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ORIGINAL ARTICLE

# Trade and National Security: Rising Risks for the WTO

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**Abstract**
The WTO is exposed to significant political risks deriving from both the abusive employment of the national security argument, as well as the use of the WTO dispute settlement system to address this problem. This article explores the implications of the first WTO panel decision, adopted in April 2019, in which the argument of 'essential security interests' was employed to justify trade restrictions. Article XXI of the GATT 1994 now tends to be invoked in other ongoing disputes, notably by the United States in the dispute settlement cases involving its barriers to steel and aluminum. The article argues that pathways other than WTO litigation should be explored to deal with trade barriers adopted under the argument of national security and, despite the absence of simple solutions, it considers some possible alternatives.

**Keywords:** WTO; national security; security exception; Article XXI; dispute settlement

## 1. Introduction

Perhaps no provision in the WTO agreements is more politically sensitive than one on national security. Not without reason, such a provision was not subject to a binding ruling in the GATT/WTO for over seven decades.[1] The decision in a case between Russia and Ukraine changed this in April 2019, with the adoption of the first panel report involving Article XXI.[2]

This first dispute paved the way for several others, currently proceeding at the WTO, where Article XXI is being or will likely be discussed. Though the situation remains in flux at the time of this writing, it is safe to state that there is approximately a dozen active disputes involving national security in the WTO. Of these, seven relate to the steel and aluminum barriers adopted by the United States.[3] Another set of cases involves Saudi Arabia, Qatar, and the United Arab Emirates.[4] Finally, South Korea started a dispute challenging Japanese export restrictions, in another case where national security is likely to come to the fore.[5]

The rubric 'Snipings' is intended for contributions which, while rigorous, offer early analyses of issues of immediate policy relevance for the multilateral trading system. They would normally be shorter and possibly be less extensively documented than our standard articles with a view to stimulating current debates. They are subject to standard, albeit expedited, refereeing procedures. Further submissions under this heading are welcome.

[1]Between 1947 and 1994, Article XXI was invoked on a few occasions, even in the context of dispute settlement, but no GATT panel on this subject was ever adopted. Cf. Mavroidis, Petros, *The Regulation of International Trade*, vol. I, Cambridge, MA: MIT Press, 2016, pp. 479–487.

[2]Panel Report, *Russia – Measures Concerning Traffic in Transit* (henceforth, *Russia–Traffic in Transit*), WT/DS512/R.

[3]These disputes were initiated by China (WT/DS544), India (WT/DS547), the European Union (EU) (WT/DS548), Norway (WT/DS552), Russia (WT/DS554), Switzerland (WT/556), and Turkey (WT/DS564) against the United States. Mexico (WT/DS551) and Canada (WT/DS550) also opened cases, but mutually agreed solutions with the United States were later announced.

[4]Cf. WT/DS567 and WT/DS576. It may be difficult to ascertain whether a case will become a 'national security case', as the defendant's strategy (and its decision to invoke Article XXI) may be known only after it presents its first written submission. Given this, another dispute involving Russia and Ukraine (WT/DS525) may well become another national security case if it proceeds (it has remained under consultation since 2017). There is also a dispute possibly related to national security involving Bahrain and Qatar (WT/DS527), but it is unclear whether it will proceed (in consultations since 2017 as well).

[5]WT/DS590.

This article explores: (1) how the Russia–Ukraine case addressed the security exception of the GATT 1994 and (2) the political implications of claimed 'essential security interests' in WTO trade disputes. It highlights the risks of presenting trade as increasingly inextricable from national security interests and it also examines the challenges related to the growing number of national security cases being brought to the Organization's dispute settlement system. The article then points to some possible ways forward.

## 2. The Security Exception in Russia–Traffic in Transit

### 2.1 Different Views of WTO Members on the Security Exception

Article XXI of the GATT 1994 reads:

> Article XXI: Security Exceptions
> *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 (emphasis added).

Article XXI(b) lends itself to an affirmative defense in WTO disputes, which means that the defendant responds to a challenge by claiming that the provision authorized it to derogate from other GATT 1994 obligations. In other words, rather than maintain that its measures comply with WTO rules, a Member can argue that any alleged deviation was backed by the *exception* provision. It is the same logic as that of Article XX, which concerns General Exceptions and has been widely used in WTO litigation.

Given the importance of 'essential security interests', Article XXI contains generous, deferential language. The 'it considers necessary' adjective clause offers ample latitude for a Member to make its defense. That is, in invoking this provision, a Member can use its discretion to define what actions would be necessary to protect its essential security interests. For some, this would impart a self-judging character to the entire Article XXI (the *mere invocation suffices* argument), as will be seen below.[6]

On 14 September 2016, Ukraine initiated a dispute against Russia, alleging undue restrictions on the transit of Ukrainian goods through Russian territory. Ukraine argued that the Russian measures violated various provisions of the GATT 1994[7] and the Russia's Accession Protocol to the WTO.

In their response, Russia did not counter the factual issues or legal arguments raised by Ukraine but instead invoked Article XXI(b)(iii) of the GATT 1994 (as emphasized above). Russia argued that the Panel lacked jurisdiction to further address the matter as a consequence

[6]On the issue, cf. Alford, Roger, 'The Self Judging WTO Security Exception', *Utah Law Review*, 3 (2011): 697–759.

[7]Ukraine claimed that Russia's measures violated Article V (Freedom of Transit) and Article X (Publication and Administration of Trade Regulations) of GATT 1994.

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of the alleged self-judging nature of Article XXI. Russia claimed that it would be solely for itself to determine whether the challenged measures would be necessary for the protection of its essential security interests. For Russia, the trade restrictions had been adopted in the context of an emergency in international relations, in line with subparagraph (b)(iii).

According to Russia, the Panel's role was not to examine the merits of the case but to acknowledge that Russia had invoked Article XXI in its defense and that its measures were therefore justified. For Russia, the mere invocation of Article XXI(b)(iii) by a Member rendered its actions immune from scrutiny by a WTO panel.[8]

As a third party to this dispute, the United States presented arguments very close to those made by Russia. For the United States, the self-judging nature of Article XXI(b)(iii) rendered the dispute 'non-justiciable'.[9] According to the United States, the Panel could not review the right of a Member to invoke Article XXI(b)(iii).

On the other hand, the European Union (EU), China, Brazil, Australia, Japan, and other third parties argued that the Panel had jurisdiction to examine the case and disagreed with the argument that the dispute was non-justiciable.[10] The third parties shared the general sense that this dispute involved serious systemic concerns and that the Panel should proceed very carefully in interpreting Article XXI.

Nevertheless, they sought to present some elements that could be considered by the Panel in interpreting Article XXI. Some third parties (China, Singapore, Moldova) stressed the importance of good faith on the part of a Member invoking Article XXI, while others pointed to the need for a 'sufficient nexus' (EU) or a 'plausible link' (Brazil) between the challenged measure and the stated security interests in question.

### 2.2 The Panel's Decision

The Panel decided that Article XXI justified the Russian measures, which otherwise would not have complied with WTO rules. However, the reasoning of the Panel was not in line with the arguments made by Russia and the United States.

For the purposes of this article, the main points of the Panel decision are:

(a) Jurisdiction of the Panel over Article XXI claims

The Panel understood that Article XXI(b)(iii) was not wholly self-judging, as claimed by Russia, and rejected the idea that the provision was non-justiciable, as the United States argued. The Panel acknowledged that there was great discretion on the part of the Member invoking Article XXI but confirmed that the invocation of the provision was subject to review by WTO panels. It concluded therefore that Article XXI should not be seen as a carte blanche to Members.

(b) Good faith in the invocation of Article XXI

The Panel acknowledged that each Member is indeed entitled to define what it considers to be its own essential security interests. But it also noted that Members are not free to elevate any concern to that of an 'essential security interest'. The Panel expressed the view that good faith limits such

[8]Panel Report, *Russia–Traffic in Transit*, para. 7.57.

[9]In response to the Panel, the United States clarified that: '[w]e have used the term "jurisdiction" to refer to the ability of a Panel or the Appellate Body, under the terms of reference set by the DSB [Dispute Settlement Body] pursuant to the DSU [Dispute Settlement Understanding], to organize and hear a dispute from a Member, including receiving submissions from the parties and third parties. We have used the term "justiciability" to refer to the ability of the Panel or Appellate Body to make findings and provide a recommendation to the DSB.' Panel Report, *Russia–Traffic in Transit*, WT/DS512/R/ADD 1, Annex D-10, para. 29.

[10]Cf. Ibid., Annex D.

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discretion. It stated that good faith requires Members not to use the exception in Article XXI as a way to circumvent their obligations under the GATT.[11]

The Panel also noted that the obligation of good faith applies not only to Members' characterization of essential security interests but also, and mainly, to the relationship between such interests and the measure at stake. In other words, the restrictive trade measure cannot be an implausible means of protecting the security interests in question.[12]

In short, the Panel recognized that the adjective clause 'which it considers necessary' provides considerable leeway for Members to define which measures to adopt to protect essential security interests so long as the definition of such interests as well the link between those interests and the challenged measures stand the test of good faith.

(c) Objective assessment of the subparagraphs of Article XX(b), including 'emergency in international relations'

The Panel decided that Article XXI is not entirely self-judging. In an important clarification, the Panel stated that the discretion provided by the adjectival clause 'which it considers necessary' in the chapeau of Article XXI(b) *does not apply* to its subparagraphs. Rather, a measure has to objectively meet the requirements of one of Article XXI(b) subparagraphs. Members, for example, do not have unconstrained latitude to define what an emergency in international relations is for the purposes of Article XXI(b)(iii).

The Panel's objective interpretation of the concepts contained in subparagraph (iii) restricted the extent of the self-judging character that Russia and the United States intended to confer to the whole of Article XXI.

(d) Reference to disputes of economic nature in the context of Article XXI

An excerpt from the Panel Report is especially of interest not only for the disputes involving the United States over its steel and aluminum barriers, but also for other recent trade measures associated with national security.

The Panel, elaborating on the 'context for the interpretation', noted that Article XXI(b) suggests that political and economic differences between Members are not sufficient in and of themselves to constitute an emergency in international relations.[13] The Panel stated that such differences cannot be treated as an 'emergency in international relations' for the purposes of subparagraph (iii) unless they 'give rise to defence and military interests, or the maintenance of law or public order interests'.[14]

The Panel then concluded: 'An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tensions or crisis, or of general instability engulfing or surrounding a State'.[15]

### 2.3 Members' Reactions to the Panel Report

The Report of the Panel was adopted by the WTO Dispute Settlement Body (DSB) on 26 April 2019,[16] after both Russia and Ukraine decided not to appeal the decision.[17] Ukraine, while

[11]Panel Report, *Russia–Traffic in Transit*, para. 7.132–133.
[12]Ibid., para. 7.138.
[13]Ibid., para. 7.75.
[14]Ibid.
[15]Ibid. para. 7.76.
[16]Action by the Dispute Settlement Body, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/7, 29 April 2019.
[17]Dispute Settlement Body, Minutes of the Meeting of 26 April 2019, WT/DSB/M/428, 25 June 2019.

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expressing its disappointment with the decision, noted that the Panel's findings had more positive than negative impacts on the WTO dispute settlement system.[18]

At the DSB meeting to adopt the Report, some Members welcomed the Panel's conclusion that the invocation of the national security exception was subject to scrutiny in the context of a dispute settlement procedure – namely the EU, Canada, Turkey, Australia, and Mexico.[19]

Although the ruling does not formally constitute a legal precedent, it invariably sheds light on other ongoing and potential disputes involving national security in the WTO.

For the United States, the Panel's analysis proved unconvincing and problematic for several systemic reasons. For the purposes of this article, there are two points worth noting among its counter-arguments.[20] According to the United States, the Panel had not sufficiently examined Russia's understanding of Article XXI as a self-judging provision. Additionally – and concerned about its own cases and new practice – the United States criticized what it saw as an 'advisory opinion' in the Panel report, arguing that the Panel went beyond the factual conclusions necessary to solve the dispute at hand.[21] The criticism possibly refers to the Panel's assessment that political and economic divergences do not, of themselves, characterize an emergency in international relations.

### 2.4 The Panel's Approach to the Underlying Tension Related to Article XXI

The Panel's decision in *Russia–Traffic in Transit* seems well balanced. The Panel addressed the challenge of respecting Members' sovereignty in matters of national security while also defining parameters for a legal review of a provision which is integral to the WTO's legal framework.

On the one hand, the Panel avoided granting unlimited discretion to Members; it decided that invoking Article XXI was not sufficient for a Member to see itself released from its GATT obligations. Such conclusion is particularly significant in present times, when trade measures are increasingly presented as necessary to 'essential security interests'.

The Panel's interpretation prevented the creation of a major loophole, which would have undermined the credibility of the WTO. In the extreme alternative, had Article XXI been deemed a sufficient justification for any barrier, the WTO would hardly serve to discipline the trade practices of its Members, and WTO rules would be of little value.

On the other hand, the Panel conferred weight to the phrase 'it considers necessary' (chapeau of Article XXI(b)), respecting a Member's sovereign assessment of which measures are needed to further its essential security interests. In this sense, the decision seems in line not only with the wording of Article XXI but also with the high political sensitivity of the Members to this matter. The test of good faith, as introduced by the Panel, cannot be perceived as unduly compromising the ample scope that Members have to decide on the need of a given measure for their essential security interests.

### 2.5 The 1986 GATT Dispute between the United States and Nicaragua and Brief Reflections about the Future

The most relevant discussion of the GATT era involving national security relates to a 1986 dispute between the United States and Nicaragua. A panel report in this case was issued but never adopted, given the lack of consensus needed at the time to adopt it.

Claiming national security, the United States implemented in 1985 a two-way trade embargo on Nicaragua, prohibiting exports to, as well as imports from, the Central American country.

[18]It is worth remembering that, at the time of this writing, the WTO Appellate Body is on the verge of paralysis. If there had been an appeal on this case, its conclusion would probably have had to wait a long time.

[19]Supra n. 17.

[20]Though it is beyond the purpose of this article to comment on these issues, the United States and other commentators also questioned the Panel's discharge of the burden of proof and its order of analysis.

[21]Supra n. 17.

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Carefully negotiated by the United States, the terms of the reference of the panel explicitly contained the following 'the Panel cannot examine or judge the validity of or motivation for the invocation of Article XXI (b)(iii) by the United States'.[22] For that, the unadopted panel report did not offer an interpretation of Article XXI.

The focus of the panel was rather on establishing 'to what extent benefits accruing to Nicaragua under the General Agreement have been nullified or impaired',[23] thereby assisting the parties in further action in this matter. With that, the issue of non-violation nullification or impairment (NVNI) came to the fore. For the United States, the only possible result from the panel would be an authorization for Nicaragua to withdraw concessions regarding the United States.

The problem in that case was that, since the United States had already interrupted its exports to Nicaragua, any authorization for Nicaragua to suspend concessions regarding the United States (for example, a tariff increase on US products) would be of no consequence. There was basically no effective means for Nicaragua to exercise a potential right to suspend concessions against the United States. Arguing the absence of practical consequences, the Panel decided not to propose a ruling on the basic question of whether actions under Article XXI could nullify or impair GATT benefits.[24] In that particular case, the nullification and impairment was unchallenged even by the United States. The fact that an effective response would be unavailable was the issue.

As indicated in Section 3.3 below, the pathway of NVNI complaints is one possibility to deal with Article XXI disputes in present times, particularly as it sidesteps the discussion about the legality of the measure in hand, and therefore reduces the political sensitivity related to solving trade & security matters in the WTO.

However, as already shown in this US–Nicaragua case of 1986, this path has some limitations. One of them relates to the lack of effect of a decision to authorize suspension of concessions when a two-way embargo has been implemented. Another limitation refers to the constraints affecting a small country authorized to suspend concessions against the world's largest economy, as Antigua and Barbuda came later to experience in an emblematic dispute.

## 3. Political Considerations on the Security Exception Following the Russia–Traffic in Transit

### *3.1 The Rising Use of the National Security Argument in Trade Affairs*

The *Russia–Traffic in Transit* case must be seen against the background of national security being framed as increasingly inextricable from trade and economic matters, which raises a plethora of legal and political questions.

There have been threats to adopt new trade measures on the basis of national security. For example, the United States has threatened to restrict imports of vehicles and auto-parts from the EU, Japan, and potentially more countries[25] and to impose tariffs on Mexican imports in response to issues related to migration.[26]

[22] *United States – Trade Measures Affecting Nicaragua*, L/6053, 13 October 1986 (unadopted), para. 1.4.

[23] Ibid.

[24] Ibid., para. 5.11.

[25] USA, 'Presidential Proclamation on Adjusting Imports of Automobiles and Automobile Parts Into the United States', 17 May 2019, www.whitehouse.gov/presidential-actions/adjusting-imports-automobiles-automobile-parts-united-states/ (accessed 19 June 2019). A key point in the justification for the Proclamation is: 'the Secretary [of Commerce] found that American-owned automotive R&D and manufacturing are vital to national security. Yet, increases in imports of automobiles and automobile parts, combined with other circumstances, have over the past three decades given foreign-owned producers a competitive advantage over American-owned producers.'

[26] The threat of tariffs was dropped after the United States and Mexico reached a deal on migration enforcement. President Trump announced on 7 June 2019 via Twitter that the tariffs, due to enter into force three days later, were 'indefinitely suspended'.

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There are also new and strengthened export restrictions. In September 2019, South Korea opened a case in the WTO to challenge Japanese export controls of materials that are critical for South Korean technology companies.[27] The United States passed the Export Control Reform Act[28] in 2018, and China announced it would implement its own business restrictions scheme in response to the inclusion of the telecom giant Huawei in the US list of companies facing severe restrictions (including trade restrictions) for allegedly 'engag[ing] in activities that are contrary to US national security or foreign policy interest'.[29]

Investment screening procedures are being tightened to address national security concerns, impacting for example trade in services (in Mode 3) and Members' commitments under the GATS.[30] The national security argument has also affected other modes of service supply and intellectual property (IP) issues, and the disputes involving Saudi Arabia and Qatar provide some examples in that regard.[31]

Moreover, there are emerging issues in the area of trade and national security, which notably include cybersecurity, in addition to others such as food security and energy security. It would not be surprising to see a Member presenting climate change as a national security imperative. Cybersecurity in particular is poised to raise a range of political and legal issues for the WTO. China's cybersecurity regulations have been debated in different WTO bodies for at least the past two years.[32]

These elements point to a new state of global affairs, one where geopolitical concerns and economic affairs – rightly or not – are increasingly linked, particularly for the United States. One feature of this new scenario is the increasing weaponization of economic policy, with tariffs and trade sanctions being deployed for non-economic goals or goals that in the past were not perceived as economic.[33]

In that context, the traditional approach to national security, linked to defense and military affairs, which was followed by the *Russia–Traffic in Transit* Panel Report runs counter to US interests. This interpretation undermines the line of defense that, for example, the United States is following in justifying its barriers in steel and aluminum.[34]

If the reading of this Panel prevails in future disputes, it would be difficult to convince panel members as part of an Article XXI defense that the 'weakening of the internal economy' for example appertains to essential security interests.[35] It is not surprising therefore that in its First Written Submission in the *United States – Certain Measures on Steel and Aluminum*

[27] *Japan – Measures Related to the Exportation of Products and Technology to Korea*, WT/DS590.

[28] www.congress.gov/bill/115th-congress/house-bill/5040/text (accessed 19 June 2019).

[29] US Department of Commerce, Department of Commerce Announces the Addition of Huawei Technologies Co. Ltd. to the Entity List, 15 May 2019, http://www.commerce.gov/news/press-releases/2019/05/department-commerce-announces-addition-huawei-technologies-co-ltd (accessed 19 June 2019).

[30] See, for example, UNCTAD, *World Investment Report 2019*. Geneva: Unctad, 2019, chapter III.A.

[31] WT/DS528 (involving services and intellectual property) and WT/DS567 (exclusively on intellectual property) are two cases brought against Saudi Arabia by Qatar.

[32] www.wto.org/english/news_e/news17_e/tbt_20jun17_e.htm (accessed 19 June 2019).

[33] It is important to consider the demonstration effect of having the United States, the very architect of the trading system, using trade as a tool to pursue non-trade related policy objectives. There are obvious risks of other countries following the same approach, further increasing the risks for the WTO.

[34] Cf. US First Written Submission on the case United States – Certain Measures on Steel and Aluminum Products (WT/DS552), https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.%28DS552%29.fin.%28public%29.pdf (accessed 7 October 2019).

[35] Cf. USA. Presidential Proclamation on Adjusting Imports of Aluminum into the United States, 8 March 2018, https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states/ (visited on 20 July 2019). The Proclamation also includes the following excerpt: '[t]his relief will help our domestic aluminum industry to revive idled facilities, open closed smelters and mills, preserve necessary skills by hiring new aluminum workers, and maintain or increase production, which will reduce our Nation's need to rely on foreign producers for aluminum and ensure that domestic producers can continue to supply all the aluminum necessary for critical industries and national defense'.

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*Products* case, the United States strongly criticized the references to economic disputes in the Russia–Ukraine Panel Report.[36]

### 3.2 Resorting to Dispute Settlement to Solve Security-Related Claims

The Panel Report in *Russia–Traffic in Transit* is a landmark one. The Panel interpreted Article XXI in a way to help to contain abuses in the adoption of the national security argument. That objective is extremely important for the WTO and the rules-based system that it embodies.

Such observation, however, should not lead to the conclusion that dispute settlement is the best way to address differences involving trade and national security. The well-balanced decision reached by the Panel should not encourage Members to resort to dispute settlement to address such issues.

First and foremost, from the perspective of the WTO, Members obviously should not use reasons of national security to justify measures of purely economic or commercial motivations. As noted in Section 3.1, however, there are clear signs of a new policy orientation, particularly in the United States, towards the use of trade policy for non-trade objectives. Other Members may follow the US example, contributing to the proliferation of measures of such kind, in a worrisome scenario.

Likewise, Members should, to the extent possible, avoid bringing cases as well as making claims related to Article XXI in the context of dispute settlement. The self-restraint which prevailed until 2017 seems to have quickly disappeared. These new cases subject the system to undue pressure and to a burden it was not designed to carry.

Members must understand the risk associated with having panelists or the Appellate Body ruling on what Members can or cannot do in the name of national security. Matters related to essential security interests are extremely sensitive from a political perspective. They pertain – or should pertain – to very fundamental issues related to national sovereignty, to war and peace and to the very existence of the State.

Some third parties in the Russia–Ukraine dispute articulated the argument in favor of avoiding Article XXI litigation. Canada, for example, noted that: '[t]he WTO is not intended or equipped to resolve security issues or conflicts and, as a general matter, Canada urges Members involved in such situations to proactively and constructively engage to peacefully resolve the situation and avail themselves of any means that may assist them in doing so'.[37]

Some would argue that the ultimate purpose of having a dedicated dispute settlement mechanism is exactly to allow Members to have an appropriate track to adjudicate complex differences and that litigation over Article XXI should not be seen as inherently different from litigation over other WTO disciplines.

While such observation is certainly correct from a legal and institutional standpoint, it would be shortsighted not to recognize the quintessential political nature of Article XXI. Because of that, Members should ideally solve them outside the WTO dispute settlement system.[38]

Ahead of the *Russia–Traffic in Transit* ruling, the US Permanent Representative to the WTO argued: 'If the WTO were to undertake to review an invocation of Article XXI, this would undermine the legitimacy of the WTO's dispute settlement system and even the viability of the WTO as a whole.'[39]

[36]Supra n. 17.

[37]Panel Report, *Russia–Traffic in Transit*, WT/DS512/R/ADD, Annexes D-3 (Canada) and D-6 (Japan).

[38]For a different view on this point, see Balan, George Dian, 'On Fissionable Cows and the Limits to the WTO Security Exceptions (2 July 2018)', Society of International Economic Law (SIEL), Sixth Biennial Global Conference, https://ssrn.com/abstract=3218513. The author argues that 'litigating the security exceptions should be rather seen as a matter of normality and not as an atomic danger to the multilateral system'.

[39]The minutes of the Dispute Settlement Body meeting of 29 October 2018 contain the following: 'The United States said that it was not the WTO's function, nor was it within its authority, to second guess a sovereign's national security determination. Members had not abdicated their responsibilities to their citizens to protect their essential security interests when they had formed the WTO.' WTO Dispute Settlement Body, Minutes of Meeting of 29 October 2018, WT/DSB/420, para. 13.3.

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One can only speculate how Members involved in disputes related to Article XXI might react to a panel's decision on the boundaries that they have to observe when implementing measures that they consider necessary for national security purposes. From ignoring the report to exiting the WTO (particularly in light of an unfavorable decision from the Appellate Body), no options can be discarded for Members who believe that their national security interests are being undermined by the WTO.

The United States and the European Union, for example, have opposing views on how the WTO should deal with disputes related to national security (as evidenced in the Russia–Ukraine case), and both are involved in ongoing litigation related to Article XXI. The two fundamentally disagree on whether such disputes are justiciable or not, and if the system is effectively forced to resolve existing cases, the odds of leaving one party extremely dissatisfied with the outcome are high. Likewise, the United States and China are also involved in Article XXI litigation and their views equally diverge on how WTO panels should address such matters. Given the challenges that the WTO already faces and the political nature associated with matters (rightfully or not) characterized as of national security, the gravity of the situation seems clear.

In summary, there is an urgent need for Members to exercise restraint in using the national security argument to justify commercial measures but also in seeking a legal response to essentially political problems via the WTO's dispute settlement system. Problems of a political nature, particularly of extreme sensitivity, are better served by political – not legal – solutions.

If Members should not put undue pressure on the system by forcing panels and the Appellate Body to rule on national security matters, as argued by this article, there has to be other manners to keep abuses in check. Potential options are discussed in the section below.

### 3.3 Looking Ahead: Addressing the Issue While Mitigating the Risks for the WTO

The considerations above beg the question of: *what then?* If not WTO litigation, what tools exist for WTO Members to check potential abuses derived from the national security argument?

Despite its limitations, the path of conciliation, mediation, and good offices, as stipulated in the WTO DSU (article 5), should not be discarded. Needless to say, the parties would have to agree to this path, which would not prevent the opening of a dispute settlement case if necessary. Those who are more skeptical argue that alternatives methods may only delay litigation.

For those who believe that moving directly to litigation is the only effective option, it is worth noting that the DSU calls on Members, before bringing a case, to exercise judgment as to whether such a pathway would be fruitful. In this spirit, Members should not disregard the risk of a respondent simply refusing to comply with a WTO ruling that it perceives to undermine its essential security interests. The rush to resolve such disputes must be tempered by reviewing the respondent's possible failure to comply with a DSB ruling, among other, more consequential, risks.

Waivers are often recalled as an option to provide legal basis for a trade restriction which would otherwise violate WTO rules. However, when it comes to trade measures that could arguably relate to national security, it is not realistic to expect that a Member would request a waiver (transferring the decision on the adoption of the measure to the rest of the Membership) when it believes that it could rely on the deferential language of Article XXI and decide for itself on the adoption of a given trade measure.

In the context of dispute settlement, one possible way forward relates to resorting to non-violation nullification or impairment (NVNI) cases (GATT Article XXIII and WTO DSU article 26), as suggested in Section 2.4. Such approach would circumvent the discussion about the compatibility of the measure at hand with Article XXI, putting aside political problems arising from that. At the same time, such course of action could recognize the nullification or impairment caused to other Members and allow for appropriate compensation. This would pave the way for the reestablishment of the balance of right and obligations between Members, which may

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have been upset by the introduction of a trade measure – rightfully or not – adopted in the name of national security.

The United States has been advocating for such approach. It has argued that the drafting history of Article XXI shows that 'the appropriate means of redress for Members affected by essential security action is a non-violation, nullification or impairment claim, and not a claim that a Member has breached its trade obligations'. The United States also argues that the views they expressed in the Nicaragua case confirm such understanding.[40]

There are downsides to this course of action. For Members affected by such measures, the key one is the extremely poor record of non-violation complaints in WTO dispute settlement. No Member has ever succeeded in making a non-violation nullification or impairment (NVNI) case. By December 2018, eight WTO panels have considered NVNI claims[41]. In seven of them, panels concluded that complainants failed to meet the appropriate burden of proof.

If NVNI claims are to be an effective alternative to the review of the conditions for Article XXI invocation, it is clear that panels should consider whether the particularities of Article XXI would require a different, more flexible approach to the burden of proof. In other words, NVNI complaints have the potential to serve as an escape valve for Article XXI litigation, but for that to happen panels would need to approach it differently, recognizing what is at stake.

The gravity of the trade & security matter has not escaped Members in the context of the current WTO reform discussions.[42] A recent proposal made by China is worth exploring in this context. In its May 2019 WTO reform proposal, China covers the issue of national security in a brief but substantive manner.[43]

Firstly, China argues that WTO Members should act in good faith and exercise restraint in invoking provisions related to national security. It calls for the clarification of the existing WTO provisions on the matter, as well as for enhanced transparency and for a multilateral review of such measures. Though very difficult to implement in the current political environment, these suggestions are natural for China to raise, as a key target of national security measures.

The most interesting part of the proposal comes next. China proposes that, in the interim, 'WTO Members whose interests have been affected should be entitled to take prompt and effective remedies, so as to maintain the balance of their rights and obligations under the WTO.'

As previously noted, the United States has adopted tariffs and quotas on its imports of steel and aluminum based on the argument of national security. Some affected Members have brought WTO cases against the United States and some have adopted, in conjunction, countermeasures against US imports. The United States has brought its own WTO cases against five Members for their retaliatory actions.[44] In short, the United States sees their trade measures as consistent with the national security exception of the WTO and the retaliatory measures as blatant violations of WTO agreements, with no justification in the rules.[45]

China's proposal is interesting for various reasons: firstly, it legitimizes a Member's right to respond to trade restrictions in a manner that sidesteps discussions about the legality of the trade measure adopted (rightfully or not) for national security reasons. Altogether avoiding

[40]Supra n. 34.

[41]WTO Analytical Index, www.wto.org/english/res_e/publications_e/ai17_e/gatt 1994_art23_jur.pdf (accessed 14 October 2019).

[42]Members have tried to clarify Article XXI in the past, with very limited success. Cf. GATT, Decision Concerning Article XXI of the General Agreement, L/5426, 2 December 1982.

[43]Communication from China, China's Proposal on WTO Reform, WT/GC/W/773, 13 May 2019.

[44]China (WT/DS558), Canada (WT/DS557), the EU (WT/DS559), Turkey (WT/DS561), Mexico (WT/DS560), Russia (WT/DS566), and India (WT/DS585). The cases against Canada and Mexico have been terminated following mutually agreed solutions.

[45]https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/july/united-states-challenges-five-wto (accessed 19 July 2019).

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recourse to the WTO dispute settlement system, it circumvents a considerable political problem and thereby protects the multilateral trading system.

Secondly, China's proposal allows affected Members to adopt a timely and effective response to trade measures presented as matters of national security. Rather than wait for a panel's ruling in a dispute and hope for the other party's compliance, Members would be empowered to respond in a proportionate manner. Though China's proposal does not explicitly refer to proportionality, the concept is embodied in the notion of reestablishing the balance of rights and obligations between the Members in question – something key to not further escalating tensions.

Likewise, it seems reasonable to assume that, in China's proposal, if the Member that imposed the original measure on national security grounds believes that the countermeasure was disproportionate and has upset the balance of rights and obligations between Members, the matter could be referred to the WTO dispute settlement system (in the same way that arbitration is available for a party wishing to challenge the level of retaliation imposed in the context of a WTO dispute). Though the proposal does not make this clear, an alternative option would be to allow Members to unilaterally respond to a disproportionate countermeasure – but in this case, at a greater risk of escalation. All these issues would be subject to negotiations, should Members be willing to explore China's proposal and build on that.

Thirdly, China's proposal tries to shield retaliatory measures from being challenged via dispute settlement, sparing the system from spin-off cases of national security problems, like the handful of cases initiated by the United States in response to retaliatory tariffs. The proportionality of the response could always give room for divergence, but the right to respond would be made lawful.

Surely, one could argue that small economies would not have the ability to implement retaliatory measures against larger ones. It can also be argued that such a proposal would not contain but encourage the proliferation of unilateral measures. However, in light of the current circumstances, China's proposal provides an alternative worthy of further consideration.

The logic of legitimizing appropriate countermeasures is also present in the strategy followed by the European Union and others in their respective cases against the United States on the steel and aluminum measures. The EU claims that the US tariffs and quotas were in fact a safeguard measure in the sense of the WTO Agreement on Safeguards, even if the United States disagrees with that.[46]

The EU's line is worth noticing because, arguably, it provides a legal basis for its retaliatory tariffs, since the Agreement on Safeguards provides for 'trade compensation for the adverse effects of the measure' and affirms a Member's right to suspend the 'application of substantially equivalent concessions'. In adopting its response, the EU argued that it would 'use the possibility under WTO rules to rebalance the situation by targeting a list of US products with additional duties. *The level of tariffs to be applied will reflect the damage* caused by the new US trade restrictions on EU products' (emphasis added).[47]

By following this course of action in its litigation against the United States, the EU and others acknowledge that their retaliation should be proportionate to the nullification or impairment caused by US measures. Additionally, rather than disregard the system, they seek to find within it a lawful response to a measure that, in their view, finds no justification in the rules.[48]

These elements can provide some constructive insights into protecting the WTO from the dangerous trend of combining trade with national security. Before it is too late, a political solution must be found by Members, particularly as Article XXI litigation currently involves almost all major players, including the United States, China, the EU, India, Russia, and Japan.

[46]See Lee, Yong-Shik, 'Three Wrongs Don't Make a Right: The Conundrum of the US Steel and Aluminum Tariffs', *World Trade Review*, 18(3) (2019): 481–501.

[47]http://europa.eu/rapid/press-release_IP-18-4006_en.htm (accessed 21 July 2019).

[48]The EU Trade Commissioner said: 'Our response is measured, proportionate and fully in line with WTO rules. Needless to say, if the US removes its tariffs, our measures will also be removed.' See http://trade.ec.europa.eu/doclib/press/index.cfm?id=1868 (accessed 21 July 2019).

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## 4. Conclusion

The proliferating use of the national security argument combined with the end of Members' self-restraint related to Article XXI litigation puts the WTO in a position of great vulnerability. For many Members, the main risks relate to the trivialization of the national security argument in trade affairs and to the WTO's inability to put limits on the abuse of the national security argument as a justification for trade barriers. For others, the risks arise from having a biding international ruling restricting Members' ability to pursue policies that they consider necessary for national security interests.

This paper argued that Members should act wisely and carefully – but still quickly – to preserve the Organization. It argued that an effective response to address national security concerns should be, as much as possible, found outside of the WTO's dispute settlement system. In the context of dispute settlement, Members, and even panels if provoked, should explore how to turn NVNI claims into an effective escape valve for Article XXI litigation.

This article recognized the merits of the first adopted Panel Report on Article XXI in the history of the multilateral trading system. Faced with a difficult and politically charged task, the first WTO panel to interpret Article XXI skillfully tackled the heart of the dispute, finding a delicate balance between two important objectives: (1) to ensure that Members can derogate from their obligations if necessary to protect essential security interests and (2) to contain the risks for abuse in the argument, which would otherwise undermine the effectiveness and credibility of the Organization itself.

Yet, despite the quality of the legal analysis carried out by the Panel, the political risk posed by national security litigation in the WTO remains very high. Some would argue that, precisely because it is technically sound on the interpretation of the national security clause, the decision further highlights the political risk related to discussing national security in WTO disputes. With more clear parameters to contain abuses, the risk of political problems on the horizon just become more evident, and Members should urgently consider alternatives as they are moving fast toward the abyss.

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