



The “National Security Exception” and the World Trade Organization

November 28, 2018

Introduction

Recent international trade disputes between the United States and other Members of the World Trade Organization (WTO) have raised thorny questions about the relationship between national sovereignty and the multilateral rules-based trading system. In response to the Trump Administration’s imposition of tariffs on U.S. imports of certain [steel](#) and [aluminum](#) products pursuant to authority provided in [Section 232 of the Trade Expansion Act of 1962](#), several WTO Members have brought [dispute settlement cases](#) against the United States. The complaining parties, which include Canada, China, and the European Union, among others, have [argued](#) that the Section 232 measures, along with [exemptions from the application of these measures](#) for certain countries, are contrary to U.S. obligations in the WTO agreements. Many of these obligations are contained within [various provisions](#) in the General Agreement on Tariffs and Trade (GATT), the WTO’s foundational agreement governing parties’ international trade in goods. In retaliation to the Administration’s tariffs, some of the complaining countries have [imposed tariffs](#) on certain U.S. exports without awaiting the outcome of WTO dispute settlement proceedings. These retaliatory measures, in turn, have been [challenged](#) by the United States at the WTO.

In defense of the steel and aluminum tariffs, the United States [has cited](#) national security reasons. Specifically, the United States contends that the tariffs are necessary to ensure the long-term viability of the domestic steel and aluminum industries, which must meet U.S. national defense requirements, by protecting the industries from foreign competition. The United States has [argued](#) that even if the steel and aluminum measures are inconsistent with U.S. obligations under the GATT, a WTO adjudicator (e.g., a WTO panel) cannot examine whether the Section 232 measures violate the GATT because the United States considers the measures to be necessary for the protection of its “essential security interests” under [GATT Article XXI](#)—the so-called “national security exception.”

This Sidebar examines the meaning of the national security exception in Article XXI of the GATT—a provision also implicated in a recent [WTO dispute](#) between Russia and Ukraine; a [blockade of Qatar](#) by Saudi Arabia, Bahrain, and the United Arab Emirates; and a few other disputes. Members of Congress have an interest in the meaning of the exception and its interaction with federal laws such as Section 232 because of Congress’s [specific constitutional authority](#) to impose tariffs and regulate foreign commerce.

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LSB10223

Congress also funds and oversees federal agencies involved in Section 232 investigations, along with the Office of the United States Trade Representative (USTR), which represents the United States in WTO dispute settlement cases.

This Sidebar does not examine whether the United States could successfully invoke GATT Article XXI to defend against claims brought under [other WTO Agreements](#) that lack a similar exception for national security (e.g., claims alleging that the Section 232 measures violate the WTO's Safeguards Agreement). Nor does it consider whether other WTO Members could seek compensation from the United States by bringing a "non-violation claim" under [GATT Article XXIII](#), alleging that even if the Section 232 measures do not violate the agreements because a WTO panel deems them justified under Article XXI, the measures nonetheless undermine the benefits that the complaining Member could reasonably have expected to obtain from WTO membership.

GATT Article XXI's Exception for Essential Security Interests

[GATT Article XXI's](#) national security exception provides, in relevant part, the following:

Nothing in this Agreement shall be construed

. . . .

(b) to prevent any [member country] 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 [member country] from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

GATT Article XXI does not clearly address whether a WTO panel should either (1) completely defer to a WTO Member's judgment that its trade measures are justified to protect the Member's national security or (2) evaluate, at least to some degree, whether the Member's use of the exception is valid. Although WTO Members and parties to the organization's predecessor, the GATT, have invoked Article XXI a few times in trade disputes, neither the WTO members nor a WTO panel have formally interpreted the Article XXI exception to define its scope.

In the absence of formal guidance, if a WTO panel or the WTO's Appellate Body (which hears appeals from panel rulings) were to interpret Article XXI, the deciding body would likely rely on [Article 3.2 of the WTO's Dispute Settlement Understanding](#), which states that the WTO agreements should be interpreted "in accordance with customary rules of interpretation of public international law." The WTO's Appellate Body has not established a formal process for interpreting the WTO agreements, but it has generally relied on the rules for treaty interpretation incorporated into [Articles 31-33 of the Vienna Convention on the Law of Treaties](#) (Vienna Convention) to ascertain the intended meaning of WTO agreement provisions.

In past cases, the Appellate Body's [interpretive approach](#) has examined various factors, including three particularly relevant to Article XXI's interpretation: (1) "the ordinary meaning to be given to the terms of the [WTO agreements] in their context and in the light of [their] object and purpose"—a method that also

uses relevant canons of treaty interpretation (e.g., the principle that an interpreter must give effect to all the terms of a treaty); (2) WTO Members' subsequent practices in applying the WTO agreements that establish consensus of the WTO membership as to the agreements' interpretation; and (3) relevant rules of international law that do not conflict with the agreements (e.g., the Vienna Convention's concept of "good faith"). The Appellate Body has sometimes supplemented the meaning derived from these methods by considering the drafting history of the provision.

Text, Context, and Purpose of the WTO Agreements

As noted, the Appellate Body's approach to interpreting the WTO agreements has often focused on the ordinary meaning of the relevant WTO provisions, as informed by the context in which those provisions appear, and in light of the purposes of all of the WTO agreements. Applying these interpretive methods to Article XXI provides some guidance as to its intended meaning. On the one hand, Article XXI, which states that nothing in the GATT prevents a WTO Member from taking "any action which *it considers necessary*" to protect its "essential security interests," arguably makes each WTO Member the sole judge of whether its trade-restrictive actions are justified. In other words, once a WTO Member has invoked the exception to justify a measure potentially inconsistent with its GATT obligations, a WTO panel cannot independently evaluate whether the WTO Member's use of the exception is essential to its security interests or fits within the enumerated list of national security justifications in Article XXI(b).

Interpretive context provided by other GATT provisions arguably supports this broad view of the Article XXI exception. For example, [GATT Article XX](#) provides general, non-security-related exceptions to GATT obligations; WTO Members can rely upon these exceptions when implementing certain public policy measures that restrict trade (e.g., measures relating to the conservation of exhaustible natural resources). But unlike the Article XXI exception, GATT Article XX does not provide an exception for measures that an *individual Member* subjectively "considers necessary" to protect its interests. Perhaps as a result, WTO panels have [examined](#) whether a Member's invocation of an Article XX exception is objectively valid. Thus, it could be argued that, in contrast to the general exceptions in Article XX, the Article XXI national security exception was intended to be "self-judging." And [several other provisions](#) of the WTO agreements beside Article XXI use the word "considers" when reserving judgment about a particular matter to a single specified actor (e.g., a WTO Member).

A broad reading of Article XXI is also arguably consistent with the WTO's stated [objective](#) to serve as the "common institutional framework for the conduct of trade relations among its Members." The WTO is a trade organization that arguably lacks competence to opine on matters of national security—a point [made by one of the representatives](#) of the parties to the drafting of the GATT.

On the other hand, it could be argued that a WTO panel should not completely defer to a WTO Member's judgment about the appropriateness of invoking GATT Article XXI and [must](#) evaluate whether use of the exception is proper. At least one scholar and former WTO Appellate Body Member [has argued](#) that the United States must at least demonstrate to the panel that the Section 232 tariffs on steel and aluminum fit within one of the three specific categories of actions that a Member may take for national security reasons enumerated in Article XXI(b): (1) actions related to nuclear materials; (2) actions related to traffic in arms or ammunition and traffic in other goods "carried on directly or indirectly for the purpose of supplying a military establishment"; and (3) actions "taken in time of war or other emergency in international relations."

A narrower view of the exception might also draw support from certain canons of treaty interpretation. The Appellate Body has [repeatedly applied](#) the principle that an interpretation must give effect to all provisions of a treaty. If a WTO panel declined to evaluate whether the United States' justification for the Section 232 measures fits within Article XXI(b)'s list, the list would arguably become ineffective, contravening this principle of treaty interpretation. Furthermore, the Appellate Body has [stated](#) that, under

the Vienna Convention, a treaty should be interpreted under the assumption that its parties will make reasonable use of its exceptions and perform their obligations in good faith. Therefore, the United States arguably must prove that it adopted the Section 232 measures in good faith for national security reasons rather than to circumvent its trade obligations and protect domestic industries.

The argument for a more limited scope of the Article XXI exception may also draw support from one of the [central purposes](#) of the WTO agreements and dispute settlement system: to provide “security and predictability to the multilateral trading system” so that businesses can conduct international trade with certainty. Arguably, allowing a WTO Member to take any measure it deems essential to its security interests would defeat this objective by undermining the predictability and certainty of the rules-based system. A reading of Article XXI that permits WTO Members to retain complete discretion over use of the exception could lead countries to enact a multitude of protectionist measures under the guise of national security, potentially undermining the purpose of WTO rules.

Other Interpretive Methods

Other interpretive methods may also be relevant to the meaning of Article XXI. Historical practice involving the invocation of Article XXI under the WTO agreements and the GATT demonstrates that member countries have often argued that each country is the sole judge of questions relating to its own security interests. Parties to the GATT or WTO agreements adopted this view in several [disputes](#), many of which were resolved informally through diplomacy. These disputes include:

- a dispute settlement case from 1949 involving U.S. export licensing controls and Czechoslovakia;
- Ghana’s boycott of Portuguese goods in the 1960s;
- a Swedish import quota system for footwear in the 1970s;
- restrictions on Argentinian imports in the 1980s;
- a U.S. trade embargo against Nicaragua in the 1980s; and
- a [WTO dispute](#) between the United States and European Union over the Helms-Burton Act, which authorized civil lawsuits against foreign companies that dealt in property that Cuba had expropriated from U.S. citizens.

Furthermore, an interpretation of Article XXI that would allow a WTO panel to review a WTO Member’s use of the exception would arguably interfere with a Member’s sovereignty because the panel could substitute its judgment regarding the validity of a national security justification for that of the invoking Member. The United States has [argued](#) that Article XXI’s drafting history, which a panel might rely upon as a supplementary means of interpretation, shows that the drafters intended to preclude such a result.

On the other hand, although the practices of some parties to the GATT suggest that the Article XXI exception is broad, this historical practice is not necessarily an indication of how the *entire WTO membership* interprets the Article XXI exception. Support can be found in the early drafting history of Article XXI for the notion that a panel may review a WTO Member’s use of the Article XXI exception. One of the U.S. negotiators and drafters of an early version of Article XXI [reportedly stated](#) that the exception was not intended to be “so broad that, under the guise of security, countries will put on measures which really have a commercial purpose,” suggesting some limits to the scope of Article XXI.

Next Steps

On November 21, the WTO’s Dispute Settlement Body [agreed to establish panels](#) to hear the disputes over the Section 232 tariffs and retaliatory countermeasures on U.S. imports. The establishment of a panel is the first stage in the [formal dispute settlement process](#). Nonetheless, it is possible that one or more of

the parties will [settle](#) these disputes, [effectively terminating](#) the panel process prior to a ruling. In the event that a compromise is reached—or a WTO panel rules on the scope of the national security exception in a [separate dispute](#)—this Sidebar will be updated accordingly.

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