

***UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS***  
**(DS554)**

**FIRST WRITTEN SUBMISSION  
OF THE UNITED STATES OF AMERICA**

**June 12, 2019**

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## I. INTRODUCTION

1. At issue in this dispute is the sovereign right of a state to take action to protect its essential security in the manner it considers necessary. WTO Members did not relinquish this inherent right in joining the WTO. To the contrary, this right is reflected in Article XXI(b) of the GATT 1994,<sup>1</sup> and WTO Members have not agreed to subject the exercise of this right to legal review.

2. As the United States will explain, Article XXI(b) is self-judging, meaning that each WTO Member has the right to determine, for itself, what it considers necessary to protect its own essential security interests, and to take action accordingly. This has been the consistently expressed view of the United States for more than 70 years, and this view is conclusively established by the text and context of the provision, as well as the negotiating history confirming the intention of the parties.

3. The self-judging nature of this provision is established by the ordinary meaning of its terms,<sup>2</sup> which state in unequivocal terms: “Nothing in this Agreement shall be construed to prevent any Member from taking any action *which it considers necessary for the protection of its essential security interests.*” Action under this provision is made self-judging through the expression “which it [the acting Member] considers necessary”. Similarly, the provision’s reference to “its” essential security interests confirms that the essential security interests at issue are those as determined by the acting Member. Subparagraphs (i) to (iii) of Article XXI(b) guide a Member’s exercise of its rights under this provision – reflecting that Members wished to set out certain types of “essential security interests” and a temporal circumstance that Members considered could lead to action under Article XXI(b) – while reserving to the Member the judgment whether and in what circumstance action is necessary to protect its essential security interests.

4. Very soon after the establishment of the GATT, this ordinary meaning of Article XXI(b) was confirmed through a subsequent agreement of the GATT Contracting Parties regarding the interpretation of the agreement or the application of its provisions.<sup>3</sup> In this subsequent agreement, which came in the context of the *United States Export Restrictions* GATT dispute, the GATT CONTRACTING PARTIES, in light of the U.S. invocation of Article XXI, did not review the legality of that action but found that the United States had not failed to carry out its obligations under the GATT. This agreement was reached after discussions in which parties opined that, among other things, every country must have the last resort on questions relating to its own security. Accordingly, this subsequent agreement confirms that it is for Members to determine what action is necessary for the protection of their essential security interests.

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<sup>1</sup> *General Agreement on Tariffs and Trade 1994* (“GATT 1994”).

<sup>2</sup> See below at Section III.A.1.

<sup>3</sup> See below at Section III.A.2.

5. The negotiating history of this provision, which serves as supplementary means of interpretation, also confirms that Article XXI(b) is self-judging.<sup>4</sup> Specifically, the provision that became Article XXI(b) was revised during the negotiations to include the explicitly self-judging reference to actions that “it [the acting Member] considers necessary.” The text was also revised to separate essential security exceptions from public health and other exceptions, with the latter remaining subject to review in dispute settlement.<sup>5</sup> These deliberate choices by the negotiators in drafting the text that became Article XXI(b) confirm that this provision is self-judging.

6. Negotiators also explicitly discussed that essential security actions would not be reviewable for consistency with the agreement and that the appropriate means of redress for a Member affected by such actions would be to bring a non-violation, nullification or impairment claim.<sup>6</sup> Indeed, an early 1948 Working Party Report, in deciding to retain the non-violation provision, concluded that essential security actions “*would be entirely consistent with the Charter*, but might nevertheless result in the nullification or impairment of benefits accruing to other Members,” and that “[s]uch other Members should, under those circumstances, have the right to bring the matter before the Organization, *not on the ground that the measure taken was inconsistent with the Charter*, but on the ground that the measure so taken effectively nullified benefits accruing to the complaining Member.”<sup>7</sup> Thus, the negotiators contemplated the appropriate means of redress for Members affected by essential security actions, and decided that this means of redress would be non-violation, nullification or impairment claims. Importantly, such claims would *not* permit review of whether a Member’s actions were in conflict with its underlying trade obligations.<sup>8</sup>

7. Accordingly, WTO Members have understood, from the very beginning of the international trading system, that each WTO Member may judge for itself what actions it considers necessary to protect its essential security interests. It would undermine the legitimacy of the WTO and its dispute settlement system if a WTO panel were to undertake review of a Member’s invocation of Article XXI(b) and a Member’s assessment of its own essential security interests.

8. The United States deeply regrets that Russia has sought to advance claims against a U.S. national security action. Russia in the past has not only recognized that Article XXI(b) is self-

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<sup>4</sup> See below at Section III.A.3.

<sup>5</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development, E/PC/T/W/236 (July 4, 1947), at 1, 12–14 (US-35).

<sup>6</sup> See below at Section III.A.3.

<sup>7</sup> United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (emphasis added) (US-42).

<sup>8</sup> The provision discussed by this Working Party would permit redress for an action “whether or not [that action] conflicts with the provisions of the Charter.” United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 1 (US-42).

judging, and its invocation is non-justiciable, but has taken the same position as the United States when Russian essential security actions were at issue. Its current view that a WTO panel should assess the invocation of Article XXI against some, necessarily invented, standard is contrary to the text of Article XXI, its negotiating history, and longstanding practice in the GATT and WTO. It also is completely unnecessary as the negotiators of the GATT (and Members themselves) recognized that an invocation of essential security, though not reviewable for its consistency with a Member's commitments, can nonetheless lead to another claim that benefits under the Agreement have been nullified or impaired.<sup>9</sup>

9. Under a proper interpretation of Article XXI(b), given the U.S. invocation of this defense with respect to all claims in this dispute, the Panel should limit its report to the DSB to a recognition that the United States has invoked GATT 1994 Article XXI(b).

10. In this submission, the United States will first provide, in Section II, brief background on the U.S. actions.

11. The United States will then demonstrate, in Section III.A, that GATT 1994 Article XXI(b) is self-judging, as established by the ordinary meaning of its terms, in their context, and in the light of the object and purpose of the GATT 1994. The United States then explains that this understanding is confirmed by the subsequent agreement of the GATT Contracting Parties regarding the interpretation or application of that provision. This understanding of Article XXI(b) is further confirmed by the negotiating history of the provision – including drafting revisions and explicit discussion of the appropriate claim when a Member is affected by a security action – as well as other supplementary means of interpretation.

12. In Section III.B of this submission, the United States addresses the analysis of Article XXI(b) in the recent *Russia – Traffic in Transit* panel report and explains why that panel's findings are incorrect and unpersuasive. In brief, the panel in that dispute failed to apply customary rules of interpretation and failed to interpret Article XXI as a whole, based on the ordinary meaning of its terms, in context, and in the light of the object and purpose of the GATT 1994. In fact, the panel reached its conclusion regarding Article XXI(b)(iii) before its analysis of the provision even started, suggesting the interpretation was guided, not by the text of Article XXI as agreed to by WTO Members, but by the result sought by the panelists.

13. In addition, that panel misconstrued certain statements made during the Article XXI negotiations, and ignored other pertinent negotiating history, instead relying on materials that are not properly considered part of the negotiating history of that provision and therefore not even relevant to a proper interpretative exercise. The recent public comments by the Chair of that panel, opining on the possible application of Article XXI to other situations, raises grave concerns that the *Russia – Traffic in Transit* panel's interpretation was results-oriented.<sup>10</sup> In light

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<sup>9</sup> See below at paragraphs 67 to 76.

<sup>10</sup> See below at text accompanying footnote 223.

of these numerous errors, that panel’s analysis is unpersuasive and should not be relied upon by this Panel in making its own objective assessment of the matter before it.

14. Finally, the United States explains in Section III.C that the Panel’s terms of reference under Article 7.1 of the DSU<sup>11</sup> are to make such findings as will assist the DSB in making recommendations to bring a WTO-inconsistent measure into conformity with the GATT 1994. As the U.S. invocation of Article XXI is self-judging and no finding of inconsistency is possible, the Panel should limit its report to the DSB to a recognition that the United States has invoked GATT 1994 Article XXI(b).

## II. BACKGROUND

15. Section 232 of the Trade Expansion Act of 1962 (Section 232) allows the United States to adjust imports of an article based on a finding that such imports threaten to impair U.S. national security.<sup>12</sup>

16. On April 19 and 26, 2017, the United States initiated investigations under Section 232 into imports of steel and aluminum, respectively.<sup>13</sup> In connection with these investigations, United States solicited written comments from interested parties and held public hearings.<sup>14</sup> The United States summarized its findings from these investigations in written reports, and released these reports to the public.<sup>15</sup>

17. On March 8, 2018, the United States acted pursuant to Section 232 and imposed tariffs on certain steel and aluminum imports, effective beginning on March 23, 2018.<sup>16</sup> The United States

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<sup>11</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

<sup>12</sup> See 19 U.S.C. 1862 (US-1); Section 232 Regulations, 15 C.F.R., Part 705 (US-2).

<sup>13</sup> U.S. President, Memorandum on Steel Imports and Threats to National Security, April 20, 2017 (US-3); U.S. President, Memorandum on Aluminum Imports and Threats to National Security, April 27, 2017 (US-4).

<sup>14</sup> DOC, Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel (US-5); DOC, Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Aluminum (US-6).

<sup>15</sup> U.S. Department of Commerce, “The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended”, January 11, 2018 (US-7); U.S. Department of Commerce, “The Effect of Imports of Aluminum on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended”, January 17, 2018 (US-8).

<sup>16</sup> Presidential Proclamation 9705 of March 8, 2018 (US-9); Presidential Proclamation 9704 of March 8, 2018 (US-10); Presidential Proclamation 9711 of March 22, 2018 (US-11); Presidential Proclamation 9710 of March 22, 2018 (US-12); Presidential Proclamation 9740 of April 30, 2018 (US-13); Presidential Proclamation 9739 of April 30, 2018 (US-14); Presidential Proclamation 9759 of May 31, 2018 (US-15); Presidential Proclamation 9758 of May 31, 2018 (US-16); Presidential Proclamation 9777 of August 29, 2018 (US-18); Presidential Proclamation 9776 of August 29, 2018 (US-19).

also established a process to permit product-specific exclusions from the Section 232 tariffs, based on, among other factors, the national security implications of those imports.<sup>17</sup>

### III. ARGUMENT

18. Article XXI(b) of the GATT 1994 is self-judging, as is clear from that provision’s text, in context and in the light of the object and purpose of the agreement. A subsequent agreement in the application of the treaty, and supplementary means of interpretation also confirm the self-judging nature of GATT 1994 Article XXI(b). In light of the self-judging nature of this provision and its application to all the claims at issue here, the Panel should limit its findings in this dispute to a recognition that the United States has invoked its essential security interests.

#### A. Article XXI Of GATT 1994 Is Self-Judging

19. The self-judging nature of Article XXI(b) of GATT 1994 is established by the text of that provision, in its context, and a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions. In particular, Article XXI(b) refers to “any action which it [a Member] considers necessary for the protection of its essential security interests”, reflecting the desire of WTO Members to reserve an assessment of the necessity of an invocation of security interests to the Member taking the action. Each WTO Member likewise must determine whether a situation implicates “its security interests,” and whether the interests at stake are “essential” to that Member. These questions are political in nature and can only be answered by the Member in question. A WTO panel cannot substitute its views for those of a Member on such matters.

20. The context provided by, among other things, GATT 1994 Article XX further supports this self-judging interpretation of Article XXI(b). Specifically, although Article XX permits exceptions for certain actions that are “necessary,” Article XX lacks the crucial phrase “it considers” which is present in Article XXI(b) and indicates that essential security determinations are left to Members and not subject to panel review. A number of provisions of the GATT 1994 and other WTO agreements refer to action that a Member “considers” appropriate or necessary, and—as in Article XXI(b)—this language signals that a particular judgment resides with that Member. By way of contrast, and further context, in DSU Articles 26.1 (non-violation claims) and 26.2 (situation complaints) what a Member “considers” is expressly subject to review through dispute settlement.

21. Supplementary means of interpretation, including the drafting history of Article XXI(b), also confirm that this provision is self-judging, and that trade organizations were not intended to be a forum for political disputes. The drafting history of Article XXI also shows that the appropriate means of redress for Members affected by essential security action is a non-violation, nullification or impairment claim, and not a claim that a Member has breached its trade

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<sup>17</sup> Department of Commerce, Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum” (US-20); Department of Commerce, Interim Final Rule, “Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum” (US-21).

obligations. Finally, the views expressed by GATT contracting parties (now WTO Members) when Article XXI has been invoked in the past provide further support that this provision is self-judging, and that the GATT is not the appropriate forum to address political disputes.

**1. The Text Of GATT 1994 Article XXI(b) In Its Context, And In The Light Of The Agreement’s Object And Purpose, Establishes That The Exception Is Self-Judging**

a. *The Plain Meaning of the Text Of GATT 1994 Article XXI(b) Establishes That The Exception Is Self-Judging*

22. The text of GATT 1994 Article XXI(b), in its context and in the light of the agreement’s object and purpose, establishes that the exception is self-judging.<sup>18</sup> As this provision states in full:

Nothing in this Agreement shall be construed ...

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

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

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

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

23. As this text provides “[n]othing” in the GATT 1994 shall be construed to prevent a WTO Member from taking “any action” which “it considers necessary” for the protection of its essential security interests. This text establishes that (1) “nothing” in the GATT 1994 prevents a Member from taking any action needed to protect an essential security interest, and (2) the action necessary for the protection of its essential security interests is that which the Member “considers necessary” for such protection.

24. The self-judging nature of GATT 1994 Article XXI(b) is demonstrated by that provision’s reference to actions that the Member “considers necessary” for the protection of its essential security interests. The ordinary meaning of “considers” is “[r]egard in a certain light or aspect; look upon as” or “think or take to be.”<sup>19</sup> Under Article XXI(b), the relevant “light” or “aspect” in which to regard the action is whether that action is necessary for the protection of the acting Member’s essential security interests. Thus, reading the clause together, the ordinary meaning of the text indicates it is the Member (“which it”) that must regard (“consider[.]”) the

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<sup>18</sup> See Article 31(1) & (2) of the Vienna Convention on the Law of Treaties (“Vienna Convention”).

<sup>19</sup> *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 485 (US-22).

action as having the aspect of being necessary for the protection of that Member’s essential security interests.

25. The French and Spanish texts of Article XXI(b) confirm the self-judging nature of this provision. Specifically, use of the subjunctive in Spanish (“estime”) and the future with an implied subjunctive mood in French (“estimera”) support the view that the action taken reflects the beliefs of the WTO Member, rather than an assertion of objective fact that could be subject to debate.

26. The ordinary meaning of the terms in the phrase “its essential security interests,” also supports the self-judging nature of Article XXI. The word “interest” is defined as “[t]he relation of being involved or concerned as regards potential detriment or (esp.) advantage.”<sup>20</sup> The term “security” refers to “[t]he condition of being protected from or not exposed to danger.”<sup>21</sup> The definitions of “essential” include “[t]hat is such in the absolute or highest sense” and “[a]ffecting the essence of anything; significant, important.”<sup>22</sup>

27. And it is “its” essential security interests – the Member’s in question – that the action is taken for the protection of. Therefore, it is the judgment of the Member that is relevant. Each WTO Member must determine whether certain action involves “its interests,” that is, potential detriments or advantages from the perspective of that Member. Each WTO Member likewise must determine whether a situation implicates its “security” interests (not being exposed to danger), and whether the interests at stake are “essential,” that is, significant or important, in the absolute or highest sense. By their very nature, these questions are political and can only be answered by the Member in question, based on its specific and unique circumstances, and its own perception of those circumstances. No WTO Member or WTO panel can substitute its views for those of a Member on such matters.

28. The text of subparagraphs (i) to (iii) of Article XXI(b) also supports the self-judging nature of this provision. Again, the text of Article XXI(b) reads:

Nothing in this Agreement shall be construed

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

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

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<sup>20</sup> *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1393 (US-22).

<sup>21</sup> *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2754 (US-22).

<sup>22</sup> *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 852 (US-22).

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

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

29. The first element of this text that is notable is the lack of any conjunction to separate the three subparagraphs. The subparagraphs are not separated by the coordinating conjunction “or”, to demonstrate alternatives, or the conjunction “and”, to suggest cumulative situations. Accordingly, each subparagraph must be considered for its relation to the chapeau of Article XXI(b).

30. Subparagraphs (i) and (ii) of Article XXI(b) both begin with the phrase “relating to” and directly follow the phrase “essential security interests” in the chapeau of paragraph (b). The most natural reading of this construction is that subparagraphs (i) and (ii) modify the phrase “essential security interests” and thus illustrate the types of “essential security interests” that Members considered could lead to action under Article XXI(b).<sup>23</sup>

31. Subparagraphs (i) and (ii) do not limit a Member’s essential security interests exclusively to those interests. First, the chapeau of Article XXI(b) (as noted) reserves to the Member the judgment of what “its interests” are, including whether they are relating to one of the enumerated interests. Second, subparagraph (iii) reflects no explication (and therefore cannot be understood to reflect a limitation) on a Member’s essential security interests. Rather, as with subparagraphs (i) and (ii), the essential security interests are those determined by the Member taking the action.

32. Subparagraph (iii) begins with temporal language: “*taken in time of war or other emergency in international relations.*” The phrase “taken in time of” echoes the reference to “taking any action” in the chapeau of Article XXI (b), and it is actions that are “taken”, not interests. Thus, the temporal circumstance in subparagraph (iii) modifies the word “action,” rather than the phrase “essential security interests.” Accordingly, Article XXI(b)(iii) reflects a Member’s right to take action it considers necessary for the protection of its essential security interests *when* that action is taken in time of war or other emergency in international relations.<sup>24</sup> Nor does the text of Article XXI(b)(iii) require that the emergency in international relations or

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<sup>23</sup> Had the drafters not sought to economize expression, Article XXI(b)(i) might have been written: “Nothing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests relating to fissionable materials or the materials from which they are derived.” Article XXI(b)(ii) might then have been written: “Nothing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment.”

<sup>24</sup> Article XXI(b)(iii) thus might have been written: “Nothing in this Agreement shall be construed to prevent any contracting party from taking, in time of war or other emergency in international relations, any action which it considers necessary for the protection of its essential security interests.”

war directly involve the acting Member, reflecting again that the action taken for the protection of its essential security interests is that which the Member judges necessary.

33. Subparagraphs (i) to (iii) of Article XXI(b) thus reflect that Members wished to set out certain types of “essential security interests” and a temporal circumstance that Members considered could lead to action under Article XXI(b). A Member taking action pursuant to Article XXI(b) would consider its action to be necessary for the protection of the interests identified in subparagraphs (i) and (ii) or to be taken in time of war or other emergency in international relations. In this way, the subparagraphs guide a Member’s exercise of its rights under this provision while reserving to the Member the judgment whether particular action is necessary to protect its essential security interests.

b. *The Context of Article XXI(b) Supports an Understanding of that Provision as Self-Judging*

34. The context of Article XXI(b) also supports this understanding. First, the phrase “which it considers necessary” is present in Article XXI(a) and XXI(b), but not in Article XXI(c). The selective use of this phrase highlights that, under Article XXI(a) and XXI(b), it is the judgment of the Member that controls. The Panel should recognize and give meaning to such deliberate use of the phrase “which it considers” in Article XXI(b), and not reduce these words to inutility.<sup>25</sup>

35. Second, the context provided by Article XX supports the understanding that Article XXI(b) is self-judging. Specifically, Article XX sets out “general exceptions,” and a number of subparagraphs of Article XX relate to whether an action is “necessary” for some listed objective. For example, Article XX(a), (b), and (d), respectively, provide exceptions for certain measures “*necessary to protect public morals,*” “*necessary to protect human, animal or plant life or health,*” and “*necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement*” (emphases added).<sup>26</sup>

36. Unlike Article XXI(b), however, none of the Article XX subparagraphs use the phrase “which it considers” to introduce the word “necessary.” Furthermore, Article XX includes a chapeau which subjects a measure qualifying as “necessary” to a further requirement of, essentially, non-discrimination. Notably, such a qualification, which requires review of a Member’s action, is absent from Article XXI.

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<sup>25</sup> *US – Gasoline (AB)*, at 23 (“One of the corollaries of the “general rule of interpretation” in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”) *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.57 (“[T]he principle of effective treaty interpretation requires us to give meaning to every term of the provision”).

<sup>26</sup> Article XX(i) similarly provides an exception for certain measures “involving restrictions on exports of domestic materials *necessary* to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan.” (emphasis added).

37. Third, a number of provisions of the GATT 1994 and other WTO agreements refer to action that a Member “considers” appropriate or necessary, and—as in Article XXI(b)—this language signals that a particular judgment resides with that Member. For example, under Article 18.7 of the Agreement on Agriculture, “[a]ny Member” may bring to the attention of the Committee on Agriculture “any measure which it considers ought to have been notified by another Member.” Similarly, Article III(5) of the General Agreement on Trade in Services (GATS) permits “[a]ny Member” to notify the Council for Trade in Services of any measure taken by another Member which “it considers affects” the operation of GATS.

38. In other provisions of the GATT 1994 or other WTO agreements, however, certain judgments are left for determination by a panel, the Appellate Body, or a WTO committee. Under DSU Art. 12.9, for example, “[w]hen the panel considers” that it cannot issue its report within a certain period of time, the panel must provide certain information to the DSB. Under Article 4(1) of the Agreement on Rules of Origin, the Committee on Rules of Origin may request work from the Technical Committee on Rules of Origin “as it considers appropriate” for the furtherance of the objectives of that agreement.

39. Numerous other provisions of WTO agreements include language to vest particular considerations with a WTO Member, a panel, the Appellate Body, or another entity.<sup>27</sup> The text

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<sup>27</sup> Such provisions include GATT 1994 Art. XXIII: 1 (“If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired... [in three situations] the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned.”); TBT Agreement, chapeau (sixth recital) (“*Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they 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, and are otherwise in accordance with the provisions of this Agreement”); TBT Agreement Art. 10.8.3 (“Nothing in this Agreement shall be construed as requiring: . . . Members to furnish any information, the disclosure of which they consider contrary to their essential security interests.”); TBT Agreement Art. 14.4 (“The dispute settlement provisions set out above can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 and its trade interests are significantly affected.”); DSU Art. 3.3 (“The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.”); DSU Art. 4.11 (“Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements[], such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations.”); DSU Art. 13.1 (“A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.”); DSU Art. 17.5 (“When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.”); Agreement on Rules of Origin, Article 4(2) (“The Technical Committee may also request such other work from the Committee as it considers appropriate for the furtherance of the above-mentioned objectives of the Agreement.”); Agreement on Trade Facilitation, Article 3(8) (“Each Member shall endeavor to make publicly available any information on advance rulings which it considers to be of significant interest to other interested parties, taking into account the need to protect commercially confidential information.”); General Agreement on

of such provisions makes clear that the judgment of whether a particular situation has arisen is left to the discretion of the named actor, whether that is a WTO panel, the Appellate Body, a WTO committee, or a WTO Member. This context makes clear that the phrase “it considers necessary” in GATT 1994 Article XXI(b) refers to the judgment of the WTO Member taking action to protect its essential security interests, not the judgment of a WTO panel or the Appellate Body.

40. This understanding of “it considers” in GATT 1994 Article XXI(b) is consistent with the Arbitrator’s approach in *EC – Bananas* with respect to the phrase “if that party considers” in Article 22.3(c) of the DSU,<sup>28</sup> and reflects that such language is self-judging absent additional text.<sup>29</sup> Unlike the “it considers” language in GATT 1994 Article XXI(b), the phrase “that party considers” in DSU Article 22.3(c) is preceded by mandatory language in the chapeau (“the complaining party shall apply the following principles and procedures”) and followed by permissive language in the subsection (“it may seek to suspend concessions or other obligations”). Accordingly, while the text of DSU Article 22.3(c) provides that the judgment whether to suspend concessions or other obligations resides with the party in question, the provision expressly limits that discretion by imposing an obligation to apply certain principles and procedures. Conformity with the obligation (“shall apply the following principles and procedures”) was viewed as permitting review of the decision to take action.<sup>30</sup>

41. Fourth, by way of contrast, and further context, in at least two WTO provisions the judgment of a Member is expressly subject to review through dispute settlement. Specifically, DSU Article 26.1 permits the institution of non-violation complaints, subject to special requirements, including that the panel or Appellate Body agree with the judgment of the complaining party. As DSU Article 26.1 states, a non-violation complaint may be instituted, “[w]here and to the extent that such party considers *and* a panel or the Appellate Body determines” that a particular measure does not conflict with a WTO agreement, among other requirements. Thus, in this provision, Members explicitly agreed that it is not sufficient that “[a]

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Trade in Services Article XIV *bis*(a) (“Nothing in this Agreement shall be construed: to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests;”); General Agreement on Trade in Services Article XXIV(1) (“The Council may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions.”); Revised Agreement on Government Procurement Art. III(1) (“Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.”).

<sup>28</sup> See Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 22.3(c) (“In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures . . . if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement.”).

<sup>29</sup> See *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 51–61.

<sup>30</sup> Indeed, the panel in *Russia – Traffic in Transit*, while otherwise disparaging of U.S. arguments as a third party in that dispute, expressly adopted the understanding of *EC – Bananas* (Art. 22.6) reflected above without noting that only the United States had raised this argument in relation to Article 22.3(c) and *EC – Bananas*. See *Russia – Traffic in Transit*, para. 7.147.

party considers” a non-violation situation to exist, and accordingly, a non-violation complaint is subject to the additional check that “a panel or the Appellate Body determines that” a non-violation situation is present. A similar limitation—that a “party considers and a panel determines that”—was agreed in DSU Article 26.2 for complaints of the kind described in GATT 1994 Article XXIII:1(c).

42. The context provided by DSU Articles 26.1 and 26.2 is highly instructive. No such review of a Member’s judgment is set out in Article XXI(b), which permits a Member to take action “which it [a Member] considers necessary for the protection of its essential security interests.” In agreeing to GATT 1994, Members could have subjected a Member’s essential security judgment to an additional check through phrasing similar to the text of DSU Articles 26.1 and 26.2. For example, Article XXI(b) could have permitted a Member to take action to protect its essential security interests only if the Member considered “and a panel (or the Appellate Body) determined” that such action was necessary. But Members did not agree to such language in Article XXI(b). Accordingly, the context of Article XXI(b) demonstrates that Members did not agree to subject a Member’s essential security judgments to review by a WTO panel.

c. *The Object And Purpose Of GATT 1994 Supports An Understanding Of That Provision As Self-Judging*

43. The object and purpose of the GATT 1994 also establishes that Article XXI(b) is self-judging. The object and purpose of the GATT 1994 is set out in the agreement’s Preamble. That Preamble provides, among other things, that the GATT 1994 set forth “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade.”<sup>31</sup> Particularly with these references to arrangements that are “mutually advantageous” and tariff reductions that are “substantial” (rather than complete), the contracting parties (now Members) acknowledged that the GATT contained both obligations and exceptions, including the essential security exceptions at Article XXI.

44. Consistent with this language, the obligations and exceptions of the GATT 1994 are part of a single undertaking, in which it is specifically contemplated that Members will make use of exceptions, consistent with their text. As discussed above at Section III.A.1, the text of Article XXI establishes that the invocation of this exception is self-judging by the Member taking action. And the GATT 1994 makes available a claim through which an affected Member may seek to maintain the level of reciprocal arrangements. Accordingly, the object and purpose of the GATT 1994, as set forth in the agreement’s Preamble, further supports an interpretation of Article XXI(b) as self-judging.

45. In sum, the text of GATT 1994 Article XXI(b), in context and in the light of the agreement’s object and purpose, establishes that this provision is self-judging, and permits the Member to determine what action is necessary to protect its essential security interests.

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<sup>31</sup> GATT 1994, pmb1.

## 2. A Subsequent Agreement Regarding The Application of the Treaty Confirms That Article XXI(b) Is Self-Judging

46. The self-judging nature of Article XXI is further established by a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions in the context of the *United States Export Measures* dispute between the United States and Czechoslovakia. Shortly after the GATT entered into force, relations between the United States and Czechoslovakia deteriorated and the United States took certain measures affecting Czechoslovakia's trade. Czechoslovakia requested the CONTRACTING PARTIES to find those U.S. actions were inconsistent with the GATT 1947, but the CONTRACTING PARTIES rejected that challenge, instead finding that the U.S. invocation of essential security interests was not justiciable. That action by the CONTRACTING PARTIES reflects the interpretation of Article XXI(b) as self-judging and constitutes a subsequent agreement regarding the interpretation of the treaty or application of its provisions, within the meaning of Article 31(3)(a) of the Vienna Convention.

47. As Article 31(3)(a) of the Vienna Convention provides, “[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.” A subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention is “a further authentic element of interpretation to be taken into account together with the context.”<sup>32</sup> The WTO Agreement sets out procedures for consideration of an authoritative interpretation by the Ministerial Conference, but such procedures had not been elaborated or agreed in 1951 when Czechoslovakia requested the GATT CONTRACTING PARTIES to consider its claims.

48. Here, the resolution of the *United States Export Measures* dispute between the United States and Czechoslovakia establishes a subsequent agreement between the CONTRACTING PARTIES that Article XXI is self-judging. In this dispute, Czechoslovakia requested that the GATT Council decide under Article XXIII whether the United States had failed to carry out its GATT obligations through its administration of export licenses.<sup>33</sup> In explaining its request, Czechoslovakia claimed that the United States had engaged in discrimination in violation of

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<sup>32</sup> See *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 221 (US-23).

<sup>33</sup> GATT Contracting Parties Third Session, Agenda (Revised 8<sup>th</sup> April), GATT/CP.3/2/Rev.2 (Apr. 8, 1949) (US-24), item 14 (“Request of the Government of Czechoslovakia for a decision under Article XXIII as to whether or not the Government of the United States has failed to carry out its obligations under the Agreement through its administration of the issue of export licenses.”).

Article I by withholding certain export licenses.<sup>34</sup> In response, the United States invoked Article XXI and proposed that Czechoslovakia’s request be dismissed.<sup>35</sup>

49. In the GATT Council meeting discussing Czechoslovakia’s request, various parties expressed the view that Article XXI is self-judging. For instance, the United Kingdom delegate commented that “since the question clearly concerned Article XXI, the United States action would seem to be justified.”<sup>36</sup> The United Kingdom delegate explained further that “every country must have the last resort on questions relating to its own security.”<sup>37</sup>

50. The delegate from Cuba supported dismissal of Czechoslovakia’s request, and explained that “the question asked by the Czechoslovakian representative in relation to the provisions of Article I did not require an answer since the United States representative had justified his case under Article XXI whose provisions overrode those of Article I.”<sup>38</sup> The representative of Pakistan similarly opined that, because the situation involved Article XXI, “the case called for examination only under the provisions of that Article.”<sup>39</sup>

51. In discussing the decision to be made in that meeting, the Chairman opined that the question of whether U.S. measures conformed to GATT Article I “was not appropriately put” because the United States had defended its actions under Article XXI, which “embodied exceptions” to Article I.<sup>40</sup> Instead, the Chairman stated, the question should be whether the United States “had failed to carry out its obligations” under the GATT 1947.

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<sup>34</sup> See Statement by the Head of the Czechoslovak Delegation, Mr. Zdeněk Augenthaler to Item 14 of the Agenda, GATT/CP.3/33 (May 30, 1949), at 1 (US-25) (“Request of the Government of Czechoslovakia for a decision under Article XXXII as to whether or not the Government of the United States has failed to carry out its obligations under the Agreement through its administration of the issue of export licenses.”).

<sup>35</sup> Reply by the Vice-Chairman of the United States Delegation, Mr. John W. Evans, to the Speech by the Head of the Czechoslovak Delegation under Item 14 of the Agenda, GATT/CP.3/38 (June 2, 1949), at 2—3 & 4 (US-26) (referring to provisions of GATT Article XXI and stating that the United States is “making use of these exceptions”); Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 5 (US-27) (proposing dismissal of Czechoslovakia’s request).

<sup>36</sup> Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 7 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27).

<sup>37</sup> Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 7 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27).

<sup>38</sup> Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 5 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27).

<sup>39</sup> Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 6 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27).

<sup>40</sup> Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27).

52. After discussing the matter, 17 contracting parties held—with only Czechoslovakia dissenting—that the United States had not failed to carry out its obligations under the GATT.<sup>41</sup> This decision of the CONTRACTING PARTIES was published in its official documents,<sup>42</sup> and the summary record of the meeting was sent to all signatories of the Havana Final Act and to other members of the United Nations.<sup>43</sup>

53. This GATT decision constitutes a subsequent agreement between the CONTRACTING PARTIES that Article XXI is self-judging.<sup>44</sup> As the Chair noted in his summary of the decision to be taken, the United States had defended its actions in particular on the basis of Article XXI, and Contracting Parties had not supported establishing a Working Party to review this issue. Further, as the United Kingdom delegate stated during the discussions leading up to this decision, every country must have the last resort on questions relating to its own security. Accordingly, this subsequent agreement between the CONTRACTING PARTIES confirms the United States' interpretation that GATT 1994 Article XXI(b) is self-judging.

54. This subsequent agreement by the CONTRACTING PARTIES constitutes a further authentic element of interpretation. Consistent with the customary rules of interpretation, this Panel must take into account this subsequent agreement, together with the text and context and the object and purpose of the agreement, when interpreting Article XXI. The text, context, object and purpose, and this subsequent agreement, all establish that every sovereign has the right to take action it considers necessary for the protection of its essential security interests. This right is enshrined in Article XXI(b).

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<sup>41</sup> Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27). Those voting in favor of this position were Australia, Belgium, Brazil, Canada, Ceylon, Chile, China, Cuba, France, The Netherlands, New Zealand, Norway, Pakistan, S. Rhodesia, South Africa, the United Kingdom, and the United States. Three parties abstained (India, Lebanon, and Syria), and two parties were absent (Burma and Luxembourg).

<sup>42</sup> GATT, Decision of 8 June 1949, BISD vol. II, at 28 (US-28) (“The CONTRACTING PARTIES decided to reject the contention of the Czechoslovak delegation that the Government of the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licenses.”).

<sup>43</sup> Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 10 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27).

<sup>44</sup> While a few parties abstained and one party dissented, the decision nonetheless constitutes a subsequent agreement on interpretation. Article 31.3(a) of the Vienna Convention does not require a subsequent agreement on interpretation to be unanimous. The text of Article 31 of the Vienna Convention demonstrates this point. Article 31.2(a) refers to “all the parties.” By contrast, Article 31.3(a) merely refers to “the parties.” The drafters intentionally omitted the word “all” from Article 31.3(a) of the Vienna Convention, thus showing an intention not to require a subsequent agreement on interpretation to be unanimous.

### 3. Supplementary Means of Interpretation, Including Negotiating History, Confirm The Self-Judging Nature of GATT 1994 Article XXI(b)

55. While not necessary in this dispute, supplementary means of interpretation, including negotiating history, confirms that GATT 1994 Article XXI(b) is self-judging.<sup>45</sup> In particular, the United States draws the Panel’s attention to the negotiating history of GATT 1947, as such materials may constitute historical background against which the GATT 1994 was agreed.<sup>46</sup>

56. Under customary rules of interpretation, not all preparatory materials may be correctly considered part of a treaty’s negotiating history, or *travaux préparatoires*, and therefore appropriate for recourse as a supplementary means of interpretation. Instead, for materials to be so considered, they should be in the public domain, or at least “in the hands of all the parties.”<sup>47</sup>

a. *The Negotiating History of GATT Article XXI(b) Confirms That This Provision Is Self-Judging*

57. The drafting history of GATT 1994 XXI(b) dates back to negotiations to establish the International Trade Organization of the United Nations (ITO). In 1946, the United States proposed a draft charter for the ITO, which included the following two exceptions provisions:

Article 32 (General Exceptions to Chapter IV):

Nothing in Chapter IV of this Charter 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.

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<sup>45</sup> See Vienna Convention, Article 32 (“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31.”).

<sup>46</sup> *EC – Computer Equipment (AB)*, para. 86 (“With regard to “the circumstances of [the] conclusion” of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated.”).

<sup>47</sup> See *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 223 (US-23) (noting that the Commission did not define *travaux préparatoires* and suggesting that unpublished *travaux préparatoires* could be relevant to the interpretation of bilateral treaties because such documents “will usually be in the hands of the all the parties”); Ian Sinclair, *THE VIENNA CONVENTION ON THE LAW OF TREATIES*, Manchester University Press, 2nd edition (1984), at 144 (US-30) (“The *travaux préparatoires* should be in the public domain so that States which have not participated in the drafting of the text should have the possibility of consulting them.”); *EC – IT Products*, paras. 7.573-7.581 (declining to consider as *travaux préparatoires* documentation which was only reviewed by a subset of participants in treaty negotiations and were not circulated prior to the dispute).

Article 49.2 (Exceptions to Provisions Relating to Intergovernmental Commodity Agreements):

None of the foregoing provisions of Chapter VI is to be interpreted as applying to agreements relating to fissionable materials; to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; or, in time of war or other emergency in international relations, to the protection of the essential security interests of a Member.<sup>48</sup>

58. The United States asserted at the time that Article 32(e) “afforded complete opportunity for the adoption of all measures regarded as necessary for the protection of national interests” in a time of war or a national emergency.<sup>49</sup> As originally drafted, however, neither exceptions provision was explicitly self-judging. These provisions lacked the key phrase that appears in the current text of GATT 1994 Article XXI(b) regarding action by a Member that “it considers necessary for” the protection of its essential security interests. In addition, the essential security exception set out in Article 32 of the ITO draft charter was one of twelve exceptions, several of which later formed the basis for the general exceptions at GATT 1994 Article XX. Thus, this initial proposed text drew no distinction between essential security interests and other issues that would permit derogation from ITO commitments.

59. In March 1947, the same exceptions text was proposed as both GATT Article XX and Article 37 the ITO draft charter, in Chapter V, which related to “[g]eneral commercial policy.” This text provided that:

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

.....

(e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a contracting party.<sup>50</sup>

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<sup>48</sup> Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter (US-31).

<sup>49</sup> Preparatory Committee of the International Conference on Trade and Employment, E/PC/T/C.II/W.5 (Oct. 31, 1946), at 11 (US-32).

<sup>50</sup> Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), at 31 (ITO draft charter) & 77 (GATT draft text) (US-33). *See also* Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), at 51 (US-33) (“The draft [GATT] reproduces many provisions of the [ITO draft] Charter.”). In addition to item (e) that provided an exception for measures “[i]n time of war or other emergency in international relations” relating to the protection of essential security interests, the proposed text also included other security-based exceptions at items (c), (d), and (k), respectively, providing for measures “[r]elating to

60. The chapeau of this proposed text and a number of the subparagraphs are identical to what would become GATT 1994 Article XX. With its proviso, the chapeau contemplated panel review so that the exceptions would not be applied to discriminate unfairly. The subparagraphs corresponding to essential security were included in this proposed text, together with other exceptions, and thus were subject to the proviso in the chapeau, like these other exceptions. This structure suggests that, at that time, not all drafters may have viewed the essential security exception in subparagraph (e) as self-judging.

61. In May 1947, the United States offered amendments to the ITO draft charter, and proposed removing, *inter alia*, subparagraph (e) from the ITO draft charter exceptions provision quoted above at paragraph 59.<sup>51</sup> In the U.S. proposal, item (e) would be included in a new article, to be inserted at an “appropriate” place at the end of the ITO draft charter, so that these exceptions would apply to the whole charter.<sup>52</sup> The United States also proposed that the new article would begin by stating “[n]othing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures,” including those relating to the protection of essential security interests.<sup>53</sup>

62. Thereafter, the United States proposed the addition of a new chapter, entitled “Miscellaneous” at the end of the ITO draft charter, and that the proposed exceptions to the charter as a whole be included in this new chapter.<sup>54</sup> The United States also suggested additional text to this exceptions provision, to make the self-judging nature of these exceptions explicit. Under this U.S. proposal, the draft exceptions provision stated:

Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of which *it considers contrary* to its essential security interests, or to prevent any Member from taking any action which *it may consider to be necessary* to such interests:

a) Relating to fissionable materials or their source materials;

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fissionable materials; [r]elating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; ... [or] [u]ndertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security.”

<sup>51</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, at 5 (May 6, 1947) (US-34).

<sup>52</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, at 5 (May 6, 1947) (US-34).

<sup>53</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, at 5 (May 6, 1947) (US-34).

<sup>54</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development, E/PC/T/W/236 (July 4, 1947), at 1, 12—14 (US-35).

- b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
- c) In time of war or other emergency in international relations, relating to the protection of its essential security interests;
- d) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security.<sup>55</sup>

63. For the first time in the drafting of this provision, the text now referenced what a Member considered to be necessary, explicitly indicating that this provision could be invoked based on a Member's own judgment. Moreover, this reference was included only for national security issues, including actions which a Member may consider necessary for the protection of its essential security interests. The drafting history thus shows that a deliberate textual distinction was drawn between the self-judging nature of exceptions pertaining to essential security and exceptions related to other interests that, unlike the security-based exceptions referenced above, were retained as part of the “[g]eneral commercial policy” chapter of the ITO draft charter.

64. In July 1947, this provision was revised in a manner that strengthened and emphasized the explicitly self-judging nature of this exception. In this revision, the language of the exception was changed from “action which *it may consider* necessary” to the current GATT formulation, “action which *it considers* necessary for the protection of its essential security interests.”<sup>56</sup> The GATT 1947 final text reflected this revision to the essential security provision.<sup>57</sup> A summary of the draft charter prepared in late 1947 by the negotiating group comments on the self-judging nature of this provision. As this November 1947 summary states, the essential security exceptions would permit members to do “whatever they think necessary to protect their essential security interests relating to” the circumstances presented in that provision.<sup>58</sup>

65. Regarding the exception's scope, at a July 1947 meeting of the ITO negotiating committee, the delegate from The Netherlands requested clarification on the meaning of a Member's “essential security interests,” and suggested that this reference could represent “a very

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<sup>55</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development, E/PC/T/W/236, at Annex A (July 4, 1947) (US-35). Emphases added.

<sup>56</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Committee on Chapters I, II and VIII, E/PC/T/139 (July 31, 1947), at 25—26 (US-36). *See also* Report of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/180 (Aug. 19, 1947), at 178 (retaining “it considers” language at ITO draft charter provision on essential security) (US-37).

<sup>57</sup> *See* Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, (Draft) General Agreement on Tariffs and Trade, E/PC/T/189 (Aug. 30, 1947), at 47 (US-38).

<sup>58</sup> United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter, E/CONF.2/INF.8 (Nov. 21, 1947), at 35 (US-39).

big loophole” in the ITO charter.<sup>59</sup> The U.S. delegate responded that the exception would not “permit anything under the sun,” but suggested that there must be some latitude for security measures.<sup>60</sup> The U.S. delegate further observed that in situations such as times of war, “no one would question the need of a Member, or the right of a Member, to take action relating to its security interests and to determine for itself—which I think we cannot deny—what its security interests are.”<sup>61</sup>

66. In those discussions the Chairman made a statement “in defence of the text,” and recalled the context of the essential security exception as part of the ITO charter.<sup>62</sup> As the Chairman observed, when the ITO was in operation “the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind” raised by The Netherlands delegate.<sup>63</sup> That is, the parties would serve to police each other’s use of the essential security through a culture of self-restraint.

67. During the same July 1947 meeting, the Chairman asked whether the drafters agreed that actions taken pursuant to the essential security exception “should not provide for any possibility of redress.”<sup>64</sup> In response, the U.S. delegate observed that such actions “could not be challenged in the sense that it could not be claimed that the Member was violating the Charter.”<sup>65</sup> The United States acknowledged, however, that a member affected by such actions “would have the right to seek redress of some kind” under Article 35(2) of the ITO charter.<sup>66</sup>

68. At that time, Article 35(2) provided for the possibility of consultations concerning the application of any measure, “whether or not it conflicts with the terms of this Charter,” which had “the effect of nullifying or impairing any object” of the ITO charter.<sup>67</sup> If the parties were

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<sup>59</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 19 (US-41).

<sup>60</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 20 (US-41).

<sup>61</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 20 (US-41).

<sup>62</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 21 (US-41).

<sup>63</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 21 (US-41).

<sup>64</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26 (US-41).

<sup>65</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26—27 & 29 (US-41).

<sup>66</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26—27 & 29 (US-41).

<sup>67</sup> Article 35(2) stated in full:

unable to resolve the matter, it could be referred to the ITO, which in turn could make recommendations, including the suspension of obligations or concessions.<sup>68</sup>

69. In response to the explanation from the U.S. delegate, including the right to seek redress for non-violation under Article 35(2), the Australian delegate lifted a reservation on the essential security exception at this July 1947 meeting. The delegate from Australia stated that, as the exception was “so wide in its coverage”—particularly the “which it may consider to be necessary” language—Australia’s agreement was done with the assurance that “a Member’s rights under Article 35(2) will not be impinged upon.”<sup>69</sup>

70. This exchange demonstrates that the drafters of the text that became GATT 1994 Article XXI(b) understood that essential security measures could not be challenged as violating obligations in the underlying agreement. Nevertheless, an ITO member affected by essential security measures could claim that its expected benefits under the charter had been nullified or impaired, as set forth at Article 35(2) of the ITO Charter draft current in July 1947. As applied to the WTO context, this discussion indicates essential security measures cannot be found by a panel to breach the GATT 1994 or other WTO agreements, although Members may request that

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If any Member should consider that any other Member is applying any measure, whether or not it conflicts with the terms of this Charter, or that any situation exists, which has the effect of nullifying or impairing any object of this Charter, the Member or Members concerned shall give sympathetic consideration to such written representations or proposals as may be made with a view to effecting a satisfactory adjustment of the matter. If no such adjustment can be effected, the matter may be referred to the Organization, which shall, after investigation, and, if necessary after consultation with the Economic and Social Council of the United Nations and any appropriate intergovernmental organizations, make appropriate recommendations to the Members concerned. The Organization, if it considers the case serious enough to justify such action, may authorize a Member or Members to suspend the application to any other Member or members of such specified obligations or concessions under this Chapter as may be appropriate in the circumstances. If such obligations or concessions are in fact suspended. Any affected Member shall then be free, not later than sixty days after such action is taken, to withdraw from the Organization upon the expiration of sixty days from the day on which written notice of such withdrawal is received by the Organization.

Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), Chapter V, General Commercial Provisions, Most-Favoured-Nation Treatment, Section H, General Exceptions, Article 35, Consultation—Nullification or impairment, at 30 (US-33).

<sup>68</sup> Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), Chapter V, General Commercial Provisions, Most-Favoured-Nation Treatment, Section H, General Exceptions, Article 35, Consultation—Nullification or impairment, at 30 (US-33).

<sup>69</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 27 (US-41). *See also* Summary Record of the Thirty-Third Meeting of Commission A, Second Session of the Preparatory Committee, E/PC/T/A/SR/33, at 5 (July 24, 1947) (US-40) (“During the discussion the Delegate for Australia stated that it should be clear that the terms of Article 94 [on essential security] would be subject to the provisions of paragraph 2 of Article 35. On being assured that this was so he stated that he did not wish to make any reservation.”).

a panel review whether its benefits have been nullified or impaired by the essential security measure and, if so, to assess the level of that nullification or impairment.

71. This understanding of the relationship between essential security measures and nullification or impairment procedures is further confirmed by discussions of the ITO Charter that occurred in early 1948. In these discussions, which took place after GATT 1947 had been finalized,<sup>70</sup> negotiators of the ITO draft charter continued to suggest that actions taken pursuant to the charter’s essential security exception—which at that time mirrored the GATT text in relevant part—could not be found to breach obligations of the charter. These negotiators opined, however, that essential security measures could be the subject of nullification or impairment claims.

72. For example, after “extensive discussions,” a Working Party of representatives from Australia, India, Mexico, and the United States decided to retain the draft charter’s non-violation nullification or impairment provision.<sup>71</sup> The Working Party noted that the provision “would apply to the situation of action taken by a Member” to protect its essential security interests.<sup>72</sup> The explanation of the Working Party is worth reading in full:

Such action, for example, in the interest of national security in time of war or other international emergency *would be entirely consistent with the Charter*, but might nevertheless result in the nullification or impairment of benefits accruing to other Members. Such other Members should, under those circumstances, have the right to bring the matter before the Organization, *not on the ground that the measure taken was inconsistent with the Charter*, but on the ground that the measure so taken effectively nullified benefits accruing to the complaining Member.<sup>73</sup>

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<sup>70</sup> Views expressed by parties at or after the conclusion of an agreement may provide pertinent evidence of the intention of the parties, particularly as the GATT 1947 discussions were integral to and intended to lead to formation of the ITO Charter. Cf. *EC – Chicken Cuts (AB)*, at para. 321 (enactment of domestic tariff regulation following tariff negotiations may be relevant for discerning common intentions of the parties).

<sup>71</sup> That provision permitted a Member to seek redress if it felt that any benefit accruing to it was being impaired as a result of “the application by another Member of any measure, whether or not it conflicts with the provisions of the Charter.” United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 1 (US-42).

<sup>72</sup> United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (US-42).

<sup>73</sup> United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (emphasis added) (US-42).

73. That is, the Working Party reflected the intention of the parties to permit non-violation claims of nullification or impairment when essential security action is taken, but not to permit review of such action “on the ground that the measure taken was inconsistent with the Charter.”<sup>74</sup>

74. Members of a sub-committee on the ITO Charter’s dispute settlement chapter expressed similar views. At a January 13, 1948 meeting, “[f]ive representatives agreed with the Chairman that action of the type mentioned in [the essential security provision] could not be challenged by recourse to the procedures of [the dispute settlement chapter].”<sup>75</sup> These representatives suggested, however, that “any Member which considered that any benefit accruing to it being nullified or impaired” might invoke other ITO procedures “in order that compensatory measures might be permitted.”<sup>76</sup>

75. Thereafter, the essential security exception in the ITO draft charter was revised based on suggestions from the United Kingdom.<sup>77</sup> The UK representative opined that with these revisions, the Charter “would neither permit, nor condemn, nor pass any judgment whatever on, unilateral economic sanctions.”<sup>78</sup> After the UK’s revisions were accepted, a representative of India—when discussing nullification or impairment claims as a remedy for essential security measures—“expressed some doubt” about whether “the bona fides of an action allegedly coming within [the essential security exception] could be questioned.”<sup>79</sup>

76. In early 1948, negotiators also declined to adopt a UK proposal that would have amended the essential security provision to state that nullification or impairment procedures were the appropriate recourse for members affected by essential security measures by other members.<sup>80</sup>

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<sup>74</sup> United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (emphasis added) (US-42).

<sup>75</sup> United Nations Conference on Trade & Employment, Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation), E/CONF.2/C.6/W.41 (Jan. 13, 1948), at 1 (US-43).

<sup>76</sup> United Nations Conference on Trade & Employment, Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation), E/CONF.2/C.6/W.41 (Jan. 13, 1948), at 1 (US-43).

<sup>77</sup> United Nations Conference on Trade & Employment, Sixth Committee: Organization, Amendment to Article 94 Proposed by the United Kingdom Delegation, E/CONF.2/C.6/W.48 (Jan. 16, 1948), at 1-2 (US-44). The UK’s amendment altered the chapeau of the essential security exception to read provide that nothing in this charter shall be construed to prevent any member from taking action which it “necessary for the protection of its essential security interests; where such action” relates to fissionable materials, etc.) (alteration underlined). The UK’s amendment was adopted by the parties, and is reflected in the final text of the Havana Charter. See Final Act and Related Documents of the United Nations Conference on Trade and Employment, article 99(2)(b) (US-45).

<sup>78</sup> United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Eighth Meeting (Article 94), E/CONF.2/C.6/W.123 (March 1, 1948), at 1 (US-46).

<sup>79</sup> United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 & E/CONF.2/C.6/W.60/Corr.1 (Jan. 20, 1948), at 3 (US-47).

<sup>80</sup> The UK’s suggestion, if adopted, would have added the following text to the essential security exception of the ITO charter: “If any action taken by a Member under paragraph 1 of this Article nullifies or impairs any benefit accruing to another Member directly or indirectly the procedure set forth in Chapter VIII of this Charter shall apply

This proposal would have made more explicit the understanding that a security action could be reviewed for the nullification or impairment caused, but not for the action’s consistency with the Charter. As the United States noted at the time, such a reference to nullification or impairment in the essential security provision was “unnecessary” in light of the existing text.<sup>81</sup>

77. As the foregoing demonstrates, the drafters of the security exception that became GATT 1994 XXI(b) made several intentional choices that make clear that this provision is self-judging. Specifically, they separated this provision from the “commercial” exceptions that became Article XX, altered the placement of this text so that it was broadly applicable, and inserted the pivotal “it considers” language. Accordingly, the drafting history of GATT Article XXI(b) confirms that a Member’s invocation of its essential security interests is self-judging and not subject to review by a dispute settlement panel. This drafting history also makes clear that nullification or impairment claims, rather than breach claims, are the means of recourse for parties affected by essential security measures.

78. In this dispute, the complainant has not advanced any non-violation nullification or impairment claim under GATT 1994 Article XXIII:1(b). Given the clear text of Article XXI(b) and the negotiating history reviewed above, this decision by the complainant can only be understood as deliberate.

b. *Internal Documents Of The U.S. Delegation Also Confirm That Article XXI(b) Is Self-Judging*

79. In its analysis of the negotiating history of Article XXI(b), the *Russia – Traffic in Transit* panel referred at length to internal documents of the U.S. delegation to the GATT negotiations.<sup>82</sup> Specifically, in addition to considering published documents associated with the negotiating history of Article XXI(b), that panel considered a study that discusses internal documents of the U.S. delegation.<sup>83</sup> In particular, the panel report recounts at some length this study’s discussion of an internal U.S. delegation meeting of July 4, 1947.<sup>84</sup> The panel used these documents as

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and the Organization may authorize such other Member to suspend the application to the Member taking action of such obligations or concessions under or pursuant to this Charter as the Conference deems appropriate; provided that where the action is taken under paragraph 1(d) of this Article the procedure set forth in Chapter VIII of this Charter shall not apply until the United Nations has made recommendations on or otherwise disposed of the matter.” United Nations Conference on Trade & Employment, Sixth Committee: Organization, Amendment to Article 94 Proposed by the United Kingdom Delegation, E/CONF.2/C.6/W.48 (Jan. 16, 1948), at 1—2 (US-44).

<sup>81</sup> United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 & E/CONF.2/C.6/W.60/Corr.1 (Jan. 20, 1948) (US-47).

<sup>82</sup> *Russia – Traffic in Transit*, paras. 7.89—7.91.

<sup>83</sup> *Russia – Traffic in Transit*, paras. 7.89—7.91. We note that none of the documents to which this study referred were themselves on the panel record in the *Russia – Traffic in Transit* dispute.

<sup>84</sup> *Russia – Traffic in Transit*, footnotes 169 to 174.

negotiating history to confirmed the panel’s interpretation that it had the authority to review a Member’s invocation of its essential security interests<sup>85</sup>

80. The Panel in *Russia – Traffic in Transit* erred in relying on such material because it is not “negotiating history” within the meaning of the Vienna Convention. It is concerning that the panel would commit such an elementary error in interpretive approach.

81. Even putting aside this interpretative error, the panel also misunderstood and mischaracterized the U.S. discussions to which it referred. These internal U.S. deliberations—when considered as a whole and in context—further confirm that Article XXI(b) is self-judging.

*i. The Russia – Traffic In Transit Panel Erred In Considering  
Materials Internal To the U.S. Government As  
Supplementary Means of Interpretation*

82. As explained above, to be considered part of the *travaux préparatoires* for a treaty, materials should be in the public domain, or at least “in the hands of all the parties,” so that States which have not participated in the drafting of the text may consult them.<sup>86</sup> The internal U.S. government documents relied upon by the *Russia – Traffic in Transit* panel, however, were confidential, internal memoranda of the United States delegation to the ITO charter negotiations.

83. These materials were neither introduced into the negotiation process nor officially published. Accordingly, these documents were not in the public domain at the time of the negotiations, nor were they available to all the parties to the GATT 1947. In fact, these documents were considered “confidential” or “secret” at the time, meaning that access to them was restricted even within the U.S. government.<sup>87</sup> The *Russia – Traffic in Transit* panel erred in

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<sup>85</sup> *Russia – Traffic in Transit*, paras. 7.89—7.100.

<sup>86</sup> See *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 223 (US-23) (noting that the Commission did not define *travaux préparatoires* and suggesting that unpublished *travaux préparatoires* could be relevant to the interpretation of bilateral treaties because such documents “will usually be in the hands of the all the parties”); Ian Sinclair, *THE VIENNA CONVENTION ON THE LAW OF TREATIES*, Manchester University Press, 2nd edition (1984), at 144 (US-30) (“The *travaux préparatoires* should be in the public domain so that States which have not participated in the drafting of the text should have the possibility of consulting them.”); *EC – IT Products*, paras. 7.573-7.581 (declining to consider as *travaux préparatoires* documentation which was only reviewed by a subset of participants in treaty negotiations and were not circulated prior to the dispute).

<sup>87</sup> See “confidential” and “secret” markings on U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 2, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 - July 30, 1947.” – 8:00 p.m. meeting – July 2, 1947 (US-48) & U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947.” – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memos, at 1–3 (emphasis added) (US-49).

considering these internal U.S. government materials as supplementary means of interpretation of Article XXI.

84. In fact, the *Russia – Traffic in Transit* panel’s misguided approach is a radical departure from the approach of other WTO panels and the Appellate Body in considering preparatory work under Article 32 of the Vienna Convention. For example, the *EC – IT Products* panel emphasized that, to be relevant for consideration under Article 32 of the Vienna Convention, documents from individual members should be officially published and publicly available, so that all relevant parties, not just those which participated in the original negotiations, can access those materials and use them to interpret their obligations.<sup>88</sup> In *EC – Chicken Cuts*, the Appellate Body similarly relied on a document’s official publication and public availability when determining whether to consider it as circumstances of a treaty’s conclusion under Article 32 of the Vienna Convention.<sup>89</sup>

85. Indeed, even when considering supplementary means of interpretation that are not part of the preparatory work of the treaty, WTO panels have emphasized that these materials they are considering are available to the relevant parties before and during the negotiations.<sup>90</sup> Other international tribunals have similarly focused on the availability of materials when considering whether they are appropriate supplementary means of interpretation under Article 32 of the Vienna Convention.<sup>91</sup>

86. Not only is there no need to consider the confidential, internal documents of one delegation to a negotiation, but it would be legal error to consider such documents as negotiating history constituting supplementary means of interpretation.

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<sup>88</sup> *EC – IT Products*, paras. 7.156-7.157.

<sup>89</sup> *EC – Chicken Cuts (AB)*, paras. 282—309.

<sup>90</sup> *Chile – Price Band System (Panel)*, footnote 596 (“We believe that Article 32 of the Vienna Convention allows us to use such documents, to which all GATT Contracting Parties had access before and during the negotiations of the Uruguay Round, as a supplementary means of interpretation.”).

<sup>91</sup> *Young Loan Arbitration*, (UK, US, France, Belgium and Switzerland v. Federal Republic of Germany), Arbitral Award of 16 May 1980, ILR 59 (1980), para. 34 (“A further prerequisite if material is to be considered as a component of travaux préparatoires is that it was actually accessible and known to all the original parties. Drafts of particular articles, preparatory documents and proceedings of meetings from which one member or some members of the contracting parties were excluded cannot serve as an indication of common intentions and agreed definitions unless all the parties had become familiar with the documents or material by the time the treaty was signed.”) (US-50); Permanent Court of Arbitration, *Iron Rhine (“Ijzeren Rhin”) Railway Arbitration (Belgium v Netherlands)*, 27 RIAA 35, (2005), para. 48 (“Although the Parties have provided it with extracts from the prolonged diplomatic negotiations leading up to the conclusion of the 1839 Treaty of Separation, these do not, in the view of the Tribunal, have the character of travaux préparatoires on which it may safely rely as a supplementary means of interpretation under Article 32 of the Vienna Convention. These extracts may show the desire or understanding of one or other of the Parties at particular moments in the extended negotiations, but do not serve the purpose of illuminating a common understanding as to the meaning of the various provisions of Article XII.”) (US-51).

ii. *When Viewed in Context, Internal U.S. Government Documents Confirm That Article XXI(b) Is Self-Judging And That Nullification Or Impairment Claims Are The Appropriate Recourse*

87. As explained, it would be legal error to consider as negotiating history the internal documents of one delegation to a negotiation. Moreover, even putting aside the panel’s error in considering these documents as part of its interpretative analysis, the *Russia – Traffic in Transit* also erred in concluding, based on its limited review of an article discussing U.S. internal documents, that U.S. negotiators believed internally that “the risk of abuse [of a security exception] by some countries outweighed concerns regarding the scope of action left to the United States by the Charter,”<sup>92</sup> and that “the scope of unilateral action accorded to a Member invoking the security exceptions would be limited to the necessity of the measure and would not extend to the determination of the other elements of the provision.”<sup>93</sup> Importantly, the panel in its limited review of a secondary source failed to recognize that the version of the text to which these internal documents relate was *not* the final version found in the GATT 1994. In fact, the draft provision was amended soon after the internal discussions to which the panel refers, and the later-revised text, by proposal of the United States, clarified further the self-judging nature of this exception.

88. Therefore, contrary to the views expressed by the panel in *Russia – Traffic in Transit*, these U.S. internal documents—when viewed as a whole and in context—further confirm that Article XXI(b) was understood by the majority of the U.S. delegation to be self-judging as then currently drafted, both as to whether certain action was “necessary” and as to the appropriate relationship between the action and other elements of the provision. These internal U.S. government materials also demonstrate that U.S. negotiators and other ITO negotiating parties sought to exclude essential security and other political matters from scrutiny in international fora focused on trade.

89. For completeness, the United States notes that in June 1946 internal deliberations, before the United States presented a draft ITO charter to negotiating partners, some U.S. government stakeholders recognized potential tension between ITO obligations and the ability to act unilaterally to protect national security. During internal U.S. government discussions at that time, U.S. military stakeholders sought an exception to ITO obligations that would permit the United States “unilaterally” to take measures “which they feel might be helpful to security.”<sup>94</sup>

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<sup>92</sup> *Russia – Traffic in Transit*, para. 7.90.

<sup>93</sup> *Russia – Traffic in Transit*, para. 7.91.

<sup>94</sup> U.S. Delegation (Internal) Department of State, Memorandum of Conversation, “Security Exceptions to Proposed ITO Charter” June 17, 1946, NARA, Record Group 43, International Trade Files, In Folder “ITO Charter – Security” (June 17, 1946) (US-52).

This exception, military stakeholders suggested, should apply “without regard to whether or not there was an imminent threat of war.”<sup>95</sup>

90. Other U.S. government stakeholders suggested in these early, internal discussions that such a broad exception—in which military security interests would “override all considerations of economic and social wellbeing”—was inconsistent with “established foreign policy” and the United Nations Charter.<sup>96</sup>

91. To satisfy these competing views, the U.S. delegation initially devised a “procedural solution.”<sup>97</sup> Specifically, in a July 1946 internal U.S. government memorandum, a State Department representative suggested reconciling differing interests of U.S. military and other government stakeholders by “assigning some body, presumably international . . . the task of granting exceptions to the Charter provisions on the grounds of national defense.”<sup>98</sup> The State Department suggested that the ITO Executive Board could make such decisions in the first instance, with the possibility of appeal to the United Nations Security Council.<sup>99</sup>

92. A version of this procedural solution was included in the draft ITO Charter that the United States presented to its counterparts in September 1946. As noted above at paragraph 57, September 1946 draft ITO charter included a single exceptions provision that covered public health, essential security, and other measures.<sup>100</sup> At that time, the ITO Conference—made up of

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<sup>95</sup> U.S. Delegation (Internal) Department of State, Memorandum of Conversation, “Security Exceptions to Proposed ITO Charter” June 17, 1946, NARA, Record Group 43, International Trade Files, In Folder “ITO Charter – Security” (June 17, 1946) (US-52).

<sup>96</sup> U.S. Delegation (Internal), Services Economic Disarmament Argument Draft (1946) (US-53).

<sup>97</sup> U.S. Delegation (Internal), Letter from Coppock to Wilcox, “National Security Provisions in the Draft Charter” July 3, 1946, NARA, Record Group 43, International Trade Files, Box 13, In Folder “ITO Charter – Security” July, 3 1946 (US-54).

<sup>98</sup> U.S. Delegation (Internal), Letter from Coppock to Wilcox, “National Security Provisions in the Draft Charter” July 3, 1946, NARA, Record Group 43, International Trade Files, Box 13, In Folder “ITO Charter – Security” July, 3 1946 (US-54).

<sup>99</sup> U.S. Delegation (Internal), Letter from Coppock to Wilcox, “National Security Provisions in the Draft Charter” July 3, 1946, NARA, Record Group 43, International Trade Files, Box 13, In Folder “ITO Charter – Security” July, 3 1946 (US-54).

<sup>100</sup> Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter, Chapter IV General Commercial Policy, Section I, General Exceptions, Article 32, General Exceptions to Chapter IV, at 60 (“Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures . . . (c) relating to fissionable materials; (d) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; (e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member; (k) undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security.”) (US-31).

representatives of ITO Members—was charged with interpreting the Charter.<sup>101</sup> ITO members could seek review by the International Court of Justice (ICJ), however, of “[a]ny justiciable issue” arising out of a decision of the Conference with respect to essential security and other national security-related exceptions.<sup>102</sup>

93. The United States asserted that the then-existing essential security exception “afforded complete opportunity for the adoption of all measures regarded as necessary for the protection of national interests in time of war or other national emergency.”<sup>103</sup> Other negotiating parties also did not question “[t]he absolute right of appeal to the International Court of Justice in security matters, as set out in the United States Draft Charter.”<sup>104</sup>

94. In 1947, the draft ITO Charter was revised (1) to limit the ICJ’s role to issuing advisory opinions, (2) to separate national security exceptions from general commercial exceptions, and (3) to make national security exceptions both explicitly self-judging and applicable to the entire Charter. Changes to the ICJ’s role in the ITO arose out of suggestions that it would be improper for the ICJ to review decisions by the ITO Conference,<sup>105</sup> and that “[t]he distinction between ‘justiciable’ and other issues”—in the dispute settlement provisions relating to essential security matters—was “untenable and unworkable.”<sup>106</sup> Accordingly, in the September 1947 revised draft charter, the Executive Board or the Conference of the ITO were permitted to investigate and make recommendations regarding the resolution of alleged violations of the Charter, and these bodies were permitted to request advisory opinions from the ICJ on “legal questions arising

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<sup>101</sup> Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter, Chapter VII Organization, Section C, The Conference, Article 52 & 53, at 64 (stating that the Conference shall consist of the representatives of the Members of the ITO, each Member shall have one representative, and each Member shall have one vote in the Conference) (US-31).

<sup>102</sup> Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter, Chapter VII, Organization, Section G, Miscellaneous Provisions, Article 76. Interpretation and Settlement of Legal Questions, at 67 (“Any justiciable issue arising out of ruling of the Conference with respect to the interpretation of subparagraphs (c), (d), (e) or (k) of Article 32 or of Paragraph 2 of Article 49 may be submitted by any Party to the dispute to the International Court of Justice, and any justiciable issue arising out of any other ruling of the Conference may, if the Conference consents, be submitted by any Party to the dispute to the International Court of Justice.”) (US-31).

<sup>103</sup> Preparatory Committee of the International Conference on Trade and Employment, E/PC/T/C.II/W.5 (Oct. 31, 1946), at 11 (US-32).

<sup>104</sup> Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - London Draft - E/PC/T/33 October 31, 1946, at 26 (US-31).

<sup>105</sup> Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), at 51 (US-33).

<sup>106</sup> Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), at 51 (US-33).

within the scope of the activities of the Organization.”<sup>107</sup> The opinions of the ICJ on questions referred to it was binding upon the ITO.<sup>108</sup>

95. In addition, as discussed above at paragraphs 61 to 63, the draft ITO charter’s national security exceptions were separated from the general commercial exceptions moved to the end of the ITO Charter, where they would be applicable to the entire Charter.<sup>109</sup> The United States also suggested new text for the essential security exception, to make the self-judging nature of these exceptions explicit. Under this U.S. proposal, the draft exceptions provision stated:

Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or to prevent any Member from taking any action *which it may consider to be necessary* to such interests:

- a) Relating to fissionable materials or their source materials;
- b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
- c) In time of war or other emergency in international relations, relating to the protection of its essential security interests;
- d) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security.<sup>110</sup>

96. In internal discussions of this text, some U.S. government stakeholders sought to make the self-judging nature of the national security exception even more explicit. These are the internal debates upon which the panel in *Russia – Traffic in Transit* relies so heavily. Specifically, a U.S. military representative suggested revising the essential security exception to state that “none of the obligations of this Charter shall apply to any measure or agreement”

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<sup>107</sup> Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Draft Charter, E/PC/T/A/SR/186 (Sep. 10, 1947), articles 89—91, at 53—54 (US-55).

<sup>108</sup> Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Draft Charter, E/PC/T/A/SR/186 (Sep. 10, 1947), article 91, at 53—54 (US-55).

<sup>109</sup> The United States initially suggested moving the essential security exception to the end of the draft charter in May 1947, and stated that this move “would make these items general exceptions to the entire Charter.” Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - E/PC/T/W/23 May 6, 1947, at 5 (US-34). Thereafter, the United States proposed the addition of a new chapter, entitled “Miscellaneous” at the end of the ITO draft charter, and that the proposed exceptions to the charter as a whole—including the essential security provision—be included in this new chapter. Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development, E/PC/T/W/236 (July 4, 1947), at 1, 12—14 (US-35).

<sup>110</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development, E/PC/T/W/236, at Annex A (July 4, 1947) (emphasis added) (US-35).

relating to the enumerated categories.<sup>111</sup> The same representative suggested an explicit statement in the essential security exception that Charter provisions on the interpretation and settlement of disputes “shall not apply” to essential security measures, and that “each Member shall have independent power of interpretation” over such measures.<sup>112</sup> In a separate proposal, the same representative suggested that the chapeau of paragraph 2 of the essential security exception should provide that, nothing in the charter shall be construed to prevent the adoption or enforcement of any measure which it may “consider to be necessary and to relate to” the enumerated categories.<sup>113</sup>

97. The majority of the U.S. delegation declined to adopt these suggestions, describing this additional language as “unnecessary” and observing that the then-existing text permitted “ample latitude to meet any contingency that might arise.”<sup>114</sup> Thus, contrary to the *Russia – Traffic in Transit* panel’s interpretation, the U.S. rejection of these internal suggestions was *not* based on a U.S. view that “the risk of abuse by some countries outweighed concerns regarding the scope of action left to the United States by the Charter.”<sup>115</sup> Instead, these suggestions were rejected as unnecessary, as the majority of the U.S. delegation felt that the then-existing text adequately preserved U.S. freedom of action.

98. This rationale for rejecting the internally-proposed changes to the essential security provision is further confirmed in a July 1947 memorandum responding to these proposals. In this memorandum, a State Department representative noted that the existing text of the essential security exceptions provision “gives a great deal of leeway for unilateral determination on matters affecting security.”<sup>116</sup> With respect to “[t]he question of the power to interpret the security exception,” this memorandum reasons that:

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<sup>111</sup> U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 2, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 - July 30, 1947.” – 8:00 p.m. meeting – July 2, 1947 (US-48).

<sup>112</sup> U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 2, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 - July 30, 1947.” – 8:00 p.m. meeting – July 2, 1947 (US-48).

<sup>113</sup> U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947.” – July 4, 1947, at 2 (US-56).

<sup>114</sup> U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 2, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 - July 30, 1947.” – 8:00 p.m. meeting – July 2, 1947, at 5 (US-48).

<sup>115</sup> *Russia – Traffic in Transit*, paras. 7.90–7.91.

<sup>116</sup> U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record

I agree that there is some difference between the present wording and the wording, as proposed by Mr. Neff [a U.S. military representative], which would make the sentence in question read “. . . . from taking any action which it may consider to relate to:

a) Fissionable materials . . . “ etc. (underlining supplied)

As correctly pointed out by Mr. Neff, his suggested change would make it perfectly clear that any Member had the unilateral power to decide that any action which it proposed to take did relate to the matters contained in the lettered paragraphs. This would make unchallengeable by the Organization or any other Member a justification, however far-fetched, of any action on this basis. To the extent that the wording approved by the Delegation does not permit this completely open escape from the Charter, it may be said, as Mr. Neff argues, to limit the scope of the unilateral interpretation portion of the security exceptions.

However, the security exceptions are as drafted sufficiently broad to take care of any reasonable case. They have been redrafted to provide for unilateral determination by each Member, unchallenged by any other Member, as to what action it deems necessary in a field “relating to” the listed subjects. Thus, no challenge can be made to any action taken by the U.S. which:

1) fall in the field of fissionable materials, etc.; no challenges can be made to any regulation which we may enact regulating the use of “source materials” for fissionable materials, or the traffic in arms, ammunitions and implements of war, no matter how remote may be considered the relevance of the measures undertaken to the problem to be solved, if the measure falls in any of these fields; or

2) if the measure relates to any of these fields of interest – another phrase which grants broad power of unilateral determination.<sup>117</sup>

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Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947.” – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memos, at 1—3 (US-49).

<sup>117</sup> U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947.” – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memos, at 1—3 (US-49).

99. Far from conceding that the U.S. military representative’s proposal would expand the power of unilateral determination under the essential security exception, this memorandum states only that “[t]o the extent that” such broad power of unilateral interpretation was not already preserved in the text, the U.S. military representative’s suggestions would have expanded that power. Thereafter, the memorandum observes that the security exceptions had been “redrafted” to provide for “unilateral determination by each Member” as to what action that Member deemed necessary in the listed fields.<sup>118</sup>

100. In addition, the memorandum reiterates that “no challenge can be made to any action taken by” the United States which “fall[s] in the field of fissionable materials . . . or the traffic in arms . . . no matter how remote may be considered the relevance of the measures undertaken to the problem to be solved, if the measure falls in any of these fields.”<sup>119</sup> Accordingly, the U.S. delegation viewed the then-current text of the essential security exception as already permitting each Member to determine, for itself, what actions are necessary to protect its essential security interests in the listed fields. This memorandum makes clear that it was on this basis – that the existing text was already sufficient to establish the self-judging nature of the exception – that the U.S. military representative’s proposals were rejected.

101. Consistent with this understanding of the U.S. delegation’s views, this July 1947 memorandum concluded by recognizing that, under the then-existing text “the U.S. can justify such security measures *as it may contemplate as ‘relating to’* one of the listed subjects.”<sup>120</sup> Thus, the U.S. delegation did not take the position “that the scope of the unilateral action accorded to a Member invoking the security exceptions would be limited to the necessity of the measure and would not extend to the determination of the other elements of the provision,” as the panel in *Russia – Traffic in Transit* concluded.<sup>121</sup> To the contrary, this July 1947 memorandum specifically states that, under the then-existing text of the essential security provision, the United States could justify such security measures “as it may contemplate as ‘relating to’” the listed subjects.

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<sup>118</sup> U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947.” – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memos, at 1–3 (US-49).

<sup>119</sup> U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947.” – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memos, at 1–3 (US-49).

<sup>120</sup> U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947.” – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memos, at 1–3 (emphasis added) (US-49).

<sup>121</sup> *Russia – Traffic in Transit*, para. 7.91.

102. In fact, the United States proposed a subsequent revision of the text, in which the original language was changed from “action which it may consider necessary” to the more strongly self-judging formulation—also the current GATT formulation—“action which it considers necessary for the protection of its essential security interests.”<sup>122</sup> In addition, the reference to a Member’s action “relating to the protection of its essential security interests” was removed from the third subparagraph of the exception, such that action taken “[i]n time of war or other emergency in international relations” was presumed to implicate the Member’s essential security interests.<sup>123</sup> With these changes, the essential security provision was included as a separate article, in a new final chapter in the September 1947 draft of the ITO Charter.<sup>124</sup>

103. Consistent with the views of the majority of the U.S. delegation, discussions among the ITO negotiating parties in January 1948 confirm that their prevailing view as well was that a party’s consideration of its essential security interests could not be questioned, and that measures taken for purposes of essential security were not subject to challenge before the ITO. As discussed above at paragraphs 71 to 76, members of numerous delegations expressed the view during this time that measures a member considered necessary to protect its essential security interests could not be challenged as violations of ITO obligations. Instead, members affected by such essential security measures could resort to non-violation nullification or impairment procedures.

104. Accordingly, the *Russia – Traffic in Transit* panel was incorrect not only in considering the internal deliberations of the U.S. delegation in its review of the negotiating history of the ITO charter, as these documents do not form part of the *travaux préparatoires*, but also in concluding

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<sup>122</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Committee on Chapters I, II and VIII, E/PC/T/139 (July 31, 1947), at 25—26 (US-36). *See also* Report of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/180 (Aug. 19, 1947), at 178 (retaining “it considers” language at ITO draft charter provision on essential security) (US-37). The GATT Article XX text proposed in March 1947 was likewise revised in August 1947 to reflect the current operative language of GATT Article XXI(b). *See* Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, (Draft) General Agreement on Tariffs and Trade, E/PC/T/189 (Aug. 30, 1947), at 47 (US-38)

<sup>123</sup> *Compare* Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Committee on Chapters I, II and VIII, E/PC/T/139 (July 31, 1947), at 25—26 (US-36) (stating that “[n]othing in this Charter shall be construed . . . to prevent any Member from taking any action which it may consider to be necessary to such interests: . . . (c) In time of war or other emergency in international relations, relating to the protection of its essential security interests.”) *with* Report of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/180 (Aug. 19, 1947), at 178 (stating that “[n]othing in this Charter shall be construed . . . to prevent any member from taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations”) (US-37).

<sup>124</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Commission A, E/PC/T/A/SR/33 July 24, 1947 (US-41); Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Draft Charter - E/PC/T/A/SR/186 September 10, 1947, article 94, at 56 (providing at article 94, paragraph (b) that “[n]othing in this Charter shall be construed . . . to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests” relating to particular enumerated categories) (US-55).

that these documents supported its interpretation that the essential security exception is subject to review by a WTO panel. To the contrary, when viewed in their proper context, these internal U.S. government deliberations confirm that Article XXI(b) of the GATT 1994 is self-judging, and that trade organizations were not the intended fora to resolve such political matters.

#### **4. WTO Members Have Repeatedly Expressed The View that Article XXI(b) Is Self-Judging**

105. The self-judging nature of Article XXI(b) is also supported by views repeatedly expressed by GATT contracting parties (now Members) in connection with prior invocations of their essential security interests. Specifically, on numerous occasions in which a contracting party has invoked its essential security interests, other contracting parties have expressed the view that Article XXI(b) is self-judging, and that the GATT is not the appropriate forum in which to resolve disputes over matters of essential security.

a. *GATT Contracting Parties Accepted Ghana’s Invocation of Article XXI During The Accession of Portugal*

106. For example, in 1961, the contracting parties considered Portugal’s draft protocol of accession to the GATT.<sup>125</sup> In a meeting to consider this draft, Ghana reminded the contracting parties that “[h]is Government had . . . found it necessary” to impose a ban on imports from Portugal, and that their justification for this ban rested on Article XXI(b)(iii).<sup>126</sup> Further, Ghana emphasized that Article XXI is self-judging. As Ghana stated, under Article XXI, “each contracting party was the sole judge of what was necessary in its essential security interests” and there could be “no objection” regarding Ghana’s boycott of goods justified by its security interests.<sup>127</sup>

107. No Contracting Party at the meeting contradicted Ghana’s remarks, and the Chairman noted Ghana’s statement invoking Article XXI of the GATT.<sup>128</sup> The exchange between Ghana and the Chairman at this meeting, combined with other Members’ acceptance of Ghana’s invocation of Article XXI, indicates the parties’ viewed Ghana’s invocation of Article XXI as self-judging.

b. *GATT Contracting Parties Accepted Egypt’s Invocation of Article XXI During Its Accession*

108. Similar views were expressed in 1970, during Egypt’s accession to the GATT. At this time, concerns were raised regarding the Arab League boycott against Israel and the secondary

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<sup>125</sup> Summary Record of the Twelfth Session, SR.19/12 (Dec. 21, 1961), at 194 (US-57).

<sup>126</sup> Summary Record of the Twelfth Session, SR.19/12 (Dec. 21, 1961), at 196 (US-57).

<sup>127</sup> Summary Record of the Twelfth Session, SR.19/12 (Dec. 21, 1961), at 196 (US-57).

<sup>128</sup> Summary Record of the Twelfth Session, SR.19/12 (Dec. 21, 1961), at 196 (US-57).

boycott against firms having relations with Israel.<sup>129</sup> In response to these concerns, the representative of Egypt observed that “[t]he state of war which had long prevailed in [the Middle East] area necessitated the resorting to this system.”<sup>130</sup> The representative of Egypt stated further that his country did not wish to discuss the matter within the GATT “[i]n view of the political character of this issue.”<sup>131</sup>

109. Several members of the working party supported Egypt’s views that the background of the boycott measures was political and not commercial.<sup>132</sup> Such expressions of support indicate further that the GATT contracting parties (now WTO Members) viewed Article XXI as self-judging.

c. *The GATT Contracting Parties’ Accepted The Invocation of Article XXI By The EC, Canada, and Australia In Their Imposition Of Trade Restrictions Affecting Argentina*

110. In 1982, the European Communities (EC) and its member states, Canada, and Australia invoked Article XXI to justify their application of certain measures against Argentina in light of Argentina’s invasion of the Falkland Islands.<sup>133</sup> When Argentina brought the matter for discussion in the GATT,<sup>134</sup> the EC, Canada, and Australia made clear that they did not view the GATT as the appropriate forum to address the matter; instead, they expressed hope that the situation could be resolved by “appropriate negotiations elsewhere.”<sup>135</sup>

111. In a GATT Council meeting discussing the matter, the EC representative explained that the EC and its member states had taken these measures based on “their inherent rights, of which Article XXI of the General Agreement was a reflection.”<sup>136</sup> Further, the EC representative explained that the exercise of these “inherent rights” constituted a “general exception” that “required neither notification, justification nor approval.”<sup>137</sup> As the EC representative reasoned,

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<sup>129</sup> Report by the Working Party on Accession of the United Arab Republic, L/3362 (Feb. 25, 1970), paras. 18–20 (US-58).

<sup>130</sup> Report by the Working Party on Accession of the United Arab Republic, L/3362 (Feb. 25, 1970), para. 22 (US-58).

<sup>131</sup> Report by the Working Party on Accession of the United Arab Republic, L/3362 (Feb. 25, 1970), para. 22 (US-58).

<sup>132</sup> Report by the Working Party on Accession of the United Arab Republic, L/3362 (Feb. 25, 1970), para. 23 (US-58).

<sup>133</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982) (US-59); Communication to the Members of the GATT Council, L/5319/Rev.1 (May 15, 1982) (US-60).

<sup>134</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 2 (US-59).

<sup>135</sup> Communication to the Members of the GATT Council, L/5319/Rev.1 (May 15, 1982) (US-60).

<sup>136</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 10 (US-59).

<sup>137</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 10 (US-59).

the procedures applied by contracting parties over the previous thirty-five years “showed that every contracting party was—in the last resort—the judge of its exercise of these rights.”<sup>138</sup>

112. In the same Council discussion, the representative of Canada stated that “Canada’s sovereign action was to be seen as a political response to a political issue” and therefore fell squarely within the exemption of Article XXI and outside the competency and responsibility of the GATT.<sup>139</sup>

113. Expressing the same view, the representative of Australia opined that “the Australian measures were in conformity with the provisions of Article XXI(c), which did not require notification or justification.”<sup>140</sup>

114. Other delegations expressed similar views at this meeting, and emphasized that the GATT was not the appropriate forum to decide the matter. Specifically:

- Hungary stated that “the security considerations under Article XXI of the General Agreement were within the realm of the individual contracting parties.”<sup>141</sup>
- Japan cautioned against “the interjection of political elements into GATT activities,” and noted that the contracting parties’ “pragmatic and business[-]like approach” was an important contributor to the GATT’s effective and efficient functioning.<sup>142</sup> Japan expressed hope that this spirit of co-operation would prevail in the GATT going forward.<sup>143</sup>
- New Zealand—which had also imposed economic sanctions on Argentina for reasons similar to those stated by the EC, Canada, and Australia—“expressed doubts about whether the GATT was the appropriate body” for debating the issue that had led to the sanctions.<sup>144</sup> New Zealand also opined that it “had an inherent right to take such action as a sovereign State” and that New Zealand’s actions “were in conformity with New Zealand’s rights and obligations under the General Agreement.”<sup>145</sup>

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<sup>138</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 10 (US-59).

<sup>139</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 10 (US-59).

<sup>140</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 11 (US-59).

<sup>141</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 8 (US-59).

<sup>142</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 9 (US-59).

<sup>143</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 9 (US-59).

<sup>144</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 9 (US-59).

<sup>145</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 9 (US-59).

- Norway supported the EC and its member States, Canada, and Australia, in their invocation of Article XXI, and stated that “in taking the measures ... [they] did not act in contravention of the General Agreement.”<sup>146</sup>
- Although Romania noted that it did not believe trade restrictions would contribute to solving the problem at issue, it reaffirmed that these problems “should be settled by means of negotiations.”<sup>147</sup>
- Singapore explained that “the wording of Article XXI allowed a contracting party the right to determine the need for protection of its essential security interests.”<sup>148</sup>
- The United Kingdom emphasized that the measures in question “had originated from a political dispute that went beyond the competence of the GATT and which could not be resolved in the Council.”<sup>149</sup>
- The United States opined that “the GATT had never been the forum for resolution of any disputes whose essence was security and not trade, and that for good reasons, such disputes had seldom been discussed in the GATT, which had no power to resolve political or security disputes.<sup>150</sup> The U.S. representative further stated that “GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis.”<sup>151</sup>
- Zaire observed that “political matters should be dealt with in the appropriate fora” and that it was up to the countries involved “to find an acceptable solution for these problems through discussions.”<sup>152</sup>

115. Although other contracting parties, such as Argentina and Brazil, argued that the embargo was subject to GATT review, the GATT Council did not attempt to render a decision on the matter at this meeting. Instead, the Chairman emphasized that that “one particular strain of opinion running nearly throughout” the discussions was “the expression of a wish and the keen desire that the matter be settled as quickly as possible.”<sup>153</sup>

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<sup>146</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 10 (US-59).

<sup>147</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 7—8 (US-59).

<sup>148</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 7 (US-59).

<sup>149</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 11 (US-59).

<sup>150</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 8 (US-59).

<sup>151</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 8 (US-59).

<sup>152</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 5 (US-59).

<sup>153</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 13 (US-59).

116. Similar views were expressed at the next GATT Council meeting,<sup>154</sup> and the CONTRACTING PARTIES ultimately adopted a decision concerning Article XXI in connection with these discussions.<sup>155</sup> That decision calls for contracting parties to inform each other “to the fullest extent possible” of measures taken under Article XXI and states that when such measures are taken, all contracting parties affected by such action retain their full rights under the GATT.<sup>156</sup>

117. Notably, the preamble to this decision twice acknowledges the self-judging nature of Article XXI. First, using language that mirrors the pivotal self-judging phrase of Article XXI, the text emphasizes Article XXI’s importance in safeguarding contracting parties’ rights “when they consider” that security issues are involved.<sup>157</sup> By mirroring the self-judging phrase of Article XXI in this decision, the CONTRACTING PARTIES indicated their agreement that Article XXI is self-judging.

118. Second, the preamble to this decision cautions that “the contracting parties should take into consideration” third-party interests “in taking action in terms of the exceptions provided in Article XXI.” With this phrase, the CONTRACTING PARTIES acknowledged that the decision of whether to take essential security measures, and what measures to take, is within the authority of each contracting party. Accordingly, views expressed in connection with the invocation of Article XXI by the EC, Canada, and Australia and this GATT decision provide further confirmation that Article XXI is self-judging by the acting Member, and that political disputes should be resolved before trade organizations.

- d. *Views Expressed During The United States – Trade Measures Affecting Nicaragua GATT Dispute Indicate That Article XXI Is Self-Judging, The GATT Is Not A Forum For Political Disputes, And Non-Violation Nullification Or Impairment Claims Are The Appropriate Recourse For Countries Affected By Measures Taken Under Article XXI*

119. Similar views were expressed in 1985, after the United States imposed an embargo prohibiting all imports and exports of goods and services to and from Nicaragua. At a GATT Council meeting, Nicaragua asked the Council to condemn the U.S. measures and request that the United States revoke them immediately.<sup>158</sup>

120. In response, the United States emphasized that when other countries had previously invoked Article XXI, “the United States had seen no basis for contracting parties to question,

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<sup>154</sup> See, e.g., GATT Council, Minutes of Meeting, C/M/159 (Aug. 10, 1982), at 13—22 (US-61).

<sup>155</sup> Decision Concerning Article XXI of The General Agreement, L/5426 (Dec. 2, 1982), at 1 (US-62).

<sup>156</sup> Decision Concerning Article XXI of The General Agreement, L/5426 (Dec. 2, 1982), at 1 (US-62).

<sup>157</sup> Decision Concerning Article XXI of The General Agreement, L/5426 (Dec. 2, 1982), at 1 (US-62).

<sup>158</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 2 (June 28, 1985) (US-63).

approve or disapprove the judgement of each contracting party as to what was necessary to protect its essential security interests; and the GATT had never done so.”<sup>159</sup> In this instance, the United States observed, “[i]t was not for GATT to approve or disapprove the judgement made by the United States as to what was necessary to protect its national security interests; GATT was a trade organization, and had no competence to judge such matters.”<sup>160</sup> The United States noted further that “GATT had traditionally not become involved in political disputes because it was not the appropriate place to resolve them.”<sup>161</sup>

121. Other delegations also opined that the GATT was not the appropriate forum to discuss political matters and that Article XXI was self-judging:

- Australia supported the U.S. position: “the United States was permitted under Article XXI of the General Agreement to take action of this kind with no requirement to justify such action.”<sup>162</sup>
- Canada observed “this was fundamentally not a trade issue, but one which could only be resolved in a context broader than GATT.”<sup>163</sup>
- The EC, elaborating on its position in its earlier dispute with Argentina, maintained that the “GATT had never had the role of settling disputes essentially linked to security.”<sup>164</sup> As the EC observed, “left to each contracting party the task of judging what was necessary to protect its essential security interests.”<sup>165</sup>
- “Iceland did not question the sovereign right of every contracting party to decide whether or when provisions of Article XXI should be invoked,” although it emphasized the necessity that utmost prudence be shown in applying this article.<sup>166</sup> Iceland expressed its hope that “efforts undertaken elsewhere” would resolve this problem in a manner satisfactory to the parties.<sup>167</sup>

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<sup>159</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 4-5 (June 28, 1985) (US-63).

<sup>160</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 4-5 (June 28, 1985) (US-63).

<sup>161</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 4-5 (June 28, 1985) (US-63).

<sup>162</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 12—13 (June 28, 1985) (US-63).

<sup>163</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 12 (June 28, 1985) (US-63).

<sup>164</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 13 (June 28, 1985) (US-63).

<sup>165</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 13 (June 28, 1985) (US-63).

<sup>166</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 14 (June 28, 1985) (US-63).

<sup>167</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 14 (June 28, 1985) (US-63).

- Norway endorsed the views of the EC, and expressed hope that “efforts would be undertaken elsewhere to bring about a mutually acceptable solution of this dispute.”<sup>168</sup>
- Sweden observed that “it had to be up to each country to define its essential security interests under Article XXI,” although noting that parties should be prudent in exercising their right to take essential security measures.<sup>169</sup> Sweden suggested that the U.S. had not shown the necessary prudence in this instance, and expressed hope that “efforts would be undertaken elsewhere with the aim of bringing about a mutually acceptable settlement of this dispute.”<sup>170</sup>
- “Switzerland recognized that Article XXI gave overriding weight to the judgement of the contracting parties invoking the Article.”<sup>171</sup>

122. Indeed, even contracting parties that supported Nicaragua’s position encouraged the United States and Nicaragua to resolve their differences outside the GATT.<sup>172</sup>

123. Following these discussions, a GATT panel was established, but Article XXI was left outside its terms of reference.<sup>173</sup> Before that panel, the United States acknowledged that a measure not conflicting with obligations under the GATT—such as an action that a party considered necessary for the protection of its essential security interests—could be found to cause nullification and impairment.<sup>174</sup> Ultimately, however, that panel concluded that it could not render a decision as to whether the United States was complying with its GATT obligations because the panel was not authorized to examine the U.S. invocation of Article XXI.<sup>175</sup>

124. At a subsequent Council meeting, the United States recommended adoption of the report. As the United States observed, “GATT was not a forum for examining or judging national security disputes. When a party judged trade sanctions to be essential to its security interests, it

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<sup>168</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 13—14 (June 28, 1985) (US-63).

<sup>169</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 10 (June 28, 1985) (US-63).

<sup>170</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 10 (June 28, 1985) (US-63).

<sup>171</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 11 (June 28, 1985) (US-63).

<sup>172</sup> See, e.g., Minutes of Meeting of May 29, 1985, C/M/188, at 7 (June 28, 1985) (describing the statement of Brazil that “[h]is government was convinced that the road towards negotiation, especially the one being pursued through the invaluable efforts of the Contadora Group, was the only one which could lead to a durable solution.”) (US-63); Minutes of Meeting of May 29, 1985, C/M/188, at 8 (June 28, 1985) (describing the statement of Chile “appeal[ing] to the United States and Nicaragua to search for a peaceful solution to their dispute within the context of efforts being made by the Contadora Group”) (US-63).

<sup>173</sup> Minutes of Meeting of March 12, 1986, C/M/196 & C/M/196/Corr.1 (April 2, 1986), at 7 (US-64).

<sup>174</sup> GATT Panel Report, *United States – Trade Measures Affecting Nicaragua*, para. 4.9 (US-65)

<sup>175</sup> See GATT Panel Report, *United States – Trade Measures Affecting Nicaragua*, para. 5.3 (US-65).

should be self-evident that such sanctions would be modified or lifted in accordance with those security considerations.”<sup>176</sup>

125. The European Communities echoed that:

[I]t understood the position adopted and defended by the United States regarding the invocation of Article XXI. National security was not a matter to be publicly examined or placed in doubt by the parties concerned. The United States alone had the sovereign right to determine its national security interests. Article XXI was a safety valve essential to all contracting parties, and the Community did not want it to be the subject of interpretation, discussion or negotiation either in the Council or in the new round.<sup>177</sup>

126. Although the Council could not adopt the panel’s report without consensus,<sup>178</sup> statements by the GATT contracting parties in the discussions leading up to the panel’s establishment demonstrate that invocations of Article XXI(b) were seen as self-judging and that the GATT was not intended as a forum to discuss political disputes. Views expressed by the United States in the course of the GATT dispute also indicate that non-violation nullification or impairment claims, and not claims of breach, are the appropriate recourse for parties affected by actions that another country considers necessary for the protection of its essential security interests.

127. Accordingly, views repeatedly expressed by the GATT Contracting Parties provide further indication that Article XXI(b) is self-judging, that the GATT is not a forum to resolve political disputes, and that non-violation claims of nullification or impairment are the appropriate recourse for parties affected by essential security actions. In fact, until the filing of the present dispute and similar disputes challenging U.S. actions under Section 232, every GATT contracting party or WTO Member taking action under Article XXI has expressed the view that invocations of Article XXI are self-judging by the acting country. Indeed, it is only after the Section 232 disputes were filed that some Members have supported a weak form of review, while others continue to adhere to the traditional understanding.<sup>179</sup>

**B. The *Russia – Traffic In Transit* Panel Erred In Deciding It Had Authority To Review A Responding Party’s Invocation Of Article XXI.**

128. The panel in *Russia – Traffic in Transit* erred when it decided that it had authority to review multiple aspects of a responding party’s invocation of Article XXI. That panel’s interpretation of Article XXI is not consistent with the customary rules of interpretation set forth

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<sup>176</sup> Minutes of Meeting of November 5-6, 1986, C/M/204 (Nov. 19, 1986), at 8 (US-66).

<sup>177</sup> Minutes of Meeting of November 5-6, 1986, C/M/204 (Nov. 19, 1986), at 16 (US-66).

<sup>178</sup> Minutes of Meeting of November 5-6, 1986, C/M/204 (Nov. 19, 1986), at 17. The panel’s report was never adopted.

<sup>179</sup> See, e.g., Minutes of Meeting of Dec. 4, 2018, WT/DSB/M/422 (Apr. 3, 2019), at para. 5.3 (discussing Qatar’s request for a panel in a dispute in which Saudi Arabia had invoked its essential security interests and stating that “Saudi Arabia simply would not engage in dispute settlement proceedings, or in any other international interaction, with a party that it did not recognize diplomatically due to an emergency in international relations, other than to assert its invocation of the national security exception under Article 73 of the TRIPS Agreement.”).

in the Vienna Convention. In addition to being inconsistent with the ordinary meaning of the terms of Article XXI, the panel failed to interpret that provision as a whole. In fact, the panel appears to have reached its conclusion regarding the reviewability of Article XXI a mere four paragraphs after beginning its analysis – based not on “the mere meaning of the words and the grammatical construction of the provision,” but on what it termed the “logical structure of the provision.”

129. Furthermore, in its examination of the negotiating history of the treaty, the *Russia – Traffic in Transit* panel misconstrued certain statements by negotiating parties and relied on materials not properly considered part of the negotiating history. These errors reveal the panel’s analysis as deeply flawed and suggest a results-driven approach not in line with the responsibility bestowed on the panelists by WTO Members through the DSU.

**1. That Panel Erred in Ignoring the Ordinary Meaning of the Terms of Article XXI, and Basing Its Conclusion Instead on the “Logical Structure” of the Provision**

130. Under Article 3.2 of the DSU, the provisions of the GATT 1994 are to be interpreted “in accordance with customary rules of interpretation of public international law.” In failing to base its interpretation on the ordinary meaning of the terms of Article XXI, the panel failed to interpret that provision in accordance with customary rules of interpretation, as reflected in Article 31 of the Vienna Convention on the Law of Treaties.

131. The panel described its initial task as:

to interpret Article XXI(b)(iii) of the GATT 1994 in order to determine whether, by virtue of the language of this provision, the power to decide whether the requirements for the application of the provision are met is vested exclusively in the Member invoking the provision, or whether the Panel retains the power to review such a decision concerning any of these requirements.<sup>180</sup>

132. After reciting the text of Article XXI, the panel did not interpret this provision as the Vienna Convention requires, that is, “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>181</sup> The panel acknowledged that the phrase “which it considers” in the chapeau “can be read to qualify... the determination of the matters described in the three subparagraphs of Article XXI(b)”, but the panel gave this plain meaning no interpretive weight. Instead, the panel drew its conclusion despite this “mere meaning of the words and the grammatical construction of the provision,” based on the “logical structure of the provision” – a structure it discussed in three

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<sup>180</sup> *Russia – Traffic in Transit*, para. 7.58.

<sup>181</sup> Vienna Convention, Article 31(1).

sentences only, the first of which contained its conclusion, and the final two of which contained rhetorical questions only.<sup>182</sup>

133. The entirety of this analysis filled only four short paragraphs:

7.62. Paragraph (b) of Article XXI includes an introductory part (chapeau), which qualifies action that a Member may not be prevented from taking as that “which [the Member] considers necessary for the protection of its essential security interests”.

7.63. The text of the chapeau of Article XXI(b) can be read in different ways and can thus accommodate more than one interpretation of the adjectival clause “which it considers”. The adjectival clause can be read to qualify only the word “necessary”, i.e. the necessity of the measures for the protection of “its essential security interests”; or to qualify also the determination of these “essential security interests”; or finally and maximally, to qualify the determination of the matters described in the three subparagraphs of Article XXI(b) as well.

7.64. The Panel starts by testing this last, most extensive hypothesis, i.e. whether the adjectival clause “which it considers” in the chapeau of Article XXI(b) qualifies the determination of the sets of circumstances described in the enumerated subparagraphs of Article XXI(b). The Panel will leave for the moment the examination of the two other interpretive hypotheses, which bear exclusively on the chapeau.

7.65. As mentioned above, the mere meaning of the words and the grammatical construction of the provision can accommodate an interpretation in which the adjectival clause “which it considers” qualifies the determinations in the three enumerated subparagraphs. But if one considers the logical structure of the provision, it is apparent that the three sets of circumstances under subparagraphs (i) to (iii) of Article XXI(b) operate as limitative qualifying clauses; in other words, they qualify and limit the exercise of the discretion accorded to Members under the chapeau to these circumstances. Does it stand to reason, given their limitative function, to leave their determination exclusively to the discretion of the invoking Member? And what would be the use, or *effet utile*, and added value of these limitative qualifying clauses in the enumerated subparagraphs of Article XXI(b), under such an interpretation?<sup>183</sup>

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<sup>182</sup> *Russia – Traffic in Transit*, section 7.5.3.1.1

<sup>183</sup> *Russia – Traffic in Transit*, paras. 7.62 - 7.65.

134. As is clear from these four short paragraphs, the panel reached its conclusion without any explanation of what it considered to comprise the “logical structure” of Article XXI. Nor did the panel explain how, consistent with customary rules of interpretation, the logical structure of a provision can operate to alter the ordinary meaning of the terms in that provision. Instead, the panel simply failed to credit the ordinary meaning and grammatical construction of the terms with any interpretive value. Its rhetorical questions seem almost to second guess the drafters themselves: “But why? Why would they do this?” This is not the task of a panel, however. It is not the task of a panel to determine what *should be*, in its own view, the scope and effect of a provision.

135. Article XXI concerns issues of essential security – matters of the utmost importance to sovereign nations; that go to their very existence. With respect to such matters, the drafters – the representatives of those sovereign nations – must be respected. As the panel understood immediately, the meaning and grammatical construction of the provision “can be read” to vest in each Member the sole determination of what “*it considers necessary* for the protection of *its essential security interests.*” Had it conducted its analysis consistent with customary rules of interpretation, this is the meaning of the provision that the panel in *Russia – Traffic in Transit* would have discerned. That it did not is unfortunate, and is a mistake that this Panel must take care not to repeat.

## **2. The Panel’s “Similar Logical Query” Into Whether the Provision “Is Designed To Be Conducted Objectively” Similarly Ignores the Ordinary Meaning Of Article XXI**

136. After reaching its initial conclusion—that under the logical structure of Article XXI, subparagraphs (i) to (iii) qualify and limit Members’ discretion to take essential security measures—the panel examined what it described as “a similar logical query,” that is “whether the subject-matter of each of the enumerated subparagraphs of Article XXI(b) lends itself to purely subjective discretionary determination.”<sup>184</sup> In this discussion, the panel stated that it would “focus on” subparagraph (iii) and determine whether “given their nature, the evaluation of these circumstances can be left wholly to the discretion of the Member invoking the provision, or is designed to be conducted objectively, by a dispute settlement panel.”<sup>185</sup>

137. Again, the panel did not indicate the basis on which this “logical query” could lead to a correct interpretation of Article XXI. That is, the panel did not explain why it focused on whether the “subject-matter” or “nature” of subparagraph (iii) “lends itself” to subjective or objective determination.<sup>186</sup> Nor did the panel explain why it ignored the pivotal self-judging language of Article XXI—“it considers necessary”—which indicates that essential security determinations are left to the Members. The panel also left unexplained its conclusion that,

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<sup>184</sup> *Russia – Traffic in Transit*, para. 7.66.

<sup>185</sup> *Russia – Traffic in Transit*, para. 7.66.

<sup>186</sup> *Russia – Traffic in Transit*, para. 7.66.

despite the text of Article XXI, the result of this inquiry could reveal that the provision is “designed to be conducted objectively.”<sup>187</sup>

138. In fact, the text of Article XXI(a) undermines a premise of the panel’s query. As that provision states “[n]othing in this Agreement shall be construed . . . to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests.” With this language, Article XXI(a) specifically provides that a Member need not provide any information—to a WTO panel or other Members—regarding essential security measures or the Member’s underlying security interests.

139. In light of the plain text of Article XXI(a), there is no basis upon which the determination under Article XXI(b) of what a *Member* considers necessary for the protection of *its* essential security interests could be designed to be conducted objectively “by a dispute settlement panel”. That is, a panel purporting to review an action under Article XXI may have no facts at all upon which to base its review of what it considers to be “objective” facts. This is because, by design, Article XXI(b) is not subject to review by a WTO panel. In its analysis, the panel fails to address or even acknowledge the limitation set out in Article XXI(a), or the implications that provision would have for determining whether Article XXI(b) is “amenable to objective determination” by a WTO panel.

140. Instead, like its assessment of the “logical structure” of Article XXI(b), the panel’s evaluation of whether the content of the subparagraphs is “amenable to objective determination” proceeds in a wholly conclusory manner. For example, the panel determined—solely based on prior Appellate Body decisions interpreting Article XX(g)—that the phrase “relating to” in Articles XXI(b)(i) and (ii) requires a “close and genuine relationship of ends and means’ between the measure and the objective of the Member adopting the measure.”<sup>188</sup>

141. The panel fails to identify the textual and structural differences between the two provisions, including that it is the subparagraphs of Article XX that identify the objectives, or “ends”, of the measures in question, whereas the chapeau of Article XXI(b) already contains the permissible “end” – for the protection of its essential security interests. Subparagraphs (i) and (ii) of Article XXI(b) contain subject matter, “fissionable materials” and “traffic in arms, ammunition and implements of war.”

142. In failing to analyze the text itself, the panel erroneously conflated two very different legal provisions and thereby failed altogether to evaluate the textual relationship between the terms of the chapeau and that of the two subparagraphs. Nonetheless, and without further analysis, the panel concludes that whether a measure “relat[es] to” the situation described in

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<sup>187</sup> *Russia – Traffic in Transit*, para. 7.66.

<sup>188</sup> *Russia – Traffic in Transit*, para. 7.69 (quoting and citing, *US – Shrimp (AB)*, para. 136; *China – Raw Materials (AB)*, para. 355; and *China – Rare Earths (AB)*, para. 5.90).

Article XXI(b)(i) and (ii) is “an objective relationship,” and that this relationship is “subject to objective determination.”<sup>189</sup>

143. The panel’s analysis of Article XXI(b)(iii) is similarly insufficient. Again without analyzing the full text, the panel stated that the phrase “taken in time of” “describes the connection between the action and the events of war or other emergency in international relations in that subparagraph,”<sup>190</sup> and that it understands this phrase “to require that the action be taken *during* the war or other emergency in international relations.”<sup>191</sup> The panel then pronounced that “[t]his chronological occurrence is also an objective fact, amenable to objective determination.”<sup>192</sup> In reaching this conclusion, the panel did not examine the ordinary meanings of these terms, nor did the panel examine their context, as customary rules of interpretation require.

144. Instead, in the following paragraph, the panel states that “the existence of a war, as one characteristic example of a larger category of ‘emergency in international relations’, is clearly capable of objective determination.”<sup>193</sup> Although it acknowledged some lack of clarity in “the confines of an ‘emergency in international relations’” under Article XXI(b)(iii), the panel nevertheless concluded that this phrase “can *only* be understood,” in the context of the situations addressed in Article XXI(b)(i) and (ii), “as belonging to the same category of objective facts that are amenable to objective determination.”<sup>194</sup>

145. Only after reaching these conclusions does the panel point to dictionary definitions of the terms “war” and “international relations,” or review the context provided by the references to “fissionable materials” and “traffic in arms, ammunition and implements of war” in Article XXI(b)(i) and (ii).<sup>195</sup> The panel does not rely on these definitions, however, but opines instead that the matters addressed by Articles XXI(b)(i), (ii) and (iii) “are all defence and military interests, as well as maintenance of law and public order interests.”<sup>196</sup>

146. Further, the panel stated that the reference to “war” in Article XXI(b)(iii) and the matters addressed in Article XXI(b)(i) and (ii) “suggest that political or economic differences between Members are not sufficient, of themselves to constitute an emergency in international relations

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<sup>189</sup> *Russia – Traffic in Transit*, para. 7.69.

<sup>190</sup> *Russia – Traffic in Transit*, para. 7.70.

<sup>191</sup> *Russia – Traffic in Transit*, para. 7.70.

<sup>192</sup> *Russia – Traffic in Transit*, para. 7.70.

<sup>193</sup> *Russia – Traffic in Transit*, para. 7.71.

<sup>194</sup> *Russia – Traffic in Transit*, para. 7.71 (emphasis added).

<sup>195</sup> *Russia – Traffic in Transit*, paras. 7.72—7.74.

<sup>196</sup> *Russia – Traffic in Transit*, para. 7.74.

for purposes of subparagraph (iii).”<sup>197</sup> The panel proceeded to opine, again without citation or textual analysis, that:

Indeed, it is normal to expect that Members will, from time to time, encounter political or economic conflicts with other Members or states. While such conflicts could sometimes be considered urgent or serious in a political sense, they will not be ‘emergencies in international relations’ within the meaning of subparagraph (iii) unless they give rise to defence and military interests, or maintenance of law and public order interests.<sup>198</sup>

147. Based on this discussion, the panel concludes, again, that “the existence of an emergency in international relations is an objective state of affairs,” and therefore that determining whether a measure was taken “in time of” an “emergency in international relations” under Article XXI(b)(iii) is “an objective fact, subject to objective determination.”<sup>199</sup>

148. Given the profound implications of its interpretation, the panel’s cursory treatment of the text of Article XXI(b) is startling, and should raise serious concerns for all Members, regardless of their posture in this or other disputes. According to the panel, there cannot be an emergency in international relations if the situation does not – as “objectively” determined by a WTO panel – give rise to defence and military interests, or maintenance and public order interests.”

149. It is difficult to imagine on what basis a WTO panel could conclude that political or economic conflicts between states “could sometimes be considered urgent or serious *in a political sense*, but will not be emergencies in international relations unless they give rise to defence and military interests, or maintenance of law and public order interests.” While the United States agrees that such interests would be implicated by some emergencies in international relations, if they were perceived to do so by the Member in question, the text contains no indication that a Member’s “essential security interests” would be so limited, nor is any identified by the panel.

150. It also is difficult to imagine how a WTO panel might make an “objective determination” of the existence of such a state of affairs unless the Member in question were to provide a panel with information regarding the details of the situation and the nature of its essential security concerns – information which, as already discussed, is not required to be provided by the Member.

151. Article XXI(b)(iii), again, reads in full as follows:

Nothing in this Agreement shall be construed... to prevent any contracting party from taking any action which it considers necessary

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<sup>197</sup> *Russia – Traffic in Transit*, para. 7.75.

<sup>198</sup> *Russia – Traffic in Transit*, para. 7.75.

<sup>199</sup> *Russia – Traffic in Transit*, para. 7.77.

for the protection of its essential security interests... taken in time of war or other emergency in international relations[.]

152. Under the panel’s own reading, the relationship between the chapeau and subparagraph iii requires that “the action be taken *during* the war or other emergency in international relations.”<sup>200</sup> Subparagraph (iii) does not begin with the phrase “relating to” certain “interests”, as the first and second subparagraphs do. Rather, the relationship between the action and the matters identified in subparagraph iii, as the panel found, is a temporal one. Nothing in the text or structure of the text provides otherwise. Therefore, there was no basis for the panel to use the subject matter of the other two subparagraphs to find that the facially broad terms of subparagraph (iii) in fact refer to a very limited set of circumstances.

153. Subparagraphs (i) and (ii) are textually distinct from subparagraph iii. When read together with the chapeau, they state that

Nothing in this Agreement shall be construed... to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests...

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

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

154. That is, based on the text of those subparagraphs, the phrase “relating to” modifies the text of the chapeau. And given the lack of a comma or other punctuation that might divide the sentence into separate clauses, the subparagraphs appear to modify the essential security interests themselves, suggesting that the security interests covered by the first two subparagraphs are those “relating to” the identified subject matter.

155. As already discussed, subparagraph (iii) does not contain the same language. It states that the actions covered are those “which [the Member] considers necessary for the protection of its essential security interests... taken in time of war or other emergency in international relations.” In other words, when a war or other emergency in international relations exists, a Member’s essential security interests are understood to be implicated. The Member need not consider that either its action or its interests “relate to” any particular subject matter.

156. Thus, while the drafters provided some guidance with respect to the types of security interests contemplated under subparagraphs (i) and (ii) in the absence of a war or other emergency in international relations, they chose not to do so for subparagraph (iii). The panel’s

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<sup>200</sup> *Russia – Traffic in Transit*, para. 7.70.

interpretation would alter that balance, and significantly curtail the scope of Article XXI, reading into subparagraph (iii) in particular a meaning not reflected in the terms of that provision.

157. Moreover, contrary to the *Russia – Traffic in Transit* panel’s statements, the fact that a matter is “subject” or “amenable” to objective determination does not empower a WTO panel to determine that matter. Instead, it is for WTO Members, through the text of their agreements, to specify whether a panel—or a Member, the Appellate Body, or a WTO Committee—is empowered to make such determinations. As described above at Section III.A.1, the text of Article XXI, in context and in the light of the agreement’s object and purpose, makes clear that it is for WTO Members—not a panel—to determine what essential security measures they consider necessary. The *Russia – Traffic in Transit* panel’s contrary conclusion was based on an analysis that was wholly inconsistent with the text of Article XXI, in context.

### **3. That Panel Erred in Finding that Interpreting Article XXI to be Self-Judging would be Inconsistent With The Object And Purpose Of the WTO Agreement**

158. In addition, the *Russia – Traffic in Transit* panel’s decision is inconsistent with the object and purpose of the GATT 1994 and other covered agreements. As an initial matter, the panel did not, as the Vienna Convention requires, interpret the treaty “in the light of its object and purpose.”<sup>201</sup> Instead, having concluded that Article XXI(b)(iii) contained “objective” requirements, the panel examined “whether the object and purpose of the GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) also supports an interpretation of Article XXI(b)(iii) which mandates an objective review of the requirements of subparagraph (iii).”<sup>202</sup> Using the object and purpose in this manner, to determine whether they “also support[.]” a pre-established interpretation of treaty text, is not consistent with customary rules of interpretation.

159. Moreover, the panel’s object and purpose analysis is wholly inadequate. That analysis is contained in a single paragraph of its decision, as follows:

7.79. Previous panels and the Appellate Body have stated that a general object and purpose of the WTO Agreement, as well as of the GATT 1994, is to promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade. At the same time, the GATT 1994 and the WTO Agreements provide that, in specific circumstances, Members may depart from their GATT and WTO obligations in order to protect other non-trade interests. For example, the general exceptions under Article XX of the GATT 1994 accord to Members a degree of autonomy to adopt measures that are otherwise incompatible

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<sup>201</sup> Vienna Convention, Article 31(1) (“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>202</sup> *Russia – Traffic in Transit*, para. 7.78.

with their WTO obligations, in order to achieve particular non-trade legitimate objectives, provided such measures are not used merely as an excuse to circumvent their GATT and WTO obligations. These concessions, like other exceptions and escape clauses built into the GATT 1994 and the WTO Agreements, permit Members a degree of flexibility that was considered necessary to ensure the widest possible acceptance of the GATT 1994 and the WTO Agreements. It would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements, including the concessions that allow for departures from obligations in specific circumstances, to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member.<sup>203</sup>

160. In this analysis, the panel identifies only a general object and purpose of the GATT and WTO agreements based on statements by “[p]revious panels and the Appellate Body,” rather than referring to the agreements themselves. The panel then discusses the exceptions at Article XX—which differ substantially from the exceptions at Article XXI, as noted above at paragraphs 35 to 36—and suggests that the exceptions in both Article XX and XXI allow “a degree of flexibility” for Members’ non-trade interests.

161. In the next sentence, without offering support from the GATT or other WTO agreements, the panel concludes that “[i]t would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements” to interpret Article XXI as a “potestative condition” that “subject[ed] the existence of a Member’s GATT and WTO obligations to a mere expression of the unilateral will of that Member.”<sup>204</sup>

162. At no point does the panel grapple with the text of Article XXI, the ordinary meaning of which the panel must examine to interpret its terms. Given the nature and importance of the essential security exceptions at Article XXI—which are clearly distinguished from, for example, the interests at issue in the exceptions at Article XX—the panel’s cursory treatment of the object and purpose of the treaty is not sufficient or persuasive.

163. Moreover, contrary to the panel’s conclusion, the self-judging nature of Article XXI—and the ability of Members, as they consider necessary, to impose trade restrictions to protect essential security interests—was part of the bargain struck by the GATT Contracting Parties and WTO Members. Although trade flows could be decreased by Members’ decisions to impose essential security measures they considered necessary, this situation is specifically contemplated in the WTO agreements, and it is for WTO Members—not a WTO panel—to decide how to address such developments.

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<sup>203</sup> *Russia – Traffic in Transit*, para. 7.79 (footnotes omitted).

<sup>204</sup> *Russia – Traffic in Transit*, para. 7.79.

#### 4. That Panel Erred In Its Interpretation Of the Negotiating History of Article XXI(b)

164. The *Russia – Traffic in Transit* panel’s decision is also inconsistent with the negotiating history of Article XXI, as described at paragraphs 55 to 77 above. Not only did the panel reach incorrect conclusions regarding the negotiating history of Article XXI(b), but the panel relied on materials that are not properly considered part of the negotiating history of this provision.

165. The panel incorrectly concluded that the drafts struck a “balance” in which “the security exceptions would remain subject to the consultations and dispute settlement provisions set forth elsewhere in the [ITO] Charter.”<sup>205</sup> In reaching this erroneous conclusion, the panel apparently misconstrued Australia’s statement at a July 1947 meeting during the negotiation of the ITO charter. As described in more detail at paragraphs 67 to 70 above, at this meeting Australia sought to ensure that “a Member’s rights under Article 35(2) will not be impinged upon,” by measures that a member considered necessary for the protection of its essential security interests.<sup>206</sup>

166. At that time, Article 35(2) provided for the possibility of consultations concerning the application of any measure, “whether or not it conflicts with the terms of this Charter,” which had “the effect of nullifying or impairing any object” of the ITO charter.<sup>207</sup> If the members were

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<sup>205</sup> *Russia – Traffic in Transit*, para. 7.98.

<sup>206</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 27 (US-41). See also Summary Record of the Thirty-Third Meeting of Commission A, Second Session of the Preparatory Committee, E/PC/T/A/SR/33, at 4-5 (July 24, 1947) (US-40) (“During the discussion the Delegate for Australia stated that it should be clear that the terms of Article 94 [on essential security] would be subject to the provisions of paragraph 2 of Article 35. On being assured that this was so he stated that he did not wish to make any reservation.”).

<sup>207</sup> Article 35(2) stated in full:

If any Member should consider that any other Member is applying any measure, whether or not it conflicts with the terms of this Charter, or that any situation exists, which has the effect of nullifying or impairing any object of this Charter, the Member or Members concerned shall give sympathetic consideration to such written representations or proposals as may be made with a view to effecting a satisfactory adjustment of the matter. If no such adjustment can be effected, the matter may be referred to the Organization, which shall, after investigation, and, if necessary after consultation with the Economic and Social Council of the United Nations and any appropriate intergovernmental organizations, make appropriate recommendations to the Members concerned. The Organization, if it considers the case serious enough to justify such action, may authorize a Member or Members to suspend the application to any other Member or members of such specified obligations or concessions under this Chapter as may be appropriate in the circumstances. If such obligations or concessions are in fact suspended. Any affected Member shall then be free, not later than sixty days after such action is taken, to withdraw from the Organization upon the expiration of sixty days from the day on which written notice of such withdrawal is received by the Organization.

Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), Chapter V, General Commercial Provisions, Most-Favoured-Nation Treatment, Section H, General Exceptions, Article 35, Consultation—Nullification or impairment, at 30 (US-33).

unable to resolve the matter, the draft permitted referral to the ITO, which could decide whether to authorize the affected member to suspend benefits under the charter.<sup>208</sup> After receiving this assurance that a member's rights to bring a non-violation claim under Article 35(2) would be preserved, Australia withdrew its objection to the draft ITO charter's essential security provision.

167. The withdrawal of Australia's reservation confirms the understanding that Members affected by essential security measures would have recourse to non-violation nullification or impairment procedures – that is, Members would have recourse to consultations concerning the application of any measure, “whether or not it conflicts with the terms of this Charter,” which had “the effect of nullifying or impairing any object” of the ITO charter.<sup>209</sup> Contrary to the *Russia – Traffic in Transit*'s conclusion, however, the withdrawal of Australia's reservation does *not* indicate that members intended that essential security actions could be reviewed on the ground that the actions taken were inconsistent with the Charter, or that a member's judgment about what it considered necessary for the protection of its essential security interests could be questioned.

168. This understanding of Australia's July 1947 statement is supported by numerous subsequent statements by other negotiating partners. As described above at paragraphs 71 to 77, in early 1948, made numerous statements confirming that non-violation nullification or impairment procedures were understood as the recourse for members affected by essential security measures.

169. Indeed, the panel ignored multiple statements in the negotiating history that explicitly state matters of essential security are within the judgment of the governments concerned, and that non-violation nullification or impairment claims are the appropriate recourse for members affected by such actions. For example:

- In a July 1947 meeting, the U.S. delegate observed that in situations such as times of war, “no one would question the need of a Member, or the right of a Member, to take action relating to its security interests and to determine for itself—which I think we cannot deny—what its security interests are.”<sup>210</sup>

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<sup>208</sup> Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment - New York Draft - E/PC/T/34 March 5, 1947, Chapter V, General Commercial Provisions, Most-Favoured-Nation Treatment, Section H, General Exceptions, Article 35, Consultation—Nullification or impairment, at 28 (US-33).

<sup>209</sup> Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), Chapter V, General Commercial Provisions, Most-Favoured-Nation Treatment, Section H, General Exceptions, Article 35, Consultation—Nullification or impairment, at 30 (US-33).

<sup>210</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 20 (US-41).

- In the same meeting, the Chairman stated “in defence of the text,” that, when the ITO was in operation, “the atmosphere inside the ITO will be the only efficient guarantee against abuses” of the essential security exception.<sup>211</sup>
- A November 1947 summary of the draft ITO charter states that the essential security exceptions would permit members to do “whatever they think necessary to protect their essential security interests relating to” the circumstances presented in that provision.<sup>212</sup>
- In January 1948, a representative from India “expressed some doubt” about whether “the bona fides of an action allegedly coming within [the essential security exception] could be questioned.”<sup>213</sup>
- Also in January 1948, the ITO charter negotiators declined to incorporate an explicit reference to nullification or impairment into the essential security provision.<sup>214</sup> As the United States noted at the time, a reference to nullification or impairment in the essential security provision was “unnecessary” in light of the existing text.<sup>215</sup>
- Around the same time, a Working Party of ITO negotiators decided to retain the non-violation provision based on their conclusions that essential security actions “*would be entirely consistent with the Charter*, but might nevertheless result in the nullification or impairment of benefits accruing to other Members,” and that “[s]uch other Members should, under those circumstances, have the right to bring the matter before the Organization, *not on the ground that the measure taken was inconsistent with the*

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<sup>211</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 21 (US-41).

<sup>212</sup> United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter, E/CONF.2/INF.8 (Nov. 21, 1947), at 35 (US-39).

<sup>213</sup> United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 & E/CONF.2/C.6/W.60/Corr.1 (Jan. 20, 1948), at 3 (US-47).

<sup>214</sup> The suggestion in question, if adopted, would have added the following text to the essential security exception of the ITO charter: “If any action taken by a Member under paragraph 1 of this Article nullifies or impairs any benefit accruing to another Member directly or indirectly the procedure set forth in Chapter VIII of this Charter shall apply and the Organization may authorize such other Member to suspend the application to the Member taking action of such obligations or concessions under or pursuant to this Charter as the Conference deems appropriate; provided that where the action is taken under paragraph 1(d) of this Article the procedure set forth in Chapter VIII of this Charter shall not apply until the United Nations has made recommendations on or otherwise disposed of the matter.” United Nations Conference on Trade & Employment, Sixth Committee: Organization, Amendment to Article 94 Proposed by the United Kingdom Delegation, E/CONF.2/C.6/W.48 (Jan. 16, 1948), at 1—2 (US-44).

<sup>215</sup> United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 & E/CONF.2/C.6/W.60/Corr.1 (Jan. 20, 1948) (US-47).

Charter, but on the ground that the measure so taken effectively nullified benefits accruing to the complaining Member.”<sup>216</sup>

170. The panel’s failure to grapple with such explicit statements by the negotiators of the provision that became Article XXI renders its analysis insufficient and unpersuasive.

171. Furthermore, in its analysis, the panel placed significant reliance on discussions of the essential security provision that were internal to the U.S. government at the time Article XXI was drafted.<sup>217</sup> As noted above at Section III.A.3.b.i, such discussions are not properly viewed as preparatory work of the treaty within the meaning of Article 32 of the Vienna Convention because they were not in the public domain or even in the hands of all the parties at the relevant time. The *Russia – Traffic in Transit* panel’s consideration of such materials as supplementary means of interpretation is legal error and a significant departure from not only the previous procedures of prior WTO panels and the Appellate Body, but also other international tribunals.<sup>218</sup>

### 5. That Panel’s Flawed Conclusions Appear Results-Driven

172. In sum, the *Russia – Traffic in Transit* panel’s decision that it had authority to review multiple aspects of a Member’s invocation of the essential security exception is incorrect. The panel failed to interpret Article XXI(b) as a whole, and even its understanding of Article XXI(b)(iii) is inconsistent with that text, in its context. The panel also misconstrued certain aspects of the negotiation process, and erroneously relied on documents that are not properly considered preparatory work for the GATT.

173. Given the *Russia – Traffic in Transit* panel’s failure to perform a proper analysis under the Vienna Convention and the overall conclusory nature of the panel’s analysis, that panel’s interpretation of Article XXI appears to have been driven, not by the text, but by the result apparently sought by the panelists. In fact, that panel appeared to be attempting to prejudge the U.S. measures at issue in this dispute in setting out certain considerations that did not arise in the dispute before it.

174. Under DSU Article 7.1, the DSB charged the panel with making only those findings that would assist the DSB in making the recommendation to bring a WTO-inconsistent measure into conformity with the covered agreements. The panel determined that it was for Russia to demonstrate that its invocation of Article XXI fell within the bounds of that provision. Because Russia had provided no substantive explanation for its invocation – consistent with Russia’s view that the panel lacked the authority to review the invocation – the panel’s analysis could (and

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<sup>216</sup> United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (emphasis added) (US-42).

<sup>217</sup> *Russia – Traffic in Transit*, paras. 7.89—7.91 and notes 168 to 174.

<sup>218</sup> See above paragraphs 84 to 85.

should) have ended there.<sup>219</sup> Nor was it necessary for the panel to note—after stating it had rejected Russia’s argument that the panel lacked jurisdiction to review Russia’s invocation of Article XXI(b)(iii)—that the panel also rejected the U.S. argument that Russia’s invocation of Article XXI(b)(iii) was not justiciable.<sup>220</sup>

175. Similarly, the panel’s lengthy discussion of whether “political or economic conflicts” could constitute “emergencies in international relations” within the meaning of Article XXI(b)(iii)<sup>221</sup> was wholly superfluous, in light of the panel’s subsequent reference to the UN-recognized “armed conflict” between Russia and Ukraine in finding that the requirements of Article XXI(b)(iii) were satisfied in that dispute.<sup>222</sup> The panel report therefore gives the impression of desiring to make pronouncements on the bounds of Article XXI not for purposes of resolving the dispute before it but in order to influence the results of other disputes.

176. This impression of the *Russia – Traffic in Transit* panel report as results-oriented has unfortunately been reinforced by recent public comments by the Chair of the panel. That panelist has been quoted in the press opining on the likelihood of success if the United States were to invoke Article XXI in relation to certain possible actions. The *Russia – Traffic in Transit* Chair pronounced that it would be “very difficult” for the United States to defend potential auto tariffs under Article XXI(b). The Chair stated that he would not “take such a case” on, “not only on moral aspects” but also “because I think it would be very difficult to make it prevail.”<sup>223</sup>

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<sup>219</sup> *Russia – Traffic in Transit*, para. 7.112 (“Russia, in its first written submission, refers to an emergency in international relations that occurred in 2014, which led Russia to take various actions, including imposing the measures at issue. Russia affirms that the events constituting the emergency in international relations are well known to Ukraine and that this dispute raises issues concerning politics, national security and international peace and security. It also explains that one reason for formulating its invocation of Article XXI(b)(iii) in such general terms is that it is trying to “keep the issues such as wars, insurrections, unrests, international conflicts outside the scope of the WTO which is not designed for resolution of such crises and related matters””) (citations omitted).

<sup>220</sup> *Russia – Traffic in Transit*, para. 7.103 (“Consequently, Russia’s argument that the Panel lacks jurisdiction to review Russia’s invocation of Article XXI(b)(iii) must fail. The Panel’s interpretation of Article XXI(b)(iii) also means that it rejects the United States’ argument that Russia’s invocation of Article XXI(b)(iii) is “nonjusticiable”, to the extent that this argument also relies on the alleged totally “self-judging” nature of the provision.”).

<sup>221</sup> *Russia – Traffic in Transit*, para. 7.75 (“[T]he reference to “war” in conjunction with “or other emergency in international relations” in subparagraph (iii), and the interests that generally arise during war, and from the matters addressed in subparagraphs (i) and (ii), suggest that political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii).”).

<sup>222</sup> *Russia – Traffic in Transit*, para. 7.122 (“ There is evidence before the Panel that, at least as of March 2014, and continuing at least until the end of 2016, relations between Ukraine and Russia had deteriorated to such a degree that they were a matter of concern to the international community. By December 2016, the situation between Ukraine and Russia was recognized by the UN General Assembly as involving armed conflict”) (citations omitted).

<sup>223</sup> Tom Miles, *Adjudicator says any security defense of U.S. auto tariffs at WTO “very difficult”*, REUTERS BUSINESS NEWS (May 27, 2019), <https://www.reuters.com/article/us-usa-trade-autos-wto-idUSKCN1SX117> (US-67).

177. These comments are highly regrettable and call into question the objectivity and impartiality of the *Russia – Traffic in Transit* panel. For a panelist to opine on the “moral aspects” of possible action by a Member and to speculate on the likelihood of success of a dispute challenging that action damages the integrity of the WTO dispute settlement system. One could surmise as well that these comments were intended to taint this Panel's approach to Article XXI in this dispute.

178. The *Russia – Traffic in Transit* panel's report is erroneous and misguided. That panelists might not agree with a Member's particular determination regarding what it considers necessary for the protection of its essential security interests cannot alter that panel's task under Article 7.1 of the DSU or the rights of Members under Article XXI(b). In analyzing Article XXI(b) without the appropriate rigor and respect for the text required, the Russia Transit panel did the parties, and WTO Members, a disservice.

**C. In Light Of The Self-Judging Nature Of GATT 1994 Article XXI, The Sole Finding The Panel May Make Consistent With Its Terms Of Reference Under DSU Article 7.1 Is To Note The Invocation Of Article XXI**

179. Under DSU Article 7.1, the Dispute Settlement Body (“DSB”) has established the Panel's terms of reference for the Panel to examine the matter referred to the DSB by Russia and “to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in [the covered agreements].”<sup>224</sup> Similarly, DSU Article 11 states that the “function of panels” is to make “an objective assessment of the matter before it” and “such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.”

180. In light of the self-judging nature of GATT 1994 Article XXI(b), the Panel may make no findings that “will assist the DSB in making [] recommendations” as to Russia's claims because no finding of WTO-inconsistency may be made. Under these circumstances, the Panel should limit its findings in this dispute to a recognition that the United States has invoked its essential security interests under GATT 1994 Article XXI(b).

181. In other words, although the Panel has jurisdiction over this dispute, because the DSB has established the Panel to examine the matter set out in the panel request, the dispute presents an issue that is not justiciable, meaning that the Panel cannot make findings or provide a recommendation on that issue. In this context, “jurisdiction” can be defined as the extent of power of the Panel under the DSU to exercise its judicial authority or decide a particular case.<sup>225</sup>

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<sup>224</sup> United States – Certain Measures on Steel And Aluminum Products, Constitution of the Panel Established at the Request Of The Russian Federation, Note By The Secretariat, WT/DS554/18 (Jan. 28, 2019).

<sup>225</sup> See *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1465 (US-68) (defining “jurisdiction” as “[1] Exercise of judicial authority, or of the functions of a judge or legal tribunal; power of administering law or justice. Also, power or authority in general; administration, control.; and [2] The extent or range of judicial or administrative power; the territory over which such power extends”); *Black's Law Dictionary*, ed. Bryan A. Garner, Eighth edition, 2004, at 867 (defining “jurisdiction” as “[a] government's general

The word “justiciability,” by contrast, relates to whether a matter is appropriate or suitable for adjudication by a court, or in this context, whether an issue is subject to findings by the Panel under the DSU.<sup>226</sup>

182. Based on this understanding of the words “jurisdiction” and “justiciability”, the Panel has jurisdiction in the context of this dispute in the sense that the DSB has established it, and placed the matter raised in the complaint within the Panel’s Terms of Reference under Article 7.1 of the DSU. Consistent with the DSU, the Panel may then receive submissions from the parties and third parties. The Panel, however, must exercise its jurisdiction properly under the authority of the DSU and consistent with its terms of reference under DSU Article 7.1. This is where the separate question of justiciability arises.

183. Specifically, the U.S. invocation of Article XXI is a non-justiciable issue as Article XXI makes its invocation self-judging by the Member taking the security action. It follows that the Panel may not make findings on the complainant’s claims because they are not appropriate or suitable for adjudication by the Panel and may not make recommendations because no finding of WTO-inconsistency can be made. WTO Members agreed to remove invocation of the essential security exception from multilateral judgment when they agreed to the self-judging text included in Article XXI. This decision by Members recognized that issues of essential security are inherently political in nature, and there are no legal criteria by which a Member’s consideration of its essential security interests can be objectively determined. This decision to avoid legal review of security matters also reflects that an invocation of essential security, though not reviewable for its consistency with a Member’s commitments, can nonetheless lead to another claim that benefits under the Agreement have been nullified or impaired.

#### IV. CONCLUSION

184. For the foregoing reasons, the United States respectfully requests that the Panel find that the United States has invoked its essential security interests under GATT 1994 Article XXI(b) and so report to the DSB.

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power to exercise authority over all persons and things within its territory” or “[a] court’s power to decide a case or issue a decree”) (US-69).

<sup>226</sup> See *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1466 (US-68) (defining “justiciable” as “[i]able to be tried in a court of justice; subject to jurisdiction); Black’s Law Dictionary, ed. Bryan A. Garner, Eighth edition, 2004, at 882 (defining “justiciability” as “[t]he quality or state of being appropriate or suitable for adjudication by a court.”) (US-69).