the United States of America, DS512, Russia-Measures Concerning Traffic in Transit’ (n 318). See on this Doug Palmer, ‘US Sides with Russia in WTO National Security Case against Ukraine’ *Politico* (30 July 2018) <https://www.politico.eu/article/us-sides-with-russia-in-wto-national-security-case-against-ukraine/>.
[717] The cases will be discussed further in light of cases at the WTO which have arisen out of Section 232 tariffs imposed by the United States
[718] See *DS554: United States — Certain Measures on Steel and Aluminium Products*.
[719] US Trade Representative, ‘Third Party Executive Summary of the United States of America, DS512, Russia-Measures Concerning Traffic in Transit’ (n 318). para.2
[720] European Commission, ‘Third Party Oral Statement by the European Union, Russia — Measures Concerning Traffic in Transit, (DS512)’ <http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156603.pdf>. p.2

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measure of the GATT, rather than an exception to the rules on jurisdiction. Furthermore, the European Union argues that interpreting Article XXI of the GATT as non-justiciable would:

- be contrary to the terms of reference of the Panel (as foreseen in Articles 7 (1) and 7 (2) of DSU);
- make it impossible for a Panel "to make an objective assessment of the matter before it" as prescribed by Article 11 DSU;
- undermine the objectives of WTO dispute settlement system as provided in Article 3(2) DSU;
- deprive the defending party from its right to seek redress of a violation of obligations under the covered agreement, provided in Article 23 DSU.[721]

Likewise Australia claims for a justiciability of the GATT Article XXI. [722] Contrary to the US, Australia interprets the wording "it considers" as not precluding the review by the Panel.[723] Australia first claims that a Panel has a jurisdiction over the security exception based on the following arguments:

- the Panel "shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute" as foreseen by Articles 7.1. and 7.2 of the DSU;
- the Panel should make review as required by its standard terms of reference.

Moreover, the Panel does not have a power to decline to exercise its jurisdiction under Article 7 of the DSU since the Panel's refusal to exercise jurisdiction would deprive Ukraine of its rights under Articles 3.2 and 3.3 of the DSU to bring a dispute and ask for a remedy. In addition, Australia cited Article 19.2 of the DSU which prohibits a Panel from making findings that would add to or diminish the rights and obligations provided in the covered agreements.

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[721] European Commission, 'European Union Third Party Written Submission, Russia-Measures Concerning Traffic in Transit (DS512)' (n 229). paras.10-21

[722] Australia also specified the clause of Article XXI that was invoked by Russia – Article XXI (b) (iii), see p.4

[723] In para.11 of its oral statement Australia claims: *"In Australia's view, the use of the words "it considers necessary" indicates that it is for a Member to determine "its essential security interests" and the actions "it considers necessary" for the protection of those interests. However, this deference to a Member with respect to determining what it considers necessary does not preclude a panel from undertaking any review of a Member's invocation of Article XXI(b)."*'Third Party Oral Statement of Australia Russia-Measures Concerning Traffic in Transit (DS512)' <https://dfat.gov.au/trade/organisations/wto/wto-disputes/Pages/summary-of-australias-involvement-in-disputes-currently-before-the-world-trade-organization.aspx>.

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Leaving the issue of justiciability aside, the main proposals as to interpretation of the GATT Article XXI, submitted by the third parties will be discussed below.

The EU submissions

Main issues addressed by the European Union in its third party submissions are: (i) burden of proof under Article XXI and (ii) the standard of interpretation and application of Article XXI (b) (iii) of the GATT.

Burden of proof

With regard to a burden of proof, the European Union claims that Russia has failed to meet its burden of proof on its alleged defence under Article XXI (b) (iii) of GATT 1994. The European Union substantiated this argument by claiming that Article XXI of the GATT is an affirmative defence and the burden proof lies on the party which invokes Article XXI. EU claims that Ukraine made its *prima facie* case that the Russian measures at issue are inconsistent with provisions of the GATT 1994. Consequently, the Panel should rule in favour of the party which presented a prima facie case, given the fact that Russia failed to meet its burden of proof by making its prima facie case.[724]

Standard of review

The EU proposal on standard of review is based on the analysis developed in the WTO case-law for Article XX of the GATT.[725]

To recall, analysis under Article XX of the GATT embodies two-tier analysis:

1) whether the measure is provisionally justified under at least one of the subparagraphs of Article XX
2) whether the measure is applied in a manner that satisfies the requirements of the chapeau of Article XX.

Given the fact that Article XXI does not have a chapeau similar to Article XX of the GATT, the EU proposes to limit the analysis under Article XXI of the GATT to the first tier of the analysis.[726]

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[724] European Commission, 'European Union Third Party Written Submission, Russia-Measures Concerning Traffic in Transit (DS512)' (n 229). paras.24-26

[725] ibid. paras.30-36

[726] To recall, the two-tier analysis concerns – first whether the measure falls under at least one of the exceptions (e.g. paragraphs (b) to (g), two of the ten exceptions under Article XX) and, then, whether the measure satisfies

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To recall, under "the first-tier analysis" the Panel has to assess two questions:
1) whether the challenged measure addresses the particular interest specified in the subparagraph of GATT Article XX and
2) whether "there is a sufficient nexus between the measure and the interest protected".[727]

Whether the challenged measure addresses the particular interest specified in the subparagraph of GATT Article XXI

Under the first question the defending party should demonstrate that the challenged measure falls under one of the subparagraphs of Article XXI, i.e. subparagraph (b) (iii) as claimed by Russia. To this end, Russia has to demonstrate that:

1. the measure is taken "in time of war or other emergency in international relations";[728]
2. the war or other emergency in international relations threatens "its essential security interests"; and
3. the measure is designed "for" the protection of the relevant essential security interest against that threat.[729]

Three elements will be reviewed in more details:

1. The EU notes that the war and an emergency in international relations are objective factual situations and can be fully reviewed by the Panel taken into account relevant international law. For example, the EU refers to the definition of aggression by the UN General Assembly.[730]
2. With regard to the notion of "essential security interests", the EU claims that while each Member has a right to define "its essential security interests", the deference of the State is not unlimited. The Panel has a right to review "whether the interests at stake can reasonably/plausibly be considered "essential security interests" from the perspective of that Member". [731]

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the requirements of the introductory paragraph (the "chapeau" of Article XX), i.e. that it is not applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail", and is not "a disguised restriction on international trade".

[727] European Commission, 'European Union Third Party Written Submission, Russia-Measures Concerning Traffic in Transit (DS512)' (n 229). p.8

[728] ibid. The EU clarifies that an interpretation should consider relevant international law, emergency- does not cover a measure that is taken as a response for a situation that has taken place a long time ago. At the same time, "taken in time" does not mean only the temporal coincidence, but a sufficient nexus between the situation and the measure.

[729] ibid. para.38, p.9

[730] 'United Nations General Assembly Resolution 3314 (XXIX) (Definition of Aggression)' (n 192).

[731] European Commission, 'European Union Third Party Written Submission, Russia-Measures Concerning Traffic in Transit (DS512)' (n 229). para.50, p.12

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3. The design of the measure, as developed under a case-law of Article XX of the GATT, embodies a demonstration that "the measure, its content, structure and expected operation is 'capable' of protecting the relevant essential security interests from that threat".[732] The EU proposes to examine this requirement in light of good faith standard in order to prevent abuses.[733]

Whether "there is a sufficient nexus between the measure and the interest protected"

II. With regard to the second question, i.e. whether there is a sufficient nexus between the measure and the interest protected, the EU proposes to review it under the test of necessity as developed by the Appellate Body under Article XX of the GATT.[734] The European Union clarifies that there is no reason why the term "necessary" should be given a different meaning in Article XXI (b) than in the context of Article XX. It acknowledged the difference between "it considers necessary" and "necessary" and said that the former it implies, that, "in principle, it is for each Member to assess by itself whether a measure is 'necessary'". However, it does not mean that Members enjoy unfettered discretion.[735] The EU claims that Panel should conduct the limited review, similar to the approach followed by arbitrators when interpreting Article 22.3 DSU in *EC-Bananas* which has the phrase "if that party considers". Moreover, EU refers to "it considers" provision in other areas of the public international law and the EU law.[736]

To recall, the necessity test was developed in *Korea-Beef* where the Appellate Body explained that "the necessity" should be assessed through a process of weighing and balancing of a series of factors:

- the relative importance of the objective pursued by the measure;
- the contribution of the measure to that objective;
- the restrictive effect of the measures on international commerce. [737]

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[732] Colombia -Textiles, para.5.68

[733] European Commission, 'European Union Third Party Written Submission, Russia-Measures Concerning Traffic in Transit (DS512)' (n 229). Para.55 p.13

[734] *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products, DS 400, AB Report*. Para.5.169

[735] European Commission, 'European Union Third Party Written Submission, Russia-Measures Concerning Traffic in Transit (DS512)' (n 229). paras.60-61

[736] EU discussed interpretation followed by the ICJ in *Djibouti v France* where "if it considers" wording in Article 2 of the Mutual Assistance Agreement between Djibouti and France was interpreted as requiring a good faith review ibid. para.65 The EU has also referred to Article 346 (1) (a) and (b) of the TFEU which has the similar language "it considers necessary"ibid. para.66-68

[737] WTO, 'Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT/DS169/R' <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds161_e.htm>. para.164

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Moreover, following the above analysis the measures should be compared with reasonably available alternative less trade restrictive measures which can make an equivalent level of contribution to the achievement of the relevant objective.[738]

Summing up, the EU provides a test for review of Article XXI which embodies a modified version of the test under Article XX of the GATT. The EU acknowledged the difference in wording articles Article XX and XXI of the GATT by limiting the "two-tier analysis" developed in the WTO jurisprudence to the first-tier analysis. The EU provided some guidance as to interpretation of certain elements and pointed to matters Member States have more deference ("its essential security interests") and no deference (factual situations like "war" or "other emergency"). The application of the necessity test proposed by the EU under Article XX of the GATT to Article XXI limits deference of the State while the United States claims that the wording "it considers" points out to the full deference of the State The EU also proposed to review the design of the measure in light of the good faith standard. It seems that the EU follows the approach "let us not reinvent the wheel", i.e. let us not create a new approach where we already have some guidance.[739]

Australian submissions

The two main points discussed in the Australian submissions are: (i) necessity review and (ii) "for the protection" review.

Necessity

Australia proposes to limit the necessity review of a Panel to determination of whether the Member *in fact* considered actions necessary. Such "in fact" review could be done by looking at the Member's statements and conduct.[740] Australia claimed that the Panel's review of necessity as proposed by the EU will interfere with the Russian deference on "what it considers necessary" by inviting a Panel to do a second-guessing. In this regard Australia expressed its caution with regard to a Panel's possibility to determine whether Russian assertion of the necessity of measures was "reasonable" or "plausible" as proposed by the EU.[741] Australia claims that Russia has a right to determine the measure as "it considers necessary".

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[738] European Commission, 'European Union Third Party Written Submission, Russia-Measures Concerning Traffic in Transit (DS512)' (n 229). para.59, p.14

[739] WTO, 'WTO Analytical Index, GATT Article XXI' (n 120).

[740] 'Third Party Oral Statement of Australia Russia-Measures Concerning Traffic in Transit (DS512)' (n 723). para.15 p.4

[741] 'Responses of Australia to the Panel's Questions, Russia-Measures Concerning Traffic in Transit (DS512)' <https://dfat.gov.au/trade/organisations/wto/wto-disputes/Pages/summary-of-australias-involvement-in-disputes-currently-before-the-world-trade-organization.aspx>. para.7, p.1

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"For the protection"

Australia proposes Panel to review whether that (necessary) action was taken "for the protection of" a Member's essential security interests.[742] This review will require a Panel to make an analysis of whether there is a sufficient nexus between the measure taken and the Member's essential security interests. The review of such nexus could be conducted similarly to the *EC-Seals* case. To recall, the Appellate Body stated that the measure should not be incapable of making some contribution to protection the essential security interests identified.[743]

To sum up, Australia claims that the Panel has a jurisdiction over the security exception of the GATT. In its review the Panel should make a factual analysis of whether Russia *in fact* considers the measure necessary and if so, whether the measure was *in fact* taken for the protection of the Russian essential security interests.[744] All in all, it appears that "in fact" review means that Australia maintains the view that Article XXI is not self-judging and the Panel should make its factual review, i.e., based on evidence provided by Parties.[745]

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[742] 'Third Party Oral Statement of Australia Russia-Measures Concerning Traffic in Transit (DS512)' (n 723). para.17, p.4

[743] In para. 5.228. of the EC-Seals Appellate Body Report, the AB stated: "*In sum, we do not consider that the Panel erred in concluding that the EU Seal Regime "is capable of making and does make some contribution" to its objective, or that it makes a contribution "to a certain extent"."DS400: European Communities — Measures Prohibiting the Importation and Marketing of Seal Products, AB Report*.

[744] 'Third Party Oral Statement of Australia Russia-Measures Concerning Traffic in Transit (DS512)' (n 723).

[745] As to the fact-finding see David A Collins, 'Institutionalized Fact Finding at The WTO' (2006) 27 University of Pennsylvania Journal of International Economic Law 367.

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Summary - Framework of review proposed by the European Union and Australia					
	“any action it considers necessary”	“for the protection of”	“essential security interests”	“in time of the war or other emergency in international relations”	Standard of review
EU	Analysis under Article XX of the GATT: - the relative importance of the objective pursued by the measure; -the contribution of the measure to that objective; -the restrictive effect of the measures on international commerce; But the difference of chapeau means that Panel should make a limited review of whether the Member can plausibly consider that the measure is necessary.	The content, structure and expected operation of the measure is capable of protecting the relevant essential security measure from that threat	-it is for a Member to identify its own security interests, but Based on the reasons provided by the invoking Member, a panel should review whether the interests at stake can reasonably/plausibly be considered to be “essential security interests”, from that Member’s perspective	- factual situations to be interpreted by a Panel by reference to international law - the war or other emergency threatens its essential security interests - the measure is designed for the protection of the relevant essential security interests against that threat - “in time”-requires not only a temporal coincidence but also a sufficient nexus between the action taken and the situation of war or other emergency in international relations	The limited review in order to ensure that the exception is applied in good faith (with regard to necessity)
Australia	- any action-it is for a Member to determine -the necessity review is limited to determining whether the Member “*in fact*” considers the action necessary (consider the Member’s statement and conduct)	whether there is a sufficient nexus between the action taken and the Member’s essential security interests (EC-Seal Products, para.5.169 – if the measure is not “capable of making some contribution” – to determine that the action was in fact taken “for” the purpose consistent with Article XXI(b))	It is for Member to determine its essential security interests	Not addressed	Objective assessment of the matter before the Panel, including the objective assessment of the facts

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Applying a framework of review

This section will analyse the framework of review as developed in Chapter 2 in light of the Russia-Ukraine dispute .[746] To recall, that the Panel first should establish whether there is a violation of substantive obligations under the WTO Agreements. In case there are violations of WTO Agreements, the Panel should proceed with review under Article XXI of the GATT. Then the Panel should establish whether such measure falls under the scope of Article XXI (b) (iii). Third, the Panel should decide (i)whether there is a situation of war or other emergency in international relations and (ii)whether such measure was "taken in time of war or other emergency in international relations". Last, the Panel should review whether the State considered adoption of measures in good faith.

Application to the *Russia-Traffic in Transit* case:

Russia has adopted the measures which by large constitute restrictions on traffic in transit. The restrictions on traffic in transit are covered by the GATT Article V since the transit of goods originating from Ukraine through the Russian territory is only a portion of complete journey and Russia restricts such transit through its territory. Thus, it is likely that Russia would be found in violation of Article V of the GATT.

1. Does the measure fall under the scope of violations which can be justified under the GATT Article XXI?

First, the violations under the GATT Article V can clearly be justified under the GATT Article XX since it states "Nothing in this Agreement".

Second, there is also an issue whether the measures which violate the Protocol of Accession can be justified by recourse to the GATT Article XXI. In its request for consultations Ukraine claimed that Russia has violated Paragraph 2 of Part I of the Protocol of Accession

[746] Note that the simulation is done for academic purposes and based on a publicly available information. The analysis might have another outcome given a specific evidence provided by States to the Panel.

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incorporating commitments in Working Party Report such as Paragraphs 1161[747], 1426[748] (first sentence), 1427[749] (first and third sentences), and 1428[750] of the Working Party Report. Paragraph 2 of the Russian Accession Protocol states that the Protocol together with the commitments stated in paragraph 1450[751] of the Working Party Report shall be an integral part of the WTO Agreement.[752] The Working Party Report refers, for example, (i) to the commitments with regard to compliance of the Russian laws and other regulations related to the transit of goods with Article V of the GATT and (ii) to the obligations of transparency under Article X of the GATT and the exception with regard to the transparency obligations in cases

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[747] Paragraph 1161of the Report of the Working Party states: "*The representative of the Russian Federation confirmed that the Russian Federation would apply all its laws, regulations and other measures governing transit of goods (including energy), such as those governing charges for transportation of goods in transit by road, rail and air, as well as other charges and customs fees imposed in connection with transit, including those mentioned in paragraphs 1155 and 1156 in conformity with the provisions of Article V of the GATT 1994 and other relevant provisions of the WTO Agreement. The representative of the Russian Federation further confirmed that, from the date of accession, all laws and regulations regarding the application and the level of those charges and customs fees imposed in connection with transit would be published. Further, upon receipt of a written request of a concerned Member, the Russian Federation would provide to that Member information on the revenue collected from customs fees and customs charges, including those mentioned in paragraphs 1155 and 1156, and on the costs of providing the associated services. The Working Party took note of this commitment."* 'Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization, WT/ACC/RUS/70 WT/MIN(11)/2'. p.302

[748] First sentence of para.1426 states as follows: *"The representative of the Russian Federation confirmed that from the date of accession, all laws, regulations, decrees, decisions, judicial decisions and administrative rulings of general application pertaining to or affecting trade in goods, services, or intellectual property rights, whether adopted or issued in the Russian Federation or by a competent body of the CU, would be published promptly in a manner that fulfils applicable requirements of the WTO Agreement, including those of Article X of the GATT 1994, WTO GATS Agreement, and the WTO TRIPS Agreement."* ibid. p.361

[749] First sentence of para.1427 of the Report of the Working Party, states *"The representative of the Russian Federation further confirmed that, except in cases of emergency, measures involving national security, specific measures setting monetary policy, measures the publication of which would impede law enforcement, or otherwise be contrary to the public interest, or prejudice the legitimate commercial interest of particular enterprises, public or private, the Russian Federation would publish all laws, regulations, decrees (other than Presidential decrees)…"*and the third sentence states: "*Any comments received during the period for commenting, whether provided to the Russian Federation or a competent body of the CU, would be taken into account."*ibid. p.362

[750] para.1428 the Report of Working Party states: *"The representative of the Russian Federation confirmed that, from the date of accession, no law, regulation, decree, decision or administrative ruling of general application pertaining to or affecting trade in goods, services, or intellectual property rights, whether adopted or issued in the Russian Federation or by a competent body of the CU, would become effective prior to publication, as provided for in the applicable provisions of the WTO Agreement, including the GATT 1994, the WTO GATS Agreement, and the WTO TRIPS Agreement…."* ibid.p.362

[751] Paragraph 1450 of the Working Party Report states ... "*The Working Party took note of the explanations and statements of the Russian Federation concerning its foreign trade regime, as reflected in this Report. The Working Party took note of the commitments by the Russian Federation in relation to certain specific matters which are reproduced in paragraphs …1161,… 1426, 1427, 1428,… The Working Party took note that these commitments had been incorporated in paragraph 2 of the Protocol of Accession of the Russian Federation to the WTO."* ibid.pp.368-369

[752] Paragraph 2 of the Protocol states *"...*This Protocol, which shall include the commitments referred to in paragraph *1450 of the Working Party Report, shall be an integral part of the WTO Agreement*."

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of emergency, measures involving national security and other related cases.[753] The practical importance of the reference to the Accession Protocol brings us to the question of whether Russia could justify violation of its commitments under the Protocol by reference to Article XXI of the GATT. In this regard three cases which dealt with similar issues are worth noting.

First, in *China-Audiovisual* case China adopted measures for regulation of importation and distribution of certain publications and audiovisual products. When the United States challenged the Chinese measures, China justified them, among other, by recourse to Article XX of the GATT. Since Chinese trade restrictions were contrary to the China's Protocol of Accession, the question was whether Article XX of the GATT was applicable to China's Protocol of Accession. The Appellate Body concluded that a State may have a recourse to Article XX of the GATT as far as the provision of the Protocol of Accession has a "clearly discernible, objective link … to regulation of trade".[754]

The second case dealing with relationship between the Protocol of Accession and the GATT 1994 is *China-Raw Materials*. In this case, the Appellate Body rejected that China could invoke Article XX to justify its violation of the Protocol of Accession. The Appellate Body claimed that in paragraph 11.3 there was no reference to the GATT in general or Article XX in particular, nor any language similar to that of paragraph 5.1 (which was under review in China-Audiovisual case) and therefore China cannot invoke Article XX to justify its violation of the Protocol of Accession.[755]

In the third case, *China-Rare Earths*, a similar question has arisen in relation to Article 11.3 of the Protocol. China claimed that by virtue of article XII:1 of the WTO Agreement, accession protocol is an integral part of the WTO Agreement and the annexed multilateral trade agreements (paras. 7.90-7.93). However, the Panel rejected this argument brought by China and stated that

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[753] All documents with regard to the Russian accession to the WTO can be found at WTO, 'Accessions, Russian Federation, Including Protocol of Accession, WT/MIN(11)/24; WT/L/839; 16 December 2011 and Report of the Working Party WT/ACC/RUS/70; WT/MIN(11)/2, 17 December 2011' <https://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm>.

[754] *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, DS363, Appellate Body Report*.para.233, pp.103-104

[755] The Appellate Body stated*: "As noted by the Panel, "the language in Paragraph 11.3 expressly refers to Article VIII, but leaves out reference to other provisions of the GATT 1994, such as Article XX."Moreover, there is no language in Paragraph 11.3 similar to that found in Paragraph 5.1 of China's Accession Protocol—"[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement"—which was interpreted by the Appellate Body in China – Publications and Audiovisual Products. In our view, this suggests that China may not have recourse to Article XX to justify a breach of its commitment to eliminate export duties under Paragraph 11.3 of China's Accession Protocol."China-Raw Materials, AB Report* (n 377). para.291 p.117

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> *"We see nothing in Article XII:1 to support China's position that "respective protocol provision[s] must be considered as an integral part of the specific covered agreement to which it intrinsically relates."*[756]

Consequently, Panel concluded that the exceptions under Article XX GATT could not be invoked to justify a violation of paragraph 11.3 of the Protocol.[757] The approach of the Appellate Body in *China-Raw Materials* was characterized by some scholars as rigid since it "missed the opportunity" to ensure protection of fundamental values like conservation and public health.[758]

Drawing an analogy between Article XXI and XX of the GATT, based on the cases discussed above, the following points are in order with regard to the possibility of Russia to justify its breach of the Protocol of Accession by reference to the GATT Article XXI.[759] As is mentioned above, Russia included a provision which states that its Protocol of Accession is an integral part of the WTO Agreement. To recall, the first sentence of para.1426 of the Protocol of Accession states:

> *"The representative of the Russian Federation confirmed that from the date of accession, all laws, regulations, decrees, decisions, judicial decisions and administrative rulings of general application pertaining to or affecting trade in goods, services, or intellectual property rights, whether adopted or issued in the Russian Federation or by a competent body of the CU, would be published promptly in a manner that fulfils applicable requirements of the WTO Agreement, including those of Article X*

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[756] *DS431: China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, Panel Report* (WTO). para.7.91

[757] The Panel stated: "*Accordingly, the Panel finds that the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions in Article XX of the GATT 1994."* para.7.115, p.66 However, one member of the Panel expressed an opinion that the Accession Protocol is an integral part of China's obligations under GATT. See *DS431: China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, Appellate Body Report* (WTO). *Para.7.138, p.71*

[758] Espa (n 181). p.1423

[759] This argument was also discussed by Aleksey Petrenko, 'Economic Sanctions and Their Challenge in the WTO through the Lens of the National Security Exceptions under Art. XXI:(B)(Iii) of the GATT: A Dead End?' <http://www.sielnet.org/resources/Petrenko%20-%20Highly%20Commended.pdf>. pp.13-15

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> *of the GATT 1994, WTO GATS Agreement, and the WTO TRIPS Agreement."*[760]

This provision permits us to make a conclusion that Russia would be able to justify the violation of its commitments in the Protocol of Accession by recourse to Article XXI of the GATT. It is of note that Russia, as a third party in China-Rare Earths case, supported the view that the Protocol of Accession is an integral part of the WTO Agreement and Article XX of the GATT is available to justify the violation of the GATT.[761]

Having decided that the measures are covered by the GATT Article XXI and that they are inconsistent with the GATT Agreement and other Articles of the WTO Agreement, the Panel can proceed with review under the GATT Article XXI.

Review under the GATT Article XXI

2. 1.Is there a situation of war or other emergency in international relations?

First, the Panel has to establish whether there are situations of "war" or "other emergency in international relations". To recall, according to the Oxford Dictionary war is "state of armed conflict between different countries or different groups within a country."[762] According to the UNGA Resolution "On definition of aggression", aggression is

> *"…the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."*[763]

The situation between Russia and Ukraine was reviewed by the Office of the Prosecutor of the International Criminal Court in its Report on Preliminary Examination of Activities where it mentioned that

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[760] WTO, 'Accessions, Russian Federation, Including Protocol of Accession, WT/MIN(11)/24; WT/L/839; 16 December 2011 and Report of the Working Party WT/ACC/RUS/70; WT/MIN(11)/2, 17 December 2011' (n 753).
[761] *China-Rare Earths AB Report* (n 757).
[762] War, Oxford Living Dictionaries https://en.oxforddictionaries.com/definition/war
[763] 'United Nations General Assembly Resolution 3314 (XXIX) (Definition of Aggression)' (n 192).

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> *"The Russian Federation later acknowledged that its military personnel had been involved in taking control of the Crimean peninsula."*[764]

Although Russia claims that it does not have its regular military troops in Ukraine, an annexation of Crimea obviously goes against the rules of international law.[765] First and foremost there is a prohibition of use of force under Article 2 (4) of the UN Charter.[766] Moreover, if as a result of use of force the territorial boundaries have been changed without consent of States concerned, the international community has to withhold recognition of these boundaries. International Court of Justice stated on this in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*

> *" On 24 October 1970, the General Assembly adopted resolution 2625 (XXV), entitled 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States'... in which it emphasized that 'No territorial acquisition resulting from the threat or use of force shall be recognized as legal'. As the Court stated in its Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), the principles as to the use of force incorporated in the Charter reflect customary international law (see I.C.J Reports 1986, pp. 98-101, paras. 187-190); the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force"*[767]

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[764] 'Report on Preliminary Examination Activities, 2017, Office of the Prosecutor, International Criminal Court' <https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf>. p.20

[765] See on this a discussion by Thomas Grant, 'Russia's Invasion of Ukraine: What Does International Law Have to Say?' (*Lawfareblog*, 25 August 2015) <https://www.lawfareblog.com/russias-invasion-ukraine-what-does-international-law-have-say>.

[766] For an overview of the prohibition of use of force see Oliver Dörr, 'Use of Force, Prohibition Of', *Max Planck Encyclopedia of Public International Law* (2015) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e427>.

[767] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* (n 617). para.87

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The General Assembly of the United Nations adopted the Resolution o 19 December 2016 where it confirmed the Russian occupation of Crimea. The General Assembly noted:

> *"Condemning the temporary occupation of part of the territory of Ukraine – the Autonomous Republic of Crimea and the city of Sevastopol (hereinafter "Crimea") – by the Russian Federation, and reaffirming the non-recognition of its annexation".*[768]

Thus, there is an evidence of occupation by Russia of Crimea, which sparked a geopolitical conflict between Russia and Ukraine. Apart from the tensions between two countries related to Crimea, there is a conflict in eastern Ukraine between Russian-backed separatists and the Ukrainian military.[769] However, given the specifics of situation where there is no confirmed military presence of the regular Russian troops in Ukraine, it would be hard to prove the existence of war. Russia might show that the conflict pertains to the broader definition of emergency in international relations. As a matter of fact, the Russian occupation of Crimea and involvement in the territory of Ukraine can be claimed as an evidence of the situation of emergency in international relations between Russia and Ukraine.[770] Since the Russian-Ukrainian conflict involves disputes in other courts and tribunals, some guidance on interpretation of the nature of conflict could be taken from their decisions.

The Russia-Ukraine conflict was discussed in the recent judgements of the Court of Justice of the European Union (CJEU). These judgments are valuable since they interpret the security exception in the EU-Russia Partnership Agreement in light of the Russian-Ukrainian conflict.

[768] 'UN General Assembly, Resolution Adopted by the General Assembly on 19 December 2016, 71/205. Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol (Ukraine)' (n 683).
[769] 'Global Conflict Tracker' <https://www.cfr.org/interactive/global-conflict-tracker/conflict/conflict-ukraine>.
[770] For an overview of the Russian aggression against Ukraine with a focus on the US foreign policy see Thomas D Grant, *Aggression against Ukraine: Territory, Responsibility, and International Law* (1. ed, Palgrave Macmillan 2015).For a broader analysis of the international conflict see Stephen L Quackenbush, *International Conflict: Logic and Evidence* (Sage, CQ Press 2015).

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In the first case the Russian oil company *Rosneft*[771] brought the case against the UK legislation[772] enforcing the EU sanctions[773] in the United Kingdom. The UK court referred the case to the CJEU. One of the questions referred to the CJEU by the UK courts was the compatibility of the contested legal instruments with the security exception in the EU-Russia Partnership Agreement.[774]

To illustrate, Article 99(1)(d) of the EU-Russia Partnership Agreement reads as follows:

> *"Nothing in this Agreement shall prevent a Party from taking any measures:*
> *(2) which it considers necessary for the protection of its essential security interests:*
> *…(d) in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security…"*

As is seen, the wording of Article 99(1)(d) of the EU-Russia Partnership Agreement is different from the security exceptions clause enshrined in GATT Article XXI (b) (iii). For example, it contains the wording "international tension" instead of "time of war or other emergency in international relations". In the *Rosneft case* the Court interpreted the notions of "war" or "serious international tension constituting a threat to war" by saying that the provision does not require the war to directly affect the territory of the EU. Events which take place in a

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[771] *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others Request for a preliminary ruling from the High Court of Justice (England & Wales), Queen's Bench Division (Divisional Court)* [2017].
[772] 'The Export Control (Russia, Crimea and Sevastopol Sanctions) (Amendment) Order 2014, No.2932' <http://www.legislation.gov.uk/uksi/2014/2932/pdfs/uksi_20142932_en.pdf>.
[773] 'Council Regulation (EU) No 833/2014 Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine' <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1423669611951&uri=CELEX:32014R0833>. and 'Council Decision 2014/512/CFSP Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine' <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1423671258141&uri=CELEX:32014D0512>.
[774] "Agreement on Partnership and Cooperation Establishing a Partnership between the European Communities and Their Member States, of One Part, and the Russian Federation, of the Other Part," June 24, 1994, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.1997.327.01.0003.01.ENG.

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country bordering the EU are capable of justifying measures designed to protect essential EU security interests and to maintain peace and international security.[775]

Second case dealing with the security exception in the EU-Russia Partnership Agreement was brought by the Russian citizen, Mr. Dmitriy Kiselev against the EU sanctions (*Kiselev v. Council)*.[776] The Court went further with regard to the definition of "war" in this case and stated that it may be considered that "the actions of the Russian Federation constitute 'war or serious international tension constituting threat of war' within the meaning of Article 99(1)(d) of the Partnership Agreement".[777]

Last, the most recent case where the CJEU also addressed the security exception in the EU-Russia Partnership Agreement is the Rosneft and other four Russian oil companies challenging the EU sanctions directly before the General Court of the European Union. In its decision of 13 September 2018, the General Court dismissed the action of claimants which sought to annul the regulations imposing sanctions on the Russian companies.[778] In this case the Court interpreted that the actions of the Russian Federation which undermine or threaten Ukraine's territorial integrity, sovereignty and independence could amount to a case of an "other emergency in international relations".[779] Taking into account the above, the situation between Russia and Ukraine is likely to fall under the definition of emergency in international relations. Therefore, the Panel would be able proceed with a further analysis.

Did Russia take measures in time of situation of emergency in international relations?

Having found that there is a situation of emergency in international relations, the Panel has to check whether there is a coincidence in time between the measures and situation of emergency. In this regard the Panel has to review the moment when the measures have been adopted by Russia and the moment when the situation of emergency has erupted. One could claim that the situation of emergency erupted on 1 March 2014 when the Federal Council of

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[775] Rosneft case, PJSC Rosneft Oil Company v Her Majesty's Treasury and Others Request for a preliminary ruling from the High Court of Justice (England & Wales), Queen's Bench Division (Divisional Court), C-72/15, para.122

[776] *Judgment of the General Court (Ninth Chamber) of 15 June 2017, Dmitrii Konstantinovich Kiselev v Council of the European Union*.

[777] ibid., para. 33

[778] The Court said that the review is *"...restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate and that there has been no manifest error of assessment of the facts or misuse of power Rosneft and Others v Council, Judgement of the General Court, T-715/14* [2018] General Court of the European Union ECLI:EU:T:2018:544., para.155

[779] *ibid.* para.182

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Russia adopted the decision to use its armed forces in Ukraine.[780] Russia adopted its measures restricting transit of the Ukrainian goods on 1 January 2016 [781] where the President of the Russian Federation refers to the Decree of 06 August 2014, being the framework decree that allows adoption of special economic measures aiming to protect the security of the Russian Federation.[782] It means that there is two years period between the eruption of the situation of emergency and adoption of the specific measures at issue in this case. At the same time, Russia adopted the framework decree in 2014, which allowed imposition of trade-restrictive measures. Indeed, Russia might argue that the gravity of the emergency has risen in 2016 which prompted necessity to adopt trade-restrictive measures under the framework decree of 2014. Therefore, the Panel might conclude that there is a coincidence in time between the measures at issue and the situation of emergency.

Whether Russia invoked the security exception in good faith

In this regard the first step for the Panel is to check whether the State determined its essential security interests in good faith. While the State has a wide deference with regard to "its essential security interests", it must show that it considered them in good faith as related to the situation in question. In this regard the analysis of the Russian understating of its essential security interests and its national security might shed light on a good faith by Russia.

The concept of the Russian national security could be better understood if we address some of its aspects from the historical perspective. The evolvement of the national security of Russia is important since Russia seems to pursue the policy of revival of its imperial past.[783]

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[780] 'Decree of the Federation Council Meeting of the Russian Federation "On Use of the Armed Forces on the Territory of Ukraine" No.48-SF' <https://rg.ru/2014/03/05/voyska-dok.html>. For other related documents see 'The Federation Council Gave Its Consent to Use the Armed Forces on the Territory of Ukraine' <http://council.gov.ru/events/news/39851/>.
[781] 'Decree of the President of the Russian Federation No.1 "On Measures to Ensure Economic Security and National Interests of the Russian Federation in International Cargo Transit from the Territory of Ukraine to the Territory of Kazakhstan or Kyrgyz Republic through the Territory of the Russian Federation", as Amended 01.07.2016 No.319, 30.12.2017 No.643 and 29.06.2018 No.380' (n 709).
[782] 'Decree of the President of the Russian Federation No.560 "On Adoption of Special Economic Measures with the Aim to Protect Security of the Russian Federation"' <http://kremlin.ru/acts/bank/38809>.
[783] On the Russian modern foreign policy of imperial revival see David E McNabb, *Vladimir Putin and Russia's Imperial Revival* (CRC Press, Taylor & Francis Group 2016). In the context of the Crimean intervention see Michael E Becker and others, 'Reviving the Russian Empire: The Crimean Intervention through a Neoclassical Realist Lens' (2016) 25 European Security 112. Some Russian scholars claim that the concept of national security of Russia could be traced back to the agreement between Rus' and Byzantium in 912 which included the right of each party to take all necessary actions to mitigate risks of violation of their national security. Tatyana Verbitskaya, *Natsional'naya bezopasnost' kak institut konstitucionnogo prava [National security as an institute*

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Russia defined the concept of security for the first time in modern times in its Law "On Security" dated 1992. Article 1 stipulated that

> *"security is a State of protection of essential interest of an individual, society and State from internal and external threats".*[784]

Moreover, Article 1 of the above-mentioned Law defined "essential interests"[785] as

> *"a complex of demands, fulfilment of which safely ensures the existence and possibility of the progressive development of an individual, society and State".*

In 2010 Russia adopted a new law "On Security" (the "Security Law") which does not contain the definition of security. However, the Security Law defines its subject matter as

> *"the security of the State, public security, environmental security, individual security, other types of security, foreseen by the legislation of the Russian Federation (herein – security, national security) ".*[786]

As is seen, the Security Law combines all types of security under the term "national security" which it uses interchangeably with the term "security".[787]

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of the constitutional law] (Mir nauki 2015). p.30 The term "state security" in the Soviet Russia was mentioned in Article 14 of the Constitution of the USSR of 1936, which dealt with the jurisdictional matters of the Union. The translation of the Constitution is available here '1936 Constitution of the USSR' <https://www.departments.bucknell.edu/russian/const/36cons01.html> accessed 11 July 2018.

[784] 'Law of the Russian Federation "On security" dated 5 March 1992, No.2446-I (as amended)' <http://pravo.gov.ru/proxy/ips/?docbody=&prevDoc=102144301&backlink=1&&nd=102015025> accessed 11 July 2018.

[785] The word-to-word translation would be "*vitally important interests*" which corresponds to Russian "*zhyznenno vaznhye interesy*"

[786] 'Law of the Russian Federation "On security" dated 5 March 1992, No.2446-I (as amended)' (n 784).

[787] There is a criticism as to the term "national security" among the Russian scholars. Aleksandr Rogov and Yuliya Fedotova argue that the term "national security" is not politically correct and should be substituted by "state security". Aleksandr Rogov and Yuliya Fedotova, 'Nacional'naya Bezopasnost': Element Ili Soderzhanie Nacional'naoi Bezopasnosti Rossiyskoi Federacii [State Security: Element or Content of the National Security of the Russian Federation]' (2013) 21 Vlast' 128. p.131 Tatyana Verbitskaya claims that the term "national" is a controversial, polysemic and elastic. Moreover, it does not fully serve the purpose of the Russian state security because of the nature of the Russian Federation which entails different nations. She proposed to use instead a "federal security". Verbitskaya (n 783). p.16 the Russian legislation refers to the term "national" which does not have the connotation of the nation in its classic view as peoples living in one country. The Law itself corroborates this argument since it equals the term "national security" with "security".

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Along with the Law "On Security" Russia adopted its National Security Strategy[788] in 2015 substituting the National Security Strategy of 2009. In 2015 Russia redefined and changed its definition of the national security in light of its conflict with Ukraine in 2014.[789] In particular, Russia reflected the Ukrainian conflict in its National Strategy by saying that the United States and the European Union were responsible for the "anti-constitutional *coup d'état*" and ensuing armed conflict in Ukraine. Ukraine was portrayed as a "chronic seat of instability in Europe and in the immediate vicinity of Russia's borders".[790] This wording shows that Russia considers Ukraine to be a threat to its essential security interests. Consequently, the transit of the Ukrainian goods through the Russian territory might fall under the threat.

Furthermore, Russia refers to the economic security in its decisions adopting trade-restrictive measures against Ukraine. In this regard a few lines should be devoted to the economic security of Russia. In May 2017 Russia adopted its Strategy on economic security till 2030 ("Economic Security Strategy") by the Edict of the President of the Russian Federation No.208[791] within the framework of the strategic national priorities of the Russian Federation.[792] The main points of the Russian economic strategy are the following.

First, the Economic Security Strategy underlines an increased use of economic methods for political ends. In this regard Russia mentions as one of its goals the "enhancement of the mechanism of adopting the countermeasures in case of application by foreign states and international organizations sanctions and other discriminatory restrictions against Russian legal and (or) natural person and industries of the economy of the Russian Federation".[793] The use of national security for foreign policy aims is also evident from the use of food security as a response to the EU sanctions against Russia. In this regard Russia imposed an import ban on

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[788] President of the Russian Federation, 'Ukaz Prezidenta Rossiiskoi Federacii No.683 "O strategii nacional'noi bezopasnosti Rosii" [Edict of the President of the Russian Federation No.683 "On the National Security Strategy of the Russian Federation"]' <https://rg.ru/2015/12/31/nac-bezopasnost-site-dok.html> accessed 10 July 2018.
[789] On the evolution of the national security concept in a light of the Ukrainian conflict see Katri Pynnöniemi, 'Russia's National Security Strategy: Analysis of Conceptual Evolution' (2018) 31 The Journal of Slavic Military Studies 240.
[790] President of the Russian Federation, 'Ukaz Prezidenta Rossiiskoi Federacii No.683 "O strategii nacional'noi bezopasnosti Rosii" [Edict of the President of the Russian Federation No.683 "On the National Security Strategy of the Russian Federation"]' (n 788). para.17
[791] President of the Russian Federation, 'Ukaz Prezidenta Rossiiskoi Federacii "O strategii ekonomischeskoi bezopasnosti" [Edict of the President of the Russian Federation "On the economic security strategy"]' <http://kremlin.ru/acts/bank/41921> accessed 10 July 2018.
[792] The framework is stated in the Strategy on the national security of the Russian Federation President of the Russian Federation, 'Ukaz Prezidenta Rossiiskoi Federacii No.683 "O strategii nacional'noi bezopasnosti Rosii" [Edict of the President of the Russian Federation No.683 "On the National Security Strategy of the Russian Federation"]' (n 788)..
[793] ibid.p.5 para 16

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food from the EU countries,[794] which in turn forced Russia to reinforce its import substitution.[795] Russia connected the development of its own food industry to the condition of improving its national security.[796]

Second, the Economic Security Strategy considers the alternative routes of collaboration without the European Union and the US. With this in mind, Russia considers interstate economic unions which were created without Russian participation as those that "can cause damage to the national interests of the Russian Federation" and consequently as one of threats to its economy.[797] At the same time, Russia looks for an expansion of partnership and integration in the framework of CIS, Eurasian Economic Union, BRICS, Shanghai organization of cooperation and other interstate organizations.[798] This type of the Russian policy corresponds to the idea of managed interdependence[799] - Russia finds it more convenient to deal with smaller "clubs" where it has more power to pursue its strategic interests. Some scholars name the Russian approach in economic security as "conditional re-globalization" which means the change of trade and investment relations based on economic and or/security reasons.[800] The economic strategy was criticized by some Russian economists as not reflecting a reality and being a pure a proclamation without precise steps as to its implementation.[801]

To sum up, the security as defined in the Russian Law "On Security" is a broad term which includes State security, public security, individual security and all other types of security and equals to a national security. Russia amended its National Security Strategy following the conflict with Ukraine and included Ukraine as a seat of instability in Europe close to the Russian borders. Moreover, Russia prioritized use of economic tools for political ends in its economic

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[794]See all documents on this at European Commission, 'Russian Import Ban on EU Products' <https://ec.europa.eu/food/safety/international_affairs/eu_russia/russian_import_ban_eu_products_en>.
[795] Although there are doubts as to the effectiveness of the import substitution, see Yu S Makasheva and others, 'The Policy of Import Substitution as the Basis for Economic Security and Well-Being of Society' (2016) 43 IOP Conference Series: Earth and Environmental Science 012097.
[796] Vladimir Glinskiy and others, 'The Development of the Food Industry as a Condition for Improving Russia's National Security' (2018) 21 Procedia Manufacturing 838.
[797] President of the Russian Federation, 'Ukaz Prezidenta Rossiiskoi Federacii No.683 "O strategii nacional'noi bezopasnosti Rosii" [Edict of the President of the Russian Federation No.683 "On the National Security Strategy of the Russian Federation"]' (n 788).p.7 para.12
[798] ibid.p.2 para.21
[799] The idea of managed interdependence will be dealt extensively with in the last subsection
[800] Philip Hanson and Richard Connolly, 'Import Substitution and Economic Sovereignty in Russia' (Chatham House 2016) <https://www.chathamhouse.org/sites/default/files/publications/research/2016-06-09-import-substitution-russia-connolly-hanson.pdf>. p.1
[801] Tatyana Khruleva, '"Strategiya ekonomicheskoi bezopasnosti napominaet tvorenie Frankenshteina" [The economic strategy reminds the artwork of the Frankenstein]' *Rosbalt* (19 May 2017) <http://www.rosbalt.ru/business/2017/05/19/1616488.html> accessed 10 July 2018.

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security strategy. In light of above one could claim that Russian essential security interests cover the threat which might be caused by the transit of goods from the territory of the country which is recognized as threat to the Russian security. Consequently, it is likely that Russia interpreted its essential security interests in good faith.

Whether Article XXI was invoked in good faith

As discussed in the Chapter 2, good faith could be viewed through the lens of reasonableness. According to the approach proposed by William Burke-White and Andreas von Staden, a tribunal must ask "whether a reasonable person in the state's position could have concluded that there was a threat to national security or public order sufficient to justify its measures taken".[802] Given the fact that Russia clearly pointed out Ukraine as a threat to its essential security in its National Security Strategy and there is a situation of emergency in international relations between two countries, one could reasonably expect that Russia might adopt trade-restrictive measures for protection of its essential security interests. In other words, there is a reasonable connection between the measure and essential security interests, given the situation of emergency at hand.

Furthermore, Russia has shown that there is no economic pretext behind the measures, and that the measures have been adopted for security reasons which are covered by the GATT Article XXI. In this regard Burke-White and Andreas von Staden mention that the tribunal would be able to understand if the State invoked the security exception in a good faith if there is evidence that "a state uses the treaty clauses just as a pretext for ulterior economic motives, or where the connection between measures taken and national security is so spurious as to clearly breach the good faith requirement".[803] If we look at the rationale behind the Russian trade-restrictive measures against Ukraine, Russia connected its economic security with the Ukrainian intention to sign the Free Trade Agreement with the European Union.[804] The

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[802] William W Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 Virginia Journal of International Law 307. p.380

[803] ibid. p.379

[804] To recall that in its request for consultations in DS512, Ukraine referred to the Russian decision to impose restrictions on transit of the Ukrainian goods "*following Ukraine's decision to start the implementation of Deep and Comprehensive Free Trade Area with the European Union on 1 January 2016*." For reaction of the Russian Federation to the Ukrainian plan to sign the Free Trade Agreement with the European Union see, for example, Shaun Walker, 'Ukraine Set to Sign EU Pact That Sparked Revolution' *The Guardian* (26 June 2014) <https://www.theguardian.com/world/2014/jun/26/ukraine-european-union-trade-pact>. For an extensive analysis of the relations between Russia and EU in light of Ukraine see Vsevolod Samokhvalov, 'Ukraine between Russia and the European Union: Triangle Revisited' (2015) 67 Europe-Asia Studies 1371., Hiski

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disapproval of the Ukrainian actions by Russia is evident from the speech of the Russian Prime Minister Dmitriy Medvedev who mentioned that: *"The implementation of the said agreement impinges on our interests and creates risk to our economic security."*[805] The restrictions on traffic in transit adopted by Russia are in line with previous actions of Russia towards Ukraine: it suspended the CIS Free Trade Agreement with Ukraine by its Federal Law on 16 December 2015.[806] Therefore, there is no economic motive behind the Decision of the Russian President but rather a foreign policy motive which is covered by Article XXI of the GATT. In other words, Russia might be able to show that it adopted the measures in good faith given the situation of emergency in international relations between two countries.

To sum up, the Panel is likely to establish that the Russian-Ukrainian conflict falls under the definition of emergency in international relations and there is a timing coincidence between the measures adopted and the situation of emergency. The analysis of the Russian national security strategy and definitions of essential security interests in its national legislation reveals that Russia might prove that it considered its essential security interests in good faith. Last, the Russian trade-restrictive measures have a reasonable connection to the aim of protection essential security interests in light of the situation of emergency between Russia and Ukraine.

Case Study 2, US Section 232 tariffs

As mentioned above, the second type of disputes where the national security measures have been challenged before the WTO are the cases which concern the US trade-restrictive measures. The US President, Donald Trump, claimed that the WTO "treated the United States

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Haukkala, 'From Cooperative to Contested Europe? The Conflict in Ukraine as a Culmination of a Long-Term Crisis in EU–Russia Relations' (2015) 23 Journal of Contemporary European Studies 25.

[805] Dmitriy Medvedev, 'Meeting with Deputy Prime Ministers, Excerpts from Dmitry Medvedev's Speech:Agenda: Application of Import Customs Duties and Introduction of Sanctions on Ukraine; Payment of Debt by Ukraine.' (*The Russian Government*, 21 December 2015) <http://government.ru/en/news/21184/>.

[806] President of the Russian Federation, 'Decree of the President of the Russian Federation No.628 "On suspension by the Russian Federation of the Free Trade Agreement with regard to Ukraine"' <http://kremlin.ru/acts/bank/40310>. More on suspension see Kari M Loomer, 'Russia Suspends CIS Trade Deal after EU-Ukraine Pact' (*North Carolina Journal of International Law*, 19 January 2016) <http://blogs.law.unc.edu/ncilj/2016/01/19/russia-suspends-cis-trade-deal-after-euukraine-pact/#16>.

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very badly".[807] In the US Trade Policy Agenda there is as national security argument which says that

> *"…the United States will no longer turn a blind eye to violations, cheating, or economic aggression. Our trade policy will fulfill these goals by using all possible tools to preserve our national sovereignty and strengthen the U.S. economy."*[808]

In light of above, the US started to impose unilateral trade-restrictive measures which some scholars considered to be trade protectionist measures.[809] While the US rejects that its measures represent a clear example of trade protectionism, there is a sentiment of trade protectionism which will be discussed below.

Trade protectionism is the opposite of free trade which aims to eliminate trade barriers. The reality shows that protectionism is widespread around the world.[810] For example, a recent WTO report on G20 economies states that there is a worrying trend of increase of trade-restrictive measures among G20 economies.[811] Notwithstanding the fact that the US was applying a protectionist policy before, under the policy of the US President Donald J. Trump, the scale of trade-restrictive measures is striking: his new tariffs cover 12 percent of the US imports and has a disruptive impact on global supply chains.[812] The trade protectionism of 2017 revived a memory of the Smoot-Hawley Act of 1930 when the US imposed sweeping tariffs

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[807] Jennifer Epstein, 'Trump Says WTO Is Treating the U.S. "Very Badly" Despite Wins' *Bloomberg* (2 July 2018) <https://www.bloomberg.com/news/articles/2018-07-02/trump-says-wto-is-treating-the-u-s-very-badly-despite-wins>.

[808] US Trade Representative, 'The President's Trade Policy Agenda' <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf>. p.2

[809] Distinguished Service Professor of Law and International Trade at George Mason University's Schar School of Policy and Government. and Stuart S Malawer, 'Trump's Tariff Wars and National Security: A Political and Historical Perspective' (2018) 4 China and WTO Review 351.

[810] Luca Ferrini, 'What Are the Main Causes and Effects of Economic Protectionism?' (*E-International Relations*, 28 August 2012). Protectionism can be narrowly defined as restrictions or distortions of trade flows through tariffs or quotas.

[811] 'Report on G20 Trade Measures (Mid-October 2017-Mid-May 2018)' <https://www.wto.org/english/news_e/news18_e/g20_wto_report_july18_e.pdf>. p.2

[812] Chad P Bown, 'Protectionism Was Threatening Global Supply Chains before Trump' (*Peterson Institute of International Economics*, 8 November 2018) <https://piie.com/blogs/trade-investment-policy-watch/protectionism-was-threatening-global-supply-chains-trump#_ftn1>.George F Will, 'The U.S. Takes a Disturbing Plunge into Protectionism' *Washington Post* (5 October 2018) <https://www.washingtonpost.com/opinions/the-us-takes-a-disturbing-plunge-into-protectionism/2018/10/05/adee23a8-c803-11e8-b2b5-79270f9cce17_story.html?utm_term=.0b305ba32ecc>.

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which exacerbated Great Depression.[813] This time the US trade-restrictive measures sparked countermeasures from other States and even led to trade wars.[814] Trade war with China is notable in this respect since there are predictions that the US-China trade will be a major threat to the US economy in 2019.[815] As has been shown, the US trade policy is characterized by various trade-restrictive measures and the US Section 232 measures take the most prominent place.

Section 232 of the Trade Expansion Act of 1962

In 2018 the United States imposed tariffs on steel and aluminium under Section 232 of the US Trade Expansion Act of 1962.[816] The US Section 232 permits adoption of trade-restrictive measures for protection of national security.[817] In relevant part it says:

> *"If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in such report."*[818]

The procedure of investigations for determination of effect of the imports on the US national security is prescribed under federal regulations codified in 15 C.F.R. part 705 (Effect of Imported Articles on the National Security) and could be summarized as follows.[819]

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[813] Robert J Samuelson, 'The Ghost of Smoot-Hawley Seems to Haunt Trump' *Washington Post* (27 June 2018) <https://www.washingtonpost.com/opinions/the-ghost-of-smoot-hawley-seems-to-haunt-trump/2018/06/27/42f3392c-7a19-11e8-80be-6d32e182a3bc_story.html?noredirect=on&utm_term=.408ddcbbd779>.

[814] 'America and China Are in a Proper Trade War' *The Economist* (20 September 2018) <https://www.economist.com/finance-and-economics/2018/09/20/america-and-china-are-in-a-proper-trade-war>. For a timeline of the war see Bown and Kolb (n 9).

[815] Harry Torry, 'Economists See U.S.-China Trade War as Biggest Threat in 2019' *Wall Street Journal* (13 December 2018) <https://www.wsj.com/articles/economists-see-u-s-china-trade-war-as-biggest-threat-in-2019-11544713201>.

[816] 'United States Code, Section 1862, Safeguarding National Security' <https://www.gpo.gov/fdsys/pkg/USCODE-2015-title19/pdf/USCODE-2015-title19-chap7-subchapII-partIV-sec1862.pdf>.The Section 232 was originally enacted in Trade Expansion Act of 1962 and it is codified in Section 1862 of Title 19 of the U.S. Code

[817] On the history of the US Section 232 see 'Section 232 Investigations: Overview and Issues for Congress, R45249' <https://fas.org/sgp/crs/misc/R45249.pdf>. p.36

[818] 'U.S. Code, Title 19, Chapter 7, Subchapter II, Part IV, § 1862, Safeguarding National Security' <https://www.law.cornell.edu/uscode/text/19/1862>.

[819] 'Electronic Code of Federal Regulations. Title 15. Commerce and Foreign Trade Subtitle B. Regulations Relating to Commerce and Foreign Trade Chapter VII. Bureau of Industry and Security, Department of Commerce. Subchapter A. National Security Industrial Base Regulations. Part 705. Effect of Imported Articles on the National Security.' <https://www.law.cornell.edu/cfr/text/15/705.4>.

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First, the Secretary of Commerce must commence a Section 232 investigation into the effects of specific imports on the national security of the United States upon request by the head of any U.S. department or agency, by application by an interested party, or by self-initiation.[820] The Bureau of Industry at the Department of Commerce in its investigation should consult with the Secretary of Defense, other "appropriate officers" and the public. The Department of Commerce has 270 days for investigations during which the Department could also hold public hearings.[821] There is no definition of national security in the statute, but it states that the investigation must consider certain factors for determining effect of imports on the national security. For example, such factors are: domestic production needed for projected national defense requirements; domestic capacity; the availability of human resources and supplies essential to the national defense; and potential unemployment, loss of skills or investment, or decline in government revenues resulting from displacement of any domestic products by excessive imports.[822]

Following the conclusion of investigations, the Department of Commerce prepares the report for a President where it gives recommendations for future actions or inactions.[823] If the Department of Commerce finds that the imports pose threat to the national security of the United States, within 90 days the President shall determine whether he concurs with the Department's finding and if so she/he has to determine the nature and duration of the action to adjust the level of imports. The action by the President must be taken no later than fifteen days after making the determination. Then the President has 30 days to make a written submission to the Congress and state reasons of his/her action or inaction.[824] The ways of adjusting could take different forms like tariffs, fees, licenses, quotas or embargoes.[825]

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[820] Note, the Department of Commerce may start investigation also on its own initiative

[821] Para.705.8, para.705.10 'Electronic Code of Federal Regulations. Title 15. Commerce and Foreign Trade Subtitle B. Regulations Relating to Commerce and Foreign Trade Chapter VII. Bureau of Industry and Security, Department of Commerce. Subchapter A. National Security Industrial Base Regulations. Part 705. Effect of Imported Articles on the National Security.' (n 819).

[822] Para.705.4 ibid.

[823] Rachel F Fefer and Vivian C Jones, 'Section 232 of the Trade Expansion Act of 1962' <https://fas.org/sgp/crs/misc/IF10667.pdf>.

[824] See para.705.11 'Electronic Code of Federal Regulations. Title 15. Commerce and Foreign Trade Subtitle B. Regulations Relating to Commerce and Foreign Trade Chapter VII. Bureau of Industry and Security, Department of Commerce. Subchapter A. National Security Industrial Base Regulations. Part 705. Effect of Imported Articles on the National Security.' (n 819).

[825] For a short overview of Section 232 investigations see Peter J Koenig, Frank L Samolis and Ludmila L Savelieff, 'For National Security, Trump Administration Initiates Rarely Used Section 232 Statute to Probe Into Steel Imports' (*Squire Patton Boggs*, 2017) <https://www.squirepattonboggs.com/~/media/files/insights/publications/2017/04/for-national-security-trump-administration-initiates/section-232-statutethought-leadership.pdf>.

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In the period from 1963 to 2017, twenty-six Section 232 investigations took place and nine of them led to positive determination as to the threat to the US national security.[826] The Presidential actions in these nine cases were the following:

- the President did not take actions in 1987, 1994 and 1999 since the Department of Commerce found that that existing government programs and activities related to energy security were more appropriate and cost-effective than import adjustments;[827]
- the President introduced a license fee in 1973;[828]
- the President imposed a supplemental fee to the license fee in 1975;[829]
- the President imposed conservation fee which was found to be illegal and was blocked by the District Court in 1978;[830]
- the President imposed an embargo on crude oil from Iran in 1979 and Libya in 1982;[831]
- the President deferred a formal decision on section 232 case but sought voluntary restraint agreements starting in 1986.[832]

All other investigations led to negative determination as to the threat of imports to the US national security. For example, the investigations of 2001 into the effect of imports of iron ore and semi-finished steel did not lead to the determination that imports threaten the US national security. In this regard the US Department of Commerce stated that:

> *"…U.S. national security requirements are easily satisfied by current domestic production, and could continue to be satisfied domestically even if there were substantial further diminution of U.S. production, whether caused by imports or otherwise."*[833]

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[826] For an extensive overview of history of Section 232 investigations see Rachel F Fefer and others, 'Section 232 Investigations: Overview and Issues for Congress' (2018) Congressional Research Service CRS 7-570 <https://fas.org/sgp/crs/misc/R45249.pdf>.
[827] In the 1987, 1994 and 1999 investigations into petroleum and crude oil, the Commerce Department concluded that certain oil imports pose threat to national security but did not recommend taking action to the President. The President followed the advice of the Commerce Department. See note b.ibid. p.36
[828] 1973 investigation in petroleum
[829] 1975 investigation in petroleum
[830] 1978 investigation in petroleum Fefer and others (n 826).p.34
[831] ibid. pp.34-35
[832] ibid. p.35
[833] 'An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended, The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security'

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As is seen, the Department of Commerce used a narrow definition of national security connected to the military needs. However, the investigations which were initiated in 2017 started to deviate from this approach.[834]

Post-2017 Investigations Under Section 232

On 19 April 2017 the US Department of Commerce started the investigations into imports of steel and aluminium on its own initiative.[835] Later in April 2017 the US President in his memoranda instructed the Department of Commerce to prioritize the steel and aluminium investigations.[836] The Department of Commerce submitted the report to the President on 11 and 22 January 2018 in which it found that imports of steel and aluminium products threaten to impair the national security of the United States. The Department of Commerce defined national security in a broad way which covers not only needs for national defence:

> *"the general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, which*

<https://www.bis.doc.gov/index.php/documents/section-232-investigations/81-iron-ore-and-semi-finished-steel-2001/file>.

[834] For a comparison of the changes in the US President's Trade Agenda see Marcus Noland and others, 'Assessing Trade Agendas in the US Presidential Campaign, PIIE Briefing 16-6' <https://piie.com/system/files/documents/piieb16-6.pdf>.

[835] All documents with regard to Section 232 investigations are available here Bureau of Industry and Security, US Department of Commerce, 'Section 232 Investigations : The Effect of Imports on the National Security' <https://www.bis.doc.gov/index.php/other-areas/office-of-technology-evaluation-ote/section-232-investigations>. Some experts claimed that the investigation started as a result of the lobby of a powerful group of steel producers which supports adoption of policies favourable to itself. See the comment by Brett Williams in the blogpost by Steve Charnovitz, 'EU Can Retaliate Immediately Against Trump's Metal Tariffs' (*International Economic Law and Policy Blog*, 9 March 2018) <http://worldtradelaw.typepad.com/ielpblog/2018/03/eu-can-retaliate-immediately-against-trumps-metal-tariffs.html>. Ginger Gibson also mentioned "Steel producers in the U.S., like U.S. Steel Corp and AK Steel stand to benefit from protectionist tariffs which would enable them to raise their prices."
See Ginger Gibson, 'Behind the Scenes, Companies Fight Trump on U.S. Steel Tariffs' *Reuters* (14 July 2017) <https://www.reuters.com/article/us-usa-trade-steel-lobbying-idUSKBN19Z25K>. In this regard Steve Charnovitz mentions that there is no a clear line between the public interest and the interests of particular industries in receiving import protection under Section 232. Steve Charnovitz, 'Comments by Steve Charnovitz on 232 Autos Investigation Filed 8 June 2018' (*International Economic Law and Policy Blog*, 8 June 2018) <http://worldtradelaw.typepad.com/ielpblog/2018/06/comments-by-steve-charnovitz-on-232-autos-investigation-filed-8-june-2018.html>.

[836] 'President Donald J. Trump Stands up for American-Made Aluminum' <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-stands-american-made-aluminum/>.

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> *are critical for minimum operations of the economy and government.'*[837]

Under this broad reading of the term "national security" the Department of Commerce considered requirements for national defence and 16 specific critical infrastructure sectors, such as electric transmission, transportation systems, food and agriculture, and critical manufacturing, including domestic production of machinery and electrical equipment.[838]

Upon its investigations, the Department of Commerce proposed to the President some options with regard to the type of measures to be taken. For the US steel industry in order to operate at 80% of their rated capacity it recommended:

- a global tariff of at least 24% on all steel imports; or
- a tariff of at least 53% on all steel imports from 12 named countries (Brazil, China, Costa Rica, Egypt, India, Malaysia, the Republic of Korea, Russia, South Africa, Thailand, Turkey, and Vietnam); or
- a quota on all steel products from all countries, equal to 63% of U.S. imports from each country in 2017.

In turn, for the U.S. aluminum industry to resume operations at 80% capacity, the Secretary recommended:

- a tariff of at least 7.7% on all U.S. aluminium imports from all countries; or
- a tariff of 23.6% on all aluminium imports from 5 economies (China, Hong Kong, Russia, Venezuela, and Vietnam). All other countries would be subject to a quota equal to 100% of U.S. imports from that country in 2017; or
- a quota on all aluminium products equal to 86.7% of U.S. imports from each country in 2017.[839]

[837] 'Steel 232 Investigations Public Hearing, May 24, 2017' <https://www.bis.doc.gov/index.php/232-steel-public-comments/1927-steel-232-investigation-public-hearing-transcript/file>. P.2
[838] Rachel F Fefer and Vivian C Jones, 'Commerce Determines Steel and Aluminum Imports Threaten to Impair National Security' <https://fas.org/sgp/crs/misc/IN10865.pdf>.
[839] ibid.

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On March 8, 2018, the President of the United States in his Proclamations imposed a 10 percent tariff on imported aluminium[840] and a 25 percent tariff on imported steel.[841] The Proclamations also mentioned that any country "with which we have a security relationship is welcome to discuss alternative ways to address the threatened impairment of the national security caused by imports of steel and aluminium articles from that country".[842] In initial Proclamations the exemptions included Canada and Mexico.[843] Following negotiations, the President issued Proclamation 9710[844] and Proclamation 9711[845] of 22 March 2018 by which he granted extensions as to exemptions until May 1, 2018 to Argentina, Australia, Brazil, South Korea, and the European Union. The original Proclamations have been amended further when certain other countries reached a deal with the United States as to exemptions.[846]

Scholars have noted three characteristics which differentiate the 2017 US Section 232 investigations from previous investigations: (1)blurring a line between economic and national security, (2) use of Section 232 for political and foreign policy aims, (3) use of tariffs as a leverage in trade negotiation talks.

First, in his Proclamation imposing Section 232 tariffs the President refers to para.(c) of Section 232 which erases the difference between the national security and economic security.[847] The blurring line between economic and national security could also be drawn from the US

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[840] 'Proclamation 9704 of March 8, 2018, Adjusting Imports of Aluminum Into the United States by the President of the United States of America' <https://www.gpo.gov/fdsys/pkg/FR-2018-03-15/pdf/2018-05477.pdf>.

[841] 'Proclamation 9705 of March 8, 2018 Adjusting Imports of Steel Into the United States by the President of the United States of America' <https://www.gpo.gov/fdsys/pkg/FR-2018-03-15/pdf/2018-05478.pdf>.

[842]See para.3 ibid. and 'Proclamation 9704 of March 8, 2018, Adjusting Imports of Aluminum Into the United States by the President of the United States of America' (n 840).

[843] Kanzanira Thorington, 'Fights Among Friends: Trump's Tariffs and the Global Trading Regime' (*Lawfareblog*, 25 April 2018) <https://www.lawfareblog.com/fights-among-friends-trumps-tariffs-and-global-trading-regime>.

[844] 'Proclamation 9710 of March 22, 2018 Adjusting Imports of Aluminum Into the United States by the President of the United States of America' <https://www.gpo.gov/fdsys/pkg/FR-2018-03-28/pdf/2018-06420.pdf>.

[845] 'Proclamation 9711 of March 22, 2018 Adjusting Imports of Steel Into the United States By the President of the United States of America' <https://www.gpo.gov/fdsys/pkg/FR-2018-03-28/pdf/2018-06425.pdf>.

[846] For an extensive overview of developments with regard to the Proclamations see 'U.S. Tariffs on Steel and Aluminum Imports Go into Effect, Leading to Trade Disputes' (2018) 112 American Journal of International Law 499.

[847] Para (c) states "*In the administration of this section, the Director and the President shall further recognize the close relation of the economic welfare of the Nation to our national security*, …" "U.S. Code, Title 19, Chapter 7, Subchapter II, Part IV, § 1862, Safeguarding National Security." Note that the scope of the national security was expanded in 1958, before the term "national defense requirements" was used. See on the legislative history of Section 232 David D Knoll, 'Section 232 of the Trade Expansion Act of 1962: Industrial Fasteners, Machine Tools and Beyond' (1986) 10 Maryland Journal of International Law and Trade 55. p.58 See 'Proclamation 9704 of March 8, 2018, Adjusting Imports of Aluminum Into the United States by the President of the United States of America' (n 840). para.2

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President's speech at APEC CEO summit in Vietnam in 2017 where President Donald J. Trump equaled national security to economic security by stating that:

> *"…economic security is not merely related to national security. Economic security is national security. It is vital ... to our national strength."* [848]

In his comment on the reports Alan Sykes mentioned that within broad categories of products some products which are important for national defence, are not produced in substantial quantity or at all in the United States. In this case there is a bona fide security concern. That said, it is hard to justify the sweeping across the board tariffs as a legitimate policy response.[849]

Second, there are some comments that the US President uses the Section 232 tariffs as a pretext for political and foreign policy reasons.[850] For example, in his electoral campaign the US President promised American steel workers to protect from international competition, so he needed to fulfil his promises.[851]With regard to the foreign policy aims, the President raised tariffs on the Turkish products to 50 percent during the confrontation between Turkey and the United States.[852]

Third, other scholars claim that the US President uses Section 232 tariffs as a leverage in negotiations talks.[853] For example, in his Proclamation on steel and aluminium tariffs President

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[848] President Donald J. Trump, 'Remarks by President Trump at APEC CEO Summit | Da Nang, Vietnam' <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-apec-ceo-summit-da-nang-vietnam/>.

[849] Alan O Sykes, 'Tariffs, Free Trade and Politics' (*Stanford Legal Blog*, 9 March 2018) <https://law.stanford.edu/2018/03/09/tariffs-free-trade-politics/>.

[850] Interestingly, the US does not want other States to use the national security in a sweeping way while reserves a broad use of national security for itself. For example, the US raised concerns with regard to the Chinese use of national security in its Report to Congress on China's WTO Compliance of 2017: *"In July 2015, the National People's Congress passed a National Security Law with a stated purpose of safeguarding China's security. However, this law included sweeping provisions addressing economic and industrial policy.* US Trade Representative, '2017 Report to Congress On China's WTO Compliance' (2018) <https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf>. p.66

[851] For example, Stephanie Rickard mentions that President Trump used tariffs to fulfill his political promises "Politics, not economics, provoked Trump's metal tariffs. While campaigning for the presidency, Trump promised to protect American steel workers from international competition. He made this promise in order to win votes."Stephanie Rickard, 'What Provoked Trump's Tariffs: Politics or Economics?' (*London School of Economics and Political Science*, 13 June 2018) <http://blogs.lse.ac.uk/government/2018/06/13/what-provoked-trumps-tariffs-politics-or-economics/>.

[852] Demetri Sevastopulo, 'Trump Announces Doubling of Tariffs on Turkey Steel Imports' *Financial Times* (10 August 2018) <https://www.ft.com/content/82b4bf5e-9c9c-11e8-9702-5946bae86e6d>.

[853] Although some commentators claimed that the US President negotiation approach will not help them to get a lot of concessions Josh Barro, 'Trump's Bully-and-Threaten Approach to Dealmaking Is Not so Artful' *Business Insider* (16 June 2018) <http://uk.businessinsider.com/trump-approach-to-dealmaking-flaws-2018-6?r=US&IR=T>.

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explicitly urged States to negotiate exemptions from steel tariffs so that States will come to negotiating table with the US where it could extract concessions in other areas.[854]

Jennifer Hillman in her analysis of the procedure under the Section 232 investigations explained that in broad strokes the investigations should respond to two questions:

(i) is the United States overly reliant for critical materials on imports? and if so

(ii) are those imports coming from countries that the US does not to rely on in a time of war?[855]

Upon application of the above-mentioned questions to the present investigations one could state the following. First, as to the reliance for critical imports Steve Charnovitz commented that "Of all the sectors in the world economy, steel is probably the sector for which there is the smallest risk of a shortage due to reliance on foreign imports."[856] Moreover, the US is the world's largest steel importer.[857] In June 2017, the imports of steel raised to 30% which means that the domestic steel industry enjoyed 70 percent share of the United States steel market.[858] With regard to the defence needs, the US Defense Secretary mentioned that the US military requirements for steel and aluminium each only represent about 3 percent of US production.[859]

Second, with regard to the main sources of imports - the US imports come from Canada, Brazil, South Korea, Mexico, and Russia.[860]All above-mentioned countries, except Russia, are

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[854] "*Any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country.*" 'Proclamation 9705 of March 8, 2018 Adjusting Imports of Steel Into the United States by the President of the United States of America' (n 841). para.9, p.11626

[855] Jennifer Hillman, 'Transcript of Remarks Jennifer A. Hillman Professor of Practice Georgetown Law Center At "What's in a Name? The Tariffs, National Security, and the WTO"' <http://www.gbdinc.org/wp-content/uploads/2018/07/TRANSCRIPT-JENNIFER-HILLMAN-JUNE-29-2018.pdf>.

[856] Steve Charnovitz, 'Comments of Steve Charnovitz to the Section 232 Steel Investigation' (*International Economic Law and Policy Blog*, 26 April 2017) <http://worldtradelaw.typepad.com/ielpblog/2017/04/comments-of-steve-charnovitz-to-the-section-232-steel-investigation.html>.

[857] Department of Commerce of United States of America, 'Global Steel Trade Monitor, Steel Imports Report: United States' <https://www.trade.gov/steel/countries/pdfs/imports-us.pdf>.

[858] 'American Iron and Steel Institute, Steel Manufacturers Association, Letter to the President Trump to Take an Action under Section 232 of the Trade Expansion Act' <https://www.steel.org/~/media/Files/AISI/Public%20Policy/2018/232-Letter-2018.pdf>.

[859] Secretary of Defense, 'Memorandum for Secretary of Commerce, Subject: Response to Steel and Aluminum Policy Recommendations' <https://www.commerce.gov/sites/commerce.gov/files/department_of_defense_memo_response_to_steel_and_aluminum_policy_recommendations.pdf>.

[860] According to the US Department of Commerce Statistics U.S. Department of Commerce Bureau of Industry and Security Office of Technology Evaluation, 'The Effect of Imports of Steel on the National Security, An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962 as Amended' <https://www.commerce.gov/sites/commerce.gov/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf>. p.28

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the US allies and, in theory, the US can count on them in a time of war, as mentioned by Jennifer Hillman.[861] Therefore, one could claim that under a pre-2017 reading of the Section 232, there is a very weak rationale for conclusion that the imports of steel and aluminium pose threats to the US national security.[862]

Broader implications of the US Section 232 tariffs

The US Section 232 tariffs have led to various legal implications.[863] First, the US Section 232 tariffs were challenged in the US courts.[864] The first case was brought by Severstal Export GmbH at the Court of International Trade where the claimant argued that the Section 232 tariffs were not grounded in national security.[865] The quest for preliminary injunction was denied in April 2018.[866]

Second, the American Institute for International Steel in cooperation with other partners brought the case at the Court of International Trade. In the lawsuit the claimant argues the unconstitutionality of the Section 232 of the Trade Expansion Act of 1962 due to an improper delegation of legislative power to the President, in violation of Article I, section 1 of the Constitution and the doctrine of separation of powers and the system of checks and balances under the US Constitution.[867] This claim has proved to be a very important

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[861] Hillman, 'Transcript of Remarks Jennifer A. Hillman Professor of Practice Georgetown Law Center At "What's in a Name? The Tariffs, National Security, and the WTO"' (n 855).
[862] ibid.
[863] For a brief overview of legal consequences of the Section 232 tariffs see Shannon Togawa Mercer and Matthew Kahn, 'America Trades Down: The Legal Consequences of President Trump's Tariffs' (*Lawfareblog*, 13 March 2018) <https://www.lawfareblog.com/america-trades-down-legal-consequences-president-trumps-tariffs>.
[864] For a broader overview of the impact of tariffs on companies see Mary E Lovely and Yang Liang, 'Trump Tariffs Primarily Hit Multinational Supply Chains, Harm US Technology Competitiveness' [2018] Peterson Institute of International Economics <https://piie.com/system/files/documents/pb18-12.pdf>. For an opposition to the US Section 232 tariffs see Jennifer Rubin, 'Trump Is Bringing People Together — in Opposition to His Awful Tariffs' *Washington Post* (1 June 2018) <https://www.washingtonpost.com/blogs/right-turn/wp/2018/06/01/trump-is-bringing-people-together-in-opposition-to-his-awful-tariffs/?utm_term=.fb285c38feb4>.
[865] Kenneth Rapoza, 'Russian Steel Giant Severstal First To Sue U.S. Government Over Tariffs' *Forbes* (27 March 2018) <https://www.forbes.com/sites/kenrapoza/2018/03/27/russian-steel-giant-severstal-trump-tariff-lawsuit/#7dd127a3140c>.
[866] See the Opinion of the US CIT *Severstal Exp GmbH v United States, No 18-00057, Opinion* (Court of International Trade).Simon Lester, 'The Section 232 Tariffs in U.S. Court' (*International Economic Law and Policy Blog*, 25 March 2018) <https://worldtradelaw.typepad.com/ielpblog/2018/03/the-section-232-tariffs-in-us-court.html>.
[867] William Mauldin, 'Lawsuit Challenges Trump's Authority to Impose Tariffs' *Wall Street Journal* (27 June 2018) <https://www.wsj.com/articles/lawsuit-challenges-trumps-authority-to-impose-tariffs-1530104915>. The short analysis of the case is available here AIIS Staff, 'American Institute for International Steel Files Lawsuit Challenging Constitutionality of Section 232 Tariffs' <http://www.aiis.org/2018/06/american-institute-for-international-steel-files-lawsuit-challenging-constitutionality-of-section-232-steel-tariffs/>. All documents

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development in this area since the domestic challenges do matter as much[868] as challenges at the international arena.[869] The next hearing in this case is scheduled on 19 December 2018. A crucial matter before the US Court of International Trade concerns the interpretation of the US President authority as to imposition of tariffs.

The use of authority by the US President in matters of national security was addressed in a recent case International Refugee Assistance Project v Trump concerning the challenge of the so-called "Muslim ban".[870] In this case Judge James Wynn in his concurrent opinion mentioned that

> *"…even when the President invokes national security as a justification for a policy that encroaches on fundamental rights, our courts must not turn a blind eye to statements by the President and his advisors bearing on the policy's purpose and constitutionality.*"[871]

Likewise, Judge Stephanie Thacker mentions that

> *"Our constitutional system creates a strong presumption of legitimacy for presidential action; however, this deference does not require us to cover our eyes and ears and stand mute simply because a president incants the words 'national security.'"*[872]

related to the case are available at AIIS Staff, 'American Institute for International Steel Files Lawsuit Challenging Constitutionality of Section 232 Tariffs' <http://www.aiis.org/2018/06/american-institute-for-international-steel-files-lawsuit-challenging-constitutionality-of-section-232-steel-tariffs/>.

[868] Tucker (n 867).

[869] For a brief discussion of this case see 'Trade Lawyers Debate Strength of AIIS' Section 232 Challenge' *Inside Trade* (26 October 2018) <https://insidetrade.com/trade/trade-lawyers-debate-strength-aiis-section-232-challenge>.

[870] The "Muslim ban" was introduced by the Executive Order No.13769 see 'Executive Order No.13769 Protecting the Nation from Foreign Terrorist Entry into the United States' <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/>.It was superseded by the Executive Order on 6 March 2017 'Executive Order No.13780 Protecting The Nation From Foreign Terrorist Entry Into The United States' <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/>.For a discussion of the "Muslim ban" case in light of limits on the US Presidential authority see Quinta Jurecic, 'A New Jurisprudence for an Oathless Presidency' (2 June 2017) <https://www.lawfareblog.com/new-jurisprudence-oathless-presidency>.

[871] *Int'l Refugee Assistance Project, , Inc v Trump* (United States Court of Appeals, Fourth Circuit). p.94

[872] ibid. p.139

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As is seen, while there is a wide deference for a President in matters of national security, one could argue that it cannot cover "everything under the sun". As a matter of fact, the wide use of national security by the US President also prompted the discussion as to changes in the legislation on the delegated authority of the President under Article 1, Section 8 of the US Constitution. Some scholars proposed changes to the US legislation in order to improve congressional control over trade policy. The changes include: (i) a necessity of Congress to re-establish a mechanism of approval and disapproval for various trade-policy decisions made by executive branch, (ii) a necessity to change the process of national security investigations, making the Secretary of Defense the ultimate arbiter as to imposition of national security measures, (iii) redefine national security so as to ensure that true national security concerns are covered by the statute.[873]

As was mentioned above, the US tariffs provoked retaliatory measures from other countries. Just to mention some responses: Mexico imposed 20 and 25 percent tariffs on the US products amounting to almost 3 bln dollars.[874] The EU's response is three-fold:[875] (1) it initiated its own safeguards investigation,[876] (2) it brought a case at the WTO[877] and (3) it applied rebalancing measures as of 22 June 2018.[878] The EU measures had an effect on the US

[873] Clark Packard and Philip Wallach, 'Restraining the President: Congress and Trade Policy' (R Street Institute 2018) R Street Policy Study No158 <https://www.rstreet.org/2018/11/13/restraining-the-president-congress-and-trade-policy/>.
[874] Sabrina Rodriguez, 'Mexico Imposes Retaliatory Tariffs on Dozens of U.S. Goods' *Reuters* (5 June 2018) <https://www.politico.com/story/2018/07/05/mexico-imposes-retaliatory-tariffs-670424>. For an official text of the Decree see President of Mexico, 'DECRETO por el que se modifica la Tarifa de la Ley de los Impuestos Generales de Importación y de Exportación, el Decreto por el que se establece la Tasa Aplicable durante 2003, del Impuesto General de Importación, para las mercancías originarias de América del Norte y el Decreto por el que se establecen diversos Programas de Promoción Sectorial.' <http://www.dof.gob.mx/2018/SEECO/Aranceles.pdf>.
[875] For a concise overview of the EU response see Roderick Edward Noël Harte, 'US Tariffs: EU Response and Fears of a Trade War' <http://www.europarl.europa.eu/RegData/etudes/ATAG/2018/623554/EPRS_ATA(2018)623554_EN.pdf>.
[876] European Union, 'Notification Under Article 12.1 (A) of the Agreement on Safeguards on Initiation of An Investigation and Reason for It (Certain Steel Products)' <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=244124&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True>.
[877] 'United States - Certain Measures on Steel and Aluminium Product, Request for Consultations by the European Union, DS548/1' <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20@Symbol=%20(wt/ds548/1%20))&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#>.
[878] 'Commission Implementing Regulation (EU) 2018/886 of 20 June 2018 on Certain Commercial Policy Measures Concerning Certain Products Originating in the United States of America and Amending Implementing Regulation (EU) 2018/724' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.158.01.0005.01.ENG&toc=OJ:L:2018:158:TOC>.

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economy.[879] For example, some US companies, like Harley Davidson, announced its plans to relocate some its production activities to the EU to avoid high EU tariffs.[880] Overall, Section 232 tariffs led to escalation of EU-US disputes.[881] In July 2018 EU and US concluded a deal to prevent a trade war.[882] While the deal has mainly a declaratory character, the mere fact of its conclusion appears to a decrease of tension between two trade partners.[883]

A particular attention should be paid to the response by China which imposed tariffs on the US worth of 16 billion of the US dollars.[884] There are already signs that the Chinese tariffs had an impact on some US industries.[885] Other countries like Canada, Russia, India, Japan and Turkey responded by imposition of tariffs on the US goods.[886]

In other words, the US has forced its trade partners to respond "in extra-legal fashion".[887] At the same time, other scholars point out that the legality of such measures is doubtful,[888] while

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[879]In turn, for the impact of the US trade policy on the EU-US relations see 'Consequences of US Trade Policy on EU-US Trade Relations and the Global Trading System' <http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603882/EXPO_STU(2018)603882_EN.pdf>.

[880] Alan Rappeport, 'Harley-Davidson, Blaming E.U. Tariffs, Will Move Some Production Out of U.S.' *The New York Times* (25 June 2018) <https://www.nytimes.com/2018/06/25/business/harley-davidson-us-eu-tariffs.html>. Also BMW announced its plan to relocate to Europe in case President Trump imposes tariffs on cars Victoria Bryan, 'BMW Threatens to Cut Jobs and Move Production out of the USA If Trump Puts Tariffs on European Cars' *Reuters* (30 June 2018). President Trump was surprised by the move of the Harley-Davidson. David J Lynch and Heather Long, 'Trump Says He's "Surprised" Harley-Davidson Is Moving Work Overseas after Tariffs Take Effect' *The Washington Post* (26 June 2018) <https://www.washingtonpost.com/news/business/wp/2018/06/25/harley-davidson-moves-work-offshore-to-limit-blow-from-trumps-trade-war/?utm_term=.7232e4c61f38>. Such moves by the President undermine his own trade policy. Simon Johnson, 'Trump Undermines Himself on Trade' *Project Syndicate* (29 June 2018) <https://www.project-syndicate.org/commentary/trump-counterproductive-trade-policies-by-simon-johnson-2018-06>.

[881]'US-EU Trade Dispute on Course for Escalation' *The Economist Intelligence Unit* (2 July 2018) <http://www.eiu.com/industry/article/276900411/us-eu-trade-dispute-on-course-for-escalation/2018-07-02>.

[882] Grace Panetta, '"A Very Big Day for Free and Fair Trade": Trump Announces Preliminary Deal with EU to Avoid Full-Blown Trade War'' *Business Insider* (25 July 2018) <https://www.businessinsider.com/trump-eu-trade-deal-trade-war-tariffs-2018-7?IR=T>.

[883] Shawn Donnan, 'US-EU Agree on New Talks to Ease Trade Tensions' *Financial Times* (25 July 2018) <https://www.ft.com/content/300307e6-904b-11e8-bb8f-a6a2f7bca546>.

[884] Hudson Lockett, 'China Imposes Tariffs in Response to US Move — Reports' *Financial Times* (6 July 2018) <https://www.ft.com/content/f2ac2950-80e5-11e8-bc55-50daf11b720d>.

[885] Patrick Whittle, 'Layoffs Hit, Prices Lag as Tariff Pinches Lobster Industry' *Daily Hampshire Gazette* (15 September 2018) <https://www.gazettenet.com/Layoffs-hit-prices-lag-as-tariff-pinches-lobster-industry-20184316>.

[886] For an overview of retaliatory tariffs see International Trade Administration, 'Current Foreign Retaliatory Actions, Foreign Tariff Responses to U.S. Section 232 Steel and Aluminum Tariffs' <https://www.trade.gov/mas/ian/tradedisputes-enforcement/retaliations/tg_ian_002094.asp>.

[887] Krzysztof J Pelc, 'The U.S. Broke a Huge Global Trade Taboo. Here's Why Trump's Move Might Be Legal' *Washington Post* (7 June 2018) <https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/07/the-u-s-broke-a-huge-global-trade-taboo-heres-why-trumps-move-might-be-legal/?utm_term=.ea0a32ebc386>.

[888] For an overview of legality of measures see JHH Weiler, 'Black Lies, White Lies and Some Uncomfortable Truths in and of the International Trading System' (*EJIL Talk! Blog of the European Journal of International Law*, 25 July 2018) <https://www.ejiltalk.org/black-lies-white-lies-and-some-uncomfortable-truths-in-and-of-the-international-trading-system/>.

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States claimed that they cannot wait till a decision is made by the WTO while the US tariffs hurt their economies.[889] There is a lot of politics included in all these cases and the ultimate question is whether the States will be willing to agree on a diplomatic solution or whether they will push to the decision on these issues from the WTO Panel.

WTO complaints

China, India, EU, Canada, Mexico, Norway, Russia, Switzerland and Turkey brought the cases against the US Section 232 tariffs before the WTO.[890] The WTO dispute settlement body (DSB) established panels to review seven complaints – by China, the European Union, Russia, Canada, Mexico, Norway and Turkey on 21 November 2018.[891] On 4th of December 2018 the DSB established panels in complaints by India and Switzerland.[892]

The complainants allege the following violations by the United States: Article XVI:4 of the WTO Agreement, Article I:1 of the GATT, Article II:I, X:3 (a), XI:1, XIX of the GATT, Articles 2,3,4,5,7,8,9,11 and 11 of the Agreement on Safeguards. Members requested consultations based on Articles XXII of the GATT 1994 and 14 of the Safeguard Agreements. They allege that the US measures nullify or impair the benefits accruing under the WTO provisions since the US fails to carry out its obligations under Article XXIII:1(a). Moreover, Mexico[893] and India[894] included a non-violation complaint under Article XXIII:1(b) of the GATT 1994. In what follows, the framework of review singled out in Chapter 2 will be applied to the US Section 232 tariffs.

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[889] To note, the United States also submitted cases against the retaliatory tariffs of Canada (DS557), China (DS558), EU (DS559), Mexico (DS560), Turkey (DS561)

[890] As of September 2018, the cases include DS 543,544 and 565 (complaints by China), DS547 (India), DS548 (EU), DS550 (Canada), DS551 (Mexico), DS 552 (Norway), DS554 (Russia), DS556 (Switzerland) and Turkey (DS564)

[891] 'Panels Established to Review US Steel and Aluminium Tariffs, Countermeasures on US Imports' <https://www.wto.org/english/news_e/news18_e/dsb_19nov18_e.htm>.

[892] 'Panels Established to Review India, Swiss Complaints against US Tariffs' <https://www.wto.org/english/news_e/news18_e/dsb_04dec18_e.htm>.

[893] *DS551, United States — Certain Measures on Steel and Aluminium Products (Mexico), Request for Consultations*.

[894] *DS547, US — Steel and Aluminium Products (India), Request for Consultations*.

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Applying the framework of review

1. Whether the measure falls under the scope of the WTO Agreements and violates WTO Agreements

Article II:1 of the GATT

As to violation under Article II:1 of the GATT which provides for obligations under the schedule of concessions, the US schedule of concessions has to be checked. The US established in its Schedule (US Good Schedule: Schedule XX) a bound rate from 0% to 6.5% ad valorem in aluminium. In turn, with regard to steel products the US has the bound tariff of 0% ad valorem.[895] Given the fact that the US has imposed tariffs of 10% on aluminium and 25% on imported steel, it has violated its obligations under Article II:1 of the GATT.

Article I:1 of the GATT

As mentioned above, Article I:1 of the GATT imposes MFN obligation on WTO Members. The analysis under Article I:1 of the GATT includes: 1. Whether the measures is covered under Article:1 of the GATT, (ii) whether the products concerned are like products, (iii) whether the measures confers a trade advantage, favour, privilege or immunity, and; (iv) whether the advantage is granted immediately and unconditionally to all like products concerned. The US tariffs, quotas and waivers fall under the scope of the MFN provision since Article I:1 covers a broad range of measures, including border and internal measures. Moreover, products could be considered as like products since the US differentiates based only on the origin of products. Since the US imposed quotas and tariffs waivers to some WTO members, it has given an advantage, favour or privilege or immunity to these Members. Thus, the measures confer a trade advantage, favour, privilege or immunity and such advantage is not granted to like products. In sum, the US has violated Article I:1 of the GATT 1994.

Article XI:1 of the GATT 1994

Article XI:1 of the GATT 1994 prohibits imports and export restrictions. The concept of "prohibitions and restrictions" is broad and includes prohibitions or ban of importation or exportation of a product, absolute or conditional, authorization and licences. By imposing high tariffs, the US puts a limitation on the importation of products. Moreover, the US imposed a

[895] 'Excerpt from the US Goods Schedule, WTO Website' <https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm>.

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quota on steel products from Argentina, Brazil and South Korea and quotas on aluminium from Argentina.[896]

To sum up, the US measures could be considered inconsistent with obligations under the GATT Agreement. Then the question arises as to whether the US measures are contrary to the Agreement on Safeguards. In this regard the Panel has to define whether the US measures could be considered as safeguards.

Violations under the Safeguards Agreement

In all nine complaints brought against the US measures, WTO Members allege that the US measures are safeguards which violate Safeguards Agreement.[897] In its response the US claims that its Section 232 measures do not amount to safeguards:

> *"…the tariffs imposed pursuant to Section 232 are not safeguard measures but rather tariffs on imports of steel and aluminium articles that threaten to impair the national security of the United States. The United States did not take action pursuant Section 201 of the Trade Act of 1974, which is the law under which the United States imposes safeguard measures. Therefore, there is no basis to consult pursuant to the Agreement on Safeguards with respect to tariffs imposed under Section 232."*[898]

In this regard, the questions arise (i)whether the US measures are safeguards and if so, (ii)whether they are inconsistent with Safeguards Agreement.

The discipline on safeguards is regulated by Article XIX of the GATT 1994 and the Agreement on Safeguards. According to paragraph 1 of Article XIX of the GATT Agreement:

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[896] 'Proclamation 9711 of March 22, 2018 Adjusting Imports of Steel Into the United States By the President of the United States of America' (n 845). para.10

[897] Simon Lester, 'Deciding Whether the Section 232 Tariffs Are Safeguard Measures' (*International Economic Law and Policy Blog*, 19 July 2018) <http://worldtradelaw.typepad.com/ielpblog/2018/07/deciding-whether-the-section-232-tariffs-are-safeguard-measure.html>. Note that the question as to safeguards can also arise in cases which the US brought against retaliatory measures of other states – DS557 (Canada), DS558 (china), DS559 (EU), DS560 (Mexico), DS561 (Turkey)

[898] 'United States - Certain Measures on Steel and Aluminium Products - Communication from the United States, DS550/10'. The US Trade Representative also underlined this view in his statement on retaliatory duties. In particular, the US Trade Representative said that the "…United States has not taken a safeguard measure. The President's actions here were taken under a U.S. national security statute – not under the separate U.S. statute for safeguard measures." Lighthizer (n 228).

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> *"If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."*

In this light safeguard measures are defined as "emergency" actions with respect to increased imports of particular products, which have caused or threaten to cause serious injury to the importing Member's domestic industry. Such actions may take the form of suspension of concessions or obligations and can consist of quantitative import restrictions or of duty increases to higher than bound rates.[899] In other words, they can take the form of tariff duty increase or quota. The rationale behind imposition of safeguards is to protect domestic industry against fair imports.

Safeguards measure were designed to replace grey-area measure such as voluntary restraints popular in the 1970s and 1980th. Voluntary restraints are called grey-area measures since they are adopted as a result of voluntary agreements between two countries, notwithstanding the fact that they can be inconsistent with Articles XI and XXIII which prohibit quantitative restrictions and nullification or impairment of the benefit accruing to a contract

[899] For an overview of characteristics of safeguards see 'WTO Trade Topics, Agreement on Safeguards' <https://www.wto.org/english/tratop_e/safeg_e/safeint.htm>. On the history of negotiating Article XIX see Alan O Sykes, 'The Safeguards Mess: A Critique of WTO Jurisprudence' (2003) 2 World Trade Review 261. For the influence of a case-law on safeguards on practice see Meredith Kolsky Lewis, 'When Popular Decisions Rest on Shaky Foundations' in Julien Chaisse and Tsai-yu Lin (eds), *International Economic Law and Governance* (Oxford University Press 2016) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198778257.001.0001/acprof-9780198778257-chapter-9> accessed 17 September 2018. p.125

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party under the GATT.[900] WTO Member to suspend temporarily their obligations following surge in imports that threatens domestic industry.[901]

Safeguard measures are applied following the national safeguard investigations which are conducted according to national legislation of respective country and should be in line with Safeguards Agreement and Article XIX of the GATT 1994. The substantive requirements established for application of safeguards are provided for in Article 2 of the Safeguards Agreement.[902] In order to impose safeguard measures pursuant to the national legislation, the Member State should meet three substantive requirements: (1) increased quantity of imports in absolute or in relative terms (2) serious injury caused, or threatened to be caused, to the domestic industry producing the "like or directly competitive" products; and (3) causal link between the increased imports and injury.

In light of the above criteria, one could claim that the Reports on Steel and Aluminium have certain similarities with an investigation under the Safeguards Agreement. For example, the US steel report analyzes increase in imports, prices, employment, financial distress, and capital expenditure, similarly to Article 4.2 of the Safeguards Agreement.[903] However, Yong-Shik Lee points out that despite overlaps between investigations on injury assessment, the reports are arguably not the same type of report required by the Safeguards Agreement due to the following reasons. First, the reports have a different focus: in the US steel and aluminium reports the focus is on the importance of steel and aluminium to US national security which goes beyond the scope of injury analysis under the Safeguards Agreement. Second, the reports make an analysis with regard to the impact of imports on the welfare of the overall domestic industry which is not covered by the assessment under the Safeguards Agreement. In general, the scope of steel and aluminium reports is focused on effect of imports on national security

[900] For a recent research on Voluntary-export restraints see Geraldo Vidigal, 'The Return of Voluntary Export Restraints? How WTO Law Regulates (And Doesn't Regulate) Bilateral Trade-Restrictive Agreements' [2019] Journal of World Trade 187.
[901] Due to the possibility of States to derogate from their WTO obligations by imposing safeguards, they are called as "escape clauses" by some scholars. Pelc, 'Seeking Escape' (n 97). A thorough account of safeguards as an escape in trade agreements from an economic perspective has been done by Mathias Herzing, 'Essays on Uncertainty and Escape in Trade Agreements' (PhD thesis, Stockholm University 2005) <https://www.iies.su.se/polopoly_fs/1.57460.1321520832!/50MH.pdf>.
[902] For an extensive overview of WTO jurisprudence with regard to the definition of a safeguard measure See Analytical index 'WTO Analytical Index, Agreement on Safeguards, Article 1 (Jurisprudence)' <https://www.wto.org/english/res_e/publications_e/ai17_e/safeguards_art1_jur.pdf>.
[903] Bureau of Industry and Security, US Department of Commerce (n 835). pp.27-40

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and goes beyond the assessment needed under the Safeguards Agreement.[904] Thus, the steel and aluminium tariffs have been applied to address the national security concerns rather than to address injury as it is done in case of imposition of safeguards.

Further guidance as to determination of the measure as a safeguard could be taken from a recent dispute *Indonesia-Iron or Steel Products (Viet Nam).*[905] This case will be briefly discussed below in order to shed some light how the Panel might address the US Section 232 tariffs.

Guidance from the Indonesia-Iron or Steel Products?

The case concerns the specific duty imposed by Indonesia on imports of galvalume, a type of flat-rolled iron or non-alloy steel, under HS code 7210.61.11.00. Indonesia imposed a specific duty following an investigation by Indonesia's competent governmental body (Komite Pengamanan Perdagangan Indonesia, "KPPI") under its domestic safeguards legislation. The Minister of Finance of the Republic of Indonesia adopted Regulation No.137.1/PMK.011/2014 which stated that the specific duty was imposed for a period of three years and entered into force on 22 July 2014. Indonesia applied the duty on imports of galvalume from all sources, excluding 120 developing countries. Indonesia notified the list of these countries to the WTO Committee on Safeguards under the Safeguards Agreement Article 9.1.

It should be noted that Indonesia did not have a binding tariff obligation on galvalume in its Schedule of Concessions. Its MFN-duty rate was 12.5% which was increased to 20% in May 2015. Moreover, Indonesia applied preferential duty rates with regard to four separate regional trade agreements (RTAs) – ASEAN-China Free Trade Agreement (12.5%), the ASEAN-Korea Free Trade Agreement (10%), the ASEAN Trade in Goods Agreement (0%) and the Indonesia-Japan Economic Partnership Agreement (12.5%). The specific duty was applied in addition to existing MFN duty and preferential duty rates.

On 12 February 2015 Chinese Taipei requested consultations with Indonesia (DS490), while Viet Nam requested consultations on 1 June 2015 (DS496).

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[904] Yong-Shik Lee, 'Are Retaliatory Trade Measures Justified under the WTO Agreement on Safeguards?' [2019] Journal of International Economic Law <https://academic.oup.com/jiel/advance-article/doi/10.1093/jiel/jgz006/5445925> accessed 15 April 2019. p.17

[905] Appellate Body Report, *Indonesia – Safeguard on Certain Iron and Steel Products,* circulated on 15 August 2018, adopted on 27 August 2018, WT/DS490/AB/R, WT/DS496/AB/R

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The Panel Report

The two complaining parties, Chinese Taipei and Viet Nam argued that the Indonesian specific duty was a safeguard measure inconsistent with Articles I:1, XIX:1 (a), XIX:2 of the GATT and Safeguards Agreement Articles 2.1, 3.1, 4.1 (a), 4.1 (b), 4.2. (a), 4.2 (b), 4.2. (c), 12.2 and 12.3. Alternatively, they argued that the specific duty as a *stand-alone measure* violated the MFN principle enshrined in the GATT Article I:1. Even though both parties agreed that the specific duty imposed by Indonesia constituted a safeguard, the Panel said that it had to examine the issue for itself in order to discharge its duty under Article 11 DSU – i.e. to make an objective assessment of the matter.

Definition of a safeguard measure

The "fundamental question" for the Panel was whether the specific duty applied by Indonesia was a safeguard measure within the meaning of Article I of the Agreement on Safeguards.[906] In its assessment of the Indonesian measures the Panel first noted the definition of the safeguard measure provided in Article 1 of the Agreement on Safeguards and Article XIX:1(a) of GATT 1994. The language of Article XIX:1 (a) of GATT 1994 makes clear that the measures provided in this Article are "the measures that suspend a GATT obligation and/or withdraw or modify a GATT concession in situations where … a product is imported into a Member's territory in such increased quantities and such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products". Moreover, the Panel added that not any measure suspending, withdrawing, or modifying a GATT obligation or concession would fall within the scope of Article XIX:1 (a). The measure should be one that a Member "finds it must be temporarily released from in order to pursue a course of action necessary to prevent or remedy serious injury".[907] The Panel determined that one of the defining features of safeguard measures under Article XIX:1(a) of the GATT is "…the suspension, withdrawal, or modification of a GATT obligation or concession that precludes a Member from imposing a measure to the extent necessary to prevent or remedy serious injury, in a situation where all of the conditions for the imposition of a safeguard measure are satisfied".[908] Based on these premises the Panel proceeded with its analysis. Panel reiterated that Indonesia had no

[906] Panel Report, *DS496: Indonesia — Safeguard on Certain Iron or Steel Products, Panel Report*., para. 7.10
[907] ibid. para.7.14
[908] ibid.., para.7.15

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binding tariff obligation with regard to galvalume in its WTO Schedule of Concessions within the meaning of Article II of GATT 1994. Consequently, Indonesia was free to apply any duty it considered appropriate, including the specific duty mentioned in Regulation No.137.1/PMK.011/2014. Thus, by imposing specific duties on galvalume, Indonesia did not suspend or withdraw obligations since its commitments under Article II of the GATT 1994 did not preclude it from raising its MFN *ad valorem* duty rates from 12.5% to 20%. [909] Therefore, the specific duty was not a safeguard measure within the meaning of Article XIX:I (a) of the GATT and Article I:1 of the Safeguards Agreement.

No suspension of other concessions

In order to show that the measure falls under the definition of a safeguard measure, Indonesia also argued that it suspended two other GATT obligations: Article XXIV of the GATT as Indonesia increased the specific duty on imports from its RTA partners and Article I:1 of the GATT since as it applied the specific duty on a discriminatory basis (excluding the 120 developing countries).

First, with regard to the increase of specific duty on imports from its RTA partners, Indonesia pointed out that tariff obligations under the ASEAN-Korea (10%) and the ASEAN Trade in Goods (0%) RTAs prevented it from increasing its tariff on imports of galvalume. Indonesia claimed that by imposing its specific duty it has suspended the GATT exception under Article XXIV of the GATT 1994. However, the Panel concluded that Article XXIV of the GATT 1994, providing for an exception for RTAs, did not impose any obligation on Indonesia with regard to its duty rates. In particular, the Panel mentioned that Article XXIV was a permissive provision allowing WTO Members to depart from their obligations rather than a positive obligation. In line with this, the Panel explained that the Indonesian obligations with regard to the level of tariffs on galvalume were established in relevant FTAs of which Indonesia was a part. In the end the Panel concluded that there was no basis for Indonesia to claim that Article XXIV precluded its authorities from raising tariffs on imports of galvalume and that the specific duty suspended its obligations under the GATT Article XXIV for the purposes of Article XIX:1(a).[910]

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[909] ibid., para. 7.18
[910] ibid., paras. 7.19-7.20

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Second, Indonesia asserted that its specific duty suspended obligation of a MFN-treatment under Article I:1 of the GATT since it applied the specific duty on a discriminatory basis (applying to all but 120 developing countries) in order to comply with its obligations under Article 9.1 of the Safeguards Agreement.[911] The complainants agreed with Indonesia that the specific duty suspends Indonesian MFN-obligations since Indonesia applied the specific duty on a selective basis "with a view to address the threat of serious injury 'suffered' by the domestic industry".[912] In its evaluation the Panel disagreed with the parties and pointed out that Article 9.1 was premised on application of a safeguard measure. Given the previous finding of the Panel that the Indonesian specific duty did not constitute a safeguard measure, there was no legal prerequisite for application of Article 9.1 of the Safeguards Agreement. The Panel added that even in case where a safeguard measure did exist, the discriminatory application of that measure for the purpose of Article 9.1 did not result in a suspension of MFN obligations under Article I:1 of the GATT for the following reasons. First, the discrimination under Article I:1 was not intended to prevent a serious injury but intended to leave producers from qualifying developing country Members with essentially the same access to the importing country market as existed prior to the imposition of a safeguard measure. Second, the Panel noted that the parties based their arguments on a misconceived understanding of Article 9.1 of the Safeguards Agreement and its relationship with Article XIX:1 (a) of the GATT 1994. In particular, according to General Interpretative Note to Annex 1A[913] the discriminatory application under Article 9.1, even if inconsistent with Article I:1 of the GATT 1994, is permissible due to the fact that Article 9.1 of the Safeguards Agreement prevails as a matter of law over the MFN obligation contained in Article I:1.[914]

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[911] Article 9.1 of the Safeguards Agreement states: "1. Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned."

[912] *DS496: Indonesia — Safeguard on Certain Iron or Steel Products, Panel Report* (n 906). para 7.23

[913] General interpretative note to Annex 1A states *"In the event of conflict between a provision of the General Agreement on* Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict."

[914] *DS496: Indonesia — Safeguard on Certain Iron or Steel Products, Panel Report* (n 906)., para.7.29 It should be noted that the Panel departed from findings of the Panel in *Dominican Republic -Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric (WT/DS/415/R, WT/DS/416/R, WT/DS/417/R, WT/DS418/R)* where it was found that the discriminatory application of a safeguard measure in accordance with Article 9.1. of the Agreement on Safeguards was considered as the suspension of obligations under Article I:1 of the GATT 1994. The Panel explained its position by referring to the differences in the facts between two cases. See para.7.30.

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Safeguards investigation is not determinative

The Panel evaluated the fact that Indonesia imposed its specific duty following a safeguards investigation according to the Indonesian legislation which was notified to the WTO Safeguards Committee. In this regard the Panel concluded that the WTO-consistent investigation on safeguards was a necessary prerequisite for the WTO-consistent safeguard measure. That being said, the fact that the WTO Member conducted a WTO-consistent safeguard investigation did not mean that any measure adopted as a result of such investigation suspends, modifies or withdraws any GATT obligation or concession and consequently, constitutes a safeguard measure within the meaning of Article I:1 of the Safeguards Agreement.[915] In the end the Panel found that the specific duty of Indonesia did not constitute a "safeguard measure" within the meaning of Article 1 of the Agreement on Safeguards.

Appellate Body Report

On appeal, Indonesia raised a claim that the Panel exceeded its terms of reference or failed to carry out an objective assessment of the matter before it. All parties argued that the Panel erred in its interpretation and application of Article 1 of the Safeguards Agreement and Article XIX:1(a) of the GATT 1994.

Whether the Panel exceeded its terms of reference or failed to carry out an objective assessment of the matter

The Appellate Body reiterated that under Article 11 DSU that the Panel was required to ascertain, on its own motion, whether the measure at issue was a safeguard measure within the meaning of the WTO safeguard disciplines since the description of the measure provided by a party in a WTO dispute is not, in and of itself, dispositive of the legal characterization of that measure for purposes of WTO law.[916] In light of the above, the Appellate Body found that the Panel did not err under Article 6.2, 7.1. or 11 of the DSU by making its own assessment of

[915] ibid., para.7.39
[916] *Indonesia — Iron or Steel Products (Viet Nam)* (n 373)., para.5.32

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whether the measure constituted a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.[917]

Whether the Panel erred in its interpretation with regard to the fact that Indonesian duty did not constitute a safeguard measure

On appeal, the parties claimed that the Panel erred in finding that the Indonesian specific duty was not a safeguard measure. The Appellate Body stated that for a measure to be considered as a safeguard measure under Article XIX:1 (a) of the GATT: (i) it must suspend, in whole or part, a GATT obligation or withdraw or modify of a GATT concession, and (ii) the suspension, withdrawal or modification must be designed to prevent or remedy serious injury to a Member's domestic industry caused or threatened by an increase in imports of the subject product. The Appellate Body stated that "to determine whether a measure presents such features, a panel is called to assess the design, structure, and expected operation of the measure as a whole". However, no such factor is dispositive in determining whether the measure constitutes a safeguard measure.[918] The Appellate Body made a caveat that in its reasoning, the Panel conflated the constituent features of a safeguard measure with the conditions for the conformity of a safeguard measure with the Agreement on Safeguards. That being said, the Appellate Body agreed with the finding of the Panel that the Indonesian measure does not constitute a safeguard measure based on three points: (1) Indonesia had no binding tariff obligations with respect to galvalume in its Schedule of Concessions and was free to impose any amount of duty it deemed appropriate; (2) the measure does not suspend the GATT exception under Article XXIV since the obligations in regional trade agreements are assumed under the separate regional trade agreements rather than under Article XXIV; and (3) the exemption of 120 countries under Article 9.1 of the Safeguards Agreement constitutes an ancillary aspect of the measure and it had not been shown that it was designed to prevent or remedy serious injury to Indonesia's domestic industry.[919] Article 9.1. of the Safeguards Agreement deals with the consistency of the safeguard measures with WTO discipline on safeguards rather than with the issue of whether a measure was a safeguard for purposes of the applicability of the WTO safeguard disciplines. Therefore, the Appellate Body upheld the

[917] ibid., para. 5.37
[918] ibid., para. 5.60
[919] ibid., para 5.62

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overall finding of the Panel that the Indonesian specific duty was not a safeguard measure within the meaning of Article I:1 of the Agreement on Safeguards. Consequently, there was no legal basis to rule on claims under Article XIX of the GATT and other claims under the Safeguards Agreement.

The main takeaways from the case *Indonesia-Safeguard Measures* are twofold: first, the Panel must make its own independent assessment of whether the WTO Safeguards Agreement applies notwithstanding concurring opinions of the parties as to the nature of the measure. Second, the substantive content of the measure and procedural elements must be analysed altogether in order to define the measure and no single feature is determinative for a characterization of the measure.

US measures in light of the Indonesia -Safeguards case

Applying the criteria mentioned by the Appellate Body in *Indonesia-Safeguards*, the following should be noted. [920] First, with regard to the two essential features-whether measure withdraws a GATT obligation or concession and whether it is designed to prevent or remedy serious injury. It is evident that the US tariffs withdraw a GATT obligation since the US applied tariffs higher than its bound rate in its Schedule of Concessions under Article II:1 of the GATT. However, the question as to whether the measures are designed to prevent or remedy serious injury does not have a clear-cut answer. Here we have to review procedural aspects (national legislation and national procedure) and the substantive elements.

As to the national legislation, the US applied tariffs under Section 232 of the Trade Expansion Act rather than Section 201 which regulates imposition of safeguards measures. Moreover, the US did not make a notification to the WTO Safeguards Committee. Therefore, from a procedural perspective the US measures cannot be characterized as safeguards.

Moreover, it is unlikely that the US measures' aim could be characterized as prevention or remedy of a serious injury. One could claim that the US measures have multiple objectives: protecting national industry (as it is the case with a safeguard measure) and protection of national security under Article XXI. Under established WTO case-law each of the multiple objectives must be separately justified under the relevant provisions.[921] In this regard Yong-Shik Lee commented that if there is no justification for national security purpose on Article

[920] Brett Fortnam, 'Indonesia-Vietnam Ruling Could Hint at WTO View of Section 232' *Inside Trade* (21 August 2018) <https://insidetrade.com/daily-news/indonesia-vietnam-ruling-could-hint-wto-view-section-232>.
[921] For example, see *EC-Seals, AB Report* (n 743). para.5.313

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XXI of the GATT, it does not automatically convert into the strength of commercial purpose objective under the Safeguards Agreement.[922]

In light of multiplicity of the objectives of the measures, there is a need to establish a relationship between safeguards measures and national security measures. On this note Article 11.1 (c) of the Safeguards Agreement which states

> *"This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provision of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangement or concluded within the framework of GATT 1994."*[923]

With Article 11.1 (c) in mind, if the US measures are characterized as national security measures under Article XXI of the GATT, the Safeguards Agreement would not be applicable.

Opinions among scholars as to whether we can treat the US measures as safeguards are divided. On the one hand, scholars like Steve Charnovitz are closer to the opinion that the US measures constitute safeguards by referring to the aim – protection of domestic industry. To substantiate his argument, Steve Charnovitz points out to the tweet from the US President where the protection of steel and aluminium industry is mentioned.[924] On the other hand, scholars like Simon Lester claim that the US Section 232 measures are not safeguards by reference to the US domestic law and objective characteristics of measures. Moreover, they point out that all references to the protection of industry are mentioned in the context of national security.[925]

The question can also arise whether the measures could be considered as illegal safeguards. Lorand Bartels claims that the US measures could be defined as illegal safeguards by saying that at the outset we have to differentiate between (i) definition of a safeguard as such and (ii) determination of the legality of safeguard. With regard to the definition of the measure as a safeguard we have to take into account two characteristics: (1) the purpose of a measure (to remedy serious injury due to imports) and (ii) its form (suspension of concessions or other

[922] Lee (n 904). p.15
[923] 'WTO Trade Topics, Agreement on Safeguards' (n 899).
[924] The tweet says: "Mar 8: Looking forward to 3:30 P.M. meeting today at the White House. We have to protect & build our Steel and Aluminum Industries while at the same time showing great flexibility and cooperation toward those that are real friends and treat us fairly on both trade and the military." In his post Steve Charnovitz concentrates on a broader question of a possibility to retaliate against Section 232 measures Charnovitz, 'EU Can Retaliate Immediately Against Trump's Metal Tariffs' (n 835).
[925] See the comment of Simon Lester of 9 March 2018 below the blogpost of ibid.

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obligations). The purpose of the measure could be determined by reference to domestic legislation. Other procedural and substantive conditions are related to the legality of safeguard. Based on these premises and having analyzed the US measures, Lorand Bartels supposes that the US measures could be defined as an illegal safeguard not justified on national security grounds.[926]

To conclude, there is no clear-cut answer as to the US measures as safeguards within the meaning of the Safeguards Agreement. From the analysis of reports on steel and aluminium it is evident that the focus of the US investigations is the impact on national security which has a broad coverage and goes beyond the investigations under the Safeguards Agreement. The decision in Indonesia-Safeguards points out that the Panel would have to make the determination of the measure on its own, notwithstanding the US national legislation and procedure.

Non-violation complaints

As mentioned above, Mexico and India included non-violation complaints in its requests for consultations against the US tariffs.[927] The possibility to bring a non-violation complaint is embodied in Article XXIII (1)(b) of the GATT 1947:

> *1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give*

[926] See the comment by Lorand Bartels of 11 March 2018 below the post of ibid.
[927] Simon Lester, 'Non-Violation Claims in the Steel/Aluminum WTO Complaints' (*International Economic Law and Policy Blog*, 20 June 2018) <http://worldtradelaw.typepad.com/ielpblog/2018/06/the-steelaluminum-wto-complaints.html>.

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> *sympathetic consideration to the representations or proposals made to it."*

During the GATT-era five non-violation complaints were successful: *Australia-Ammonium Sulphate*,[928] *Germany-Sardines*,[929] *EEC-Canned Fruit*,[930] *EEC-Citrus*[931] and *EEC-Oilseeds.*[932] In these cases the Panels developed the test under which the complainant required to demonstrate that the expected result from the tariff concession was offset due to the application by a respondent of the measure which could not have been reasonably anticipated by the complainant at the time of the concession.[933] Graham Cook commented on this:

> *"...In many cases there appears to have been a close nexus including the timing, product coverage, and effect of the challenged measure and the pre-existing tariff at issue, such that the challenged measures could be characterized as a "replacement" measure for a protective tariff that had recently been removed."*[934]

Some scholars like Nicolas Lamp pointed out that bringing a non-violation complaint would be the better response to the US unilateral measures[935] justified by recourse to national security based on the following reasons:

- the complainant cannot lose since the national security measures almost in each case will nullify or impair benefits. On the contrary, with regard to the violation complaints, the national security measures, even if inconsistent with the GATT obligations, could be justified by the GATT Article XXI. However, here we have to remember that a mere evidence that the

[928] *The Australian Subsidy on Amonium Sulphate* [1950].
[929] *Treatment by Germany of Imports of Sardines* [1952].
[930] *European Economic Community - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktails, and Dried Grapes* [1985].
[931] *European Community - Tariff Treatment on import products from certain countries in Mediterranean region*.
[932] *EEC-Oilseeds* (n 540).
[933] For an overview of cases see Cho (n 331). See pp.354-355 for the table of cases
[934] Graham Cook, 'The Legalization of the Non-Violation Concept in the GATT/WTO System' [2018] SSRN Electronic Journal 22. p.3 For an extensive overview of the cases on non-violation complaints see also Cook.
[935] It should be noted that the US itself in the Nicaraguan case acknowledged the possibility to bring a non-violation complaint *"The United States recognized that a measure not conflicting with obligations under the General Agreement could be found to cause nullification and impairment and that an invocation of Article XXI did not prevent recourse to the procedure of Article XXIII.*" *L/6053, United States – Trade Measures Affecting Nicaragua, Report by the Panel* (n 225)., para.4.9

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measures nullify or impair benefits is not enough for winning a non-violation complaint. In particular, Panels through a case-law created a requirement that the measures challenged under Article XXIII:1(b) must frustrate reasonable expectations of the complainant. In this regard two elements are necessary for a claim to succeed: the measure must not be reasonably foreseeable by the complainant at the time the expectation arose, and the measure must frustrate the complainant's reasonable expectations of better market access arising out of negotiated agreements, or statements or conduct of the respondent. In this regard the question arises why would one State not expect another State to protect its national security?!

- the procedure as to the non-violation complaint is faster than with regard to the violation complaints. In the cases dealing with non-violation complaints the Panel should only establish as to the question of whether the benefits to the complainant have been nullified or impaired. In case of the violation complaints, the Panel has to decide on the legality of the measures which takes more time. However, as stated above, establishing the evidence as to nullification or impairment of benefit requires an analysis of other factors as well. In *Japan-Film* the Panel stated:

> *"The text of Article XXIII:1 (b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b) (1) application of a measure by a WTO Member; (2)a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure.*[936]

- the non-violation complaint seeks to restore the balance of concessions rather than prove the breach of the rule by another WTO Member. In this way the claimant respects the decision of the complainant by not challenging the review of its measure;

- the non-violation complaint will not need to interpret Article XXI of the GATT. Consequently, the decision on non-violation complaint will avoid all uncertainty connected with meaning of the security exception;

- the non-violation complaint focuses on the important aspect of the case-i.e. the compensation. Given the fact that it is unlikely that the WTO Member will withdraw its national security measure, the real outcome of the case will depend on the compensation which the non-

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[936] *DS44: Japan — Measures Affecting Consumer Photographic Film and Paper*., para 10.41

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violation complaint addresses right away.[937] That being said, one could ask a question – why States should bring non-violation complaints and claim for a compensation against States which had genuine national security rationale?!

To sum up, a non-violation complaint seems to be attractive from the theoretical point of view, although it is harder to prove in practice. Additional requirements which were developed through a case-law would be hard to prove in a case against national security measures. That being said, the US measures are likely to be found in violation of the GATT Articles I:1, II:1 and XI:1. Therefore, the Panel would proceed with analysis of review under Article XXI of the GATT.

Review under Article XXI of the GATT

1. To recall, the Panel first has to define whether there is a situation of war or other emergency in international relations. With regard to the US involvement in the war, some practitioners referred to the war in Afghanistan and Syria, although they concluded that the mere existence of these situations does not justify the imposition of the US tariffs.[938] In search for inspiration on interpretation of war or other emergency relations in international relations in this case, the evidence could be drawn from the US Section 232 steel investigations. For example, during the steel investigations, the CEO of AK Steel Corporation Roger Newport referred to other situations of emergencies which might threaten the US national security, like

> *"..Major blackouts ... as a result of grid obsolescence, severe weather events like Hurricane Katrina or Superstorm Sandy or cyber terrorist or other attacks on the electrical grid infrastructure..."*[939]

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[937] Nicolas Lamp, 'Guest Post: Why WTO Members Should Bring Pure Non-Violation Claims Against National Security Measures' (*International Economic Law and Policy Blog*, 15 October 2018) <https://worldtradelaw.typepad.com/ielpblog/2018/10/guest-post-why-wto-members-should-bring-pure-non-violation-claims-against-national-security-measures.html>.

[938] Jayant Raghu Ram, 'US Steel and Aluminium Tariffs and the WTO's Security Exception: Unsecuring Multilateral Trade?' (*Lakshmikumaran and Sridharan attorneys*) <https://www.lakshmisri.com/News-and-Publications/Publications/Articles/Tax/us-steel-and-aluminium-tariffs-and-the-wto-security-exception-unsecuring-multilateral-trade>.

[939] 'Steel 232 Investigations Public Hearing, May 24, 2017' (n 837).

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However, the situations mentioned by the CEO of AK Steel refer only to the national emergency rather than to emergency in international relations. What is more important, in the reports of investigations conducted under Section 232 there is no reference to a specific situation of war.[940] At any rate, the definition of war is more narrow than situation of emergency in international relation, so the US might try to claim that there is a situation of emergency in international relations.

As a matter of fact, the US could claim the overcapacity in steel is an emergency which in turn threatens the US essential security interests. In this regard the US will need a steel supply from solid domestic sources for military and critical infrastructure needs. Given a broad understanding of the emergency in international relations, it is hypothetically possible to stretch its scope and put various threats under the umbrella of emergency.[941] Here two scenarios might be possible. Under the first scenario, if the Panel decides that there is a situation of war or other emergency in international relations, then the US should show that it considered its essential security interests in good faith. At this point the level of deference provided by the Panel to the US would come into play. If the Panel applies a very deferential standard of review like good faith, the US migt be able to show that it has reasonably considered its measures in relation to the situation of emergency. On the contrary, if the Panel applies a less deferential standard of review like reasonable relationship between means and ends, it would be hard for the US to show that unilateral measures are related to the decrease of global overcapacity of steel.

Under the second scenario, if the Panel decides that overcapacity in steel does not fall under the situation of emergency in international relations, the Panel would stop its review. In such scenario the United States would not be able to justify its measure under Article XXI of the GATT. This scenario seems to be more plausible since considering a global overcapacity of steel and aluminium as an emergency in international relations would allow to use this situation for many WTO Member States and would open the door for abusive use of the security exception.

To sum up, the US Section 232 tariffs were imposed following a broad interpretation of national security which differs from the previous practice pursued by the US Department of Commerce and the US President. Section 232 tariffs provoked the lawsuits in the US courts

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[940] See Bureau of Industry and Security, US Department of Commerce (n 835).
[941] On a global overcapacity of steel, see, for example, Nicole Voigt and others, ‘Coping with Overcapacity: Navigating Steel’s Capacity Conundrum’ <https://www.bcg.com/publications/2014/metals-mining-demand-centric-growth-coping-with-overcapacity-navigating-steels-capacity-conundrum.aspx>.

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and have broader implications for the US industries. Moreover, the WTO Members challenged the US measures at the WTO.

Upon application of a framework of review as proposed in Chapter 2 the following scenarios could be anticipated:

(1)the US could survive the review (i)if a global steel glut and resulting impact on the US domestic industry could be seen as emergency in international relations and (ii) if the Panel applies a very deferential standard of review as a good faith review.

(2) the US would not be able to justify its measures under Article XXI of the GATT if the Panel decides that global steel glut and resulting impact on the US domestic industry could not be covered by the situation of an international emergency. Given the risks associated with a broad interpretation of emergency in international relations, one could argue that this scenario is aimed at the prevention of abusive use of the security exception. However, this scenario poses the risk that the United States would not comply with the Panel Report and might even pull out from the WTO. All in all, it seems that the US Section 232 cases can have systemic implications for the WTO system.

Broader insights from the security exception cases

As the previous section demonstrated, the national security cases arise from broader underlying issues like geopolitical conflicts or trade protectionism which reflect the atmosphere at the WTO. Against this backdrop, one could claim that the national security cases point to broader trends at international economic law in general and WTO law in particular. In this regard it is worth pointing out general trends which are intertwined with national security cases. The current atmosphere at the world trade system could be characterized by the following features. First and foremost, national security cases represent an evidence that the world trade system is entering into an era of geoeconomics which is characterized by the convergence of trade and security. Second, the national security cases have arisen in an environment of a backlash against globalization[942] which includes a resort to a managed interdependence and exit from international courts. Third, the national security cases point out to the role of international institutions like the WTO in renegotiating a new world order. Consequently, all these features

[942] Stiglitz (n 46).

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appeal to a necessity to re-think international economic law in general and restructure international organizations like the WTO in particular. Ultimately, there is a hope that States might use these unsettled times as a possibility to address current problems and adapt the WTO to current needs.

The world we live today

First, the use of economic means for geopolitical aims brings us to an era of geoeconomics.[943] Robert Blackwill and Jennifer Harris define geoeconomics as

> *"use of economic instruments to promote and defend national interests, and to produce beneficial geopolitical results".*[944]

Some scholars even claim that there is an emerging Geoeconomic World Order with the increased convergence of economics and security.[945] Indeed, the protean "national security" is used in regulation of investment and other areas of law.[946] Countries use economic leverage as a weapon, imposing trade sanctions, freezing assets, or cutting off access to key parts of the international financial system, to name just a few options.[947] Currently the rivalry is exploding between the US and China.[948]

Second, there is a backlash against globalization: whereas in a post-Second World War period there was a spirit for establishing multilateral organizations and elimination of unilateral tariffs, in 2018 there is a move towards bilateral trade arrangements and imposition of unilateral

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[943] See, generally, David A Baldwin, *Economic Statecraft* (Princeton University Press 1985). And Robert D Blackwill and Jennifer M Harris, *War by Other Means: Geoeconomics and Statecraft* (First Harvard University Press paperback edition, The Belknap Press of Harvard University Press 2017).
[944] Blackwill and Harris (n 943).
[945] See a series of posts in Lawfareblog Roberts, Moraes and Ferguson (n 24).Anthea Roberts, Victor Ferguson and Henrique Choer Moraes, 'Geoeconomics: The Chinese Strategy of Technological Advancement and Cybersecurity' (*Lawfareblog*, 3 December 2018) <https://www.lawfareblog.com/geoeconomics-chinese-strategy-technological-advancement-and-cybersecurity>. ibid.
[946] Desierto Diane, 'Protean "National Security" in Global Trade Wars, Investment Walls, and Regulatory Controls: Can "National Security" Ever Be Unreviewable in International Economic Law?' (*European Journal of International Law*, 2 April 2018) <https://www.ejiltalk.org/national-security-defenses-in-trade-wars-and-investment-walls-us-v-china-and-eu-v-us/>.
[947] Hina Rabbani Khar, 'Gated Globalisation', *Connectivity Wars. Why Migration, Finance and Trade are the Geo-Economic Battlegorunds of the Future* (European Council on Foreign Relations 2016) <https://www.ecfr.eu/page/-/Connectivity_Wars.pdf>. p.98
[948] Stephen Kotkin, 'Realist World: The Players Change, but the Game Remains Which World Are We Living In' (2018) 97 Foreign Affairs 10.

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tariffs. Inequality[949] and populism[950] are among processes which underpin backlash against globalization. In this regard there are proposals as to how the WTO can address social inequality.[951]

The backlash against globalization encouraged States to pursue so-called policy of a managed globalisation, or "gated globalisation", where they want to control their trade partners and restrict trade as they wish.[952] It does not seem to be preferred solution for a world trade, but it is a course charted by the changing world order. Gates to restrict the movement of goods and people will continue to be the overwhelming global trend.[953]

Furthermore, the backlash against globalization includes a backlash against international courts and tribunals which are claimed to be "at critical junctures".[954] The over judicialization of international courts is also a current trend.[955] In this regard Joost Pauwelyn and Rebecca Hamilton delineated five factors which have an impact on a State's effort to leave the international tribunals: "(i) the type of tribunals - embedded v. stand-alone tribunals, (ii)

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[949] Anthea Roberts, 'Being Charged by an Elephant: A Story of Globalization and Inequality' (*EJIL Talk! Blog of the European Journal of International Law*, 19 April 2017) <https://www.ejiltalk.org/being-charged-by-an-elephant-a-story-of-globalization-and-inequality/>.

[950] Nicolas Lamp, 'How Should We Think about the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements' [2018] Queen's University Legal Research Paper Forthcoming. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290590>. Jeffry Frieden points out that the success of populist movements in some countries may be a sign of backlash from the world economy Jeffry Frieden, 'The Politics of the Globalization Backlash: Sources and Implications', *Making Globalization Inclusive* (2018) <https://scholar.harvard.edu/files/jfrieden/files/the_politics_of_the_globalization_backlash.pdf>. For an alternative view see for an interview by Martti Koskenniemi who claims that "the concern is not economic deprivation: it is a concern about *loss of status*." Dimitri Van Den Meerssche, 'Interview: Martti Koskenniemi on International Law and the Rise of the Far-Right' (*Opinio Juris*, 10 December 2018) <http://opiniojuris.org/2018/12/10/interview-martti-koskenniemi-on-international-law-and-the-rise-of-the-far-right/?fbclid=IwAR2UQ5XLmhI4BKKkbTQl_MLLAewDy8VPHBP4E8osHGoyWblnlIvzvR55a-Q>.

[951] Gregory Shaffer, 'Retooling Trade Agreements for Social Inclusion' [2018] Legal Studies Research Paper Series, University of California, Irvine, School of Law. p.45 Joseph Stiglitz also points out to a social protection without protectionism, pursued by the Nordic countries which could inspire the work to fix globalization. Moreover, Joseph Stiglitz also mentions two other responses to discontents against globalization which might not work out – "Las Vegas strategy" – to bet on globalization with the hope that it will somehow work out in the future and "Trumpism" strategy – to cut a country off from globalization.
Joseph E Stiglitz, 'Globalisation: Time to Look at Historic Mistakes to Plot the Future' *The Guardian* (5 December 2017) <https://www.theguardian.com/business/2017/dec/05/globalisation-time-look-at-past-plot-the-future-joseph-stiglitz>.

[952] Rabbani Khar (n 947). p.93

[953] ibid. p.96 At the same time, it is hard to avoid globalization since the world is deeply interconnected. Buttonwood, 'The Changing Face of Global Trade' (23 November 2016) <https://www.economist.com/buttonwoods-notebook/2016/11/23/the-changing-face-of-global-trade>.

[954] Karen J Alter, 'Critical Junctures and the Future of International Courts' [2018] SSRN Electronic Journal <https://www.ssrn.com/abstract=3238053> accessed 29 November 2018.

[955] Karen J Alter, Emilie Marie Hafner-Burton and Laurence Helfer, 'Theorizing the Judicialization of International Relations' [2018] SSRN Electronic Journal <https://www.ssrn.com/abstract=3284481> accessed 14 December 2018.

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adjudicator appointment rules, (iii) constituent support, (iv) political capital, and (v) domestic mechanisms".[956]

Third, international institutions have a role in renegotiating the global order. An American political scientist Phillip Y. Lipscy claims that in the context of globalization international institutions play a crucial role with regard to: (i) an exercise of influence by States over international institutions and (ii) the role of institutions in global shifts of power.[957] An example of influence of States over international institutions might be the relationship between the US and the WTO. The conflicts and confrontations between US unilateralism and WTO multilateralism during the last decade have produced at least three big rounds attracting worldwide attention: (i)'*The Great 1994 Sovereignty Debate',* (ii) the Section 301 Dispute and (iii) the Section 201 Disputes.[958] It seems that in 2018 we entered into a new round – Article XXI of the GATT or Section 232 Disputes which might lead to trade wars and chaos.[959]

As to the role of institutions in shifts of the international balance of power,[960] the type of institutions has an impact on the behaviour of States. For instance, in case of "universal" institutions which deal with a lot of issues - States do not have credible outside options so they will be forced to remain as the members of organization. On the contrary, with regard to "concentrated" institutions, States can pursue alternative ways of cooperation.[961]For example, one could claim that the WTO is a concentrated organization and we encounter a rise of regional

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[956] Joost Pauwelyn and Rebecca J Hamilton, 'Exit from International Tribunals' [2018] Journal of International Dispute Settlement <https://academic.oup.com/jids/advance-article/doi/10.1093/jnlids/idy031/5076138> accessed 24 August 2018. See also an alternative approach to love-hate relationship between states and international tribunals-neutral arbitration where there is more responsibility for states to work out a final resolution and the adjudicator is restricted to choose between offers proposed by parties. Joost Pauwelyn, 'Baseball Arbitration to Resolve International Law Disputes: Hit or Miss?' [2018] SSRN Electronic Journal <https://www.ssrn.com/abstract=3155363> accessed 14 December 2018.

[957] Phillip Y Lipscy, *Renegotiating the World Order: Institutional Change in International Relations* (Cambridge University Press 2017) <http://ebooks.cambridge.org/ref/id/CBO9781316570463> accessed 24 August 2018.p.267

[958] An Chen, 'Trade as the Guarantor of Peace,Liberty and Security?' in Wenhua Shan, Penelope Simons and Dalvinder Singh (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing 2008) <http://www.bloomsburycollections.com/book/redefining-sovereignty-in-international-economic-law> accessed 22 August 2018. p.144

[959] Raj Bhala, 'Chaos: Recent Developments in International Trade Law at the Multilateral, Regional, and U.S. Levels' <https://law.ku.edu/sites/law.ku.edu/files/docs/recent-developments/2018/bhala-materials.pdf>.

[960] Lipscy (n 957).p.267

[961] ibid. p.266-267

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free trade agreements. For example, the EU-Singapore,[962] EU-Japan,[963] African Free Trade Agreement have been concluded recently.[964]

Last, the renegotiation of a global order is mostly characterized by the rivalry between the United States and China. The rise of China at a global arena and at the WTO is hard to debate.[965] Some scholars even started to talk about the globalization with Chinese characteristics.[966] In this regard a certain State may choose to use the WTO tools to discipline the Chinese trade policy rather than resort to unilateral tools contrary to the WTO provisions.[967] China was able to build its state-owned enterprises within the framework of the current WTO rules,[968] and now the WTO rules need to adapt to the Chinese policy. In this regard Chad Bown proposes to create new rules on state-owned enterprises used by China, rather than applying the US trade policy. [969] Likewise, Jennifer Hillman proposes to bring a multilateral case against China at the WTO: since the concerns posed by China are global, the strive for solution should be global as well.[970] This strategy could be an effective one since there is an evidence that China implements the WTO decisions.[971]

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[962] 'EU and Singapore Forge Closer Economic and Political Ties' <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1926>.

[963] 'EU-Japan Trade Agreement on Track to Enter into Force in February 2019' <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1954>.

[964] Landry Signé, 'Africa's Big New Free Trade Agreement, Explained' *The Washington Post* (29 March 2018) <https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/29/the-countdown-to-the-african-continental-free-trade-area-starts-now/?utm_term=.2e2953256102>. 'Africa Set for a Massive Free Trade Area' <https://www.un.org/africarenewal/magazine/august-november-2018/africa-set-massive-free-trade-area>.

[965] Shaffer and Gao (n 360). Some commentators even claimed that China "swallowed the WTO". Jacob M Schlesinger, 'How China Swallowed the WTO' *Wall Street Journal* (1 November 2017) <https://www.wsj.com/articles/how-china-swallowed-the-wto-1509551308>.

[966] Barry Eichengreen, 'Globalization with Chinese Characteristics' (*Project Syndicate*, 10 August 2018) <https://www.project-syndicate.org/commentary/globalization-chinese-characteristics-by-barry-eichengreen-2018-08>.

[967] James J Nedumpara and Weihuan Zhou, *Non-Market Economies in the Global Trading System: The Special Case of China* (2018) <https://doi.org/10.1007/978-981-13-1331-8> accessed 24 November 2018.

[968] Weihuan Zhou, Henry S Gao and Xue Bai, 'China's SOE Reform: Using WTO Rules to Build a Market Economy' [2018] SSRN Electronic Journal <https://www.ssrn.com/abstract=3209613> accessed 24 November 2018.

[969] Wim Muller, 'China and the WTO: How US Unpredictability Jeopardizes a Decade and a Half of Success' (*Chatham House*, 7 March 2017) <https://www.chathamhouse.org/expert/comment/china-and-wto-how-us-unpredictability-jeopardizes-decade-and-half-success>. Chad P Bown, 'US Tools to Address Chinese Market Distortions, Testimony before the US-China Economic and Security Review Commission' <https://piie.com/commentary/testimonies/us-tools-address-chinese-market-distortions>.

[970] Jennifer Hillman, 'The Best Way To Address China's Unfair Policies and Practices Is Through a Big, Bold Multilateral Case at The WTO' (2018) Testimony Before the US-China Economic and Review Security Commission <https://www.uscc.gov/sites/default/files/Hillman%20Testimony%20US%20China%20Comm%20w%20Appendix%20A.pdf>. p.19

[971] Simon Lester and Huan Zhu, 'Disciplining China at the WTO' (*Cato Institute*, 22 March 2018) <https://www.cato.org/blog/disciplining-china-wto>.

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Confronting new challenges

All current features of the world trade system mentioned above point out to the necessity to reshape world trade order. As Dani Rodrick argues, we do not need to ask a question whether a globalization is good or bad, we have to think how to rebalance it and look where we have areas the globalization could help to gain benefits.[972] In this regard there is a need to re-think international law and international economic law together with restructuring of the WTO and solving crisis of its dispute settlement system.

First, the international law has to be re-thought in line with the new developments in a global arena.[973] In particular, taking into account the new policy of nation States one could claim that there is a decline of international law.[974] This is why the present institutions reflect the views of hegemonic States which negotiated them sparking a clash between the American hegemonic diplomats and peripheral States.[975] Some scholars argue that since traditional approaches restrain the solutions, States should consider innovative projects which are outside Anglo-American, orthodox views.[976] Other scholars point out that international economic order might need to reorient around other policy issues like tax and regulations.[977]

[972] Dani Rodrik, 'The Trouble with Globalization' [2017] Milken Institute Review <http://www.milkenreview.org/articles/the-trouble-with-globalization?IssueID=26>.
[973] The values of liberalism are fading due to the rise of other ideologies like anti-establishment in the United States, populism in Europe and traditional values in China. China is trying to propose its values. While it is not clear which values will gain its prominence, Chinese authors advocated for use of humane authority in its modernized form: *Three main elements of the humane authority - benevolence, righteousness, and rites—can be modernised as the values of fairness, justice, and civility through their embrace of equality, democracy, and freedom.* Xuetong Yan, 'Chinese Values vs. Liberalism: What Ideology Will Shape the International Normative Order?' (2018) 11 The Chinese Journal of International Politics 1. p.19
[974] Gregory Shaffer, 'A Tragedy in the Making?: The Decline of Law and the Return of Power in International Trade Relations' [2018] Yale Journal of International Law, 2018, Forthcoming; UC Irvine School of Law Research Paper No. 2018-64 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3292361>.
We have to acknowledge that ideas and practice shape international law Karen J Alter, 'The Empire of International Law?' [2018] American Journal of International Law <https://ssrn.com/abstract=3226898>. p.13
[975] Alter (n 306). pp.17, 19-20
[976] See this essay Rafael Lima Sakr, 'Beyond History and Boundaries: Rethinking the Past in the Present of International Economic Law' [2018] SSRN Electronic Journal <https://www.ssrn.com/abstract=3194660> accessed 23 August 2018.
[977] Harlan Grant Cohen, 'What Is International Trade Law For?' [2018] Dean Rusk International Center Research Paper <https://ssrn.com/abstract=3298389>. p.1

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Second, the WTO[978] and its dispute settlement system should be re-structured.[979] In his farewell speech the former Appellate Body Member David Unterhalter aptly noted back in 2014

> *"…If too much rests upon dispute settlement, the system gets out of kilter, and the atrophy of one part of the system ultimately takes hold of everything else."*[980]

In this context first States have to fix a dispute settlement system of the WTO.[981] There exist a whole set of proposals as to how to change the WTO dispute settlement system: both from academics and former WTO Appellate Body members[982] and practical proposals from States.[983]

Without going into analysis of all proposals, one point is crucial - all solutions would be impossible to implement without cooperation between the WTO Member States and a leadership quality displayed by the WTO Member States. On this note a former Chair of the Appellate Body, Giorgio Sacerdoti, mentioned that all solutions should be implemented with all WTO Members engaging into a discussion and looking for improvements.[984]There is an urgent need of leadership among States since the US is dragging on.[985] Instead, other WTO

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[978] The comprehensive outlook, proposed by Alan Wolff states that "effective management of the international trading system and its continuing relevance require a set of three operational institutional capabilities: rule-making (a legislative function), dispute settlement (a consultative process with resort possible to mediation and adjudication) and executive functions). See Wolff (n 81).

[979] For example, see the most recent proposal from Jennifer Hillman as to approaches to fixing the Appellate Body Jennifer Hillman, 'Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad and the Ugly?' (*Institute of International Economic Law Briefs, Georgetown University Law Center*) <http://iielaw.org/iiel-issue-briefs/>.

[980] David Unterhalter, 'Farewell Speech of Appellate Body Member David Unterhalter' (WTO 2014) <https://www.wto.org/english/tratop_e/dispu_e/unterhalterspeech_e.htm>.

[981] For a discussion on the crisis in the WTO dispute settlement and its fixing see Robert Mcdougall, 'The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance' [2018] Journal of World Trade 867.

[982] See, for example, Hillman, 'Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad and the Ugly?' (n 979). and Sacerdoti, 'The WTO Dispute Settlement System' (n 68). p.160 On the crisis and solution of the WTO Appellate Body see Payosova, Hufbauer and Schott (n 17). The solutions from the international relations perspective have been written by Rorden Wilkinson, *What's Wrong with the WTO and How to Fix It* (Polity Press 2014). Although, they have a lot of practical challenges. For a strategy of dealing with "trade and…" issues at the see WTO Andrew Guzman, 'Global Governance and the WTO' (2004) 45 Harvard International Law Journal 303.

[983] For an analysis of proposals from the EU see Tetyana Payosova, Gary Clyde Hufbauer and Jeffrey J Schott, 'EU Proposals to Resolve the WTO Appellate Body Crisis Represent Partial Progress' (*Peterson Institute of International Economics*, 10 December 2018) <https://piie.com/blogs/trade-investment-policy-watch/eu-proposals-resolve-wto-appellate-body-crisis-represent-partial>.

[984] Sacerdoti, 'The WTO Dispute Settlement System' (n 68). p.160

[985] Bernard Hoekman et al., 'Revitalizing Multilateral Governance at the World Trade Organization' (2018) Policy Brief based on the Report of the High-Level Board of Experts on the Future of Global Trade Governance <https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/MT_Policy_Brief_Revitalizing_Multilateral_Governance_at_the_WTO.pdf>. p.7 More on the US backlash from the WTO see Ana Swanson, 'Once the W.T.O.'s Biggest Supporter, U.S. Is Its Biggest Skeptic' *New York Times* (10 December 2017)

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Members like the European Union and Canada express the initiative as to restructuring of the WTO.[986]

It seems that current challenges like protectionism and geopolitical conflicts mobilized the State efforts to re-think the WTO. As the former WTO Director General, Pascal Lamy puts it:

> *"Paradoxically, protectionism has presented an opportunity to make critical reforms: It was Trump's recent round of tariffs, which violate WTO rules, that may well be the trigger for updating those rules — a process that has remained stalled and elusive for too many years."*[987]

Likewise, Bradly Condon expresses his hope that the pressure will only push the trading system to break current deadlocks and allow the WTO to transform in order to correspond to the realities of the twenty-first century.[988]

With all the predicaments piling up, if the global world intends to preserve the trade system, the WTO Member States should find the common ground, otherwise the organization is back to power-based relationships, which is opposite for what the rule-oriented system was devised. Hopefully, this is not the dawn of the WTO, instead, national security cases may give new lease of life for the WTO. In this regard WTO Panels and the Appellate Body should be careful in dealing with national security cases in order not to infringe on the sovereignty of the WTO Members. At the end of the day, one should be positive and hope that these times of unpredictability and tensions of the WTO would push the WTO Members to cooperate in order

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<https://www.nytimes.com/2017/12/10/business/wto-united-states-trade.html>. In his comparison of the WTO to the political "bicycle club" James Bacchus claimed that the "Washington chapter" is dragging on. Moreover, one should not overlook the internal US problems which pose threat against globalization. In this regard James Bacchus stated: *"the challenge facing every … American member of "The Bicycle Club" is the challenge of summoning and sustaining the political will to move the bicycle forward in the face of all the powerful political opposition to freer trade."* James Bacchus, 'The Bicycle Club: Affirming the American Interest in the Future of the WTO' [2003] Journal of World Trade 429. p.437

[986] See, for example, a joint communiqué at the meeting, organized by Canada where Australia, Brazil, Canada, Chile, European Union, Japan, Kenya, Korea, Mexico, New Zealand, Norway, Singapore and Switzerland expressed their views on WTO reform
'Joint Communiqué of the Ottawa Ministerial on WTO Reform' <https://www.canada.ca/en/global-affairs/news/2018/10/joint-communique-of-the-ottawa-ministerial-on-wto-reform.html>.

[987] Pascal Lamy, 'Trump's Protectionism Might Just Save the WTO' *Washington Post* (12 November 2018) <https://www.washingtonpost.com/news/theworldpost/wp/2018/11/12/wto-2/?utm_term=.524b346ffdaf>.

[988] Bradly J Condon, 'Captain America and the Tarnishing of the Crown: The Feud Between the WTO Appellate Body and the USA' [2018] Journal of World Trade 535.

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to keep the benefits of the WTO system. In the words of Hannah Arendt “Even in the darkest of times we have the right to expect some illumination.”[989]

Concluding Remarks

Geopolitical conflicts, like the Russia-Ukraine case along with the trade-restrictive policy of the United States, revived a discussion as to security exception of the GATT at the WTO. Applying the standard of review developed in Chapter 2 to geopolitical conflicts might help to de-politicize the conflict. Simulating the review and testing the standard of review in the context of the Russia-Ukraine trade dispute, Russia might be able to justify that it adopted measures for protection of its essential security interests since there is a situation of emergency in international relations between Russia and Ukraine. Moreover, Russia might be able to show that it invoked the security exception in good faith.

US trade-restrictive measures, already widespread before the policy changes introduced by the US President Trump, took a new lease of life in 2018. The Section 232 tariffs, adopted by the US, sparked retaliatory measures from the US trade partners like the European Union, China, Mexico and Canada. What is more important, these tariffs led to the WTO disputes where the United Sates might invoke GATT Article XXI as justification of its trade-restrictive measures. The application of the framework of review to the US case revealed that the US tariffs might fail at the first step of review – i.e. whether the measures have been adopted during the situation of war or other emergency in international relations. Since there is no war or other emergency in international relations which have a rational connection with the US tariffs, it is highly unlikely that the US tariffs could survive a review. However, the second less likely scenario could be that the US might claim that the overcapacity in steel production is a situation of emergency in international relations. It is hard to imagine that the Panel would accept such interpretation, but it depends on the evidence and arguments of the Parties. Moreover, in the US Section 232 cases, the Panel would be confronted with other issues like, for instance, determining whether the US national security measures are safeguards or deciding on non-violation complaints. While it is to be seen whether States decide to pursue further these disputes or they would be able to agree on an amicable solution, all national security cases point to broader problems of the WTO.

[989] Hannah Arendt, *Men in Dark Times* (Important Books 2014).

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The national security cases show that the global world order is entering into an era of geoeconomics where security and trade converge. Moreover, there is a strong backlash against globalization which includes a backlash against international courts and tribunals. All these events prompt States to re-think international economic law in general and fix the crisis in the WTO dispute settlement system in particular. While there is lot of unpredictability in a current crisis, hopefully these turbulent times could bring the changes and push WTO Member States to adapt international economic law along with the WTO.

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4. Conclusions

This thesis dealt with hotly debated issues in both academia and policy circles. The emergence of a geoeconomic world order, as a result of rising economic nationalism and geopolitical conflict, brought the review of the security exception before the WTO Panel. The security exception, being at a crossroads between trade and security, was not interpreted throughout the history of the GATT/WTO. However, due to the evolution of the dispute settlement system and change in the global political order, the time to review the security exception has come. Russia was the first State to invoke the security exception of the GATT in case brought against it by Ukraine. The case is pending before the WTO Panel and the main question is what standard of review will the Panel apply? This thesis aimed at answering this question by exploring the different scenarios that different standards of review would likely bring about.

The analysis of the language and structure of the GATT security exception pointed out the necessity to balance the States' right to adopt national security measures on the one side and preserving a rules-based system at the WTO on the other side. To achieve this balance, the thesis has proposed a framework for review of the GATT security exception provision. The crux of the matter is how much deference the Panel should give to States in reviewing their measures. In this regard standards of review such as good faith, reasonableness, abuse of rights, margin of appreciation and clean hands doctrine have been analysed. A close examination has brought me to conclude that margin of appreciation and clean hands doctrine are so vague that it is risky to use them for the review of the security exception. On the contrary, good faith and its notions of reasonableness and abuse of rights allow for a flexibility which can accommodate the States' need for a "wiggle room" in review of the measures. Consequently, good faith along with its particularizations could be used in review of the security exception by the Panel. To demonstrate how the above-mentioned framework for review could solve pending cases before the WTO, different scenarios were simulated in two cases – Russia- Goods in Transit and the US Section 232 cases. In the Russian case a simulation revealed that Russia might pass good faith review. In the US Section 232 tariffs cases it would be harder for the United States to pass the review and the decision will depend on whether the overcapacity in steel production could be considered as an emergency in international relations.

More broadly, my analysis has revealed how the national security cases point to other trends in the global order which the WTO has to address. Such trends include a convergence

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between security and trade, a backlash against globalization in general and against international tribunals in particular. Furthermore, in this context the most pressing issue is a crisis at the WTO Appellate Body.

There are already proposals and discussions among States as to how solve the crisis at the WTO including a standstill at the WTO dispute settlement system. Although there is not a lot of progress on this yet, the hope is that the WTO Members will come to an agreement in order to prevent the world trade system from collapsing and going back to the "wild west of trade" where the power reigns instead of law. At the end of the day, States should remember that one of the reasons behind the creation of a rules-based system at the WTO was promoting peace. Let us not forget that "when goods do not cross borders, soldiers will".[990] For the sake of preserving peace and not provoking wars, States should work hard to keep the WTO working for the benefit not only of a world trade system and its Member States, but a peaceful world order as a whole.

I find that proposals made in this thesis as to the framework of review for the security exception of the GATT might serve as a guidance for WTO Panels which can contribute to a de-politicization of the security exception cases. Furthermore, I conclude that the current crisis at the WTO might be treated by the WTO Members as an opportunity to reinforce a rules-based order and re-think international economic law.

Post Scriptum

After submitting this dissertation, on the 5th of April 2019, the WTO Panel circulated its report in the case DS512 *Russia-Traffic in Transit*. The Panel found that WTO panels have jurisdiction to review aspects of a Member's invocation of Article XXI(b)(iii). Furthermore, the Panel established that Russia had met the requirements for invoking Article XXI(b)(iii) in relation to the measures at issue, and therefore, that the transit bans and restrictions were covered by Article XXI(b)(iii) of the GATT 1994. The main findings of the Panel report will be addressed in comparison to the approach proposed in this thesis during the PhD thesis defence.

[990] Otto Tod Mallery, *Economic Union and Durable Peace* (Harper & Bros 1943).

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