

Trump's trade tariffs and the Article XXI 'trump' card

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Abstract

The recent 'Trump tariffs' have heralded concerns about a blooming 'trade war' between the US and China. These unilateral measures are a threat to the substance of international trade law. In part, this is due to questions the measures raise about the interpretation of the Article XXI 'Security Exception' in the General Agreement on Tariffs and Trade. It is feared that an expansive reading of Article XXI would undermine the World Trade Organization (WTO) by allowing 'anything under the sun' to be considered 'necessary' for the protection of 'essential security interests'.¹ This paper argues that WTO Members should respond by narrowing the scope of the exception. This paper also acknowledges, however, that too narrow a reading of the exception also poses problems, as this would reduce the ability of member states to introduce legitimate regulations in regard to national security interests.

Introduction

US President Trump's tariffs impose rates of 25 per cent and 10 per cent on steel and aluminium imports from Norway, Mexico, Canada, the EU, India and China.² These unilateral tariffs are a threat to the substance of international trade law. Among other reasons, this is because the Trump administration has invoked the Article XXI security exceptions in defence of complaints by the affected countries.³ It is feared that an expansive reading of Article XXI would undermine the World Trade Organization

¹ Roger P Alford, 'The Self-Judging WTO Security Exception' (2011) 3 *Utah Law Review* 697, 698; *Summary of the Twenty-Second Meeting*, CP.3/SR22-II/28 (8 June 1949) (Summary of the Record of the Twenty-Second Meeting, Third Session); Johannes Fahner, 'Qatar under Siege: Chances for an Article XXI Case?' *EJIL: Talk!* (online) 9 January 2018 <www.ejiltalk.org/qatar-under-siege-chances-for-an-article-xxi-case/>; Raj Bhala, 'National Security and International Trade Law: What the GATT Says, And What the United States Does' (1998) 19(2) *National Security and International Trade Law*, 275; Peter Lindsay, 'The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?' (2003) 52 *Duke Law Journal*, 1294; Ji Yeong Yoo and Dukgeun Ahn, 'Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?' (2016) 19 *Journal of International Economic Law* 423.

² 'A summary of US President Donald Trump's many trade wars', *Strait Times* (online) 6 July 2018 <www.straitstimes.com/world/united-states/a-summary-of-us-president-donald-trumps-many-trade-wars>; Simon Lester, 'Litigating GATT Article XXI: The US View of the Scope of the Exception' on *International Economic Law and Policy Blog* (19 March 2018) <worldtradelaw.typepad.com/ielpblog/2018/03/litigating-gatt-article-xxi-the-us-view-of-the-scope-of-the-exception.html>.

³ 'A summary of US President Donald Trump's many trade wars', above n 2.

(WTO) by allowing ‘anything under the sun’ to be considered ‘necessary’ for the protection of ‘essential security interests’.⁴ This would mean that Trump’s restrictive trade measures – which would otherwise be in breach of Articles I, II, X, XI and XIX of the General Agreement on Trade and Tariffs (GATT) – would get a free pass, defeating the WTO’s objective of promoting trade liberalisation and its associated socio-economic benefits.⁵ This paper argues that WTO Members should respond by narrowing the scope of the exception. To demonstrate this point, this paper will first explain how Article XXI is currently understood and why it needs to be changed, before exploring the different methods of doing so.

How is Article XXI currently understood?

Currently, Article XXI is regarded as a self-judging provision.⁶ Consequently, measures enacted under this exception are seen as beyond the jurisdiction of the WTO’s Dispute Settlement Body.⁷ Even those who argue that Article XXI is technically reviewable despite its self-judging nature – distinguishing between the ‘authority to define’ and the ‘authority to interpret’ – acknowledge that such a right holds ‘no practical importance’.⁸

This conclusion is largely derived from interpretations of Article XXI’s chapeau and part (b). The chapeau reads, ‘[n]othing in this agreement shall be construed ...’⁹ When drafted, this provision included words of limitation preventing measures that were an ‘arbitrary or a disguised restriction on international trade.’¹⁰ Today, that language is located in the Article XX’s chapeau but is conspicuously absent from Article XXI.¹¹ This suggests that the limitations no longer apply, lending support to Article XXI’s ‘all-encompassing’ and self-judging nature.¹² This interpretation is further strengthened by the lack of an explicit definition of ‘essential security interests’ in part (b).¹³ The interpretative difficulties surrounding parts (a), (c) and the subparagraphs of part (b) will not be explored for the

⁴ Alford, above n 1, 698; *Summary of the Twenty-Second Meeting*, CP.3/SR22-II/28 (8 June 1949) (Summary of the Record of the Twenty-Second Meeting, Third Session); Fahner, above n 1; Bhala, above n 1, 275; Lindsay, above n 1, 1294; Yoo and Ahn, above n 1, 423.

⁵ *Summary of the Twenty-Second Meeting*, CP.3/SR22-II/28 (8 June 1949) (Summary of the Record of the Twenty-Second Meeting, Third Session); Alford, above n 1, 698; Fahner, above n 1; Bhala, above n 1, 275; Lindsay, above n 1, 1294; Yoo and Ahn, above n 1, 423.

⁶ Alford, above n 1, 704; Bhala, above n 1, 269.

⁷ Lindsay, above n 1, 1291; Yoo and Ahn, above n 1, 427.

⁸ Bhala, above n 1, 267; Yoo and Ahn, above n 1, 428.

⁹ *General Agreement on Tariffs and Trade 1994*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948) (‘GATT’), Article XXI.

¹⁰ Yoo and Ahn, above n 1, 421.

¹¹ GATT, Article XX; Yoo and Ahn, above n 1, 421.

¹² Fahner, above n 1; Yoo and Ahn, above n 1, 422; Bhala, above n 1, 268; Lindsay, above n 1, 1291.

¹³ Yoo and Ahn, above n 1, 423; Lindsay, above n 1, 1278.

purpose of this essay, as the heart of the controversy around Article XXI is how best to limit the scope of a ‘self-judging’ exception.

Article XXI’s and GATT’s interests are also diametrically opposed. There is no implied definition as per the ‘ordinary meaning’ of the words, against the background of the ‘context, object and purpose’ of Article XXI and the GATT.¹⁴ Rather, ‘essential security interests’ are to be defined by the Member themselves, as indicated by the words ‘it [the nation] considers’ (its subjective opinion).¹⁵ In contrast to Article XXI, such subjective language is absent from Article XX, which instead uses objective language – for example, ‘necessary to protect human, animal or plant life or health.’¹⁶ Additionally, in *China – Raw Materials* it was found that Article XI:2(a) was *not* self-judging because otherwise, ‘Article XI:2 could have been drafted in a way such as Article XXI(b) ...’¹⁷

Given the importance of state practice to the WTO, it is also useful to turn to it for confirmation.¹⁸ The majority of states strongly affirm Article XXI’s self-judging nature, citing the need to prioritise security over trade interests.¹⁹ In 1949, Czechoslovakia’s suggestion for a narrow reading of Article XXI was rejected in favour of an approach which championed the rights of each country to make their own determinations on what constituted a security interest under the exception,²⁰ while in 1961, Ghana used a similar rationale to defend a boycott on Portuguese goods, asserting its right to be the ‘sole judge’ of its own security.²¹ In *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons* (‘*Argentina*’), the EU, Australia and Canada asserted their ‘inherent rights, of which Article XXI of the General Agreement was a reflection’ and reiterated that Article XXI was beyond the GATT Panel’s purview.²² This was met by approbation from 20 of the 37 other countries (11 did not discuss the issue and 6 disagreed).²³ Finally, in *United States – Trade Measures Affecting Nicaragua* (‘*Nicaragua*’) the US’s defence of its ban on imports of Nicaraguan origin under Article XXI was approved by 19 of 43

¹⁴ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Article 31(1).

¹⁵ Fahner, above n 1; Matthew Kahn, ‘Pretextual Protectionism? The Perils of Invoking the WTO National Security Exception’ on *Lawfare* (21 July 2018) <www.lawfareblog.com/pretextual-protectionism-perils-invoking-wto-national-security-exception>; Yoo and Ahn, above n 1, 427; Alford, above n 1, 698; Lindsay, above n 1, 1282; Bhala, above n 1, 268; Lester, above n 2.

¹⁶ Lindsay, above n 1, 1282.

¹⁷ Panel Report, *China – Measures Related To The Exportation Of Various Raw Materials*, WT/DS394/R (5 July 2011), 7.276.

¹⁸ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Article 31(3)(b); Lindsay, above n 1, 1282; Alford, above n 1, 706; Joost Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’ (2001) 95(3) *The American Journal of International Law*, 536.

¹⁹ Bhala, above n 1, 317; Yoo and Ahn, above n 1, 419; Alford, above n 1, 708.

²⁰ Alford, above n 1, 709; Bhala, above n 1, 268; Lindsay, above n 1, 1286.

²¹ Kahn, above n 15; Lindsay, above n 1, 1286; Bhala, above n 1, 269; Alford, above n 1, 732.

²² Panel Report, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, WTO Doc L/5317 (30 April 1982).

²³ Alford, above n 1, 710.

nations (15 did not discuss the issue and 9 disagreed).²⁴ The collective weight of this state practice is compelling support for a self-judging interpretation of the security exception.

Finally, the persuasive judgements of other courts, such as the International Court of Justice (ICJ), also support Article XXI's 'self-judging' interpretation. Most notably in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* the ICJ found that it had jurisdiction to interpret a security exception in a treaty between the disputing parties. This decision was reached by distinguishing the treaty provision from Article XXI. Instead of 'it considers necessary', the treaty allowed measures that were 'necessary', indicating that the treaty provision was *not* self-judging.²⁵ Again, turning to such bodies is useful because the WTO's dispute resolution mechanisms exist within the broader context of international law.²⁶

Why does Article XXI need to be changed?

One school of thought about why Article XXI needs to be amended concerns pro-status quo preferences to rely on other means of rule. It is argued that the 'sovereignty safety valves' already built into the WTO system adequately provide for Members' needs to further their security objectives without turning to Article XXI.²⁷ These 'valves' include: procedures established by the *Decision Concerning Article XXI of the General Agreement*, such as the need to give a priori notice of an impending measure; the opt-out option in accession rules, which can be used against unfriendly nations; preferential trading agreements, which can be used for friendly nations; 'strings attached' preferential agreements between developed and developing countries and, finally, non-violation claims under Article XXIII.²⁸ The latter has been a particular focus of the literature surrounding the exception, although it is now largely settled that the right will apply even in the context of Article XXI.²⁹ Members may also be circumspect in their invocation of Article XXI because they enjoy the flexibility and control afforded by the provision's 'constructive ambiguity'.³⁰ In order to prevent this discretion from being stripped away, they are careful

²⁴ Panel Report, *United States – Trade Measures Affecting Nicaragua*, WTO Doc L/6053 (13 October 1986); Kahn, above n 15; Michael Woods, 'GATT Article XXI's National Security Exception – The Ultimate Trade Policy Conundrum' *Woods Lafortune LLP* (online), 9 March 2018 <www.wl-tradelaw.com/gatt-article-xxis-national-security-exception-the-ultimate-trade-policy-conundrum/>; Lindsay, above n 1, 1285; Simon Lester, 'Non-Violation Claims in the Steel/Aluminium WTO Complaints' on *International Economic Law and Policy Blog* (20 June 2018) <worldtradelaw.typepad.com/ielpblog/2018/06/the-steelaluminum-wto-complaints.html>; Lester, above n 2; Alford, above n 1, 713.

²⁵ Fahner, above n 1; Alford, above n 1, 707; Yoo and Ahn, above n 1, 427; Lindsay, above n 1, 1285.

²⁶ Pauwelyn, above n 18, 577; Lindsay, above n 1, 1280.

²⁷ Alford, above n 1, 750.

²⁸ *Decision Concerning Article XXI of the General Agreement* L/5246 (2 December 1982) (Text of Members' Decision), Article 1; Alford, above n 1, 725; Fahner, above n 1.

²⁹ Lindsay, above n 1, 1280; Bhala, above n 1, 278; Alford, above n 1, 746.

³⁰ Lindsay, above n 1, 1279; Bhala, above n 1, 272; Fahner, above n 1.

in their invocation and instead prefer resolving issues through ‘international pressure and diplomacy’.³¹ Indeed, the exception has not often been raised or used recklessly, despite the decided lack of other coercive, rational or normative motives in preventing Members from doing so.³² However, the very fact that the Trump tariffs now exist seems to discount this argument.

Perhaps we are now in a world where Article XXI is no longer tolerated because parties no longer share ‘mostly ... common security goals’.³³ Additionally, although the notice procedures and preferential trading agreements are now common practice, other mitigating factors do not apply as well. The opt-out measures can only be applied during accession and so are useless in situations where relations sour between countries that are already Members. This is the more likely situation, given the WTO now has 153 Members out of the world’s 195 countries.³⁴ Meanwhile, non-violation claims are rarely invoked (then again, Article XXI invocations are almost as rare). In the case of the Trump tariffs, only Mexico and India included a non-violation claim under Article XXIII:1(b).³⁵

While it is clear that change to Article XXI needs to occur, it is unclear in which direction this change needs to happen, given the situation of minority state powers. Too broad a reading would invite the normalisation and legitimisation of the exception’s abuse by allowing ‘anything under the sun’ – an allowance particularly likely to be exploited by economically powerful states.³⁶ This has long been a concern of the minority in state practice – in the *Argentina* case, Argentina named Article XXI as a ‘magnificent safeguard clause’, saying ‘[i]t would appear that trade restrictions could be adopted without having to be justified or approved’, while Brazil warned against setting a ‘dangerous precedent’ by not requiring a concrete demonstration of ‘essential security interests’.³⁷ In *Nicaragua*, a handful of Members (including Poland, Cuba and Nicaragua itself) argued that the US’s (self-)judgement that Nicaragua posed a threat to its national security was ridiculous – a global superpower could not be threatened by such a relatively small and underdeveloped nation.³⁸

Too narrow a reading, however, would also undermine the WTO regime. Article XXI was an opt-out provision designed to increase buy-in to the WTO by allowing Members autonomy over ‘political

³¹ Lindsay, above n 1, 1279; Bhala, above n 1, 272; Fahner, above n 1.

³² Alford, above n 1, 750; Bhala, above n 1, 271; Yoo and Ahn, above n 1, 439.

³³ Yoo and Ahn, above n 1, 433.

³⁴ Bhala, above n 1, 271.

³⁵ Lester, above n 2.

³⁶ *Summary of the Twenty-Second Meeting*, CP.3/SR22-II/28 (8 June 1949) (Summary of the Record of the Twenty-Second Meeting, Third Session); Alford, above n 1, 698; Fahner, above n 1; Bhala, above n 1, 275; Lindsay, above n 1, 1294; Yoo and Ahn, above n 1, 423.

³⁷ Panel Report, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, WTO Doc L/5317 (30 April 1982).

³⁸ Panel Report, *United States – Trade Measures Affecting Nicaragua*, WTO Doc L/6053 (13 October 1986).

matters' seen to be beyond the gamut of the WTO's institutional competence.³⁹ Indeed, in *Argentina* the US stated that the self-judging approach was more likely to preserve the longevity of the WTO system, since no country would submit to an organisation which might decide against its national interests.⁴⁰ However, the WTO today is not the same 'pseudo-UN agency' envisioned in the design of the International Trade Organization (ITO) – on the contrary, it presides over an increasing number of progressively complex trade issues.⁴¹ Hence, this paper iterates that it is well within the WTO's capability to have a hand in limiting the scope of the Article XXI exception. Further, although there are a number of ways in which this Article XXI 'loophole' can be closed, it must be done with a view towards 'balance', as per the original intentions of the drafters.⁴²

How should Article XXI be understood?

Textual solutions

Good faith

One method of limiting Article XXI's scope is to imply a 'good faith' requirement that is subject to WTO review.⁴³ Some go further, suggesting that Article XXI should be amended to explicitly include this limitation.⁴⁴ The principle of good faith is supported by the GATT's text, whose 'context, object and purpose' advocates for trade restrictions on limited grounds with proportionate applications.⁴⁵ It is also supported by state practice given that, until now, the exception has largely been applied in good faith, with a mere 'margin of discretion' – whether this be due to a fear of reprobation, self-interest or other normative values it is not known.⁴⁶ Statements such as the EU's oral submission in *Russia – Traffic in Transit*, which notes that any review should be limited to questions of good faith, further strengthen this argument.⁴⁷

The principle of good faith has also been applied in comparable bodies of international law. It has been recognised in *Gabcikovo-Nagymoros* and applied specifically in relation to a 'self-judging' security

³⁹ Fahner, above n 1; Woods, above n 24; Lindsay, above n 1, 1279.

⁴⁰ Panel Report, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, WTO Doc L/5317 (30 April 1982); Alford, above n 1, 712; Lindsay, above n 1, 1286; Bhala, above n 1, 269.

⁴¹ Yoo and Ahn, above n 1, 440; Alford, above n 1, 702.

⁴² Kahn, above n 15; Alford above n 1, 699; Yoo and Ahn, above n 1, 426; Bhala, above n 1, 269; Fahner, above n 1.

⁴³ Lester, above n 2; Fahner, above n 1; Lindsay, above n 1, 1307; Yoo and Ahn, above n 1, 429; Alford, above n 1, 705.

⁴⁴ Yoo and Ahn, above n 1, 429.

⁴⁵ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Article 31(1); Alford, above n 1, 706.

⁴⁶ Alford, above n 1, 708; Woods, above n 24; Bhala, above n 1, 272

⁴⁷ European Union Third Party Written Submission, *Russia – Measures Concerning Traffic in Transit*, WTO Doc WT/DS512/Ares(2017)5434182 (8 November 2017).

exception in *Djibouti v France*.⁴⁸ The principle has also been crystallised by its inclusion in Article 31 of the Vienna Convention on the Law of Treaties.⁴⁹ When applying this to Trump's tariffs, however, its use would likely be limited. Article XXI(a)'s protection of the non-disclosure of sensitive information would likely operate to both obstruct any dispute settlement process and make a lack of good faith difficult to prove, while any test for the principle remains difficult to define.⁵⁰

Objective–subjective

The objective–subjective approach suggests an alternative interpretation of Article XXI that fuses objective and subjective standards. Herein, Members 'consider' whether the measure is 'necessary' but the reasonableness of the measures are subject to review.⁵¹ This proportionality test asks whether a 'reasonable, similarly-situated government ... faced with the same circumstances' would invoke the exception.⁵² It could include considerations such as: whether or not the measure is effective (although national security sanctions are generally regarded to be 'ineffectual at best, and counter-productive at worst'⁵³); how effective the measure is in proportion to the burden it imposes on a third party; whether that third party is a developing country and how consistently the measure applies to other nations in like circumstances.⁵⁴ This approach satisfies the need for objective criteria while also accommodating the self-judging language of Article XXI (although there is some debate about whether this quasi-accommodation will suffice).⁵⁵

The objective–subjective approach also offers more concrete criterion than the good faith principle, despite not being such a widely accepted idea. However, some support for this approach can be found in state practice, under items such as the *Decision Concerning Art XXI of the General Agreement*, which urges Members to take into account the interests of the third parties and balance security interests with disruption to international trade.⁵⁶ Another example is the language of the GATT Panel in *Nicaragua*, that it is incumbent on 'each contracting party, whenever it made use of its rights under Article XXI, [to] carefully weigh its security needs against the need to maintain stable trade relations'.⁵⁷ Additionally, scholars have argued that if the final decision lay with the party invoking Article XXI, it would be

⁴⁸ Fahner, above n 1.

⁴⁹ Yoo and Ahn, above n 1, 442.

⁵⁰ *GATT*, Article XXI(a); Kahn, above n 15.

⁵¹ Alford, above n 1, 704; Yoo and Ahn, above n 1, 442; Lindsay, above n 1, 1286.

⁵² Bhala, above n 1, 275.

⁵³ *Ibid*, 266.

⁵⁴ Fahner, above n 1; Alford, above n 1, 706; Lindsay, above n 1, 1307; Yoo and Ahn, above n 1, 428; Bhala, above n 1, 276.

⁵⁵ Yoo and Ahn, above n 1, 429; Fahner, above n 1.

⁵⁶ *Decision Concerning Article XXI of the General Agreement*, L/5246 (2 December 1982) (Text of Members' Decision).

⁵⁷ Panel Report, *United States – Trade Measures Affecting Nicaragua*, WTO Doc L/6053 (13 October 1986); Alford, above n 1, 716; Woods, above n 24; Kahn, above n 15.

ineffective in creating any legal limitation on a country's power to escape sanction, as originally intended.⁵⁸ Otherwise, they say, if the provision was completely self-judging, the words of limitation contained in the subparagraphs of Article XXI(b) would be rendered useless.⁵⁹

Amend the chapeau

Alternatively, it has been suggested that the chapeau of Article XXI could be amended in order to impose a 'trade restrictiveness' condition, similar to that in Article XX.⁶⁰ However, as discussed above, the removal of this test during the original drafting process reflects a decision by countries that the exception would otherwise be too narrow to effectively protect countries' 'essential security interests'. Therefore, this amendment would unlikely be supported.⁶¹

Non-textual solutions

UN/WTO collaboration

A more novel albeit unsupported idea suggests procedural restraints, based on UN–WTO collaboration. One version of this establishes a WTO – Security Council Committee that could offer non-binding, non-precedential opinions or advice on counter-retaliatory measures.⁶² Another version is to encourage limiting Article XXI to scenarios where a UN Security Council resolution highlighting the relevant security interest has already been issued.⁶³ Both of these solutions aim to resolve the issue of the WTO's alleged lack of institutional competence over 'political matters'; however, both will likely be unpopular. Although non-binding, the history of Members' obedience to WTO recommendations indicates that these statements would still be persuasive and ignoring them would still be detrimental to WTO credibility. Besides, the US already complains of WTO overreach.⁶⁴

Conclusion

This paper has argued that, the current interpretation of Article XXI is too broad. A more balanced, narrower reading of Article XXI – through either the 'good faith' or 'objective–subjective' solutions – is needed in order to protect the substance and future of international trade law. Contrary to claims that the Article's 'constructive ambiguity' is actually beneficial, it is clear that the current understanding of

⁵⁸ Alford, above n 1, 706.

⁵⁹ Lindsay, above n 1, 1287.

⁶⁰ *GATT*, Article XX; Alford, above n 1, 705; Yoo and Ahn, above n 1, 442.

⁶¹ Woods, above n 24.

⁶² Bhala, above n 1, 276.

⁶³ *Ibid*, 267.

⁶⁴ Jack Ewing, 'Europe Feels the Squeeze of the Trump Trade Tariffs', *New York Times* (online) 2 April 2018 <www.nytimes.com/2018/08/02/business/economy/europe-trade-trump-tariffs.html>.

Article XXI – as a self-judging provision with no capacity for review under the WTO’s dispute resolution system – will not hold. The issues raised by Trump’s tariffs are not new. It is merely that the long-held consensus on careful invocations of Article XXI has been undone by Trump’s tariffs. While it is possible that future American administrations may reverse Trump’s tactics, reducing the urgency of such a question, the fact is that the precedent has been made. If not answered soon, the question of whether a country will next try to invoke the security exceptions is more a matter of ‘when’ and not ‘if’.

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