

## COMMENTS

# ARMORED PLATING AND ALUMINUM FOIL ARE NOT LIKE PRODUCTS: CONSEQUENCES OF THE UNITED STATES' OVERBROAD INTERPRETATION OF ARTICLE XXI OF THE GATT

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*In 2018, the United States imposed tariffs on the importation of steel and aluminum in the name of economic security. The Trump administration alleged that the influx of low-cost foreign steel and aluminum hurt domestic steel and aluminum manufacturers economically to the point that they were decreasing production. In turn, the administration argued that a decrease in steel and aluminum production would lead to national security threats, especially if the United States could no longer produce the steel and aluminum necessary for military consumption. In response, eight fellow member states of the World Trade Organization initiated dispute settlement proceedings against the United States. The members alleged that the steel and aluminum tariffs exceeded the United States' tariff bindings and that the United States could not invoke the security exception in GATT Article XXI because economic security is not an "essential security interest."*

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*This Comment argues that the United States' proposition that economic security is national security has stretched the meaning of "essential security interest" past its breaking point, and, in doing so, has violated its obligations under the GATT. Specifically, an analysis of the term "essential security interest" under both Article 31 and 32 of the VCLT clearly shows that the drafters of the GATT did not intend for the security exception to encompass economic security. Accordingly, by implementing tariffs only to protect its economic security, the United States has breached its treaty obligations under the GATT and a dispute resolution panel will ensure they face economic repercussions.*

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## INTRODUCTION

Imagine for a moment that you are playing a game of Monopoly with a group of friends. You pass “Go.” You collect \$200. You land on Park Place. You purchase the property for \$350. You land on the “Go To Jail” space. You go to jail. While all of these actions may have positive or negative consequences for you as a player, it is our shared common understanding that we play Monopoly according to the series of rules set forth in the rulebook, else the game descends into strife and conflict.

Now it is your friend Tom’s turn. Tom rolls a six and lands on “Community Chest.” Tom picks a card and reads it to the group, “Go to Jail. Go directly to jail. Do not pass Go, do not collect \$200.” Tom picks up his piece, moves it past “Go,” collects \$200, and places his piece outside of the jail, showing the other players that he has a “Get Out of Jail Free” card. All the other players are aghast. The common understanding is that players cannot use their “Get Out of Jail Free” card until the next turn after they have gone to jail. You tell Tom, “Hey, you cannot collect \$200 until your next lap of the board.” To which Tom replies, “there is actually an exception in the rules; only the reader of the Community Chest card can interpret its meaning. I believe that a ‘Get Out of Jail Free’ card can be used immediately when a player is sent to jail, and the other players are not allowed to dispute my interpretation.”

The next player, Timmy, also rolls a six. Timmy lands on “Community Chest,” and picks up the card. Timmy reads, “Collect \$100.” Timmy then asks the banker for \$50,000, exclaiming “That is my interpretation of the card.” From here, the game is over. The interpretive exception has swallowed the rule, and the players now wield the exception as a sword to defeat any attempt to enforce the rules. We learn that when a rule set allows for discretionary exceptions, there must be some institutional oversight; otherwise, the members will use the exception as a tool to evade the established rules.

The rules of Monopoly are analogous to the rules set forth in the General Agreement on Tariffs and Trade (GATT),<sup>1</sup> which is the primary treaty that the World Trade Organization (WTO) enforces. WTO Member states are bound to abide by the provisions of the GATT when they engage in international trade with other Members.<sup>2</sup> In a similar manner to

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1. General Agreement on Tariffs and Trade art. 1, Oct. 30, 1947, 4 U.S.T. 639, 55 U.N.T.S. 188 [hereinafter GATT].

2. Understanding on Rules and Procedure Governing the Settlement of Disputes, art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 [hereinafter DSU].

Monopoly, when one Member abuses its discretionary power under the rules, the other Members follow suit so as not to lose out on a potential economic benefit. This Comment analyzes whether the United States has incorrectly invoked a discretionary exception to the general GATT rules.

On March 8, 2018, President Trump issued two Presidential Proclamations that could have the effect of destroying the GATT. Presidential Proclamations 9704 and 9705, titled “Adjusting Imports of Aluminum into the United States” and “Adjusting Imports of Steel into the United States” respectively, provided for an increase in the import tariffs that are applied to steel and aluminum products imported to the United States after March 23, 2018, in the interest of economic security.<sup>3</sup> Under the GATT, a Member can change the value of its import tariffs as long as the Member does not set the tariff rate above the upper limit of its set tariff binding.<sup>4</sup> However, Article XXI acts as a discretionary exception to these tariff-binding obligations, which allows Members to raise their tariffs above the bindings when they consider it necessary for the protection of their essential security interest.<sup>5</sup>

This Comment asserts that the United States’ use of economic security instead of national security to justify its increased tariffs violated Article XXI of the GATT, as the drafters of the GATT did not intend for “essential security interests” to encompass tariffs based solely on economic security. Using the applicable treaty interpretation tools provided in the Vienna Convention on the Law of Treaties,<sup>6</sup> this Comment shows that the GATT itself does not give a definitive interpretation of Article XXI and that the provision’s true meaning can only be deduced from the GATT’s negotiating history.

Part I of this Comment provides an overview of the international trade system and its governing treaty, the GATT.<sup>7</sup> It then highlights relevant prior cases that have struggled to interpret Article XXI.<sup>8</sup> Next, it deals with the threshold question of justiciability.<sup>9</sup> After establishing the framework of the system, this Comment details the current steel

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3. See Proclamation No. 9704, 83 Fed. Reg. 11,619 (Mar. 8, 2018); Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 8, 2018).

4. GATT, *supra* note 1, art. II (tariff bindings are the upper limits for tariffs that Members agree to when joining the WTO).

5. See *id.* art. XXI.

6. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT].

7. See *infra* Section I.A.1–3.

8. See *infra* Section I.A.4.

9. See *infra* Section I.A.5.

and aluminum tariffs and the circumstances around their imposition.<sup>10</sup> Then, it looks to the Vienna Convention and details the step-by-step process of treaty interpretation, with particular attention paid to the WTO's consistent practice.<sup>11</sup>

Part II analyzes each step of treaty interpretation, looking first to Article 31 of the Vienna Convention and the general rules of treaty interpretation.<sup>12</sup> After exhausting those interpretive tools, this section then looks to Article 32 of the Vienna Convention, and the supplemental means of treaty interpretation, to determine the correct interpretation of Article XXI.<sup>13</sup> This Comment concludes that in light of the intent of the drafters to create a narrow essential security exception, the WTO Appellate Body should find that economic security alone does not fall within the treaty language of essential security interests.

## I. BACKGROUND

### A. *WTO Structure and the Birth of GATT Article XXI*

#### 1. *Formation of the GATT & WTO*

Any discussion of the contemporary international trading system must start at its origin, the post-World War II environment. After the horrors of World War II, the international community determined that it was necessary to bind the economies of states together in an effort to prevent further global conflict.<sup>14</sup> To that end, delegates from forty-four allied states met in Bretton Woods, New Hampshire in 1944 to regulate the international monetary and financial order.<sup>15</sup> The conference attendees envisioned creating three institutions to maintain the economic system: the International Monetary Fund (IMF); the International Bank for Reconstruction and Development (IBRD), which is now part of the World Bank Group; and the International Trade Organization (ITO).<sup>16</sup>

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10. See *infra* Section I.B.

11. See *infra* Section I.C.

12. See *infra* Section II.B.1.

13. See *infra* Section II.B.2.

14. See EDWARD S. MASON & ROBERT E. ASHER, *THE WORLD BANK SINCE BRETTON WOODS* 1–3 (1973).

15. *Id.*

16. *Id.* at 12.

The attendees drafted the charters of the IMF and World Bank at the conference, which the relevant states ratified shortly thereafter.<sup>17</sup> However, the ITO did not have the same fate. Reportedly, all delegates agreed that international trade was of sufficient importance to the goal of preventing future conflict that it was necessary to create an international organization for oversight.<sup>18</sup> The problem was that the delegates attending the Bretton Woods conference were finance ministers and not trade ministers, so the delegates decided only that the present states should negotiate this institution at a later point.<sup>19</sup> The trade ministers finally met in Havana, Cuba in 1947 and drafted the charter for the ITO, which over fifty countries signed.<sup>20</sup> Unfortunately, the U.S. Senate never ratified the treaty, and without the United States' support, the ITO withered and died.<sup>21</sup>

However, at the same time as the ITO negotiations took place, the same states conducted a series of parallel negotiations in Geneva.<sup>22</sup> These negotiations resulted in the GATT, which the delegates signed on October 30, 1947.<sup>23</sup> The GATT negotiations were different from the ITO in one major respect: while the ITO was a proposed international institution, with all the physical and regulatory capacity that comes with an institution, the GATT simply outlined a treaty that would define the boundaries of the international trading system.<sup>24</sup> The GATT had two goals: first, reduce tariffs, and second, promote trade liberalization.<sup>25</sup>

The defining characteristic of the GATT was that every Member had to affirmatively agree with the proposed matter in order for the GATT to make any decision.<sup>26</sup> This consensual form of decision-making is a

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17. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 2 U.N.T.S. 39; Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 2 U.N.T.S. 134.

18. DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE*, 1–2 (2d ed. 2004).

19. *Id.*

20. *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORG., [https://www.wto.org/English/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](https://www.wto.org/English/thewto_e/whatis_e/tif_e/fact4_e.htm) [<https://perma.cc/VCA7-DR37>].

21. PALMETER & MAVROIDIS, *supra* note 18, at 2.

22. *The GATT Years*, *supra* note 20.

23. *Id.*

24. *Id.*

25. Michael Tomz, Judith L. Goldstein & Douglas Rivers, *Do We Really Know That the WTO Increases Trade?* *Comment*, 97 AM. ECON. REV. 2005, 2005–07 (2007).

26. See Jaime Tijmes-Lhl, *Consensus and Majority Voting in the WTO*, 8 WORLD TRADE REV. 417, 422 (2009) (“[P]articipation is not enough for fulfilling the necessary

side effect of the non-institutional nature of the agreement and extended even to the dispute settlement process.<sup>27</sup> This led to one major failure of the GATT system: a single Member could block parties from adopting a dispute settlement panel report and prevent the panel's remedy from going into effect, even if the Member was the losing party.<sup>28</sup> However, the GATT is a living treaty, having had eight "rounds" of negotiation from 1948 to 1994.<sup>29</sup> During the most recently completed round, the "Uruguay Round," the Members determined that they needed a fully-fledged institutional system, similar to the ITO, to create rules and settle disputes with binding effect.<sup>30</sup>

Though the goals of the WTO were largely identical to those of the GATT, there were two significant changes. First, the Members created an appellate review mechanism for panel decisions, the Appellate Body.<sup>31</sup> Second, under the WTO, Members must unanimously agree not to adopt a panel decision, making it virtually impossible for a losing party to halt the implementation of a panel decision.<sup>32</sup> The conclusion of the Uruguay Round and the signing of the Marrakesh Declaration marked the birth of the WTO.<sup>33</sup>

## 2. *GATT Article XXI*

GATT Article XXI is a security exception to the rights and obligations that Member states have contracted for under the GATT.<sup>34</sup> Article XXI includes a short chapeau<sup>35</sup> and three substantive components. Subsection A provides, "Nothing in [the GATT] shall be construed . . . to require any contracting party to furnish any information the disclosure

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condition that no-one's objections are ignored, since additionally the treaties have to be approved by everyone.")

27. *Id.*

28. *A Unique Contribution*, WORLD TRADE ORG., [https://www.wto.org/English/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](https://www.wto.org/English/thewto_e/whatis_e/tif_e/displ_e.htm) [<https://perma.cc/P6FG-N9W5>].

29. *The GATT Years*, *supra* note 20 (describing in detail each set of negotiations and agreements that became known as "rounds" in GATT nomenclature).

30. *The GATT Uruguay Round*, OVERSEAS DEV. INST. BRIEFING PAPER (1987), <http://www.odi.org.uk/resources/docs/6726.pdf> [<https://perma.cc/5CKF-MV6F>].

31. *See* DSU, *supra* note 2.

32. *Understanding the WTO: Settling Disputes*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm) [<https://perma.cc/YTC6-W53S>].

33. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1153 (the multilateral agreement that denotes the transition between the GATT era and the formal establishment of the WTO).

34. GATT, *supra* note 1, art. XXI.

35. In international law, a chapeau is introductory text in a treaty laying out its principles, objectives, and background. JON R. JOHNSON, *INTERNATIONAL TRADE LAW* (1998).

of which it considers contrary to its essential security interests.”<sup>36</sup> Subsection B continues that the GATT shall not be construed “to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests,” specifically those that relate to (i) fissionable materials or the materials from which they are derived, (ii) goods relating to arms, ammunition, or other implements of war that directly or indirectly supply a military establishment, and (iii) or other actions taken in a “time of war or other emergency in international relations.”<sup>37</sup> Finally, subsection C provides that “nothing in [the GATT] shall be construed . . . to prevent any contracting party from taking any action in pursuance of its obligation under the United Nations Charter for the maintenance of international peace and security.”<sup>38</sup> Therefore, Article XXI deals with five explicitly different security-related issues: the disclosure of confidential information, preventative measures taken to safeguard nuclear materials, actions dealing with the flow of weapons for use in a military establishment, any actions taken in a time of war, and actions that a Member must take to fulfill their U.N. obligation to maintain peace and security.<sup>39</sup>

Several elements of Article XXI are ripe for interpretation because of their ambiguity, primarily, the phrase “essential security interests.”<sup>40</sup> The most relevant indicia of the original intent of Article XXI comes from the drafting history of the article. One of the members of the drafting committee said of Article XXI, “[w]e cannot make it too tight, because we 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.”<sup>41</sup>

The Chair of the drafting committee echoed this sentiment but, when pushed on a solution, only suggested that the spirit in which the Members interpret the provision would safeguard against abuse of Article XXI.<sup>42</sup> His statement implies that an analysis of good faith is necessary when determining if a Member has permissibly invoked

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36. GATT, *supra* note 1, art. XXI(a).

37. *Id.* art. XXI(b).

38. *Id.* art. XXI(c).

39. *See id.* art. XXI.

40. *See id.* art. XXI(a)–(b).

41. *See* U.N. Conference on Trade and Employment, *Second Session of the Preparatory Committee*, at 21, U.N. Doc. E/PC/T/A/PV/33 (July 24, 1947).

42. *See id.*

Article XXI.<sup>43</sup> This ambiguity demonstrates the need for panels to use supplementary means to interpret Article XXI.

### 3. *GATT Article XX*

One of the primary sources to look to for interpretive guidance regarding the meaning of Article XXI is Article XX, the general exceptions to GATT obligations.<sup>44</sup> Specifically, subsection (d) provides that Members can disregard their WTO obligations when “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement.”<sup>45</sup> It is a well-understood principle of treaty interpretation that interpreters can look to other uses of a word in the same treaty to understand the term’s meaning in a separate provision.<sup>46</sup>

The term “necessary” appears in both Article XX and Article XXI and should therefore have a similar meaning.<sup>47</sup> However, unlike Article XXI, Article XX has been heavily litigated, and the WTO has adopted binding Appellate Body reports governing the interpretation of “necessary.” In *Thailand—Cigarettes*, for example, the Appellate Body<sup>48</sup> interpreted the term “necessary” to mean the least GATT-inconsistent method available.<sup>49</sup> Meaning for a measure to be consistent with Article XX(d) there must be no alternative option available to the Member to get the desired result.<sup>50</sup>

### 4. *Prior use*

To date, Members have invoked Article XXI on few occasions, all prior to the creation of the WTO. The GATT Council, however, declined to adopt the panel’s decision in each instance. The United States was the first to invoke Article XXI shortly after the creation of the GATT in 1948 to import goods for the Marshall Plan without paying import duties.<sup>51</sup> Czechoslovakia challenged this practice, arguing that the United States had misapplied Article XXI “because the narrow reference in the text to

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43. Following from the perambulatory language of the VCLT. VCLT, *supra* note 6, pmb. (“[N]oting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.”).

44. GATT, *supra* note 1, art. XX.

45. *Id.* art. XX(d).

46. VCLT, *supra* note 6, art. 31.1–4.

47. GATT, *supra* note 1, arts. XX(b), XXI.

48. Appellate Body Report, *Thailand—Customs and Fiscal Measures on Cigarettes*, WTO Doc. WT/DS371/AB/R (adopted June 17, 2011).

49. *Id.* ¶ 177.

50. *Id.*

51. GATT Council, *Summary Record of the Twenty-Second Meeting*, at 2–3, GATT Doc. CP.3/SR.22 (June 8, 1949).

war materials had been construed by the United States Government to cover a wide range of goods which could never be so regarded.”<sup>52</sup> The Members unanimously voted against the creation of a panel to litigate this issue, mainly on the grounds of justiciability, which this Comment discusses next.<sup>53</sup> However, even at this early moment in Article XXI’s existence, particularly in an instance where no Member could seriously fault the United States for not paying tariffs on Marshall Plan goods, the British delegation reasserted that Members must respect the object and purpose of the GATT even when invoking Article XXI, stating “Members should be cautious not to take any step which might have the effect of undermining the General Agreement.”<sup>54</sup>

The GATT membership summarily dealt with the second and third invocations of Article XXI in short order. Neither Ghana’s 1961 invocation to boycott Portuguese goods<sup>55</sup> nor Sweden’s 1975 invocation regarding shoe tariffs<sup>56</sup> resulted in an adopted panel report.

In 1982, the Falklands War forced the GATT Council to make a decision about Article XXI. The entire European Economic Community (EEC) imposed an embargo on Argentina over the Falkland Islands dispute in a show of solidarity with England.<sup>57</sup> For the first time, there was no security pretext for the invocation of Article XXI; the EEC simply placed the noneconomic measures and told the membership that there was nothing they could do about it.<sup>58</sup> The GATT Council “punted” on the justiciability issue;<sup>59</sup> however, it did release a decision about Article XXI generally, stating that trade measures taken for security reasons “could constitute . . . an element of disruption and uncertainty for international trade,”<sup>60</sup> again asserting that the object and purpose of the GATT must be acknowledged when invoking Article XXI.

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52. *Id.* at 3.

53. *See infra* Section I.A.5.

54. *Summary Record of the Twenty-Second Meeting*, *supra* note 51, at 3.

55. GATT Council, *Summary Record of the Twelfth Session*, at 196, GATT Doc. SR.19/12 (Dec. 21, 1961).

56. Report of the Panel Notification of Global Import Quota, *Sweden—Import Restrictions on Certain Footwear*, GATT Doc. L/4250 (Nov. 17, 1975).

57. *See Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, at 2, GATT Doc. L/5317 (Apr. 30, 1982) (discussing, in a letter, the embargo and the EEC’s restrictions on Argentina).

58. *Id.*

59. *See infra* Section I.A.5.

60. GATT Council, *Decision Concerning Article XXI of the General Agreement*, GATT Doc. L/5426 (Dec. 2, 1982).

In 1985, the United States was once again the asserting party, this time defending the trade embargo that President Reagan placed on Nicaragua.<sup>61</sup> In a return to prior form, the membership declined to refer the matter to a panel, reaffirmed a Member's inherent right to protect its security interests, and failed to create a binding report.<sup>62</sup> In short, the existing GATT jurisprudence is inadequate to conclusively interpret Article XXI.

### 5. *Justiciability*

Before analyzing the United States' recent interpretation of Article XXI, the Appellate Body must address the threshold question of justiciability. Justiciability, also known in the international trade lexicon as the doctrine of self-judging, is similar to the United States' notion of the political question doctrine.<sup>63</sup> Namely, there are certain issues that the courts do not have jurisdiction to decide and thus they are the domain of politicians, or negotiators in the WTO context.<sup>64</sup> The WTO takes a similar approach to *Marbury v. Madison* with respect to this doctrine. Like the U.S. President, Members of the WTO are "invested with certain political powers, in the exercise of which [they are] to use [their] own discretion." Further, there is "no power to control that discretion."<sup>65</sup> As stated in the summary report of the 1947 Geneva Charter draft, "Members may . . . do whatever they think necessary to protect their security interests relating to atomic materials, arms traffic, and wartime or other international emergencies."<sup>67</sup>

To date, no GATT panel or WTO Appellate Body has addressed the issue of justiciability in any binding dispute resolution proceeding. Although Members have invoked Article XXI, panels have always sidestepped the issue and declined to resolve cases on the merits of Article

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61. Report by the Panel, *United States—Trade Measures Affecting Nicaragua*, L/6053 (Oct. 13, 1986).

62. *Id.*

63. Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 698 (2011).

64. *Id.*

65. *Marbury v. Madison*, 5 U.S. 137, 166–67 (1803) (holding that some questions are fundamentally political, and in these cases, courts should decline to exercise jurisdiction).

66. *Id.* at 166.

67. See U.N. Conference on Trade and Employment, *An Informal Summary of the ITO Charter*, at 35, U.N. Doc. E/CONF.2/INF.8 (Nov. 21, 1947).

XXI,<sup>68</sup> and before the WTO, the GATT Council did not adopt the panel reports and thus they have no binding effect.<sup>69</sup> There are many examples of GATT Members asserting their absolute right to determine what constitutes an essential security interest before the dispute settlement body. In the GATT dispute proceeding between Ghana and Portugal concerning Ghana's boycott of Portuguese goods during Portugal's accession to the GATT, the Ghanaian government argued that each Member state was the sole judge of what was necessary for its essential security interest.<sup>70</sup> The Ghanaian government asserted that no Member could object to the boycott because "a country's security interests may be threatened by a potential as well as an actual danger," which in this case was the mere presence of Portugal in nearby Angola.<sup>71</sup>

The European Economic Community (EEC) and Argentina revisited these arguments in the Falkland Islands dispute.<sup>72</sup> The EEC argued it had taken trade-restrictive measures based on its inherent right under Article XXI, that the exercise of those rights required "neither notification, justification, nor approval,"<sup>73</sup> and that "every [Member] was—in the last resort—the judge of its exercise of these rights."<sup>74</sup>

Two third parties to the dispute, Canada and Australia, reached similar conclusions but used different logic.<sup>75</sup> Canada asserted that the GATT was the improper forum to resolve this issue,<sup>76</sup> and Australia conceded that Article XXI did apply, but that the measure was justified

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68. Report of the Panel, *United States—Trade Measures Affecting Nicaragua*, L/6053 (Oct. 13, 1986). Nicaragua sued the United States because of the U.S. embargo. Both parties agreed that the United States had acted against the trade-facilitating provisions of the GATT but disagreed on whether XXI justified this noncompliance. The Panel concluded was not authorized to examine the U.S. justification for invoking the security exception of the GATT. Thus, it could find neither that the United States complied with, or failed to comply with, its obligations under the GATT.

69. *Sweden—Import Restrictions on Certain Footwear*, *supra* note 56.

70. *Summary Record of the Twelfth Session*, *supra* note 55, at 196 ("[U]nder 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.").

71. *Id.*

72. GATT Council, *Minutes of Meeting*, GATT Doc. C/M/157, at 10 (June 22, 1982).

73. *Id.*

74. *Id.*

75. *Id.* at 10–11.

76. *Id.* at 10 ("Canada was convinced that the situation which had necessitated the measures had to be satisfactorily resolved by appropriate action elsewhere, as the GATT had neither the competence nor the responsibility to deal with the political issue which had been raised.").

under XXI(c).<sup>77</sup> Argentina countered that “in order to justify [trade] restrictive measures a [Member] invoking Article XXI would specifically be required to state reasons of national security” and without those statements, the Member would violate its GATT obligations.<sup>78</sup> This position is consistent with the 1982 Ministerial Declaration, which declared that the Members undertook to “abstain from taking restrictive trade measures, for reasons of a non-economic character.”<sup>79</sup>

This leaves three options for analyzing justiciability. First, a fully Member-centric approach where the Member has all the power to determine if the measure is *essential* and if it *relates to an enumerated provision*.<sup>80</sup> Second, an approach where the Member determines if the measure is *necessary*, but the question of if the measure fits into an *enumerated provision* is subject to judicial review.<sup>81</sup> Third, a middle ground approach, where the Member has full authority to determine if the security measure is *essential*, but the measure would be subject to judicial review.<sup>82</sup> This approach is most appropriate as it tracks with the general intent of the international trade community, as evidenced by the creation of a binding dispute resolution system to address problems on a multilateral basis, instead of a purely reciprocal basis.<sup>83</sup>

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77. *Id.* at 11. The Australian delegation justified the acts under Art. XXI(c), which they argued did not require notification or justification. *Id.*

78. *Id.* at 12.

79. GATT, *Ministerial Declaration Adopted on 29 November 1982*, GATT Doc. L/5424, at 3 (adopted Nov. 29, 1982).

80. Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. PA. J. INT'L ECON. L. 263, 268–69 (1998) (describing how the phrasing of the section “allows the WTO Member invoking sanction measures sole discretion to determine whether an action conforms to the requirements set forth in Article XXI(b)”).

81. Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT'L L. 413, 418 (2001) (articulating that the interpretation that members can self-define their interests “does not inherently address the question as to whether these interests should be self-defining . . . . The power to impose non-reviewable security-based sanctions is especially troublesome” based on the intent of the parties to resolve concerns multilaterally).

82. Hannes L. Schloemann & Stefan Ohlhoff, “*Constitutionalization*” and *Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM. J. INT'L L. 424, 426 (1999) (asserting that the “correct assessment of the relevance of the national security exception to the WTO’s jurisdiction, i.e., to the allocation of decision-making power between states parties and the organization, is the distinction between the *authority to interpret* and the *authority to define*”).

83. *Id.* at 435, 439–40.

This Comment assumes that Article XXI is justiciable, particularly under the third interpretive method, where the Member determines what is essential and the WTO can review.<sup>84</sup>

### B. *The 2018 Tariffs*

President Trump imposed a series of tariffs on steel and aluminum on March 8, 2018.<sup>85</sup> The President derived his authority to impose these tariffs from section 232 of the Trade Expansion Act, which allows the President to enter into trade agreements or modify existing trade agreements when foreign countries place an undue burden on or restrict U.S. trade.<sup>86</sup> Section 232 permits the President to impose safeguard tariffs on goods when national security concerns require that the President consider “domestic production needed for projected national defense requirements.”<sup>87</sup> Safeguards are a subcategory of tariffs that a state can use to protect its domestic industry even when there are no unfair trade practices, such as dumping or subsidization.<sup>88</sup> The WTO Safeguard Agreement permits the use of safeguard tariffs for limited periods when a Member can show a significant spike in imports.<sup>89</sup> When administering section 232, “the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries.”<sup>90</sup>

When announcing the tariffs, President Trump justified them as “vital to our national security” because “steel is steel. You don’t have steel, you don’t have a country.”<sup>91</sup> In November 2018, seven WTO Members—China, the European Union (EU), Canada, Mexico, Norway, Russia, and Turkey—requested that the WTO establish panels to review the section

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84. *Id.*; Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U. J. INT’L L. & POL. 437, 467 (2008).

85. *Section 232 Tariffs on Aluminum and Steel*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/trade/programs-administration/entry-summary/232-tariffs-aluminum-and-steel> [<https://perma.cc/VK3H-YJY9>].

86. 19 U.S.C. § 1862 (2012).

87. *Id.* § 1862(d).

88. *Safeguard Measures*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/safeg\\_e/safeg\\_e.htm](https://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm) [<https://perma.cc/LG4C-VHRB>].

89. Marrakesh Agreement Establishing the World Trade Organization, *supra* note 33, art. 2 ¶ 1, Annex 1A.

90. 19 U.S.C. § 1862(d).

91. Scott Horsley, *Trump Formally Orders Tariffs on Steel, Aluminum Imports*, NPR (Mar. 8, 2018, 5:00 AM), <https://www.npr.org/2018/03/08/591744195> [<https://perma.cc/C2NE-YAY9>].

232 tariffs for compliance with the WTO Safeguard Agreement.<sup>92</sup> At the time, the international community expected that the United States would invoke Article XXI, alleging it did not produce steel and aluminum in “a sufficient and reasonably available amount” to necessitate safeguards to protect national security.<sup>93</sup>

However, on December 9, 2018, the official government rationale changed when Peter Navarro,<sup>94</sup> Assistant to the President and Director of the Office of Trade and Manufacturing, released an op-ed in *RealClearPolitics* titled *Why Economic Security is National Security*.<sup>95</sup> The following day, the government posted the same article on the official White House website.<sup>96</sup> The article asserted that the rationale for the steel and aluminum tariffs was economic security and thus relied on the presumption that economic security is an essential security interest for the purpose of Article XXI.<sup>97</sup>

At the November 21, 2018 meeting of the WTO Dispute Settlement Body (DSB), the DSB agreed to the seven Members’ requests that the DSB establish panels to examine the U.S. steel and aluminum tariffs. It also created four additional panels at the United States’ request<sup>98</sup> to examine retaliatory safeguard countermeasures applied by China,

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92. Justine Coyne, *WTO Panels to Review US 232 Tariffs on Steel, Aluminum*, S&P GLOBAL: PLATTS METALS DAILY (Nov. 21, 2018), <https://www.spglobal.com/platts/en/market-insights/latest-news/metals/112118-wto-panels-to-review-us-section-232-tariffs-on-steel-aluminum>.

93. Saud Aldawsari et al., *Updates on the Section 232 Tariffs on Steel and Aluminum: Exclusion Requests, WTO Challenges, and Reactions from U.S. Trading Partners*, JD SUPRA: KING & SPALDING (July 6, 2018), <https://www.jdsupra.com/legalnews/updates-on-the-section-232-tariffs-on-97452> [<https://perma.cc/6QAN-38CY>].

94. See generally Annie Lowrey, *The ‘Madman’ Behind Trump’s Trade Theory*, ATL. (Dec. 2018), <https://www.theatlantic.com/magazine/archive/2018/12/peter-navarro-trump-trade/573913>.

95. Peter Navarro, *Why Economic Security Is National Security*, REALCLEAR POL. (Dec. 9, 2018), [https://www.realclearpolitics.com/articles/2018/12/09/why\\_economic\\_security\\_is\\_national\\_security\\_138875.html](https://www.realclearpolitics.com/articles/2018/12/09/why_economic_security_is_national_security_138875.html) [<https://perma.cc/3GFS-M6RK>].

96. Peter Navarro, *Why Economic Security Is National Security*, WHITE HOUSE: ECONOMY & JOBS (Dec. 10, 2018), <https://www.whitehouse.gov/articles/economic-security-national-security> [<https://perma.cc/M92Z-X7KE>].

97. *Id.*

98. *Panels Established to Review US Steel and Aluminum Tariffs, Countermeasures on US Imports*, WORLD TRADE ORG. (Nov. 21, 2018), [https://www.wto.org/english/news\\_e/news18\\_e/dsb\\_19nov18\\_e.htm](https://www.wto.org/english/news_e/news18_e/dsb_19nov18_e.htm) [<https://perma.cc/VBS9-DNBF>] (United States—Certain Measures on Steel and Aluminum Products, DS554, DS548, DS550, DS551, DS552, DS554, DS654).

Canada, the European Union, and Mexico.<sup>99</sup> The seven Members reiterated their claim that the United States had implemented the measures on steel and aluminum to “protect the U.S. steel and aluminum industries from the economic effects of imports,” even though the United States asserts the measures are to protect national security.<sup>100</sup>

The seven went further, disagreeing with the United States’ argument that the invocation of Article XXI by the United States precluded the WTO panel from examining the claim.<sup>101</sup> In the request for panel formation, the Members argued, “While national security was a sensitive matter, panels were fully within their right to examine whether such claims are justified under the exception.”<sup>102</sup> Several Members went on to assert that the “resort to Article XXI by the United States would frustrate the purpose of WTO dispute settlement and could render all WTO obligations effectively unenforceable.”<sup>103</sup> The DSB created eleven panels on January 25, 2019, to resolve all claims.<sup>104</sup>

If the Members were to prevail in their claims against the United States, the Appellate Body would have to determine if the steel and aluminum tariffs constituted a nullification or impairment of benefits under Article XXIII.<sup>105</sup> The WTO considers “nullification and impairment” to be any material change to a Member’s actual or expected benefits arising from the WTO Agreements due to another Member’s failure to carry out its WTO obligations.<sup>106</sup> Specifically, Article XXIII provides a cause of action for Members seeking redress for a GATT violation:

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99. *Id.* (Canada/China/European Union/Mexico—Additional Duties on Certain Products from the United States, DS557, DS558, DS559, DS560).

100. *Id.* (“The seven members reiterated their belief that the U.S. measures, allegedly taken for national security reasons, were, in their content and substance, safeguard measures taken to protect the U.S. steel and aluminum industries from the economic effects of imports.”).

101. *Id.*

102. *Id.*

103. *Id.*

104. *See United States—Certain Measures on Steel and Aluminum Products*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds544\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds544_e.htm) [<https://perma.cc/UDS9-595S>]; *see also* Coyne, *supra* note 92; *Panels Established to Review US Steel and Aluminum Tariffs, Countermeasures on US Imports*, *supra* note 98.

105. GATT, *supra* note 1, art. XXIII.

106. *Glossary Term: Nullification and Impairment*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/glossary\\_e/nullification\\_and\\_impairment\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/nullification_and_impairment_e.htm) [<https://perma.cc/3XR4-MHTJ>].

[A]ny [Member] 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 [Member] to carry out its obligations under this Agreement, or (b) the application by another [Member] of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation.<sup>107</sup>

If the economic security rationale underlying the tariffs is outside the scope of essential security interests, then imposing them would constitute a *prima facie* case of nullification and impairment under Article XXIII, and the United States would be required to remove the tariff.<sup>108</sup>

*C. Tools for Treaty Interpretation: The Vienna Convention on the Law of Treaties*

To determine if the steel and aluminum tariffs fall within the security exception, the Appellate Body must determine the correct interpretation of Article XXI. When the express language of an international treaty contains ambiguity, treaty interpreters must use particular methods to determine the proper interpretation.<sup>109</sup> The Vienna Convention on the Law of Treaties<sup>110</sup> (VCLT) is a codification of the primary methods of customary treaty interpretation in international law. Customary international law “consists of the rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act in that way” and is binding on all states, even when a state is not party to any treaty on the matter.<sup>111</sup>

Customary international law has two elements: first, there must be an extensive and virtually uniform state practice, and second, the states must exercise the practice in a manner that evidences a belief that the practice is obligatory, or *opinio juris*.<sup>112</sup> The International Law Commission lists

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107. GATT, *supra* note 1, art. XXIII.

108. Appellate Body Report, *EC—Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 185, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001).

109. VCLT, *supra* note 6, art. 31.

110. *Id.*

111. SHABTAI ROSENNE, *PRACTICE AND METHODS OF INTERNATIONAL LAW* 55 (1984); *see also* Daniel Bodansky, *The Concept of Customary International Law*, 16 MICH. J. INT’L L. 667, 671 (1995) (comparing schools of thought on customary law purpose and formation); *Customary Law*, INT’L COMMITTEE RED CROSS, <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law> [<https://perma.cc/G635-SQVX>].

112. *North Sea Continental Shelf (Ger. v. Den.)*, Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20) (affirming that there is a subjective element of cooperation whereby “[t]he States concerned must . . . feel that they are conforming to what amounts to a legal obligation”).

treaties, decisions of national and international courts, diplomatic correspondence, and the practice of international organizations as evidence of customary international law.<sup>113</sup>

In 1989, the International Court of Justice (ICJ) explicitly held that the preexisting principles of treaty interpretation “are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point” and the ICJ has reiterated that standard over time.<sup>114</sup> As of yet, the ICJ has never found that the VCLT does not reflect customary international law, especially with respect to Articles 31 and 32, which are the operative provisions.<sup>115</sup>

The International Tribunal on the Law of the Sea,<sup>116</sup> the European Court of Human Rights,<sup>117</sup> and the European Court of Justice<sup>118</sup> share the view that the operative provisions of the VCLT are universally binding as customary international law.<sup>119</sup> Establishing the customary nature of the VCLT is paramount as the United States is not a signatory to the treaty. However, the U.S. Department of State has explicitly recognized that “[while] the U.S. Senate has not given its advice and consent to the treaty[,] [t]he United States considers many of the provisions of the [VCLT] to constitute customary international law on the law of treaties.”<sup>120</sup> As the United States recognizes the VCLT as customary international law and has

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113. *Report of the International Law Commission to the General Assembly*, 367–72, U.N. Doc. A/1316 (July 1950) (referencing for example specific volumes of documents and agreements assembled by the League of Nations, United Nations, and International Court of Justice).

114. Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), Judgment, 1991 I.C.J. 53, ¶ 48 (Nov. 12); *see also* Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 213, ¶ 47 (July 13) (affirming the status of Articles 31 and 32 of the Vienna Convention as customary international law); LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, ¶ 99 (June 27).

115. *Vienna Convention on the Law of Treaties*, OXFORD PUB. INT’L L., <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498> [<https://perma.cc/GY3Z-3WNV>] (last updated June 2006).

116. Responsibilities and Obligations of States Sponsoring Persons & Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 15 ITLOS Rep. 10, ¶ 57.

117. *Demir & Baykara v. Turkey*, 2008 Eur. Ct. H.R. 1345, ¶ 65; *Al-Saadoon & Mufdhi v. U.K.*, 2010 Eur. Ct. H.R. 762, ¶ 126.

118. Case C-386/08, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, 2010 E.C.R. I-01289, ¶¶ 41, 43; Case C-63/09, *Axel Walz v. Clickair SA*, 2010 E.C.R. I-04239, ¶ 23.

119. *See id.*

120. *Vienna Convention on the Law of Treaties*, U.S. DEP’T STATE, <https://www.state.gov/s/1/treaty/faqs/70139.htm> [<https://perma.cc/4PM4-SDTJ>].

not been a persistent objector<sup>121</sup> to the operative provisions, both Articles 31 and 32 are binding on the United States and in litigation before international tribunals involving the United States.

Interpretation is necessary to give effect to the expressed intentions of the parties as expressed in the words they used in the light of their surrounding circumstances.<sup>122</sup> Therefore, according to legal scholarship, interpretation is always appropriate, as “[a]ny application of a treaty, including its execution, presupposes . . . a preceding conscious or subconscious interpretation of the treaty.”<sup>123</sup> Therefore, interpretation is a primary process that applies even if the plain terms of the treaty are clear.

Two competing temporal approaches to treaty interpretation, static and dynamic, provide essential context to the specific provisions of the VCLT. A static approach looks at what the words of the treaty meant at the conclusion of the treaty, similar to how an originalist in the United States would interpret the Constitution as the founders understood it at the time of signing.<sup>124</sup> The dynamic approach is similar to the U.S. understanding of living constitutionalism, which interprets the treaty in light of the world at the present time.<sup>125</sup> The WTO has adopted the dynamic approach to interpret generic terms,<sup>126</sup> following the logic from the ICJ that where parties use generic terms in a treaty, they must “necessarily hav[e] been aware that the meaning of the terms was likely to evolve over time, and where the treaty . . . is ‘of continuing duration,’ the parties must be presumed, as a general rule, to have intended those terms

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121. A persistent objector is a state that has clearly and consistently objected to a rule of customary international law for the entirety of the rule’s existence. Persistent objector states are not bound by customary international law, unless that custom captures a peremptory norm. *Persistent Objector*, OXFORD PUB. INT’L L., <http://opil.oup.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1455> [<https://perma.cc/JDU4-JVS8>] (last updated September 2006).

122. LORD MCNAIR, *THE LAW OF TREATIES* 365 (1961).

123. Georg Schwarzenberger, *Myths and Realities of Treaty Interpretation*, 9 VA. J. INT’L L. 1, 8 (1968).

124. MCNAIR, *supra* note 122, at 424; *see* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

125. MCNAIR, *supra* note 122, at 385–86; *see* Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 I.C.J. 16, ¶ 53 (June 21) (interpreting a past covenant based both on the time period of when it was written and the development of law and society since).

126. Appellate Body Report, *China—Measures Affecting Trading Rights*, ¶ 369, WTO Doc. WT/DS363/AB/R (adopted Dec. 21, 2009); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 130, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998).

to have an evolving meaning.”<sup>127</sup> Therefore, this Comment’s analysis applies the intent of the drafters, rather than the strict text of the treaties, to the ever-changing realities of the international trade system.

1. *Article 31: General rule of interpretation*

Article 31 of the VCLT catalogues the general rules of treaty interpretation. The proper method of interpretation follows the sequential order of the provisions in Article 31.

a. *Article 31.1*

The first subsection of Article 31 reads, “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.”<sup>128</sup> All interpretation starts here, as the commentary to the VCLT states that the “elucidation of the meaning of the text, not an investigation . . . into the intentions of the parties” should be the starting point.<sup>129</sup> Article 31.1 can be broken down into three disparate components for analysis: good faith, ordinary meaning, and object and purpose.<sup>130</sup> The standard of good faith in treaty interpretation flows directly from the internationally recognized norm of *pacta sunt servanda*, or “agreements must be kept.”<sup>131</sup> This is a fundamental requirement of reasonableness, which “preclud[es] arbitrary action and [the] abusive use of rights.”<sup>132</sup>

Next, interpreters must look at the ordinary meaning, as opposed to any special meaning, of the terms. Here, the Appellate Body has given additional guidance to supplement the existing VCLT tools. Its interpretation of “ordinary” means regular, normal, or customary; however, the Appellate Body cautions that this is how a reasonably informed person, not a layman, would interpret the term.<sup>133</sup> To determine this meaning, the Appellate Body suggests using a dictionary,

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127. Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 213, ¶ 66 (July 13).

128. VCLT, *supra* note 6, art. 31.1.

129. International Law Commission, *Draft Articles on the Law of Treaties with Commentaries* 220, ¶ 11 (1966) [hereinafter VCLT Commentary].

130. VCLT, *supra* note 6, art. 31.1.

131. *Id.* art. 26.

132. RICHARD GARDINER, TREATY INTERPRETATION 177 (2017).

133. Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, ¶ 153, WTO Doc. WT/DS70/AB/R (adopted Aug. 2, 1999); Appellate Body Report, *EC and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, ¶ 658, WTO Doc. WT/DS316/AB/R (adopted May 18, 2011).

though the Appellate Body has been critical of using a dictionary that catalogues all, and not just ordinary, meanings of words.<sup>134</sup>

Lastly, interpreters must analyze the ordinary meaning in light of the treaty's object and purpose.<sup>135</sup> The context for determining the object and purpose is the entirety of the treaty, including the title, preamble, and any annexes, as the structure of the treaty is as important for interpretation as the express meaning.<sup>136</sup> This applies in instances where the interpreter is comparing the use of the same term in different sections of the treaty or when different sections of the treaty deal with the same issue in a different language.<sup>137</sup> When determining the object and purpose, the general rule indicates the entire treaty should have a single overarching object and purpose.<sup>138</sup> Interpreters discern the purpose through intuition and common sense, as the rule of good faith acts as a deterrent to outside influences that the drafters of the treaty did not intend.<sup>139</sup> The Appellate Body stresses interpreters should simultaneously use all three components of Article 31.1, and that the process should be "an integrated operation, where interpretative rules and principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise."<sup>140</sup>

*b. Article 31.2*

Article 31.2 provides additional methods for determining the relevant context when interpreting a treaty.<sup>141</sup> It specifically notes two types of documents that are useful for context: agreements made between all the

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134. Appellate Body Report, *China—Measures Affecting Trading Rights*, ¶ 348, WTO Doc. WT/DS363/AB/R (adopted Dec. 21, 2009); Appellate Body Report, *United States—Measures Affecting Gambling*, ¶¶ 164–67, WTO Doc. WT/DS285/AB/R (adopted Apr. 7, 2005).

135. VCLT Commentary, *supra* note 129, at 221, ¶ 12.

136. Competence of the ILO in Regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture, Advisory Opinion, 1922 P.C.I.J. (ser. B) No. 02, at 23 (Aug. 12).

137. Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), Judgment, 1992 I.C.J. 351, ¶ 373 (Sept. 11) (illustrating how courts have used this principle in practice).

138. *Treaties, Object and Purpose*, OXFORD PUB. INT'L L., <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1681> [<https://perma.cc/8NUR-7EJF>] (last updated December 2006).

139. *Id.*

140. Appellate Body Report, *China—Measures Affecting Trading Rights*, ¶ 399, WTO Doc. WT/DS363/AB/R (adopted Dec. 21, 2009).

141. VCLT, *supra* note 6, art. 31.2.

parties at the conclusion of the treaty<sup>142</sup> and instruments made by one or more parties at the conclusion of the treaty that the other parties accepted as an instrument of the treaty.<sup>143</sup> Subsection (a) recognizes the principle that a unilaterally constructed document is not part of the context around the conclusion of a treaty, but instead has to receive some kind of acceptance by the other parties to become contextual.<sup>144</sup>

*c. Article 31.3*

Article 31.3 analyzes the next step in a treaty's life, looking to the subsequent agreements, subsequent practice, and the generally relevant rules of international law.<sup>145</sup> Turning first to the subsequent agreements, this provision and Article 31.2(a) overlap a great deal. The primary difference is that the agreements under 31.3 are "subsequent," implying a necessary time delay between the conclusion of the treaty and the creation of the agreement.<sup>146</sup>

Next, interpreters analyze the subsequent practice of the parties to the treaty.<sup>147</sup> The general principle, which underlies this interpretive tool, is that the parties are the masters of their treaty, and, therefore, meaning derived from their consistent and consensual subsequent actions constitutes an authoritative interpretation of the treaty.<sup>148</sup> A key clarification from the WTO explains that the state conduct must constitute a series of actions or pronouncements, not an isolated incident.<sup>149</sup> Finally, the agreement of the parties is necessary to establish any subsequent practice.<sup>150</sup>

The final element of Article 31.3 is the relevant rules of international law.<sup>151</sup> This provision presupposes that the international legal system as a whole is part of the context of every treaty concluded in the international system, and thus the relevant rules lay a foundation and

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142. *Id.* art. 31.2 (a).

143. *Id.* art. 31.2 (b).

144. VCLT Commentary, *supra* note 129, at 221, ¶ 13.

145. VCLT, *supra* note 6, art. 31.3.

146. *See id.*

147. *Id.*

148. *Summary Records of the Sixteenth Session*, U.N. Doc. A/CN.4/167/Add.3 (1964), reprinted in [1964] 1 Y.B. Int'l L. Comm'n 275, 279 ¶¶ 51-54 U.N. Doc. A/CN.4/SERA/1964 (discussing what specifically would be included as tools and references for treaty interpretation within the Law of Treaties document).

149. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages II*, 13, WTO Doc. WT/DS8/AB/R (adopted Oct. 4, 1996).

150. *Id.*

151. VCLT, *supra* note 6, art. 31.3.

provide context for all treaties.<sup>152</sup> Thus, as the ICJ stated in the *Namibia*<sup>153</sup> advisory opinion, “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”<sup>154</sup> The WTO has used this expansive provision to introduce several international rules not based in the WTO treaties.

*d. Article 31.4*

The final element of Article 31 is the special meaning, which reads, “A special meaning shall be given to a term if it is established that the parties so intended.”<sup>155</sup> Article 31.4 acts as an exception to 31.1 for treaties where the parties have agreed, explicitly or implicitly, to replace the ordinary meaning of a term with a special meaning.<sup>156</sup> This is the only component of Article 31 that looks to the parties’ intent prior to the finalization of the treaty to interpret its meaning.<sup>157</sup> This interpretive tool provides that the burden of proof lies with the party asserting a special meaning.<sup>158</sup>

*2. Article 32: Supplementary means of interpretation*

Article 32 of the VCLT details the supplementary means of treaty interpretation and the process to follow to invoke those provisions. Article 32 is a secondary means of interpretation, only employed when analysis under Article 31 leads to ambiguity or manifestly absurd results.<sup>159</sup> The most common supplemental action is an analysis of the preparatory work, or *travaux préparatoires*, and the circumstances surrounding the signing of the treaty.<sup>160</sup>

The Permanent Court of International Justice (PCIJ), the predecessor to the ICJ, created this standard expressly limiting Article 32 with a restrictive use of preparatory work in the landmark *Polish Postal Services*<sup>161</sup>

152. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 53 (June 21).

153. *Id.*

154. *Id.* (clarifying for U.N. Members that the continued presence of South Africa in Namibia was illegal and that Members had an obligation to recognize that illegality).

155. VCLT, *supra* note 6, art. 31.4.

156. *Id.*

157. See *id.*

158. See VCLT Commentary, *supra* note 129, at 222, ¶ 17.

159. VCLT, *supra* note 6, art. 32.

160. See GARDINER, *supra* note 132, at 347–49; McNair, *supra* note 122, at 412 (“It would hardly be an exaggeration to say that in almost every case involving the interpretation of a treaty one or both of the parties seeks to invoke the preparatory work.”).

161. *Polish Postal Service in Danzig*, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 11 (May 16).

case: “It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.”<sup>162</sup> The ICJ has adopted this interpretation, and the interpretation constitutes customary international law.<sup>163</sup>

The core of Article 32 is determining what documents can be used to evidence these two components.<sup>164</sup> There is no universally recognized definition of what constitutes preparatory work, or how far back into the negotiating process an interpreter can look when conducting an Article 32 analysis. Preparatory work is roughly analogous to the legislative history of U.S. laws.<sup>165</sup> International courts and tribunals generally take an expansive view of preparatory work and admit anything that looks to be helpful.<sup>166</sup> However, three general rules guide preparatory work. First, the work must be capable of objective assessment.<sup>167</sup> Thus, a reasonable definition of preparatory work might include all documents relevant to the treaty negotiations, observations by the negotiating states, diplomatic exchanges, minutes of the meetings, or conference records, as well as the processes that the documents underwent during negotiations.<sup>168</sup>

Second, the preparatory work must illuminate a common understanding of the negotiating states as to their intent of the true meaning of the treaty.<sup>169</sup> This necessitates that the materials have been, at some point, available to all the parties present in the negotiation.<sup>170</sup>

Third, the materials must relate directly to the treaty in question.<sup>171</sup> However, interpreters do not rigorously follow this rule in practice, as some will look at preparatory works of preceding or similar treaties and apply the preparatory work as if it came from the treaty at issue.<sup>172</sup> In

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162. *Id.* at ¶ 113.

163. Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. Rep. 4, 8 (Mar. 3).

164. *Id.*

165. See GARDINER, *supra* note 132, at 363–64.

166. *Id.*

167. See Yves le Bouthillier, *Article 32: Supplementary Means of Interpretation*, in THE VIENNA CONVENTION ON THE LAW OF TREATIES 852–56 (Olivier Corten & Pierre Klein eds., 2011).

168. See Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 69 (June 21); Bouthillier, *supra* note 167, at 852;

169. See Iron Rhine Railway Arbitration (Belg. v. Neth.), 27 R.I.A.A. 35, ¶ 45 (Perm. Ct. Arb. 2005).

170. See Bouthillier, *supra* note 167, at 855–56.

171. *Id.*

172. LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466, ¶¶ 105–07 (June 21).

*LaGrand*<sup>173</sup>, the ICJ interpreted Article 41 of its governing statute in light of the drafting history of the identical provision of the PCIJ Statute.<sup>174</sup>

Having established the criteria of what constitutes preparatory work, the next step is determining how to define the temporal scope of the “circumstances of [the] conclusion” of the treaty. The Appellate Body has ruled on the “circumstances” multiple times. Notably, in *European Communities—Computer Equipment*,<sup>175</sup> the Appellate Body considered the customs classification system in place at the time of the creation of the WTO to be part of the “circumstances of the conclusion” of the WTO Agreement and used the classification system in the interpretation.<sup>176</sup> Further, the Appellate Body in *European Communities—Frozen Boneless Chicken Cuts*<sup>177</sup> held that “an event . . . may be relevant . . . not only if it has actually influenced a specific aspect of the treaty text . . . [but also] when it helps to discern what the common intentions of the parties were at the time of the conclusion.”<sup>178</sup> The breadth of this scope exemplifies the WTO’s commitment to supplemental means of interpretation.

The WTO considers it proper to introduce preparatory work when confirming the meaning of a term and when determining the meaning of a term.<sup>179</sup> The first use is not relevant to the discussion of this Comment. However, there is clear jurisprudence that allows supplementary means to determine the meaning of terms. Looking at *United States—Measures Affecting Gambling*,<sup>180</sup> the Appellate Body concluded that after exhausting the primary rules of interpretation, the meaning of “other recreational services” still appeared ambiguous and did not answer the question presented with respect to U.S.

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173. *Id.*

174. *See id.*

175. *See* Appellate Body Report, *EC—Customs Classification of Certain Computer Equipment*, WTO Doc. WT/DS62/AB/R (adopted June 5, 1998).

176. *See id.* ¶ 92.

177. Appellate Body Report, *EC—Customs Classification of Frozen Boneless Chicken Cuts*, ¶¶ 282–309, WTO Doc. WT/DS269/AB/R (adopted Sept. 12, 2005).

178. *Id.* ¶ 289. The Appellate Body upheld a panel report that looked to EC customs classifications practice subsequent to the ratification of the WTO Agreement as an interpretive tool for the WTO Agreement, quoting, “In our view, it is possible that documents published, events occurring, or practice followed subsequent to the conclusion of the treaty may give an indication of what were, and what were not, the ‘common intentions of the parties’ at the time of the conclusion.” *Id.* ¶ 305.

179. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 195–212, WTO Doc. WT/DS285/AB/R (adopted Apr. 7, 2005).

180. *Id.*

commitments.<sup>181</sup> Therefore, the Appellate Body felt “required . . . to turn to the supplementary means of interpretation provided for in Article 32 of the Vienna Convention.”<sup>182</sup> The decision to proceed to Article 32 is quite simple, as in *Chile—Price Band System*<sup>183</sup> where the panel “consider[ed] . . . that the text and context of [the terms] alone do not enable us to determine the meaning of those terms without ambiguity.”<sup>184</sup> The panel then proceeded to analyze the terms under Article 32 without any further explanation.<sup>185</sup>

## II. ANALYSIS

It is under these customs, treaty laws, international norms, and Latin phrases that the WTO Appellate Body crafts its jurisprudence. In the context of this Comment, the Appellate Body must answer three questions in order to determine if the U.S. steel and aluminum tariffs comply with WTO obligations. First, does the WTO have the jurisdiction to hear this case, or is the issue entirely non-justiciable? Second, using the provided tools of treaty interpretation, what does the term “essential security interest” mean? Third, based on that interpretation, are the U.S. steel and aluminum tariffs in compliance with the obligations imposed under Article XXI?

### A. *Question 1: Justiciability*

As previously stated, this Comment assumes that the dispute settlement body would have jurisdiction over this case and that the issue itself is justiciable. To start, the United States has affirmatively asserted this right to self-judge the security exception in the case brought by China, stating:

Issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement. Every Member of the WTO retains the authority to determine for itself those matters that it considers necessary to the protection of its essential security interests, as is reflected in the text of Article XXI of the GATT 1994.<sup>186</sup>

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181. *Id.*

182. *Id.* ¶ 195.

183. Panel Report, *Chile—Price Band System*, WTO Doc. WT/DS207/R (adopted May 3, 2002).

184. *Id.* ¶ 7.35.

185. *See id.*

186. Communication from the United States, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/2 (Apr. 13, 2018).

All seven Members rebutted this argument, to varying degrees, in their requests for consultation, “arguing that while national security was a sensitive matter, panels were fully within their right to examine whether such claims are justified under the exception.”<sup>187</sup> The European Union argued that the application of section 232 did not necessarily imply a national security measure, within the meaning of Article XXI, when the implementation happened “ostensibly because of an alleged threat to the national security of the United States.”<sup>188</sup> The EU found that because of the application of section 232, the United States was acting inconsistently with obligations and rights provided for in the WTO Agreement, which is a matter well within the scope of a panel’s jurisdiction.<sup>189</sup>

Mexico and Canada shared a similar approach to the issue, arguing that, as applied, the tariffs did not act for a primarily national security purpose.<sup>190</sup> Therefore, they asserted that the blanket non-justiciability of national security is not applicable in this instance, as the interest put forth was economic security, which is not within the scope of Article XXI.<sup>191</sup>

Based on the arguments put forward, the underlying assumption of this Comment, and the recent panel report in *Russia—Measures Concerning Traffic in Transit*<sup>192</sup> the Appellate Body would likely find that judicial review is permissible. This case, which concerned Russia restricting Ukraine from using transit routes across Russia, in contravention of WTO obligations, was the first time a WTO panel interpreted the self-judging provision of Article XXI.<sup>193</sup> The panel

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187. *Panels Established to Review US Steel and Aluminum Tariffs, Countermeasures on US Imports*, WORLD TRADE ORG., [https://www.wto.org/english/news\\_e/news18\\_e/dsb\\_19nov18\\_e.htm](https://www.wto.org/english/news_e/news18_e/dsb_19nov18_e.htm) [<https://perma.cc/VBS9-DNBF>].

188. Request for Consultation by the European Union, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/1 (June 1, 2018).

189. *Id.* (finding the measures as enacted “appear to nullify or impair the benefits accruing to the European Union directly or indirectly under the covered agreements,” and, therefore, the EU has the right to address claims under the provisions of the agreement).

190. Request for Consultation by Canada, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS550/1 (June 6, 2018) (noting that section 232 is not consistent with the GATT because it includes factors other than those necessary for the protection of essential security interests); Request for Consultation by Mexico, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS551/1 (June 7, 2018) (clarifying that Mexico concurs the measures are not justifiable under the GATT).

191. *Id.*

192. Panel Report, *Russia—Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019).

193. *Id.* at 50. When Russia restricted Ukraine from using its transit routes in contravention of WTO obligations, a WTO panel found that the “self-judging”

rejected the argument that Article XXI confers a non-justiciable inherent right and found that the provision is not completely self-judging.<sup>194</sup> The Appellate Body should adopt this interpretation and allow the Member to determine itself if the security interest is essential but permit a panel to review that decision.<sup>195</sup>

*B. Question 2: Which Article Controls*

The Appellate Body would next have to determine the meaning of “essential security interest,” beginning with Article 31 and moving to Article 32 if the result is ambiguous or manifestly absurd.

*1. Article 31: General rules*

The starting point for any treaty interpretation takes a good faith look at the ordinary meaning of the terms in light of the object and purpose, found in VCLT Article 31.1.<sup>196</sup> This means first looking to the object and purpose of the entirety of the WTO Agreement. Simply put, the object and purpose of the WTO is to increase trade liberalization through the reduction of tariffs, as evidenced by the preamble to the Marrakesh Agreement.<sup>197</sup> The context used to determine the object and purpose is the entirety of the WTO Agreement, including the preamble, provisions, and the annexes, as well as the structure of the agreement.<sup>198</sup> All aspects of the WTO Agreements, including the provisions of the GATT, push the parties toward decreasing trade barriers by reducing and binding tariffs and by limiting the trade-related actions that Members can legally pursue.<sup>199</sup> Therefore, when analyzing the term “essential security interests” from Article XXI,<sup>200</sup> the interpreter must constrain the interpretation in a narrow fashion in order to conform to the object and purpose of the entirety of the WTO Agreement. However, the status of Article XXI as an exception is key, as the purpose of an exception is to break the rule, and, accordingly, it would be illogical to interpret Article XXI in a manner that would conform to the object and purpose of the rest of the Articles.

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provision of Article XXI was not a complete bar for judicial review. This was the first time the WTO had interpreted the extent of the provision. *Id.*

194. *See id.*

195. Schloemann & Ohlhoff, *supra* note 82, at 426.

196. VCLT, *supra* note 6, art. 31.1.

197. Marrakesh Agreement Establishing the World Trade Organization, *supra* note 33.

198. *See supra* Section I.C.1.

199. GATT, *supra* note 1, art. II.

200. *Id.* art. XXI.

The next step is looking to Article 31.2,<sup>201</sup> the agreements made at the conclusion of the treaty. The Member states continued to create many agreements at the conclusion of the WTO Agreement, including the Agreement on Agriculture, the Customs Valuation Agreement, and, most closely associated with this case, the Safeguard Agreement.<sup>202</sup> However, none of the agreements created near the conclusion of the WTO Agreement had any substantive relation with, or referred to, Article XXI.

Finding no answers in agreements made at the conclusion of the treaty, the next step is Article 31.3, which looks to subsequent agreements, subsequent practice, and the “relevant rules of international law.”<sup>203</sup> The first element is not determinative, as the WTO has only managed to negotiate one agreement subsequent to the conclusion of the WTO Agreement in 1994, the Trade Facilitation Agreement (TFA).<sup>204</sup> The TFA entered into force in February 2017; however, it only applies to WTO Members who accept its provisions, and it substantively applies primarily to intellectual property issues and is therefore not useful for interpreting “essential.”<sup>205</sup>

Subsequent practice highlights the failures of the GATT system prior to the creation of the WTO.<sup>206</sup> At five separate times in the GATT’s history, Members have imposed similar tariffs to the current U.S. steel and aluminum tariffs.<sup>207</sup> However, because a single Member was able to block the adoption of a panel report, the GATT panel never issued binding decisions in these cases, thus there are not subsequent practices to consider when determining intent.

The relevant rules of international law provide additional interpretive analogues. The IMF treaty shares a temporal and substantive connection with the GATT, as both include a security exception and have similar ratification years.<sup>208</sup> Another relevant analogue is the ITO charter, as

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201. VCLT, *supra* note 6, art. 31.2.

202. Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 410; Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154; Customs Valuation Agreement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 279.

203. VCLT, *supra* note 6, art. 31.3.

204. See Trade Facilitation Agreement, Nov. 27, 2014, WTO Doc. WT/L/940.

205. *Members Accepting the Protocol of Amendment to Insert the WTO Trade Facilitation Agreement into Annex 1A of the WTO Agreement*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/tradfa\\_e/tradfa\\_agreeacc\\_e.htm](https://www.wto.org/english/tratop_e/tradfa_e/tradfa_agreeacc_e.htm) [https://perma.cc/RGG8-WKGT].

206. VCLT, *supra* note 6, art. 31.3(b).

207. See *supra* Section I.A.4.

208. See *supra* Section I.A.1.

every treaty in the international legal system lays the foundation for the systemic approach to treaty interpretation.<sup>209</sup> Looking at the IMF, the governing treaty expressly provides for Members to impose exchange restrictions in an effort to preserve their national security.<sup>210</sup> However, the IMF can inform the Member that the institution is not satisfied that the restriction is actually for the purpose of national security, and can take action against the Member if it does not comply and remove the restriction.<sup>211</sup> Looking at the national security provisions of these other treaties, the institutions clearly play a role in limiting the scope of the exception, but the treaties do not contain any support for a definition of the scope of “essential.”<sup>212</sup>

The final provision of Article 31.4 looks to the special meaning of the term.<sup>213</sup> Under the technical interpretation of special meaning, Article 31.4 is not determinative of the correct interpretation of “essential.” No evidence indicates that “essential” was supposed to have a technical meaning based on the language of the text at the conclusion of the treaty, nor is there evidence that the WTO or the international trade community have given “essential” an agreed-upon technical meaning since the conclusion of the treaty.

The final interpretive tool under Article 31.4 is looking to a dictionary to determine if the term “essential” has meanings that are substantively different from the common meaning. Based on a common dictionary, one that does not list technical meanings, “essential” only has two definitions, first, “of, relating to, or constituting essence,” and second, “of the utmost importance.”<sup>214</sup> Neither definition is substantively different from the common meaning of “essential” and is therefore not useful for interpretation in this context.

The meaning of “essential security interests” remains ambiguous after exhausting the interpretive tools of Article 31. From both the plain language reading or a technical interpretation, none of the analytical methods indicates the scope of the term, or what measures would fit

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209. Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 53 (June 21).

210. See IMF, *Payments Restrictions for Security Reasons: Fund Jurisdiction*, Exec. Bd. Dec. No. 144-(52/51) (Aug. 14, 1952).

211. See *id.*

212. See *id.*

213. See VCLT, *supra* note 6, art. 31.4.

214. Essential, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/essential> [<https://perma.cc/NG5P-G569>].

within that scope. Therefore, it is proper to turn to Article 32 of the VCLT for supplementary interpretive tools.<sup>215</sup>

2. *Article 32: Supplemental means*

The first step is looking to preparatory works in an effort to determine the meaning of the term “essential security interests,” which the Appellate Body has stated is a proper use of Article 32.<sup>216</sup> The preparatory works for GATT Article XXI are the draft proposals and committee commentary. The security exception originated in the New York draft of the GATT proposed in February 1947.<sup>217</sup> The national security language initially resided in Article 37, General Exceptions, which provided:

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 Chapter V shall be construed to prevent the adoption or enforcement by any Member of measures: . . . (e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member.<sup>218</sup>

The Geneva drafters incorporated this language into the Geneva draft, which would become the final version of the GATT, at the thirty-third meeting of Commission A, which finalized Article 37 in July 1947.<sup>219</sup>

However, these parties first negotiated this language during the drafting of the ITO Charter, which was included in the New York draft. From the ninth meeting of the technical sub-committee, the delegates, particularly those from the United Kingdom (U.K.), worried that the language of the proposed exception “covered a far wider field” than traditional exceptions to import prohibitions and restrictions.<sup>220</sup> To alleviate this fear, the U.K.

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215. See VCLT, *supra* note 6, art. 32 (recourse to Article 32 is valid when the interpretation according to Article 31 leaves the meaning of the term ambiguous, obscure, or leads to a result which is manifestly absurd or unreasonable).

216. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 195, WTO Doc. WT/DS285/AB/R (adopted Apr. 7, 2005).

217. See U.N. ECOSOC, *Report of the Drafting Committee of the Preparatory Committee of the U.N. Conf. on Trade & Employment*, at 31–32, U.N. Doc. E/PC/T/34 (Feb. 25, 1947).

218. *Id.*

219. U.N. ECOSOC, 2nd Sess., 33rd mtg. at 19–21, U.N. Doc. EPCT/A/PV/33 (July 24, 1947) (explaining that the drafters were concerned about the security exception being “too wide” and therefore included “essential” and “times of war” to narrow the exception).

220. U.N. ECOSOC, 1st Sess., 9th mtg. at 7, U.N. Doc. EPCT/C.II/50 (Nov. 13, 1946).

representative proposed language that would reject restrictions that “constitute a . . . disguised restriction on international trade.”<sup>221</sup>

While drafting the ITO Charter, the U.S. delegation, who proposed the final security exception language, debated the scope of the exception.<sup>222</sup> One faction of the delegation asserted that the wording was such that it conferred a power allowing the United States, or any other Member, to determine if the measures were necessary, and how the measure related to an enumerated provision.<sup>223</sup> However, this language did not make its way into the final draft, as other delegates stated that under the proposed language, “member[s] could avoid any Charter obligation by a mere unilateral invocation of its essential security interest” and that its inclusion would “destroy[] the efficacy of the entire Charter.”<sup>224</sup> The U.S. delegation chose not to include the language in the final draft because the Charter would fail if any Member could rely on “the pretext of national security [to] take any measure whatsoever it might wish in complete disregard of all provisions of the Charter.”<sup>225</sup>

Additionally, the delegates wanted to constrain the scope of the exception, as previous trade agreements required measures taken for national security to be “in the face of a clear and present danger.”<sup>226</sup> The proposed language would have expanded that to any measure relating to general public security. However, that interpretation would again “tear the heart out of the Charter” as there is “no clear distinction between ‘security’ industries and other industries, and any basic industry might be defended as essential from the security standpoint.”<sup>227</sup> Thus, from the discussions of the U.S. delegation, the proposed language clearly intended a narrow understanding of national security.

One exchange at the finalization of Article XXI between the Dutch negotiator, Dr. Speekenbrink, and the U.S. negotiator, John Leddy, is particularly enlightening. Dr. Speekenbrink began the conversation with a clarifying question:

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221. *Id.*

222. KENNETH J. VANDELDE, *THE FIRST BILATERAL INVESTMENT TREATIES: U.S. POSTWAR FRIENDSHIP, COMMERCE, AND NAVIGATION TREATIES* 148 (2017) (replacing “any measure which [a Member] may deem necessary” with “independent power of interpretation” and later “which [a Member] may consider to be necessary and relate to”).

223. *See id.*

224. *Id.* at 148–49.

225. *Id.*

226. Draft Letter, John Leddy to Will Clayton, June 13, 1946, RG 43, A1 698, ‘Charter: Security,’ box 13, USNA.

227. *Id.*

Just before you start, I would ask for some further clarification on (e). I see, “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.<sup>228</sup>

Specifically, Dr. Speekenbrink asked, “The second point that is troubling me here is, what are the ‘essential security interests’ of a Member? I find that kind of exception very difficult to understand, and therefore possibly a very big loophole in the whole Charter.”<sup>229</sup> Here, the negotiators evidently had similar concerns to those of the present day, namely that Members could abuse this provision because of the unclear language.

The Chairman recognized John Leddy to answer these questions, as the United States had put forward the draft language, which was identical to their proposal.<sup>230</sup> Leddy responded that the United States “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.”<sup>231</sup> As the United States recognized the threat, it attempted to draft the provision “which would take care of really essential security interests and, at the same time, so far as we could, to limit the exception.”<sup>232</sup>

Leddy then addressed the issue of the scope of “essential security interests” directly, stating, “We cannot make it too tight, because we 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.*”<sup>233</sup> From this, commercial or economic measures clearly do not fall within the scope of the exception as understood by the drafters of the GATT. The chair of the committee closed the discussion with this: “We might remember that it is a paragraph of the Charter of the [GATT] and when the [GATT] is in operation I think the atmosphere inside the [GATT] will be the only efficient guarantee against abuses of the kind to which the Netherlands Delegate has drawn our attention.”<sup>234</sup> Thus, after completing an Article 32 analysis, the only logical conclusion

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228. U.N. ECOSOC, 2nd Sess., 33rd mtg. at 19, U.N. Doc. EPCT/A/PV/33 (July 24, 1947).

229. *Id.*

230. *Id.* at 20.

231. *Id.*

232. *Id.*

233. *Id.* at 21 (emphasis added).

234. *Id.*

is that the drafters intended a narrow interpretation of the term “essential security interest,” or at the least, construed it in a way that does not allow for purely commercial or economic interests.

*C. Question 3: If You Break the Rules, Do You Have to Pay*

The preceding analysis demonstrates the narrow scope of the security exception. The U.S. steel and aluminum tariffs would not fall within that scope as their purpose is purely economic. Thus, the United States is not in compliance with its obligations under Article XXI. As the Appellate Body has repeatedly held, when a Member does not comply with a GATT provision, that non-compliance constitutes a *prima facie* case of nullification or impairment under GATT Article XXIII.<sup>235</sup> From this point, there are two possible outcomes: the conclusion that the United States must stop imposing these tariffs, or a shift in the burden of proof to the United States, which would require the United States to demonstrate that the measure is in place for a reason other than to aid their economy.<sup>236</sup>

#### CONCLUSION

The U.S. steel and aluminum tariffs do not fall within the scope of the national security exception of Article XXI as the tariffs do not protect an “essential security interest.” The Appellate Body should find that it has the jurisdiction to hear a dispute over Article XXI, as the provision is justiciable, based on an examination of the drafting history and subsequent practice. Once reaching the interpretation of the term “essential security interest” itself, the Appellate Body should look to the supplemental means of interpretation in Article 32 and examine the preparatory works for the drafter’s intent.

In the preparatory works, the Members had a clear understanding as to the original scope of “essential security interests” in Article XXI. The drafters of the GATT recognized the potential for abuse that is inherent in the security exception and worked to limit the scope of the exception to not include commercial or economic purposes. The Trump Administration implemented the present tariffs for an explicit commercial purpose in the name of “economic security,” and therefore, the tariffs do not fall within the scope of the exception. This non-compliance sets the United States up for a loss under Article XXIII, as it has nullified or impaired a benefit that it is obligated to extend to Members.

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235. See GATT, *supra* note 1, art. XXIII (noting that no Member has successfully rebutted a *prima facie* case of nullification or impairment).

236. *Id.*

At this particular point in time, it is essential to remember the purpose of the international trade system. The drafters of the GATT conducted their negotiations with the specter of World War II looming large in everyone's memories. The horrors of the war provided the impetus for the initial twenty-three Members to find a consensus that states should have limitations on trade remedies. This system survived and even flourished, for sixty-five years through some of the most tumultuous periods in history, from the oil crisis and the cold war to decolonization and 9/11. The one constant throughout was consensual decision-making and the adherence to the rules, regardless of any particular nation's outcomes. It is therefore necessary for the membership to control the atmosphere inside the WTO and continue that tradition; else, someone flip the Monopoly board.