THE WTO VERSUS THE DONALD: WHY THE WTO MUST ADOPT A REVIEW STANDARD FOR ARTICLE XXI(B) OF THE GATT

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INTRODUCTION: THE WTO MUST ADOPT A REVIEW STANDARD FOR ARTICLE XXI(B) OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

The Great Depression gripped the world. In the decades that preceded the adoption of the General Agreement on Tariffs and Trade ("GATT"), Americans migrated across country in search of work, communities devolved from homes to Hoovervilles, and families collided in conflict as their unmet needs drove them to desperation. Although not the cause of the Great Depression, tariffs exacerbated its effects. Isolationist policies such as the United States' Smoot-Hawley Tariff "set off a sharp contraction of world trade that contributed substantially to the length and depth of [the] economic catastrophe."[1]

Social conflict sprouts enduring treaties.[2] The GATT developed in the wake of the Great Depression and the Second World War as an economic deterrent to armed conflict.[3] At the close of the Second World War, state leaders around the world recognized a need for economic integration. International discussions throughout the mid-1940s produced the World Bank and the International Monetary Fund.[4] Then, in 1948, after states committed to economic interdependence and conceded to reducing tariffs, the GATT was born.[5] Decades later in 1994, the World Trade Organization ("WTO") was created to serve as a forum for trade negotiations and trade disputes to monitor member states' adherence to dozens of international trade agreements, including the GATT.[6] Further, the WTO dispute settlement body has proven to be an effective mechanism for easing tensions that stem from international trade disputes.[7]

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1 Robert E. Hudec, *"Circumventing" Democracy: The Political Morality of Trade Negotiations*, 25 N.Y.U. J. INT'L L. & POL. 311 (1993).

2 Jide Nzelibe, *The Breakdown of International Treaties*, 93 NOTRE DAME L. REV. 1173, 1182–90 (2018).

3 Bettina Rudloff, *Yes, He Can: Trump Provokes a Trade War: A Clever EU Will Refrain from Further Tariffs but Hold Firm on WTO Rules* (SWP Comments. No. 29 July 2018), https://www.swp-berlin.org/fileadmin/contents/products/comments/2018C29_rff.pdf [https://perma.cc/3QWD-PK3C].

4 *The GATT Years: from Havana to Marrakesh*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm [https://perma.cc/5SCQ-RHTM].

5 *Id.*

6 *About the Organization*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/thewto_e.htm [https://perma.cc/J3NN-A4GR].

7 *See* Robert Farley, *Trump Wrong About WTO Record*, FACTCHECK.ORG (Oct. 27, 2017), https://www.factcheck.org/2017/10/trump-wrong-wto-record/ [https://perma.cc/FSD9-GFV6]

Because economic interdependence disincentivizes going to war with a fellow trading partner, the WTO generally preserves peace.[8] The WTO has preserved peace by promoting multilateral trade negotiations and facilitating trade relations,[9] thereby decreasing instances of individual nations taking unilateral action.[10] Around the globe, free trade has raised living standards, cut the costs of goods and services, and improved access to employment opportunities.[11] Specifically, in underdeveloped states increasing trade reduces both the likelihood and severity of armed conflict.[12]

However, states need not always obey the provisions of GATT. A member state may skirt the express provisions of GATT, if the state's actions fall within an applicable safeguard[13] or escape clause. For example, under GATT a state may legally impose a tariff measure that is necessary to protect human, animal, or plant life or health.[14] Consequently, safeguards and escape clauses are methods by which states can impose trade barriers such as tariffs and quotas without violating WTO obligations.[15] Yet where an international body may review whether a state's invocation of a safeguard (e.g., GATT Article XX)[16] complies with the WTO, the essential security escape clause (i.e., GATT Article XXI(b)) is generally unreviewable, exposing the escape clause to abuse.[17]

("When the United States has been a complainant [in the WTO dispute resolution forum] it has prevailed on 91 percent of adjudicated issues.").

8 Hannes L. Schloemann & Stefan Ohlohoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Compliance*, 93 AM. J. INT'L L. 424, 444 (1999).

9 Emilie M. Hafner-Burton & Alexander H. Montgomery, *War, Trade, and Distrust: Why Trade Agreements Don't Always Keep the Peace*, 29(3) CONFLICT MGMT. & PEACE SCI. 257 (2012).

10 Peter Debaere, An Expensive Lesson in Economics: Trump and the WTO, DARDEN IDEAS TO ACTION (Sept. 21, 2018), https://ideas.darden.virginia.edu/an-expensive-lesson-in-economics-trump-and-the-wto [https://perma.cc/97Y3-H8QB].

11 Sayed M. Zonaid, *Trading in Human Rights: Questioning the Advance of Human Rights into the World Trade Organization*, 27 FLA. J. INT'L L. 261, 263–64 (2015).

12 MASSIMILIANO CALÌ, WORLD BANK GROUP, TRADING AWAY FROM CONFLICT: USING TRADE TO INCREASE RESILIENCE IN FRAGILE STATES, 2–4, 23–24 (2015).

13 *See* JOOST H.B. PAUWELYN ET AL., INTERNATIONAL TRADE LAW, 381–83, 419–21 (3d ed. 2016) (discussing the safeguard provisions under GATT Article XX).

14 *Id.*

15 *Id.*

16 *Id.*

17 *See* Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558, 566–68, 586 (1991) (arguing that although the national security escape clause is prone to abuse, the GATT drafters presumed that the clause was all the while reviewable under the dispute settlement process).

This Note attempts to strike a balance between sustaining the sovereignty of WTO member states and the stability of the WTO. On the one hand, escape clauses are essential pieces of international obligations.[18] Without an escape clause, states would perceive the international obligation too burdensome and refuse to join.[19] Indeed, "every country must have the last resort relating to its own security."[20] And states will walk away from an international agreement if the agreement fails to adequately appreciate the security interests of sovereign states.[21] On the other hand, an escape clause is prone to abuse because absent a review standard to check their use, the only mechanism preventing states from abusing an escape clause is the spirit in which member states interpret the clause.[22] Thus, a self-judging escape clause is considered "the Achilles' heel of international law."[23] To strike a balance between state sovereignty and abuse prevention, this Note proposes a two-pronged objective language/good faith review standard for the WTO dispute resolution panel to apply when a member state invokes Article XXI(b) of the GATT.

Part I of this Note analyzes the language of Article XXI(b), illustrates the United States' expanding interpretation of Article XXI(b), and examines President Donald J. Trump's adverse conduct with respect to the WTO. Part II evaluates potential review standards, proposes a review standard for the WTO to apply when a member state invokes Article XXI(b), and tests President Trump's steel and aluminum tariffs against the proposed review standard. Part II continues by discussing how President Trump jeopardizes the WTO through his utilization of a broad Article XXI(b) interpretation combined with his underlying distaste for the WTO. Lastly, Part III concludes that absent a review standard, WTO member states will remain free to abuse Article XXI(b) and, as a result, to progressively delegitimize the GATT and the WTO.

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[18] *Id.* at 561–62.

[19] *Id.* at 562.

[20] *Id.* at 570 (quoting Contracting Parties to the GATT, Third Session, GATT/CP.3/SR.22 (June 8, 1949), at 7 (request of Czechoslovakia for decision under Article XXIII)).

[21] *See id.* at 612–13.

[22] *Id.* at 566, 586.

[23] Stephan Schill & Robyn Briese, *"If the State Considers": Self-Judging Clauses in International Dispute Settlement*, 13 MAX PLANCK Y.B. U.N. L. 61, 64 (2009).

I. BACKGROUND: A HISTORY OF THE UNITED STATES ABUSING ARTICLE XXI(B) DEMONSTRATES A NEED FOR A REVIEW STANDARD TODAY

Despite the success of the GATT and the WTO in advancing free trade and promoting peace, the passage of time tempers the significance of social conflict in the public's mind, and factions reemerge to threaten international institutions.[24] United States President Donald J. Trump has stated, "We [i.e., the United States] lose the lawsuits, almost all of the lawsuits in the WTO" and "[i]f [the WTO does not] shape up, I would withdraw from the WTO."[25] The falsity of President Trump's statements aside,[26] the WTO must withstand efforts to delegitimize it,[27] including President Trump's threats to withdraw, so as to continue to diminish the risk of conflict and foster economic growth.[28]

Nations are incentivized to join and remain members of the WTO because benefits from reduced trade barriers between members creates a comparative advantage over non-members.[29] In particular, the effect of minimizing trade barriers is that members enjoy lower costs associated with traded goods and services, compared to non-members who must pay the additional cost to overcome the trade barrier.[30] However, because the benefits of reduced trade costs are diffused throughout member states,

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[24] *See* Jason Stanley, *Germany's Nazi Past is Still Present*, N.Y. TIMES (Sept. 10, 2018), https://www.nytimes.com/2018/09/10/opinion/germanys-nazi-past-is-still-present.html [https://perma.cc/S9MZ-X8MH].

[25] *Trump Threatens to Pull US out of World Trade Organization*, BBC NEWS, https://www.bbc.com/news/world-us-canada-45364150 [https://perma.cc/WDK7-ZL23].

[26] Farley, *supra* note 7; Jeffrey J. Schott & Euijin Jung, *In US-China Trade Disputes, the WTO Usually Sides with the United States*, PETERSON INST. FOR INT'L ECON. (Mar. 12, 2019), https://www.piie.com/blogs/trade-and-investment-policy-watch/us-china-trade-disputes-wto-usually-sides-united-states [https://perma.cc/2LVH-B36R].

[27] *See* Megan Shannon, *Preventing War and Providing the Peace? International Organizations and the Management of Territorial Disputes*, 26(2) CONFLICT MGMT. & PEACE SCI. 144, 147 (2009).

[28] *See* Peter S. Goodman, *Trump Just Pushed the World Trade Organization Toward Irrelevance*, N.Y. TIMES (Mar. 23, 2018), https://www.nytimes.com/2018/03/23/business/trump-world-trade-organization.html [https://perma.cc/4W9Z-2JLZ] ("The W.T.O. is the direct descendant of a global trading pact reached at the end of World War II, fueled by the idea that trade across borders minimizes prospects for war.").

[29] *See, e.g.*, Alison Bevege, *Pacific Trade Pact Takes Off with Tariffs Cut in Six Nations*, REUTERS (Dec. 29, 2018), https://www.reuters.com/article/us-trade-tpp/pacific-trade-pact-takes-off-with-tariffs-cut-in-six-nations-idUSKCN1OT00C [https://perma.cc/WR74-64J].

[30] Donald J. Boudreaux & Nita Ghei, *The Benefits of Free Trade: Addressing Key Myths*, MERCATUS CENTER (May 23, 2018), https://www.mercatus.org/publication/benefits-free-trade-addressing-key-myths [https://perma.cc/248Q-NWCQ].

individual citizens within member states scarcely feel significant economic benefits from free trade.

Additionally, free trade forces states to shift resources to their most efficient industries in order to compete in the global market.[31] States shifting resources to their most efficient industries maximizes the output and profitability of those industries which, in turn, helps maximize the GDP of each member state.[32] And a greater GDP strengthens the consumer purchasing power of a state's population thereby boosting consumption and enhancing living standards.[33] Accordingly, the GATT seeks to foster a free-trade, GDP-maximizing environment by effectively outlawing the use of trade restrictions (e.g., tariffs) except in specific circumstances that implicate a GATT safeguard or escape clause.[34]

A. UNPACKING THE LANGUAGE OF GATT ARTICLE XXI

Although the GATT contains various reviewable safeguard clauses (e.g., Article XX) which can be invoked to skirt WTO obligations and to legally impose tariffs, only the Article XXI escape clause has been considered non-justiciable by WTO dispute panels, meaning that when a member state invokes Article XXI to justify imposing tariffs, the WTO dispute settlement body cannot review the legality of the invocation.[35] Indeed, the WTO has historically treated Article XXI(b) as self-judging.[36] Specifically, Article XXI reads as follows:

> Nothing in this Agreement shall be construed
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> (a) To require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

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[31] Daniel C.K. Chow et al., *A Legal and Economic Critique of President Trump's China Trade Policies*, 79 U. PITT. L. REV. 205, 214 (2017).

[32] *Id.*

[33] *Id.* at 214–15.

[34] *See* Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 703 (2011); William Krist, *Chapter 3: Trade Agreements and Economic Theory*, Wilson Center, https://www.wilsoncenter.org/chapter-3-trade-agreements-and-economic-theory [https://perma.cc/Q266-LVLF].

[35] Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 375, 386 (2003).

[36] *See* Hal Shapiro & Riikka Kuoppamäki, *National Security Self-Declaration in the Age of Fake News*, SOC. INT'L ECON. L. (SIEL), Sixth Biennial Global Conference 3 (July 11, 2018), available at https://dx.doi.org/10.2139/ssrn.3209874.

> (b) To prevent any contracting party from taking action which it considers necessary for the protection of its essential security interests
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> (i) Relating to fissionable materials or the materials from which they are derived;
>
> (ii) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) Taken in time of war or other emergency in international relations; or
>
> (c) To prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[37]

The GATT Article XXI—commonly referred to as the "national security" exception—applies in five circumstances: (a) the disclosure of national security information; (b)(i) trade in nuclear materials; (b)(ii) trade in military supplies; (b)(iii) trade in goods during "war or other emergencies in international relations;" and (c) United Nations Charter obligations.[38]

In creating Article XXI, drafters of the GATT sought to balance the need for member states to protect national security and the need to avoid member states exploiting a potentially non-justiciable exception to sidestep GATT obligations.[39] Originally, the GATT drafters noted, "We recognized that there was a great danger of having too wide an exception . . . [t]herefore we thought it well to draft provisions which would take care of real security interests and, at the same time . . . limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance."[40]

Although the GATT drafters declined to define the language within Article XXI,[41] states invoking Article XXI sparked WTO disputes

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[37] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

[38] Alford, *supra* note 34, at 703–04.

[39] Christopher G. Terris, *Iran at the WTO: The Future of the U.S. State Sponsor of Terrorism Sanctions*, 49 N.Y.U. J. INT'L L. & POL. 891, 905 (2017).

[40] PETROS C. MAVROIDIS, THE REGULATION OF INTERNATIONAL TRADE: GATT, VOL. 1, 600 (Dec. 18, 2015).

[41] The drafters intentionally refused to define the language, keeping the terms vague so as to strike a "delicate balance between security and norm-creation." Terris, *supra* note 39, at 905. They

that necessitated defining the language within the exception.[42] Further, rules of statutory interpretation and legislative history dictate how the international community has loosely defined the language of Article XXI. Accordingly, since the GATT was enacted subsequent authorities have defined the language of Article XXI.

First, "[n]othing in this Agreement" has been defined to mean that Article XXI is a general exception to all obligations that the GATT imposes upon its members.[43] Article XXI(a) permits members to refuse to disclose detrimental national security information.[44] Next, "[n]othing in this Agreement" entails that no member may be prevented from taking an action listed in Article XXI subparagraphs (b) or (c).[45] With respect to subparagraph (b), "action" applies to three enumerated circumstances: (i) trade in "fissionable materials or the materials from which they are derived;" (ii) "traffic in arms, ammunition and implements of war" and other goods "for the purpose of supplying a military establishment;" and (iii) during a "time of war or other emergency in international relations."[46]

Then, the phrase "it considers" embodies the GATT drafters' self-judging intent behind Article XXI(b).[47] "Self-judging" is defined as permitting only the "Member State invoking the exception" to decide "whether factual circumstances satisfy the requirements of the security exception."[48] Because the member state invoking Article XXI(b) must retain the sovereignty to decide what action it considers necessary to protect essential security interests, the "necessary" language substantiates a self-judging interpretation.[49] However, although the GATT drafters stated that "Members may . . . do whatever they think necessary to protect

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clarified: "We cannot make it too [restrictive], because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose." *Id.* (quoting World Trade Organization, Analytical Index of the GATT 600 (2012)).

42 *See, e.g.*, Alford, *supra* note 34, at 706–08; Perry S. Bechky, *Sanctions and the Blurred Boundaries of International Economic Law*, 83 MO. L. REV. 1, 29 n. 143 (2018); Akande & Williams, *supra* note 35, at 386.

43 Shapiro & Kuoppamäki, *supra* note 36.

44 WORLD TRADE ORGANIZATION ANALYTICAL INDEX, GUIDE TO GATT LAW AND PRACTICE, VOL. 1, 601–02 (Geneva, 1995).

45 Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, ¶¶ 7.61–7.65 (adopted on April 26, 2019) [hereinafter *Russia – Transit* Panel Report].

46 *Id.* ¶ 7.67 (quoting GATT Article XXI(b)(i)–(iii)).

47 Shapiro & Kuoppamäki, *supra* note 36.

48 Alford, *supra* note 34, at 702.

49 Bechky, *supra* note 42.

their security interests relating to atomic materials, arms traffic, and wartime or other international emergencies,"[50] subparagraphs XXI(b)(i), (ii), and (iii) "qualify and limit the exercise of the discretion accorded to Members" under Article XXI(b).[51] Hence, subparagraphs (i), (ii), and (iii) "establish alternative [] requirements" that an invocation of Article XXI(b) must satisfy.[52] Ultimately, the WTO dispute panel in *Russia – Measures Concerning Traffic in Transit* concluded that Article XXI(b) was not entirely self-judging and, in turn, the clause was justiciable.[53]

"[E]ssential security interests" applies to Article XXI(b), subparagraphs (i), (ii), and (iii).[54] Historically, the preceding "it considers" language has hamstrung attempts to neatly define "essential security interests."[55] When appearing before WTO dispute panels, members remained free to define what they considered "essential security interests" when they invoked Article XXI(b).[56] As such, an issue of notice frequently arose: invoking members were not required to inform[57] other members as to what may trigger an "essential security interest."[58] Instead, the GATT members merely trusted that each signatory will interpret "essential security interests" in good faith.[59] However, the recent WTO panel decision in *Russia – Transit* remedied the notice dilemma by explicating the phrase for the first time.[60] The *Russia – Transit* panel defined "essential security interests" as "interests relating to the quintessential functions of the state," such as protecting its territory and people and maintaining law

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[50] Alford, *supra* note 34, at 702.

[51] *Russia – Transit* Panel Report, *supra* note 45, ¶¶ 7.65–7.68.

[52] *Id.* ¶¶ 7.68, 7.82.

[53] *Id.* ¶¶ 7.102–7.103.

[54] *Id.* ¶¶ 7.62–7.68.

[55] Shapiro & Kuoppamäki, *supra* note 36, at 4–7.

[56] *Id.*

[57] However, the *Russia – Transit* panel recently held that Article XXI(b) primarily pertains to armed conflict or heightened crises that generate military or public law and order interests. In light of this holding, moving forward, members involved in armed conflicts will maintain constructive notice that Article XXI(b) may be lawfully invoked. *See Russia – Transit* Panel Report, *supra* note 45, ¶¶ 7.72–7.76.

[58] Abbey Stemler, *Paris, Panels, and Protectionism: Matching U.S. Rhetoric with Reality to Save the Planet*, 19 VAND. J. ENT. & TECH. L. 545, 569 (2017).

[59] Alford, *supra* note 34, at 699; Terris, *supra* note 39, at 905 ("[T]he spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuses.").

[60] *Russia – Transit* Panel Report, *supra* note 45, ¶¶ 7.62–7.69.

and public order.[61] In addition, the panel examined essential security interests in light of Article XXI(b), subparagraphs (i), (ii), and (iii).[62]

"Relating to" precedes subparagraphs (b)(i) and (ii), and "[t]aken in time of" precedes subparagraph (b)(iii). Respectively, the "[r]elating to" language requires that a member state's action to protect an essential security interest bears an objective relationship with the desired result.[63] "Taken in time of" requires the member to act during the war or other emergency.[64] Meanwhile, the catch-all language[65] of subparagraph (iii)—"other emergency in international relations"—has unsurprisingly proven the most prone to abuse.[66] Yet, under the doctrine of *noscitur a sociis*, a "word is known by the company it keeps."[67] Accordingly, "other emergency in international relations" read in the context of its company (i.e., all of Article XXI(b)), suggests that only extreme circumstances analogous to nuclear production, supplying military establishments, and war are suitable.[68]

To rectify the traditional abuse of the catch-all clause, the recent *Russia – Transit* panel defined "other emergency in international relations" as situations of armed conflict, latent armed conflict, "heightened tensions or crisis, or [] general instability engulfing or surrounding a state" that requires urgent action to resolve threats to the state's defense, military, maintenance of law, or public order interests.[69] To construct this definition, the panel reasoned that the coordinating conjunction "or" in "war *or* other emergency in international relations" connected the two categories by rendering "war" an example of situations that constitute other emergencies.[70] Consequently, the panel noted that "political or economic differences between Members" must generate defense, military, maintenance of law, or public order interests to "constitute an emergency in international relations."[71]

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[61] *Id.* ¶ 7.130.
[62] *Id.* ¶¶ 7.62–7.69.
[63] *Id.* ¶ 7.69.
[64] *Id.* ¶ 7.70 (emphasis added).
[65] Schloemann & Ohlohoff, *supra* note 8, at 431.
[66] *Id.*
[67] Yates v. United States, 574 U.S. 528, 135 S. Ct. 1074, 1085 (2015).
[68] Schloemann & Ohlohoff, *supra* note 8, at 442.
[69] *See Russia – Transit* Panel Report, *supra* note 45, ¶¶ 7.72–7.76.
[70] *Id.* ¶¶ 7.72–7.75 (emphasis added).
[71] *Id.* ¶ 7.75.

B. THE UNITED STATES' EXPANDING INTERPRETATION OF ARTICLE XXI(B)

Since the enactment of the GATT in the 1940s, the United States has gradually expanded its interpretation of Article XXI(b).[72] Initially, during the 1947 Article XXI negotiations, the United States expressed a desire not to draft an overly-broad security exception.[73] Rather, the United States aimed for Article XXI(b) to apply only when a member state faced an objective threat to their national security.[74]

However, the United States' interpretation deviated from the original definition during congressional deliberations on the Trade Expansion Act of 1962 ("Trade Expansion Act").[75] This deviation occurred partly because of a decrease in potential military threats to Western states.[76] During deliberations, Congress expanded the United States' Article XXI(b) interpretation when it expressly considered not only military strength but also economic prosperity as variables detrimental to national security.[77] Congress recalled the events leading up to the Second World War—the Great Depression, isolationism, and excessive tariffs—and determined that the health of essential industries inhibited unemployment and deterred civil unrest.[78] To defend domestic industries Congress passed the Trade Expansion Act in 1962, and section 232 therein permits the president to investigate whether import levels threaten national security.[79] Accordingly, with respect to the GATT Article XXI(b), the Trade Expansion Act enables the president to assert that an entirely economic variable (e.g., imports) threatens national security.

Next, during the Falkland War in 1982, the United States again expanded its interpretation of Article XXI(b). At that time, the European Economic Community—to some extent a precursor to the European

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[72] Shapiro & Kuoppamäki, *supra* note 36, at 6.

[73] *Id.*

[74] *Id.* at 6–7.

[75] *See* 108 Cong. Rec. 22,290 (Oct. 4, 1962); *see also* 108 Cong. Rec. S19,568 (Sept. 17, 1962) (statement of Sen. Young).

[76] Hahn, *supra* note 17, at 560–61.

[77] 108 Cong. Rec. 22,290 (Oct. 4, 1962) (statement of Rep. Knox).

[78] 108 Cong. Rec. S19,568-69 (Sept. 17, 1962) (statement of Sen. Young).

[79] Trade Expansion Act of 1962, 19 U.S.C. § 1862 (2012); SECTION 232 INVESTIGATIONS: THE EFFECT OF IMPORTS ON THE NATIONAL SECURITY, https://www.bis.doc.gov/index.php/other-areas/office-of-technology-evaluation-ote/section-232-investigations (last visited Mar. 11, 2019) [https://perma.cc/5YSQ-58LV].

Union—implemented an embargo on Argentinian goods, citing national security interests.[80] Argentina responded that the embargo was purely political.[81] The United States—siding with the European Economic Community—argued that the "GATT . . . left it to each contracting party to judge what was necessary to protect its essential security interest."[82] Subsequently, the Reagan administration applied this self-judging interpretation to Nicaragua, as explained in greater detail below.[83]

Additionally, George W. Bush's administration broadly interpreted "national security" in a 2001 investigation into iron ore and semi-finished steel imports. Critically, the "security" language in the Trade Expansion Act is narrower than the essential "interests" language of Article XXI(b).[84] Yet, the Bush administration's 2001 investigation identified two aspects of national security (under the Trade Expansion Act) that ultimately factored into its definition of essential interests under Article XXI(b): national defense and critical industries.[85] National defense was either strictly defined as measures necessary to protect the homeland or broadly defined as measures necessary to conduct United States military operations abroad.[86] The term "critical industries" encompassed the general security and welfare of United States industries "beyond those necessary to satisfy national defense requirements . . . critical to the minimum operations of the economy and government."[87] This national-defense-plus-critical-industries analysis further expanded the United States' interpretation of Article XXI(b) by broadening the scope of the provision's "interests" language.

Following President Bush, the Obama administration adopted the critical industries interpretation. In a debate with Mitt Romney during the 2012 presidential campaign, President Obama described his national budget proposal as being "driven by, 'What are we going to need to keep

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[80] Alford, *supra* note 34, at 710–12.

[81] *Id.*

[82] *Id.* at 712.

[83] *Id.* at 713–15; *see infra* Part II.A.iv..

[84] Fed. Energy Admin. v. Algonquin, 426 U.S. 548, 569 (1976).

[85] BUREAU OF EXP. ADMIN., U.S. DEP'T OF COMMERCE, THE EFFECTS OF IMPORTS OF IRON ORE AND SEMI-FINISHED STEEL ON THE NATIONAL SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED, 5–6 (Oct. 2001) [hereinafter IRON ORE AND SEMI-FINISHED STEEL REPORT].

[86] *Id.* at 5.

[87] *Id.*

the American people safe?'"[88] Moments later, President Obama categorized the national budget deficit as a national security concern, reasoning that a strong domestic economy ensures the ability to "project military power overseas."[89] President Obama's philosophy that a sound domestic budget affects the United States' essential interests harkened back to the Bush administration's broad national defense definition (i.e., the ability to conduct military operations abroad),[90] as well as Congress's economic concerns while deliberating the Trade Expansion Act.[91]

C. PRESIDENT TRUMP INVOKES ARTICLE XXI(B) TO JUSTIFY IMPOSING STEEL AND ALUMINUM TARIFFS

On March 1, 2018, President Trump issued Proclamations 9704 and 9705, imposing global, ten percent and twenty-five percent *ad valorem*[92] tariffs on aluminum and steel imports.[93] In doing so, President Trump further expanded the interpretations of Presidents Bush and Obama by combining President Bush's separate national defense and critical industries definitions and treating—as President Obama did—economic strength as an essential security interest.[94] For example, the Trump administration's section 232 report on steel ("Steel Report") defines national security as the "general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, which are critical to minimum operations of the economy and government."[95] The Steel Report found that steel imports pose a threat to national security,

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[88] The New York Times, *Obama vs. Romney: Complete 3rd Presidential Debate | Election 2012 | The New York Times*, YOUTUBE (Oct. 22, 2012) https://www.youtube.com/watch?v=tecohezcA78 [https://perma.cc/9LBM-3Z2T] [hereinafter *Obama v. Romney Debate*] (relevant parts viewable at 39:40–40:10).

[89] *Id.*

[90] IRON ORE AND SEMI-FINISHED STEEL REPORT, *supra* note 85, at 6.

[91] 108 Cong. Rec. 22,290 (Oct. 4, 1962) (statement of Rep. Knox); 108 Cong. Rec. S19,568–69 (Sept. 17, 1962) (statement of Sen. Young).

[92] An *ad valorem* tariff is a tariff that is calculated based on a percent value of the imported product. PAUWELYN ET AL., *supra* note 13, at 183.

[93] Jean Galbraith, *Trump Administration Continues Push to Reshape American Trade Regulations by Imposing Tariffs on Steel and Aluminum Imports*, 112 AM. J. INT'L L. 315, 315–18 (2018) [hereinafter Galbraith, *Trump Administration Imposes Tariffs*].

[94] BUREAU OF INDUS. & SEC. OFFICE OF TECH. EVALUATION, U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY: AN INVESTIGATION UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED, 1–2 (Jan. 11, 2018) [hereinafter STEEL REPORT].

[95] *Id.*

reasoning that (1) the steel industry is important to national security, (2) steel imports adversely affect the economic wellbeing of the United States steel industry, (3) displacement of United States steel by excessive imports weakens the United States economy, and (4) a global excess of steel weakens the United States economy.[96] Thus, to protect America's essential security interests under GATT Article XXI(b), President Trump imposed tariffs on steel and aluminum imports.

Shortly after President Trump announced steel and aluminum import tariffs, multiple WTO members—including Canada, China, the EU, and Mexico—brought complaints against the United States in the WTO dispute resolution body,[97] alleging that the United States was in violation of its WTO obligations.[98] The members allege that the United States' tariffs violated Article XXI(b), while the United States counterargues that section 232 of the Trade Expansion Act and the non-justiciable nature of Article XXI(b) justified the tariffs.[99]

Specifically, Canada complains that section 232 of the Trade Expansion Act is inconsistent with the WTO[100] in that section 232 violates Article XXI(b) by requiring the United States to consider the health of domestic industries as a variable necessary to protect its essential security interests.[101] Canada claims that such factors are unnecessary to protect essential security interests and outside the scope of Article XXI.[102] Perhaps Canada's claims may have found traction under the 1947 United States interpretation of Article XXI.[103] However, decades of the United States expanding its interpretation of Article XXI(b), and the WTO's reluctance to definitively interpret Article XXI(b), makes it likely that Canada's

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[96] *Id.* at 2–4.

[97] By the time this Comment was prepared for publication, the WTO had composed a panel to hear the dispute. *DS544: United States – Certain Measures on Steel and Aluminum Products*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds544_e.htm [https://perma.cc/WXS4-V9LM].

[98] Bryce Baschuk, *Europe, U.S. Escalate Trade War with New Disputes at the WTO*, BLOOMBERG (Oct. 18, 2018), https://www.bloomberg.com/news/articles/2018-10-18/wto-members-request-an-investigation-into-trump-s-metal-tariffs [https://perma.cc/VJL4-ZEB7].

[99] *Id.*

[100] Request for the Establishment of a Panel by Canada, *United States – Certain Measure on Steel and Aluminum Products*, ¶ 6, WTO Doc. WT/DS550/11 (Oct. 19, 2018).

[101] *Id.*

[102] *Id.*

[103] Shapiro & Kuoppamäki, *supra* note 36, at 6–7.

argument will fail.[104] Nonetheless, the United States permitted WTO member states to apply for permanent exemptions from the aluminum and steel tariffs.[105]

President Trump's distaste toward the WTO separates his interpretation of Article XXI(b) from the broad interpretations of past presidents. Complaints against the aluminum and steel tariffs aside, President Trump differentiates himself from his predecessors with his open disdain for international institutions generally and the WTO specifically.[106] For starters, President Trump touts unilateral "America First" policies that run counter to the multilateral interests of international institutions.[107] Adhering to this policy, President Trump withdrew from the Paris Climate Accord and the Trans-Pacific Partnership.[108] Moreover, President Trump has threatened to withdraw the United States from the WTO.[109] Continuing further, President Trump has stated, "I don't know why [the United States] is in [the WTO]. The WTO is designed by the rest of the world to screw the United States."[110] In stride with President Trump's remarks are comments by the Director of the White House National Trade Council, Peter Navarro, who has also expressed his contempt for international institutions: "[The United States has] been the piggy bank for the world and that [has] got to stop . . . [W]hen it comes to

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[104] Interestingly, a Swiss steel exporter sued the United States alleging that the tariffs were based on political and economic justifications which violate Article XXI(b) and that section 232 embodies an unconstitutional delegation of authority to the executive branch under the U.S. Constitution. Jean Galbraith, *U.S. Tariffs on Steel and Aluminum Imports Go into Effect, Leading to Trade Disputes*, 112 AM. J. INT'L L. 499, 504 (2018) [hereinafter Galbraith, *U.S. Tariffs Lead to Disputes*]. However, the suit will likely fail because the WTO is reluctant to decide political disputes. Akande & Williams, *supra* note 35, at 381. Also, the United States Supreme Court has previously held that section 232 is not an unconstitutional delegation of legislative power to the executive. Fed. Energy Admin. v. Algonquin, 426 U.S. 548, 558–60 (1976).

[105] Galbraith, *U.S. Tariffs Lead to Disputes*, *supra* note 104, at 500–02.

[106] *See* Z. Byron Wolf, *Donald Trump's War on the Alphabet of International Order*, CNN (Jul. 6, 2018, 3:30 PM), https://www.cnn.com/2018/07/06/politics/donald-trump-international-foreign-policy-upset-allies-enemies/index.html [https://perma.cc/8MGZ-3FR8]; Debaere, *supra* note 10.

[107] THE WHITE HOUSE, *President Donald J. Trump's Foreign Policy Puts America First*, (Jan. 30, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-foreign-policy-puts-america-first/ [https://perma.cc/QN68-5WH2].

[108] Jovan Ruvalcaba, *What We Have Lost with the TPP: Value-Driven Trade, a Trigger for WTO Reform*, 35 ARIZ. J. INT'L & COMP. L. 349 (2018).

[109] Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO*, 2018, U. ILL. L. REV. 115, 182 (2018); Edward Helmore, *Trump: US Will Quit World Trade Organization Unless it 'Shapes Up'*, BLOOMBERG (Aug. 30, 2018), https://www.theguardian.com/us-news/2018/aug/30/trump-world-trade-organization-tariffs-stock-market [https://perma.cc/3NYS-93KW].

[110] Helmore, *supra* note 109.

these trade disputes, *these allies basically are robbing us blind*."[111] In addition to disparaging the WTO, the Trump administration has acted adversely to it by blocking the appointments of WTO appellate body judges, thereby undermining the ability of the institution to resolve disputes.[112]

Ultimately, President Trump's steel and aluminum tariffs resurrect "the ghost of unilateralism."[113] It was unilateralist policies that amplified the economic chaos of the Great Depression, and it was unilateralism that the GATT drafters endeavored to end.[114] Consequently, the combination of disparaging statements and adverse actions corroborate allegations by WTO members that President Trump's invocation of Article XXI(b) to implement tariffs is in violation of the United States' WTO obligations.[115]

D. THE WTO NEEDS A REVIEW STANDARD FOR ARTICLE XXI(B)

Because the GATT drafters originally intended Article XXI(b) to apply to extraordinary circumstances, the United States' current interpretation of Article XXI(b) abuses the provision. Examining the language of Article XXI(b), it is apparent that the provision applies to three extraordinary circumstances: trade in materials to produce nuclear weapons, trade in armaments for military establishments, and trade during war or other emergencies in international relations.[116] Nonetheless, the "it

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[111] Mark K. Neville, Jr., *U.S. Trade Policy and National Security: Backwards or Upside Down?*, J. INT'L TAX'N, Aug. 2018, at 26, 29.

[112] Baschuk, *supra* note 98.

[113] "Unilateralism" occurs when one nation implements a trade barrier, e.g., tariffs, without negotiating with other nations and without providing other nations with an opportunity to reciprocate. Typically, unilateral actions spark retaliation by other nations, who implement their own trade barriers, harming consumers. Conversely, "multilateralism" occurs when multiple nations negotiate a trade agreement, freeing trade and helping consumers. However, multilateral trade agreements occasionally harm weaker, emerging nations. *See* Kimberly Amadeo, *Unilateral Trade Agreements, Their Pros and Cons, with Examples*, THE BALANCE, https://www.thebalance.com/unilateral-trade-agreements-definition-examples-3305904 [https://perma.cc/LKX8-LRCR]; Kimberly Amadeo, *Multilateral Trade Agreements with Their Pros, Cons and Examples*, THE BALANCE, https://www.thebalance.com/multilateral-trade-agreements-pros-cons-and-examples-3305949 [https://perma.cc/45DR-VJ2D]. *See also* Stephanie Nebehay, *China Says U.S. has Brought Back 'The Ghost of Unilateralism' to WTO*, REUTERS (Dec. 17, 2018), https://www.reuters.com/article/us-trade-china-usa/china-says-u-s-has-brought-back-the-ghost-of-unilateralism-to-wto-idUSKBN1OG14N [https://perma.cc/XWG8-MFNK].

[114] Schloemann & Ohlohoff, *supra* note 8, at 444; Debaere, *supra* note 10.

[115] Baschuk, *supra* note 98.

[116] GATT 1994, *supra* note 37, art. XXI(b).

considers" language which suggests that Article XXI(b) is partially self-judging cannot be ignored. The "it considers" language eliminates arguments for an overly intrusive review standard, such as a standard that gives the WTO authority to decide whether or not a member subjectively believed their essential security interests were threatened.[117] After all, members must retain sufficient sovereignty. In contrast, the "it considers" language cannot render Article XXI(b) completely self-judging and non-justiciable.[118] Rather, some level of judicial review is required to ensure institutional stability and predictability and to balance the members' interest in protecting their national security and the WTO's interest in preventing abusive norms.[119]

II. ANALYSIS: THE WTO SHOULD ADOPT THE TWO-PRONGED OBJECTIVE LANGUAGE/GOOD FAITH REVIEW STANDARD THAT THIS NOTE PROPOSES

The WTO must adopt a review standard for Article XXI(b) to prevent abusive norms and to fortify the institution against attempts to circumvent its obligations. The purpose of a review standard is to prevent members from abusing Article XXI(b)—specifically the "other emergency" catch-all provision.[120] Therefore, this Note proposes that the WTO adopt an objective language/good faith review standard to effectively adjudicate Article XXI(b) disputes.

Article XXI(b) has been interpreted as self-judging which, in turn, preserves the sovereignty of member states to freely protect their essential security interests.[121] Although adopting a review standard would undercut these principles, the economic incentives behind WTO membership (e.g., free trade and reduced trade costs) would compel states to remain members

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[117] Akande & Williams, *supra* note 35, at 396–97.

[118] Galbraith, *Trump Administration Imposes Tariffs*, *supra* note 93, at 320 ("[I]nternational trade scholars and practitioners are divided as to what extent the provision is 'self-judging' and thus immune from WTO review.").

[119] *See* Terris, *supra* note 39.

[120] Akande & Williams, *supra* note 35, at 378 ("In interpreting Article XXI, one must seek to construct a system which is faithful to the terms of that article but which at the same time seeks to prevent abuse of the system.").

[121] Shapiro & Kuoppamäki, *supra* note 36, at 12.

of the WTO if the WTO were to adopt a review standard for Article XXI(b).[122]

If the United States withdrew from the WTO, United States businesses would be placed at a substantial competitive disadvantage compared to WTO members.[123] Inspect, for example, the health of the United States farming industry after the United States withdrew from the Trans-Pacific Partnership ("TPP") and after the initial effects of heightened tariffs materialized. First, months after President Trump withdrew the United States from the TPP,[124] United States farmers required subsidies to offset the cost of trade barriers so as to export agricultural products at competitive prices in TPP member states.[125] For example, today, when United States farmers attempt to sell their products in Japan, products from United States farmers face higher tariffs than agricultural products from TPP members, such as Brunei, thereby increasing the prices of United States products in Japan.[126] This increase in foreign market price has harmed farmers in the United States.

Heightened tariffs from leaving free trade agreements such as the TPP in addition to President Trump's persisting trade disputes between WTO members have caused Wisconsin farmers to file for bankruptcy at alarming rates.[127] Recent trade disputes have generated export tariffs on hundreds of United States agricultural products, including agricultural products such as cranberries, pork, and corn.[128] Because these tariffs increase the export price of United States agricultural products, fewer United States farmers can export their products at competitive prices in foreign markets.[129] In turn, farmers attempt to sell in the domestic market products that they would have otherwise exported and sold in foreign

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[122] *See* Bevege, *supra* note 29 (discussing the economic incentives that members to free trade agreements enjoy compared to nonmembers).

[123] *See, e.g., id.*; Krist, *supra* note 34.

[124] Don Lee, *Trump's Withdrawal from TPP Trade Deal is Hurting U.S. Exports to Japan*, L.A. TIMES (Apr. 25, 2019), https://www.latimes.com/politics/la-na-pol-trump-abe-us-japan-trade-tpp-20190425-story.html [https://perma.cc/YSH2-74WT].

[125] *Id.*

[126] *Id.*

[127] Jan Shepel, *Midwest Farm Bankruptcies on the Rise, with Wisconsin Leading the way*, WIS. ST. FARMER (Feb. 25, 2019), https://www.wisfarmer.com/story/news/2019/02/25/wisconsin-leads-list-midwest-farm-bankruptcies/2979882002/[https://perma.cc/NA7H-55ZR].

[128] Jesse Newman & Jacob Bunge, *'This One is Gonna Kick My Butt' – Farm Belt Bankruptcies are Soaring*, WALL STREET J. (Feb. 6, 2019), https://www.wsj.com/articles/this-one-here-is-gonna-kick-my-buttfarm-belt-bankruptcies-are-soaring-11549468759 [https://perma.cc/7SCV-N58L].

[129] *Id.*

markets. This spike in domestic market supply decreases the price of agricultural products in the United States thereby diminishing the farmers' profits.[130] Consequently, plunging profits are causing Midwestern farmers to file for Chapter 12 bankruptcies at record rates.[131] Given the immediate negative economic impacts that the United States' withdrawal from the TPP and trade disputes have had on Americans, President Trump's threats to withdraw the WTO[132] are likely hollow.[133] Thus, President Trump would not withdraw from the WTO, if the WTO adopted an Article XXI(b) review standard and adjudicated his imposition of tariffs.

A review standard would legitimize the WTO against not only the present adverse rhetoric and actions from President Trump, but also the adverse actions of future leaders who would emerge to oppose the international trade institution. Allowing member states to successfully challenge a potentially abusive Article XXI(b) invocation would demonstrate to members and non-members alike that the institution functions properly.[134] Further, adopting a review standard for Article XXI(b) would signal to potential WTO opponents that the international institution is fairly structured and evenhandedly adjudicates disputes.[135] Thus, despite the lax definitions of Article XXI(b)'s language and the overarching ideology among member states that the provision is absolutely self-judging, some members advocate for a logical review standard.[136]

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[130] *Id.*

[131] Chapter 12 of the Bankruptcy Code permits farmers and fishermen to reorganize their debts and formulate plans to repay creditors in three to five years. Previously, farmers whose debts exceeded roughly $4 million could not file for Chapter 12 bankruptcy. However, given the increased debt levels among farmers, Congress recently passed legislation raising the permissible debt limit to $10 million. *Chapter 12 – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-12-bankruptcy-basics [https://perma.cc/HPN8-8PGS]; *Congress Increases Debt Limit for Chapter 12 Bankruptcies*, ABA BANKING J., (Aug. 2, 2019), https://bankingjournal.aba.com/2019/08/congress-increases-debt-limit-for-chapter-12-bankruptcies/ [https://perma.cc/T43U-3LT3].

[132] Shaffer, *supra* note 109, at 182.

[133] In addition, not only would economic implications incentivize nations such as the United States to adhere to this review standard, but also "political peer pressure" would continue to convince "reluctant states to submit themselves to the [dispute settlement] process." Hahn, *supra* note 17, at 619.

[134] *See* Goodman, *supra* note 28.

[135] *Id.*

[136] Alford, *supra* note 34, at 704.

A. ACADEMIA MAINLY OFFERS FOUR POTENTIAL ARTICLE XXI(B) REVIEW STANDARDS

Recognizing a need for an Article XXI(b) review standard, WTO and GATT scholars mainly offer four potential review standards for Article XXI(b).[137]

i. Standard One: An Entirely Self-Judging Clause

The first option is to not have a review standard because Article XXI(b) is entirely self-judging.[138] Under this approach, the WTO dispute panel cannot review a member state's invocation of Article XXI(b).[139] History supports this standard, as no invocation of Article XXI(b) has ever been successfully challenged.[140] In addition, until 2019, no WTO panel had attempted to issue a binding decision with respect to Article XXI(b).[141] Yet the *Russia – Transit* panel rejected Russia's argument that all invocations of Article XXI(b) are non-justiciable.[142] Accordingly, an entirely self-judging interpretation of Article XXI(b) has historical support but faces contemporary debate.[143]

Further, an entirely self-judging review standard is the most prone to abuse—as indicated by the United States' expanding interpretation of Article XXI(b).[144] Currently, President Trump is potentially abusing Article XXI(b) to destabilize the WTO and substantiate his accusations against the WTO.[145] Also, President Trump's "America First" policy flaunts the unilateral action that the GATT and the WTO were established to prevent.[146] President Trump's promotion of unilateral trade action demonstrates that his administration has either forgotten or is ignorant of

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[137] *Id.* at 699; Akande & Williams, *supra* note 35, at 386, 396–97.

[138] Alford, *supra* note 34, at 699.

[139] *Id.* at 699, 704.

[140] Galbraith, *Trump Administration Imposes Tariffs*, *supra* note 93, at 320.

[141] Alford, *supra* note 34, at 699; Dylan Geraets, Mayer Brown, *WTO Issues Ruling on Russia – Traffic in Transit: Measures Justified on National Security Grounds Are Justiciable*, Lexology (Apr. 8, 2019), https://www.lexology.com/library/detail.aspx?g=97ca67c2-8880-4b21-a472-d271d4fc0acc [https://perma.cc/D3AK-622E].

[142] *Russia – Transit* Panel Report, *supra* note 45, ¶ 7.57.

[143] Terris, *supra* note 39, at 905.

[144] *Id.*

[145] *See* Goodman, *supra* note 28; *Trump Threatens to Pull US out of World Trade Organization*, BBC NEWS, https://www.bbc.com/news/world-us-canada-45364150 [https://perma.cc/YYB6-YP8H].

[146] Debaere, *supra* note 10.

the turmoil which preceded the creation of the GATT, as well as the importance of the WTO in preserving peace and fostering economic prosperity through trade negotiations.[147] Thus, interpreting Article XXI(b) as an entirely self-judging provision is not practicable moving forward.

ii. Standard Two: A Good Faith Review

The second potential review standard is that the invoking member state decides whether Article XXI(b) applies as a justification for its tariffs, while a WTO dispute panel conducts a good faith inquiry regarding that invocation.[148] International law supports this standard because the Vienna Convention on the Law of Treaties requires that signatories interpret and apply all treaties in good faith.[149] Further, among the interpretations involving a WTO dispute panel inquiry, this appears to be the least intrusive standard. Nonetheless, this standard runs the risk of diluting the "necessary" element and placing the WTO in the center of political disputes—both of which could delegitimize the WTO by causing the WTO to potentially infringe on state sovereignty.[150]

However, because an Article XXI(b) invocation has never been successfully challenged thus far, member states have relied solely on good faith contracting since the GATT's enactment.[151] In particular, the risk of developing a reputation as a poor trading partner and facing sanctions has incentivized members to act in good faith.[152] Further, on a more altruistic level, member states may continue to act in good faith because of the belief that if the GATT is law, a law is binding, thus, the GATT binds member states to its obligations.[153]

Other realms of international economic law (e.g., international finance) provide guidance on how to define "good faith" in the context of a national security exception.[154] These realms can provide guidance for interpreting security exceptions analogous to GATT Article XXI(b).

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147 *Cf.* Stanley, *supra* note 24.

148 Alford, *supra* note 34, at 698–99.

149 Vienna Convention on the Law of Treaties arts. 26, 31–32, Jan. 27, 1980, 1155 U.N.T.S. 331.

150 Terris, *supra* note 39, at 905–06; Akande & Williams, *supra* note 35, at 381.

151 Alford, *supra* note 34, at 699.

152 *Id.* at 752–57.

153 *Id.* at 753–54.

154 *See* Schill & Briese, *supra* note 23, at 61; North American Free Trade Agreement art. 2102(1), Dec. 17, 1992, 107 Stat. 2057; Australia-United States Free Trade Agreement (adopted 18 May 2004, entered into force 1 Jan. 2005) Australian Treaty Series 2005 (1) art. 22(2).

Generally speaking, because a good faith review allows an international body to review the conduct of an individual state, a good faith review limits the sovereignty of the member states within the international institution.[155] However, a good faith review establishes baseline expectations for how members are expected to contract with one another; these baseline expectations cultivate consistency.[156]

Good faith requires honesty, fairness, and a relatively level playing field between signatories.[157] The good faith inquiry is a more subjective approach, and panels consider the context, object, and purpose of the invocation, as well as the "different interests and backgrounds of the . . . parties involved."[158] Typically, the party invoking the national security exception bears the burden of proving it invoked the exception under a subjective good faith belief; indeed, the Permanent Court of International Justice[159] expressly placed the burden of proof on the invoking party to demonstrate such belief.[160]

Nonetheless, the good faith review standards in other areas of international law are not flawless. The International Centre for Settlement Investment Disputes ("ICSID")[161] determined that Article XI of the U.S.-Argentine bilateral investment treaty[162] was not absolutely self-judging because tribunals could apply a substantive, good faith review.[163] Broadly speaking, the jurisprudence stemming from ICSID tribunals indicates that international dispute settlement bodies may review national security exceptions with a good faith review. However, dispute bodies refuse to

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[155] Steven Reinhold, *Good Faith in International Law*, 2 U.C.L. J.L. & JURIS. 40, 42, 57, 58, 63 (2013).

[156] *Id.* at 63.

[157] Hahn, *supra* note 17, at 599.

[158] *Id.* at 600.

[159] The Permanent Court of International Justice served as the predecessor to the International Court of Justice, offering the first ever international forum with general jurisdiction to resolve disputes over international law. *See Permanent Court of International Justice*, INT'L CT. OF JUST., https://www.icj-cij.org/en/pcij [https://perma.cc/7FS3-XAPF].

[160] Hahn, *supra* note 17, at 605; Schill & Briese, *supra* note 23, at 116.

[161] The ICSID is the world's primary international investment dispute settlement body. *About ICSID*, ICSID WORLD BANK GROUP, https://icsid.worldbank.org/en/Pages/about/default.aspx [https://perma.cc/D9NQ-7M92].

[162] "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests." Treaty concerning the Reciprocal Encouragement and Protection of Investment, art. 11, U.S.-Arg., Nov. 11, 1991, 31 I.L.M. 128 (1992).

[163] Schill & Briese, *supra* note 23, at 111–13.

define good faith and grant broad deference to the invoking state.[164] For example, the European Court of Human Rights ("ECHS")[165] ruled that the European Convention on Human Rights' security interest provision is *not* self-judging because the provision contains objective language that courts may review.[166] However, the ECHS grants states who invoke the provision broad deference, subjecting the states' invocations to merely a quasi-good faith review.[167]

The international institutions applying a good faith review standard provide a baseline of consistency, yet the apprehension of those institutions to plainly define "good faith" blurs the boundaries of their review standards.[168] Such unwillingness to concretely define the standard necessitates international institutions to apply precarious and less predictable "touch and feel" type tests.[169] But, important to this Note, other areas of international economic law *applying* a good faith review standard to otherwise self-judging exceptions paves the way for the WTO to adopt a more concrete good faith review standard with respect to Article XXI(b).[170] In addition, more intrusive review standards have been offered.[171]

iii. Standard Three: A Plain Language Review

The third potential review standard is that the invoking member state decides what "it considers" to be actions "necessary for the protection of its essential security interests," while the WTO dispute panel reviews the plain language of Article XXI(b), such as "fissionable materials" and "war."[172] This interpretation suggests that when the member state invokes Article XXI(b) with respect to an unenumerated essential security interest, such as climate change, the action would fall outside the purview of the

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[164] *Id.* at 113.

[165] The ECHS provides a forum for individuals to allege violations to their human rights under the Convention for the Protection of Human Rights and Fundamental Freedoms. *See* John G. Merrills, *European Court of Human Rights*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/European-Court-of-Human-Rights [https://perma.cc/3GJS-ZVTJ].

[166] Schill & Briese, *supra* note 23, at 74–75.

[167] *See id.*

[168] *Id.* at 113.

[169] *Id.* at 118.

[170] *See id.* at 111–13.

[171] *See infra* Parts III.A.iii, III.A.iv.

[172] Alford, *supra* note 34, at 698–99; Shapiro & Kuoppamäki, *supra* note 36, at 12–13.

WTO dispute panel.[173] Conversely, where the member's invocation of Article XXI(b) involves an enumerated security interest (e.g., "fissionable materials"), the WTO would hold the authority to decide whether the member's actions fell within the plain language of Article XXI(b).[174] Nevertheless, because this standard lacks a good faith review, the invoking member need only cite the Article XXI(b)(iii) "other emergency" catch-all[175] to circumvent WTO review.[176] As such, this review standard is toothless.

Notably, the *Russia – Transit* panel deviates from scholarly interpretations of the "it considers" language. The panel held that states consider which interests are essential[177] to their security, and those interests are subject to a good faith review, pursuant to the Vienna Convention on the Laws of Treaties.[178] Under the *Russia – Transit* analysis, the invoking state bears the burden to articulate why an essential security interest arises from the alleged "other emergency."[179] The panel explained that members bear a greater burden to articulate claimed essential security interests if the surrounding situation is farther removed from the "hard core" of war and armed conflict, reasoning that far-removed circumstances present less obvious threats to military and defense interests or interests to maintain law and public order.[180]

iv. Standard Four: A Reasonable Invocation Review

The fourth potential review standard is that the WTO dispute panel applies an objective analysis to decide whether it is reasonable for the invoking member state to subjectively believe that their essential security interests are threatened.[181] A primary concern with this interpretation is that it renders the security exception reactionary: the

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[173] Shapiro & Kuoppamäki, *supra* note 36, at 13; Stemler, *supra* note 58, at 569.

[174] Shapiro & Kuoppamäki, *supra* note 36, at 13.

[175] GATT 1994, *supra* note 37.

[176] Schloemann & Ohlohoff, *supra* note 8, at 431.

[177] *See infra* notes 54–72 (text discussing the definition of "essential security interests").

[178] *Russia – Transit* Panel Report, *supra* note 45, ¶¶ 7.127–7.135.

[179] *Id.*

[180] *Id.* ¶¶ 7.134–7.136.

[181] Akande & Williams, *supra* note 35, at 386, 396–97.

invoking member only possesses an objectively reasonable belief *after* their security interest has been harmed.[182]

This interpretation has received some support. For example, when the Bush administration investigated the impacts of iron ore and semi-finished steel in 2001, the report by then-United States Secretary of Commerce Norman Mineta reasoned that the United States' interpretation of "national security" should be reasonable under the circumstances.[183] Furthermore, this interpretation could have applied in 1985, when the United States cited national security considerations to justify an embargo on Nicaraguan goods.[184] In response to the embargo Nicaragua requested that a GATT dispute panel review the United States' Article XXI(b) invocation and argued that the United States unreasonably believed that Nicaragua threatened their national security.[185]

During the United States-Nicaragua dispute, numerous member states offered their interpretations of Article XXI(b). India contended the invoking state bears the burden of proving a "genuine nexus between its security interests and the trade action taken."[186] Cuba claimed the United States was mocking the international system.[187] Poland expressed concern about abusing Article XXI(b) because of the arbitrary, unilateral nature of the provision.[188] Ultimately, the GATT dispute panel deemed itself incapable of judging "the validity of or the motivation for the invocation of Article XXI(b)(iii) by the United States."[189]

B. THE OBJECTIVE LANGUAGE AND GOOD FAITH REVIEW STANDARD THAT THIS NOTE PROPOSES IS PREFERABLE TO THE FOUR POTENTIAL REVIEW STANDARDS ABOVE

To deter abuse, clarify Article XXI(b), and buttress the WTO against President Trump's attacks,[190] the WTO should adopt a review standard wherein the WTO dispute panel would first define the scope of

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[182] Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. PA. J. INT'L ECON. L. 263, 275 (1998).

[183] IRON ORE AND SEMI-FINISHED STEEL REPORT, *supra* note 85, at 5.

[184] Shapiro & Kuoppamäki, *supra* note 36, at 9.

[185] Alford, *supra* note 34, at 713.

[186] *Id.* at 715.

[187] *Id.*

[188] *Id.*

[189] Terris, *supra* note 39.

[190] Shapiro & Kuoppamäki, *supra* note 36, at 12–13.

the objective language within Article XXI(b)—"fissionable materials," "traffic in arms," or "time of war."[191] Then, if an invocation involved a situation beyond the defined objective language, the WTO would conduct a good faith inquiry into a member's invocation. Instead of injudiciously granting a member state absolute discretion to determine what "it considers" to be a national security threat in every situation, the member state should be required to withstand good faith scrutiny—bearing the burden of proof to show the invocation was made in good faith and the member reasonably considered the action necessary to protect a threat to its essential security interests.[192]

First, the WTO should determine whether the objective language, such as "fissionable materials," "traffic in arms," or "time of war or other emergency in international relations," applies. Defining the objective language of Article XXI(b) would ensure that member states transact in accordance with the plain language of Article XXI(b)[193] and invoke Article XXI(b) only in extraordinary circumstances as the GATT drafters originally intended.[194] Indeed, under GATT signatories currently trust one another to adhere to the objective language.[195] However, this trust-based system is unenforceable, prone to abuse, and permits members such as the United States to gradually expand their Article XXI(b) interpretations to abusive proportions.[196] For example, consider Canada's quixotic attempt to challenge the steel and aluminum tariffs.[197] There, the inability of a contracting party to challenge the United States' Article XXI(b) invocation fosters precisely the abusive norm the GATT drafters sought to prevent.[198]

The objective language of Article XXI(b) describes obvious and extraordinary, conflict-related situations, because the GATT drafters did not intend for Article XXI(b) to apply to "commercial purpose[s]."[199] In

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[191] Alford, *supra* note 34, at 699; Shapiro & Kuoppamäki, *supra* note 36, at 12–13.

[192] *See* Hahn, *supra* note 17, at 605; Schill & Briese, *supra* note 23, at 116.

[193] Alford, *supra* note 34, at 699; Terris, *supra* note 39 ("[T]he spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuses.").

[194] WORLD TRADE ORGANIZATION ANALYTICAL INDEX, GUIDE TO GATT LAW AND PRACTICE, 600 (Geneva, 1995).

[195] Alford, *supra* note 34, at 699.

[196] *See id.* at 713–15; Terris, *supra* note 39, at 905.

[197] Request for the Establishment of a Panel by Canada, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS550/11 (Oct. 19, 2018).

[198] *See* Terris, *supra*, note 39.

[199] Mavroidis, *supra* note 40. Indeed, the *Russia – Transit* panel explained that a political or economic dispute between states will only satisfy Article XXI(b)(iii) if the dispute gives "rise to defence and

practice, a dispute panel should be able to easily identify whether the objective language served as the foundation for a member's Article XXI(b) invocation.[200] The ease with which a panel may identify the presence of an enumerated extraordinary situation guarantees that members only invoke Article XXI(b) when an objective situation is present. Moreover, the absence of trade in fissionable materials, arming military establishments, or war or other emergencies sounds the alarm on a potentially abusive invocation. In the event that the objective language is not determinative, the panel would retain the flexibility to find that the invocation was nonetheless made in good faith.[201] Procedurally, if the first prong was satisfied, the second prong need not be analyzed. However, if objective language did not apply, a member may nonetheless prove that it lawfully invoked Article XXI(b) in good faith.

Second, a good faith inquiry would warn parties to only invoke the provision when "necessary." Under the proposed review standard, a member invokes Article XXI(b) in good faith when there is a reasonable basis to support the member's subjective belief that their essential security interests are threatened and required protective action.[202] Importantly, a good faith inquiry following the objective language inquiry would not dilute the "necessary" element by placing the WTO at the center of political disputes. Rather, if a member invokes Article XXI(b) for political purposes such that the objective language does not apply, the invocation of Article XXI(b) is likely to be unnecessary and in violation of WTO rules. Accordingly, in such circumstances, refusing to conduct a good faith inquiry would dilute the "necessary" element because it would allow members to mold what is "necessary" to fit their policy interests, irrespective of WTO obligations. Moreover, allowing members to mold the "necessary" element in the shape of policy interests would place the WTO at the center of political disputes because members would question the legitimacy of the institution as a whole.

Additionally, because a good faith inquiry would ensure that the invoking member's essential security interest was truly threatened, a good faith inquiry would deter abuse and cabin the "other emergency" catch-all. A good faith review would prohibit member states from liberally citing the catch-all provision if an objective category did not apply. However,

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military interests, or maintenance of law and public order interests." *Russia – Transit* Panel Report, *supra* note 45, ¶ 7.75.

[200] Shapiro & Kuoppamäki, *supra* note 36, at 4, 13.

[201] *Id.*

[202] *See* Reinhold, *supra* note 155, at 42, 58, 63.

although in specific circumstances the member's invocation of Article XXI(b) may fall outside of the objective language (thereby failing the first prong of the proposed standard), the reason for the invocation could be analogous to the objective language of Article XXI(b). In such a circumstance, a member may nonetheless prove that the invocation occurred in good faith. In turn, the WTO panel may apply the doctrine of *noscitur a sociis* to find that the member state's justification for invoking Article XXI(b) is analogous to the situations enumerated within the objective language of Article XXI(b).[203] For that reason, the review standard would contain the catch-all provision to the types of emergencies envisioned by the drafters and neither reduce Article XXI(b) into a reactionary exception nor dilute the "necessary" element.[204] Therefore, the WTO defining the objective language of the provision and conducting a good faith inquiry could effectively deter Article XXI(b) abuse. And, if the invoking member state fails both prongs, the WTO may bring the member state into compliance with the WTO through compensation or permissible retaliation.[205]

Past American presidents interpreted Article XXI(b) broadly. Because drafters originally intended for Article XXI(b) to only apply when members faced subparagraph (i), (ii), or (iii), the United States' expanding interpretation entails abuse.[206] Through adopting the Trade Expansion Act of 1962 and defending the trade measures taken by the European Economic Community during the Falkland War, the United States injected economic interests into its Article XXI(b) interpretation.[207] Moreover, both President Bush and President Obama factored economic well-being—through critical industries and a sound budget—into the

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[203] Perhaps an example of this specific situation at work is through a member hypothetically invoking Article XXI(b) for climate change purposes. For example, the effects of climate change could impair a member state's water supply such that the member state needed to impose trade barriers to assist its citizens. In such an instance, the member state relying on climate change to justify its Article XXI(b) invocation would fail the WTO's objective language review because climate change is not listed within Article XXI(b). However, the circumstances of the invocation indicate that the member state could reasonably possess the subjective belief that climate change was the culprit for its water shortages.

[204] Bhala, *supra* note 182, at 275; Terris, *supra* note 39.

[205] PAUWELYN ET AL., *supra* note 13, at 165–77.

[206] Shapiro & Kuoppamäki, *supra* note 36, at 6–7; Alford, *supra* note 34, at 713–15.

[207] 108 Cong. Rec. 22,290 (Oct. 4, 1962) (statement of Rep. Knox); 108 Cong. Rec. S19,583 (Sept. 17, 1962) (statement of Sen. Gore) (Congress expressly considered economic prosperity to be an essential security interest); Alford, *supra* note 34, at 712.

interpretation.[208] Following the precedent of his predecessors, President Trump proceeded to expand the United States' Article XXI(b) interpretation by declaring that *global* excesses of steel[209] and aluminum[210] imports threaten the essential security interests of the United States.

However, because of President Trump's anti-WTO rhetoric and actions, his invocation of Article XXI(b) is distinguishable from previous presidents and places the WTO at the center of a political dispute.[211] Although President Trump is not the first president to invoke Article XXI(b), he has invoked Article XXI(b) while overtly and consistently expressing disdain for the WTO.[212] Moreover, President Trump blocking the appointments of WTO appellate body judges stymies the ability of the WTO to resolve disputes.[213] Further, President Trump presents a political conundrum for the WTO: deciding in favor of the United States would support President Trump's "America First" policy and do little to rebut his disparaging comments, while deciding against the United States would support President Trump's assertions that the WTO is an institution designed to "screw" the United States.[214] To resolve this conundrum, the WTO should adopt the review standard this Note proposes. Doing so would enable the WTO to objectively adjudicate disputes involving members who would otherwise abuse Article XXI(b) to circumvent the international institution and advance unilateral policy interests.

C. PRESIDENT TRUMP'S INVOCATION OF ARTICLE XXI(B) FAILS THE PROPOSED OBJECTIVE LANGUAGE AND GOOD FAITH REVIEW STANDARD

President Trump's tariffs on steel and aluminum imports fail the proposed review standard because (1) the language of Article XXI(b) does not apply, and (2) the United States lacks any reasonable basis to support its belief that it invoked Article XXI(b) in good faith. First, the objective

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[208] IRON ORE AND SEMI-FINISHED STEEL REPORT, *supra* note 85, at 5-6; *Obama vs. Romney Debate*, *supra* note 88.

[209] STEEL REPORT, *supra* note 94, at 1.

[210] U.S. DEP'T COM. BUREAU INDUSTRY & SECURITY OFF. TECH. EVALUATION, THE EFFECT OF IMPORTS OF ALUMINUM ON THE NATIONAL SECURITY: AN INVESTIGATION UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED, 4 (Jan. 2018).

[211] Wolf, *supra* note 106.

[212] Helmore, *supra* note 109; Neville, Jr., *supra* note 111, at 29.

[213] Baschuk, *supra* note 98.

[214] *Id.*

language within Article XXI(b)—"fissionable materials," "traffic in arms," or a "time of war"—fails to apply. Before President Trump implemented the steel and aluminum tariffs, the United States Department of Defense noted that its ability to "acquire the steel or aluminum necessary to meet national defense requirements" was not impaired by the threat of increased steel and aluminum imports.[215] Consequently, the United States government itself admits that steel and aluminum imports do not impair its essential security interests.

Although there may be inferences drawn from history that corroborate President Trump's reliance on global impacts, his assertion is more attenuated than those of past presidents. The GATT arose from World War II, and World War II was caused in part by a global economic depression.[216] Hence, past presidents have incorporated economic variables in their Article XXI(b) interpretations. President Bush interpreted national security to include the domestic impacts on critical industries.[217] Further, President Obama added the stability of the budget as a factor to ensuring national security overseas.[218]

However, because economic considerations are not enumerated within Article XXI(b), economic justifications for Article XXI(b) fall under the second, good faith prong of the proposed review standard. Accordingly, President Trump would bear the burden of demonstrating reasonable basis to substantiate a good faith belief that restricting *global* steel and aluminum imports is analogous to the circumstances posed in the objective language of Article XXI(b).

Under the good faith inquiry prong of the review standard, the United States would be unable to prove that it invoked Article XXI(b) in good faith, failing the second prong and the standard. The tariffs lack a reasonable basis to protect essential security interests because the United States Department of Defense noted that the increased imports did not impair its ability to meet national defense needs.[219] Recall: President Trump further expanded the United States' interpretation by arguing that a global excess of steel weakens the United States' economy which, in turn, threatens essential security interests.[220] Yet soon after raising this

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[215] Galbraith, *Trump Administration Imposes Tariffs*, *supra* note 93, at 315–18.

[216] Rudloff, *supra* note 3.

[217] IRON ORE AND SEMI-FINISHED STEEL REPORT, *supra* note 85, at 5.

[218] *Obama vs. Romney Debate*, *supra* note 88.

[219] Galbraith, *Trump Administration Imposes Tariffs*, *supra* note 93, at 315–18.

[220] Baschuk, *supra* note 98.

argument, the United States permitted members to apply for permanent exemptions from the tariffs. Granting exemptions demonstrates a lack of urgency that traditionally accompanies emergencies and undermines the argument that steel and aluminum tariffs are reasonably "necessary" to protect any essential security interest.[221]

Rather, President Trump's rhetoric and actions strongly suggest that the tariffs advanced the administration's "America First" policy—creating a political dispute over Article XXI(b).[222] President Trump's unfounded declarations that the WTO is designed to "screw the United States" while blocking the appointment of appellate body judges only weigh against the United States during the good faith inquiry. Under the proposed review standard, the fact that the objective language of Article XXI(b) does not apply to the United States' circumstances, the lack of a necessity justification from the United States Department of Defense, and President Trump's disparaging rhetoric and adverse conduct, demonstrate that the United States should be precluded from invoking Article XXI(b) to justify the legality of its tariffs on steel and aluminum imports. Because the United States' invocation of Article XXI(b) to justify its tariffs on steel and aluminum fails both the objective language and good faith prongs, a WTO dispute panel applying the review standard proposed by this Note would likely find the trade measures to be in violation of WTO obligations.[223]

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[221] Alford, *supra* note 34, at 699.

[222] The White House Fact Sheets on Nat'l Security & Def., *President Donald J. Trump's Foreign Policy Puts America First*, THE WHITE HOUSE (Jan. 30, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-foreign-policy-puts-america-first/ [https://perma.cc/5TSF-GV2M].

[223] Similarly, President Trump's steel and aluminum tariffs would fail the test developed by the *Russia – Transit* panel. According to the panel, the United States would bear the burden to articulate why it considers steel and aluminum imports an essential security interest. At best, the panel would classify the steel and aluminum imports as an economic dispute between member states, requiring the United States would bear a greater burden to articulate its interests because the economic dispute is far removed from the interests of war and armed conflict which comprise the "hard core" of Article XXI(b). At worst, the panel would find that excess steel and aluminum imports do not fall under the definition of an "other emergency in international relations" because only the United States is harmed. Thus, the United States would fail to either satisfy its heightened burden of proof or to prove that Article XXI(b)(iii) applies to global steel and aluminum import levels in the first place. *See Russia – Transit* Panel Report, *supra* note 45, ¶¶ 7.59–7.149.

III. CONCLUSION

The WTO remains an effective international institution.[224] However, an increase in nationalism and unilateralism, spearheaded by President Trump's "America First" policies, encourages a global distaste for the WTO. Such societal trends coupled with Article XXI(b)'s abuse-prone catch-all provision and the United States' blocking of WTO appellate body judges endanger the WTO and thrust the institution into a crisis. Therefore, the WTO must adopt an objective language and good faith review standard to deter abuse.

Under the proposed standard, the WTO dispute panel would first examine a member state's invocation of Article XXI(b) to determine whether the objective language of Article XXI(b) applied. Then, if not, the invoking member would bear the burden of proving to the WTO dispute panel that they invoked Article XXI(b) in good faith. An objective language review requires that the invocation fall within a situation enumerated within Article XXI(b). If the second prong is reached, the member state may demonstrate good faith by presenting evidence that supports a reasonable basis to believe that their essential security interests were threatened.

As applied to President Trump's steel and aluminum tariffs, the administration's invocation of Article XXI(b) would fail this test, allowing the WTO to issue a report and bring the United States into compliance. First, the United States' steel and aluminum tariffs fall outside of the situations enumerated within Article XXI(b). Second, based on the expressed lack of necessity by the United States Department of Defense and President Trump's adverse rhetoric and actions, the United States would be unable to prove that it invoked Article XXI(b) under the good faith belief that global steel and aluminum imports threatened its essential security interests.

The absence of international institutions to facilitate free trade and encourage economic interdependence exacerbated the effects of the Great Depression and propelled desperate states into the Second World War. The GATT and the WTO were implemented in the wake of these avoidable disasters, and these institutions have contributed to preventing the reoccurrence of similar catastrophes. However, President Trump's disparaging rhetoric and adverse actions toward the WTO threaten the current era of relative international economic predictability wherein free

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[224] Farley, *supra* note 7.

international trade provides greater economic opportunities to individuals worldwide. Although President Trump correctly complains that the United States bears a heavier burden in implementing WTO obligations, a rising tide lifts all boats. Similarly, a stable and effective WTO benefits all states. In that spirit, the WTO must adopt a review standard for GATT Article XXI(b) that effectively defends against abuse and enhances the WTO's institutional legitimacy.