

Maryland Journal of International Law

Volume 34 | Issue 1

Article 13

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Recommended Citation

Stuart Davis, *Inherent Limits to the World Trade Organization's Article XXI Self-Judging Security Exception*, 34 Md. J. Int'l L. 364 (2020).

Available at: <https://digitalcommons.law.umaryland.edu/mjil/vol34/iss1/13>

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Inherent Limits to the World Trade Organization’s Article XXI Self-Judging Security Exception

STUART DAVIS[†]

I. INTRODUCTION

The United States faces nine concurrent complaints¹ in the World Trade Organization (WTO) for its twenty-five percent tariff (i.e., import taxes) on foreign steel.² While the WTO generally prohibits tariffs between its 164-members,³ the United States justified its protectionist measure under Article XXI of the WTO that exempts member states from tariff rules to protect “essential security interests.”⁴ Member states historically treated Article XXI as a last

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1. China first requested consultations—the initial step in the WTO’s dispute resolution process—on April 4, 2018. *See* United States – Certain Measures on Steel and Aluminum Products, *Request for Consultations By China*, WTO Doc. G/L/1222 (Apr. 4, 2018). The United States subsequently received eight more complaints from India, European Union, Canada, Mexico, Norway, Russia, Switzerland, and Turkey. *See* G/L/1222 (providing list of all related complaints against the United States’ steel tariff).

2. The tariff proclamation allowed for individual countries to negotiate and remove the tariff. Proclamation No. 9705, 83 FR 11625 (May 24, 2018) (amended).

3. The WTO membership accounts for 96.7% of the world’s total GDP and 96.4% of total international trade (i.e., exchange of goods and services) between countries. PETER JOHN WILLIAMS, *A HANDBOOK ON ACCESSION TO THE WTO*, 1, https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c1s1p1_e.htm (last visited Nov. 13, 2018).

4. General Agreement on Tariffs and Trade, art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter WTO Agreement] (The 1994 Marrakesh Agreement subsumed the General Agreement on Tariffs and Trade and created the modern WTO. For consistency and clarity, article citations hereinafter refer to the modern, complete WTO Agreement).

resort and rarely invoke the article to ensure no member state could abuse its language to skirt WTO rules.⁵ The complainants accuse the United States of pretextually using Article XXI to benefit its domestic steel industry.⁶

The seemingly esoteric dispute over the WTO's Article XXI national security exception presents an existential threat to the international trading system. On the one hand, the United States argues that national security issues solely constitute "political matters not susceptible to review or capable of resolution by WTO dispute settlement. Every member of the WTO retains the authority to determine for itself... its essential security interests."⁷ In other words, any WTO member may interpret XXI's margin of appreciation (i.e., discretion in applying a treaty's terms) for themselves.

On the other hand, the nine complainants assert the steel tariffs violate the rights of WTO members, the U.S.' obligations under the WTO, and impair the core pillars of the international trading system.⁸ They contend neither the United States nor any other WTO member possesses unlimited discretion in applying Article XXI when it conflicts with the rights of other members. Unless the parties settle their dispute in the interim, the case will eventually appear before the WTO's Appellate Body (AB).⁹ The AB must address the key issue in this case, and their answer will shape the course of international trade for decades: to what extent may a WTO member decide Article XXI's margin of appreciation for itself? The dispute also begs practical questions about the ability of the WTO to bind members to trade rules. Does the AB possess the authority to decide the issue? If

5. See *infra* Part I(A).

6. WTO disputes usually include third party member states. The current dispute includes Brazil, Columbia, Egypt, Guatemala, Hong Kong, Iceland, India, Indonesia, Japan, Kazakhstan, New Zealand, Malaysia, Mexico, Norway, Qatar, Russia, Saudi Arabia, Singapore, South Africa, Switzerland, Chinese Taipei, Thailand, Turkey, Ukraine, Venezuela, and Bolivia. Panel Report, *United States - Certain Measures on Steel and Aluminum Products - Request for Consultations by the European Union*, WTO Doc. G/L/1243 (June 6, 2018).

7. United States – Certain Measures on Steel and Aluminum Products, Communication from the United States, WTO Doc. WT/DS548/13 (July 6, 2018).

8. See United States – Certain Measures on Steel and Aluminum Products, Request for Consultations by the European Union, WTO Doc. WT/DS548/1 (June 6, 2018) (listing, among others, violation of Article I's Most Favored Nation provision and Article II's national treatment provision).

9. See *infra* note 78.

the AB possesses that authority, how should it balance a sovereign's claim of national security on one side and international free trade on the other?

The WTO provides member states some margin of appreciation in complying with its rules,¹⁰ but it has never formally ruled on the scope of Article XXI.¹¹ The WTO should settle the steel tariff dispute¹² by rejecting the U.S.' invocation of Article XXI because it contravenes the language, structure, and purpose of the WTO, it exceeds the reasonable legal boundaries of self-judging provisions under the WTO's margin of appreciation, and impermissibly threatens the viability of the WTO system based on past WTO cases that placed limits on similar exception articles within the WTO Agreement.

This article provides the AB an analytical template to both resolve the current steel dispute and address future invocations of Article XXI. The analysis elucidates why the WTO should narrowly construe Article XXI to preserve the international trading system.¹³ Part II presents historical and legal context to Article XXI. First, it traces the development of the WTO, emphasizing the strained but limited inclusion of Article XXI. Second, it describes the international law's rules for treaty interpretation and the binding nature of the AB's decisions. Part III analyzes the scope of Article XXI through a textual and analogical analysis of the WTO Agreement's object and purpose. This section argues the WTO Agreement's margin of appreciation should preclude any unbounded interpretation of Article XXI's language. It also analogizes the present steel tariff dispute with the factually and legally similar WTO *Shrimp-Turtle*¹⁴ case. The legal reasoning behind *Shrimp-Turtle* illustrates why Article XXI's application should be limited whenever it threatens the multilateral trading system. Part IV concludes with a

10. See *infra* Part III(A).

11. See *infra* Part II(A).

12. The WTO dispute settlement procedure seeks to avoid formal judgement between member states. The WTO's Appellate Body only makes a substantive legal ruling if both parties are unsatisfied with the arbitration process. This paper's legal analysis is not limited to the United States steel tariff but applicable to any Article XXI dispute formally submitted to the Appellate Body for resolution. See *infra* note 78.

13. See G. John Ikenberry, *The End of Liberal International Order*, 94 INT'L AFF., 7 (2018) (discussing the current and likely continuing threats to the multilateral, rule-based international order).

14. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/23 (Nov. 26, 2001) [hereinafter *Shrimp-Turtle*].

summary of why reasonable limits should be placed on Article XXI's application and how the U.S.' steel tariffs impermissibly exceed those boundaries.

II. BACKGROUND

The present dispute centers on the meaning of Article XXI(b) of the WTO Agreement. It states:

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... (ii) relating to 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.¹⁵

This section first traces the historical development and application of Article XXI. It subsequently provides a legal overview of how the WTO's AB should adjudicate the present dispute under international law of treaty interpretation.

A. Historical Context

In 1944, at the close of World War II, the leaders of the Allied powers gathered in Bretton Woods, New Hampshire to design a stable post-world international environment.¹⁶ These leaders sought to avoid the devastation of the previous decades with strong, multilateral international institutions.¹⁷ The initial negotiations eventually crystalized into the General Agreement on Tariffs and Trade ("GATT") in 1948.¹⁸ The GATT operated not only as a comprehensive international trade agreement, but also as an international organization to administer the agreement.¹⁹ The WTO

15. WTO Agreement, *supra* note 4, art. 21.

16. See JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 92 (2006) (noting that idea of trade institution was raised during Bretton Woods but not implemented).

17. The United States championed the multilateral system following the war and lead the development of diplomatic, economic, and security frameworks centered around American long-term national interest. G. JOHN IKENBERRY, LIBERAL LEVIATHAN: THE ORIGINS, CRISIS, AND TRANSFORMATION OF THE AMERICAN WORLD ORDER, 2 (2011).

18. MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION, 2 (2006).

19. Richard Sutherland Whitt, *The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of*

eventually replaced the GATT in 1994, but maintained its founding articles and principles.²⁰ Most importantly, the WTO retained the GATT's principle of Most Favored Nation ("MFN"), which requires member states to extend any trade deal (i.e., reduced tariffs) made with one member state to all member states.²¹ This principle targeted the "beggar thy neighbor"²² protectionist trade policies endemic to the interwar period.²³ The GATT addressed one of the largest market failures of international trade through collective rules, tariff obligations, and arbitration procedures.

1. Article XXI Drafters Balanced State Sovereignty with Treaty Integrity

The GATT's binding rules sparked criticism from member states from its inception.²⁴ Member states worried that the agreement could have a coercive effect on national sovereignty.²⁵ In response, the drafters of the GATT negotiated several limited exceptions to the MFN principle.²⁶ The drafters included Article XXI, the national security exception, to avoid the absurd result of penalizing a member state for placing tariffs against another member state who is at war

Nicaragua, 19 LAW & POL'Y INT'L BUS. 603, 606 (1987).

20. See JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 38-41 (1990) (detailing the circumstances for an updated international trade institution); see also Amelia Porges, *The Marrakesh Agreement Establishing the World Trade Organization*, in THE WORLD TRADE ORGANIZATION 63 (T.P. Stewart ed., 1996) (discussing the process leading to the WTO's creation).

21. General Agreement on Tariffs and Trade, art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

22. Beggar thy neighbor or "tit-for-tat" characterizes the practice of one state placing taxes on imported goods to help a domestic industry, thus sparking a cycle of increasingly stringent reciprocal tariffs. XING LIJUAN, BEHIND THE MULTILATERAL TRADING SYSTEM: LEGAL INDIGENIZATION AND THE WTO IN COMPARATIVE PERSPECTIVE, 51 (2014).

23. *Id.*

24. See John H. Jackson, *Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects*, in THE WTO AS AN INTERNATIONAL ORGANIZATION 161, 163 (Anne O. Krueger ed., 1998) (outlining a number of "birth defects" that clouded the GATT's legal status); see also Senator Eugene Millikin on GATT, at the *Hearings on Reciprocal Trade Agreements Expansion Act of 1951*, before the Senate Committee on Finance, 82d Congress, 1st Sess. 92 (1951) ("Anyone who reads GATT is likely to have his sanity impaired").

25. JACKSON, *supra* note 16, at 95.

26. See MATSUSHITA, *supra* note 18, at 4 (describing the GATT's eight exceptions to basic rules).

with them.²⁷ The drafters agreed its application should be limited, but disagreed on whether states themselves or the GATT's adjudicating body should decide what is covered under Article XXI.²⁸

Article XXI's language does not expressly declare its national security exception self-judging,²⁹ though its text could plausibly convey such an interpretation.³⁰ The drafters recognized that such an interpretation could create a nullifying loophole for the GATT.³¹ John Leddy, the U.S. representative and co-author of Article XXI, agreed with his international colleagues.³² He stated that "there was a great danger of having too wide an exception... that would permit anything under the sun."³³ Leddy and his international colleagues wanted Article XXI's language flexible enough to accommodate concerns about national security while limited enough to prevent commercial tariffs disguised as national security measures.³⁴

This balanced construction of Article XXI eventually prevailed, and the GATT retained the article's seemingly self-judging language,³⁵ while expressly limiting its application to war or international emergencies without enumerating specific definitions of these terms.³⁶ The drafters believed that these broad boundaries and

27. Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 702 (2011).

28. WORLD TRADE ORGANIZATION, WTO ANALYTICAL INDEX OF THE GATT: ART. XXI SECURITY EXCEPTIONS 603, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art21_jur.pdf (last visited Dec. 21, 2018).

29. "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." WTO Agreement, art. 21. In the current steel tariff dispute, the United States rested its argument on the plain text reading of the article alone. *See infra* text accompanying notes 144–147.

30. *See* KRZYSZTOF J. PELC, MAKING AND BENDING INTERNATIONAL RULES: THE DESIGN OF EXCEPTIONS AND ESCAPE CLAUSES IN TRADE LAW, 102 (2016) (noting Article XXI lacks any explicit mention of self-judging language).

31. United Nations, Econ. & Soc. Council, Preparatory Comm. of the U.N. Conference on Trade & Emp't, Thirty-Third Meeting of Commission A, at 19, U.N. Doc. E/PC/T/A/PV/33 (1947) [hereinafter Preparatory Comm].

32. Alford, *supra* note 27, at 698.

33. Preparatory Comm., *supra* note 31, at 20.

34. *Id.*

35. *See infra* Part III(C).

36. Article XXI provides a list of concrete exceptions to the agreement, including trade relating to fissionable materials and implements of war. Unfortunately, the third and final exception repeats the vague language from Article XXI's opening clause, "[Nothing in this Agreement shall be construed to prevent any contracting party from taking any action] taken in time of war or other emergency in international relations." WTO Agreement, art. 21.

the good faith compliance of member states would prevent future abuses, namely attempts to cloak commercial protectionist measures with alleged national security emergencies.³⁷

The United States overall negotiating strategy behind the GATT also supports a limited reading of Article XXI. On the one hand, the American delegation pushed for self-judging national security language to preserve American sovereignty.³⁸ The Cold War made national security a top priority, and American diplomats did not want to cede policy control to an international organization.³⁹ On the other hand, the United States needed the multilateral, rule-based trading system to succeed to solidify American economic interests at home and abroad.⁴⁰ The American delegation insisted on the GATT's (and later the WTO's) dispute resolution mechanism because they believed binding rules and formal arbitration would promote greater compliance with multilateral trade rules.⁴¹ Article XXI's language reflects the delicate balance between these twin objectives: national security and trade compliance.

2. The Marshall Plan Provided an Early Indication of Article XXI's Limited Scope

The United States first invoked Article XXI in a trade dispute with Czechoslovakia in 1949.⁴² The United States had recently launched the "Marshall Plan," a sweeping post-war strategy to combat the spread of Communism in Europe.⁴³ The Marshall Plan called for free trade of all products, including military supplies, to

37. Alford, *supra* note 27, at 699.

38. See Senate Finance Committee, *Preliminary Summary of Geneva Draft of ITO Charter, Changes from New York Draft*, WORLD TRADE LAW, 3 (Sep. 15, 1947), <https://worldtradelaw.typepad.com/ielpblog/2018/05/more-gatt-article-xxi-negotiating-history.html> (last visited Dec. 18, 2018).

39. Melvyn P. Leffler, *The American Conception of National Security and the Beginnings of the Cold War, 1945-1948*, 89 AM. HIS. R. 346, 358 (1984).

40. See ROBERT KAGAN, *THE WORLD AMERICA MADE* 40 (2013) (associating American twentieth century prosperity with the rule-based, international order it helped create).

41. William R. Sprance, *The World Trade Organization and United States' Sovereignty: The Political and Procedural Realities of the System*, 13 AM. U. INT'L L. REV. 1225, 1231 (1998).

42. Contracting Parties Decision, *Article XXI – United States Exports Restrictions* (June 8, 1949), GATT CP .3/SR22 – II/28 (Aug. 11, 1952).

43. See generally BENN STEIL, *THE MARSHALL PLAN: DAWN OF THE COLD WAR* (2018) (providing a comprehensive discussion of the history, implementation, and ramifications of the Marshall Plan).

Western Europe but restricted exports to Communist Eastern Europe.⁴⁴ The Marshall Plan provided member states an early test case to evaluate the meaning of Article XXI.⁴⁵

Czechoslovakia faced pressure from the Soviet Union to decline assistance, so they challenged the Marshall Plan as a violation of the GATT.⁴⁶ The United States justified its protectionism under Article XXI, arguing that it served both the U.S.' and its Western allies' national security interest.⁴⁷ The British delegation believed the United States should be able to determine which issues affect its national interest, but should not have unfettered discretion in its usage of Article XXI because it could undermine the entire agreement.⁴⁸ Ultimately, the GATT members dodged the substantive question by voting seventeen to one against the referral of the issue to arbitration.⁴⁹

The substantive avoidance of the issue initiated a pattern that would continue until today.⁵⁰ Article XXI has only been invoked six times, and it has never been formally adjudicated by either the GATT or the WTO.⁵¹ Presently, the United States argues the lack of Article XXI jurisprudence highlights the WTO's complete deference to member states on the specific subject of national security.⁵² However, this argument fails to acknowledge the historical respect

44. *Id.* at 709.

45. PELC, *supra* note 30, at 101.

46. MICHAEL BRECHER AND JOHNATHAN WILKENFELD, A STUDY OF CRISIS, 339-41 (1997).

47. Vice Chairman of the U.S. Delegation to the Speech by the Head of the Czechoslovak Delegation Under Item 14 on the Agenda, at 10, CP.3/38 (June 2, 1949).

48. GATT Council, *Summary Record of the Twenty-Second Meeting*, at 9, CP.3/SR.22 (June 8, 1949).

49. *Id.* The WTO's modern arbitration procedures had not been established in 1949. If the GATT members had voted to hear the dispute, then it would have been referred to the "Working Party" or an early version of a Dispute Resolution Panel. PELC, *supra* note 30, at 103.

50. *See* PELC, *supra* note 30, at 101 (explaining how member states have raised Article XXI six times as a defense but never insisted upon its usage during arbitration).

51. *E.g.*, 1996 Helms-Burton Act, WTO Doc. WT/DS38/1, May 13 1996; Trade Measures Taken By The European Community Against The Socialist Federal Republic Of Yugoslavia Communication From the European Communities. GATT L/6948. Panel Report, United States – Imports of Sugar from Nicaragua, March 13 1984, GATT B.I.S.D. (31st supplement 1985); United Kingdom and Falklands (GATT Doc. L/5319/Rev. 1 (May 5 1982); Sweden—Import Restrictions on Certain Footwear, Nov 17, 1975, GATT/L/4250 at 1; COM.IND/6/Add.4, p.53 (notification) (United States invoked Article XXI as justification of its embargo against Cuba in 1962); *Ghana v. Portugal*, SR.19/12 at 196 (1961).

52. PELC, *supra* note 30, at 101.

paid to Article XXI's unstated limitations. In addition, this argument fails to account for how the text and history of Article XXI intertwines with the overarching object and purpose of the WTO.

B. Legal Context

The WTO's Understanding on Rules and Procedures Governing Settlement of Disputes (DSU) specifies the rules for interpreting the WTO agreement. The DSU's interpretation occurs "in accordance with customary rules of interpretation of public international law."⁵³

1. Customary International Law Governing WTO Treaty Interpretation

The Vienna Convention on the Law of Treaties ("VCLT") provides the rules for treaty interpretation in public international law.⁵⁴ Even non-signatories to the treaty, like the United States, recognize the binding nature of the VCLT as customary international law.⁵⁵ The WTO's dispute settlement process, like any other international tribunal, must adhere these rules when interpreting its statute in a dispute between member parties.⁵⁶ Both the dispute settlement panels and the AB use these rules to ensure the rights and obligations of the WTO Agreement are not enlarged or diminished by member states.⁵⁷

The VCLT's general rule of treaty interpretation calls for treaties to 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 light of its object and purpose."⁵⁸ The VCLT stipulates the object and purpose to be found within its preamble,

53. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

54. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 311, art. 1 [hereinafter VCLT].

55. U.S. Department of State, *Vienna Convention on the Law of Treaties*, <https://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Mar. 4, 2019).

56. DSU, *supra* note 53, art. 3.2.

57. Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 46, WTO Doc. WT/DS50/AB/R (adopted Dec. 19, 1997).

58. VCLT, *supra* note 54, art. 31.

annexes, and supplementary instruments or agreements.⁵⁹ Finally, subsequent agreement or practice between the states can be used to further elucidate treaty terms.⁶⁰

2. Appellate Body's Decisions Bind Member States

WTO member states acceded to the Dispute Settlement Understanding (DSU) in as part of the Marrakesh Agreement creating the modern WTO.⁶¹ Article 1.1 of the DSU requires member parties to abide by the rules and procedures governing disputes.⁶² The DSU authorized the creation of the Appellate Body and its jurisdiction to issue binding decisions over trade disputes related to the WTO Agreement's provisions. According to Article 3.2 of the DSU, "Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."⁶³ The Appellate Body, therefore, retains the authority to interpret Article XXI's terms and their impact on the rights and obligations of Member states.

While the United States may challenge the meaning of Article XXI and its application to the current tariff dispute, it may not question the AB's authority to decide a dispute over WTO Agreement terms between two or more WTO members. The international legal maxim, *pacta sunt servanda*, or agreements must be kept, constitutes the bedrock of international treaty law.⁶⁴ The United States acceded to the WTO and the Dispute Settlement Understanding and cannot unilaterally impose its interpretation the Agreement's terms in a dispute. The U.S.' non-compliance with the AB's decision not only violates the express terms of the DSU, but its object and purpose to preserve "the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of members."⁶⁵ The next section provides the AB an

59. *Id.*

60. *Id.*

61. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

62. DSU, *supra* note 53, art 1.1.

63. DSU, *supra* note 53, art. 3.2.

64. VCLT, *supra* note 54, art 26.

65. DSU, *supra* note 53, art 3.3.

analytical roadmap to structure their interpretation of Article XXI in both the current steel dispute and subsequent invocations of national security.

III. ANALYSIS

Treaty analysis starts with its express terms, but Article XXI's ambiguous language limits the AB's ability to definitively determine its scope. While the preceding historical overview of Article XXI suggests a bounded reading of the text,⁶⁶ VCLT rules mandate an examination of the treaty's object and purpose to fully grasp the meaning of a treaty's terms in a given dispute. This section offers the AB an analytical roadmap for Article XXI. It first analyzes Article XXI in light of the WTO's object and purpose and provides further analytical backing by analogizing the current dispute to the influential WTO dispute, *Shrimp-Turtle*.

A. Object and Purpose Analysis: U.S. Steel Tariffs Exceed Article XXI's Scope Based on the WTO's Margin of Appreciation

The general rule of treaty interpretation is to read a contested clause "in light of its object and purpose."⁶⁷ A treaty's object and purpose can usually be found in its preamble,⁶⁸ but in this case the WTO's preamble cannot elucidate the full scope of Article XXI's application on its own. The preamble calls for greater cooperation in the reduction of tariffs, but never addresses the U.S.' specific assertion that Article XXI is self-judging within the narrow category of national security.⁶⁹ The international law concept of margin of appreciation provides the necessary analytical leverage to connect Article XXI with the WTO's object and purpose.

Margin of appreciation provides states some latitude in complying with treaty obligations but only within the reasonable limits of the treaty's object and purpose.⁷⁰ The WTO's preamble expresses its overarching object and purpose as "mutually

66. *Supra* Part I(A).

67. VCLT, *supra* note 54, art. 31.

68. *Id.*

69. WTO Agreement, *supra* note 4, pmbl.

70. Saida El Boudouhi, *A Comparative Approach of the National Margin of Appreciation Doctrine Before the ECtHR, investment tribunals and WTO Dispute Settlement Bodies* (European University Institute Working Paper 2015/27, 2015), [http://cadmus.eui.eu/bitstream/handle/1814/35660/RSCAS2015_27.pdf?sequence=1&isAllowed=y_\(last visited Oct. 11, 2018\)](http://cadmus.eui.eu/bitstream/handle/1814/35660/RSCAS2015_27.pdf?sequence=1&isAllowed=y_(last%20visited%20Oct.11,2018)).

advantageous arrangements directed to the substantial reduction of tariffs . . . to the elimination of discriminatory treatment in international commerce.”⁷¹ Therefore, Article XXI’s margin of appreciation allows the United States to enact measures to protect its national security, so long as it does not violate the WTO’s object and purpose to reduce tariffs and discriminatory treatment. The WTO’s consistent usage of margin of appreciation in its jurisprudence necessitates its inclusion in Article XXI analysis.

1. The Concept of Margin of Appreciation in the WTO

The WTO system hinges on shared authority between its institutional rules and its member’s sovereignty.⁷² WTO adjudicative decisions inevitably intrudes on domestic law, so the WTO affords limited deference to its members when complying with some of its rules.⁷³ The bounded discretion ensures members have some room to reasonably comply with its decisions without providing so much autonomy that members could circumvent their obligations.

Bounded discretion in applying multilateral rules is not unique to the WTO.⁷⁴ The European Court of Human Rights first formulated the concept in its “margin of appreciation” doctrine to provide states limited and reasonable discretion when deviating from international obligations based on individual societal or national interests.⁷⁵ Margin of appreciation doctrine initially arose in response to international policies that threatened a state’s national security.⁷⁶ The earliest uses of the doctrine justified derogations from treaty obligations during national emergency.⁷⁷

71. WTO Agreement, *supra* note 4, pmb1.

72. Tomer Broude, *Selective Subsidiary and Dialectic Deference in the World Trade Organization*, 79 L. & CONTEMP. PROBS. 53, 55 (2016).

73. The paradigmatic example of the interplay between WTO and member state governance comes from Article XX. See *infra* Part III; see also Broude, *supra* note 72, at 56 (explaining WTO’s multilevel governance structure).

74. *Oil Platforms (Iran v. US)* [2003] ICJ Rep 90; *Avena (Mexico v. US)* [2004] ICJ Rep 77; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Opinion of 9 July 2004 [2004] ICJ Rep 136.

75. Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT’L L. & POL. 843, 843 (1999).

76. See *Lawless, v. Ireland*, 1 Eur. Ct. H.R. (ser. A) at 195 (holding that a state may justify derogations from its international obligations during an emergency but the court reserves the right to scrutinize the decision).

77. Benvenisti, *supra* note 75, at 845.

While the WTO does not use the exact term margin of appreciation in its charter or agreements, the WTO adjudicative panels apply the concept in its decisions.⁷⁸ For example, the AB of the WTO⁷⁹ makes recommendations on how member states can adjust its domestic legislation to avoid penalty.⁸⁰ The AB also provides member states accused of rule violation a “reasonable period of time” to become in compliance.⁸¹ These prudential considerations show the AB’s careful methodology in avoiding either overt or rigid sanctions on members for alleged WTO rule violations. The AB uses margin of appreciation to recognize the reasonable constraints members may have in compliance with the rules and to suggest feasible ways for members to become compliant given domestic limitations.⁸²

Even though a variety of international courts invoke margin of appreciation differently, the concept largely consists of two elements.⁸³ The WTO’s AB, recognized two elements in its jurisprudence.⁸⁴ The first involves “judicial deference” or giving member courts some latitude in evaluating whether its government is in compliance with WTO rules.⁸⁵ The second is “normative flexibility,” which provides a zone of legality in which states could reasonably reach differing legal conclusions based on conflicting approaches to international norms.⁸⁶

78. See Broude, *supra* note 72, at 71 (noting how Article 11 of the Dispute Settlement Understanding instructs panels to make objective assessments of the applicability and conformity of the decision).

79. The Appellate Body is equivalent to an appeals court within the WTO. The AB is comprised of seven people nominated by WTO members. They can uphold, modify or reverse the findings of dispute panels. World Trade Organization, *Dispute Settlement: Appellate Body*, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited Nov. 13, 2018).

80. For example in *Shrimp-Turtle*, the AB recommended that the United States soften its ban imported shrimp caught using particular types of nets. See discussion *infra* Part III(A).

81. See Boudouhi, *supra* note 70, at 6 (discussing how the WTO Appellate Body uses the margin of appreciation concept within their jurisprudence).

82. *Id.*

83. Yuval Shany, *Towards a General Margin of Appreciation Doctrine in International Law?* 16 EUR. J. INT’L L., 907, 909 (2005).

84. Annex 1A to the Agreement establishing the World Trade Organization, Apr. 15 1994, 33 ILM (1994).

85. See *Ireland v. UK*, 2 EHRR 25, at 91-92 (1978) (holding the United Kingdom’s courts determine whether the government has power to make detention orders under the Emergency Provisions Amendment Act).

86. *Sheffield v. UK*, 27 EHRR 163, 179 (1998); see also Appellate Body, *Japan – Taxes on Alcoholic Beverages II*, 34, WTO Doc. WT/DS8/AB/R (adopted Oct. 4, 1996) (“WTO rules are not so rigid or inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world.”).

Margin of appreciation also imposes two constraints that apply generally. First, states must act in good faith when exercising its discretion in complying with the terms of a treaty.⁸⁷ The drafters of Article XXI recognized the importance of good faith and called on member states to respect the integrity of the WTO agreement with good faith interpretations of Article XXI.⁸⁸ Second, international courts possess the authority to review whether a national policy decision conforms with the object and purpose of the governing obligation.⁸⁹ The WTO's arbitration process also uses this same review power in its decisions.⁹⁰ In sum, margin of appreciation gives states some flexibility in complying with WTO rules, but states must use this flexibility in good faith and its actions can be reviewed to see if it violates the WTO Agreement's object and purpose.

The United States argues that the margin of appreciation should not apply to Article XXI and member states should have sole discretion in determining the article's limits.⁹¹ The preceding analysis refutes this argument by demonstrating how the WTO incorporates margin of appreciation into its decisions even when not expressly mentioned in the text of the agreement.⁹² The next section presents how the WTO should conduct a margin of appreciation analysis of Article XXI.

2. The U.S.' Reading of Article XXI Exceeds Its Margin of Appreciation in Light of the WTO's Object and Purpose

The AB functions as the WTO's appellate court,⁹³ and it incorporates margin of appreciation and object and purpose analysis from the VCLT⁹⁴ when deciding whether a member has breached the

87. VCLT, *supra* note 54, art. 26.

88. Shany, *supra* note 83, at 607.

89. *Id.* at 911.

90. See *US – Tax Treatment of 'Foreign Sales Corp'*, 5, WTO Doc. WT/DS108/ARB (adopted Aug. 30, 2002) (Asserting that margin of appreciation must be used to assess the gravity of a wrongful act); see also *infra* Part III(A).

91. See Third Party Executive Summary of the United States of America, *Russia—Measures Concerning Traffic in Transit*, ¶ 28, WTO Doc. DS512 (Feb. 27, 2018) (plain text and drafting history of Article XXI shows that the national security exception is self-judging).

92. *But see id.* (asserting the plain text of Article XXI is sufficient in establishing the fully self-judging nature of the article).

93. See *supra* note 79.

94. Repertory of Appellate Body Reports, *I.3.1 General Rules of Treaty Convention – Articles 31 and 32 of the Vienna Convention*, https://www.wto.org/english/tratop_e/dispu_e/repertory_e/i3_e.htm (last visited Dec. 21, 2018).

terms of the WTO Agreement.⁹⁵ In particular, the AB “is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term. This logical progression provides a framework for proper interpretive analysis.”⁹⁶ The WTO’s AB uses the five objectives within the WTO agreement’s preamble to structure its interpretive analysis:⁹⁷ keep the peace, promote world economic development and welfare, work towards sustainable development and environmental protection, reduce poverty of the poorest part of the world, and manage economic crises that might erupt partly due to the circumstances of globalization and interdependence.⁹⁸ The AB may use one or all of these purposes in its margin of appreciation analysis depending on the context of the contested article.⁹⁹

The WTO AB’s reliance on object and purpose to resolve disputes also has specific precedents in the context of protectionist claims against the United States.¹⁰⁰ In *United States – Line Pipe*,¹⁰¹ the AB held the United States violated the WTO’s Safeguard Agreement Article 5.1 by restricting imported Korean carbon pipes due to alleged safety concerns.¹⁰² Even though a small percentage of the imported pipes posed a safety risk, the U.S.’ import restriction exceeded the scope of the article in light of the WTO’s purpose to lower trade barriers between members.¹⁰³ SA Article 5.1’s margin of

95. VCLT, *supra* note 54, art. 31. The United States has not ratified the VCLT but considers most of its provisions customary international law. OLIVER DORR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, 91 (2018).

96. Appellate Body, *United States – Continued Existence and Application of Zeroing Methodology*, ¶ 268, WTO Doc. WT/DS350/AB/R (adopted June 2, 2009).

97. JACKSON, *supra* note 16, at 81.

98. WTO Agreement, *supra* note 4, pmb1.

99. See Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21 EUR. J. INT’L. L. 605, 622 (2010) (describing how the purpose of a treaty’s provision influences the AB’s margin of appreciation analysis).

100. The WTO’s dispute settlement procedure operates at multiple tiers. While it encourages negotiations and consultations between parties, states may submit a dispute to the Dispute Settlement Body which convenes a “panel” of experts to hear the case. Either side may appeal the panel’s ruling to the Appellate Body which can uphold, modify or reverse the panel’s conclusions. The Dispute Settlement Body, which consists of All WTO members, must accept or reject the Appellate Body’s decision, but rejection requires consensus from the members. *Understanding the WTO: Settling Disputes*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Oct. 16, 2018).

101. Appellate Body, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WTO Doc. WT/DS202/AB/R, (adopted Feb. 15, 2002).

102. *Id.* ¶ 251.

103. *Id.*

appreciation allowed importation safeguards, but only to the extent necessary to protect American consumers without infringing on international trade.¹⁰⁴ The AB's consistent reliance on both margin of appreciation and object and purposes provides sound justification for why Article XXI should be similarly analyzed under the same framework.

The U.S.' steel tariff violates Article XXI's margin of appreciation in light of the WTO's key object and purposes:¹⁰⁵ it weakens international security and burdens economic development. First, the U.S. steel tariff contravenes the original purpose of the WTO to mitigate trade tensions that can erupt into armed conflict between international powers.¹⁰⁶ The U.S. steel tariff has escalated tensions between the United States and triggered a "tit for tat" trade war with the largest economies in the world.¹⁰⁷ Article XXI's margin of appreciation includes member states protecting their own national security interests, but it would seem unreasonable in light of the WTO's object and purpose, to use the exception to jeopardize the economic interests of other member states.¹⁰⁸

Second, the United States tariffs oppose the WTO's objective to stimulate overall economic development. The founding document of the WTO, *The Marrakesh Agreement*, asserted that higher living standards, full employment and sustainable development can be achieved through "substantial reduction of tariffs and other obstacles to trade."¹⁰⁹ The United States steel tariffs may benefit the American steel industry, but it appears to damage other sectors of the United States and world economy.¹¹⁰ Article XXI's margin of appreciation

104. *Id.* ¶ 258.

105. The other three object and purposes mentioned in the preamble (i.e., work towards sustainable development and environmentalism, reduce poverty, and manage economic crises) are likely applicable as well; however, a full factual analysis behind the United States Steel Tariff and its global impact is beyond the scope of this paper.

106. *Contribute to Peace and Stability*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/t0thi_e/t0thi09_e.htm (last visited Nov. 13, 2018).

107. Mary A. Marchant & H. Holly Wang, *U.S.—China Trade Dispute and Potential Impacts on Agriculture*, 33 CHOICES 1, 1 (2018).

108. See Chad P. Brown, *Steel Aluminum, Lumber, Solar: Trump's Stealth Trade Protection*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS, 2 <https://piie.com/system/files/documents/pb17-21.pdf> (last visited Dec. 20, 2018) ("The administration's stated protectionist measures are likely to damage the US economy and could spiral out of control, leading to retaliation").

109. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

110. Brown, *supra* note 108, at 14.

might tolerate some negative externalities from a national security measure, but it seems unreasonable to impose measurable economic costs on twenty-seven member states plus the European Union.¹¹¹

Moreover, unlike the American export restrictions in the Czechoslovakia case¹¹² that *benefited* Western Europe, the steel tariffs in the current dispute *harm* Western Europe.¹¹³ The Czechoslovakia case was never formally adjudicated, but the United States in 1949 could have argued that their Marshall Plan was consistent with the GATT's object and purpose because it aimed to bolster the economies of Western Europe after World War II.¹¹⁴ The United States cannot make the same argument in the present steel tariff dispute because they were expressly imposed to benefit the United States at the expense of other trading partners.¹¹⁵ Article XXI's margin of appreciation might have permitted the Marshall Plan's protectionist tactics because it furthered the GATT's goal of economic development of member states,¹¹⁶ but it would seem unreasonable to further extend the margin of appreciation to include deliberate measures that harm other member states' economies—directly contravening the WTO's goal to spur economic development.

Article XXI's margin of appreciation allows member states to reasonably declare and pursue their own national security interests. The margin of appreciation ends when a member states' national security interest infringes on either the security or economic interests of other member states. Therefore, the U.S.' steel tariff exceeds the boundaries of Article XXI's margin of appreciation.

111. *See supra* note 7.

112. *See supra* part I(B).

113. *See supra* note 7.

114. *See supra* text accompanying notes 40–42.

115. President Trump, *Remarks by President Trump to the Seventy-Third Session of the United Nations General Assembly*, Sep. 25, 2018, THE WHITE HOUSE, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/> (last visited Dec. 21, 2018).

116. The British delegate served as America's strongest ally in the Czechoslovakia case, but even he expressed some doubts about the extent of Article XXI's self-judging nature. *See supra* note 46. If the United States' argument engendered doubts from its strongest ally in 1949, then it seems even more unlikely their argument would prevail today.

B. Analogical Analysis: Shrimp-Turtle Shows Article XXI's Application Should Be Limited Whenever It Might Endanger the Multilateral Trade System

Article XXI's national security exception is not unique within WTO rules. Member states may derogate from the MFN principle in other narrow, technical circumstances.¹¹⁷ The most analogous exception article comes from Article XX or the "General Exception" provision.¹¹⁸ This article allows member states to deviate from tariff rules as necessary to protect human, animal, or environmental health, unless they are applied in an arbitrary, unjustified, or pretextual manner.¹¹⁹ *Shrimp-Turtle* constitutes the landmark case in the WTO's Article XX jurisprudence.¹²⁰ The case established the limits of how far member states may stretch a WTO exception article without compromising trade rules.¹²¹

1. *Shrimp-Turtle* Explored the Boundaries of WTO's Exception Articles

The controversy that led to *Shrimp-Turtle* started when the United States passed Section 609 of the Endangered Species Act (ESA).¹²² This law required imported shrimp to be caught using specialized nets that minimize harm to endangered sea turtles.¹²³ Malaysia, Thailand, India and Pakistan submitted a complaint to the WTO arguing the law violated the WTO's MFN principle because it disadvantages "like products" (i.e., shrimp caught in regular nets) from member states.¹²⁴ They asserted that if a state can unilaterally ignore a WTO obligation under Article XX under an environmental pretext, then there would be no limit to what a state could ban in the

117. See WTO Agreement, *supra* note 4, art. XXIV (providing exceptions for Regional Trade Agreements like NAFTA or the European Union); *Id.* art. XII (providing exceptions for Balance-of-Payments or measures to safeguard a state's financial well-being); *Id.* art. IX (providing temporary relief to trade rules in exceptional circumstances).

118. *Id.* art. XX.

119. *Id.*

120. Marc Rietvelt, *Multilateral Failure: A Comprehensive Analysis of the Shrimp/Turtle Decision*, 15 *IND. INT'L & COMP. L. REV.* 473, 474 (2004).

121. See JAGDISH BHAGWATI, *AFTER SEATTLE: FREE TRADE AND THE WTO, IN EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM* 60-61 (Roger B. Porter et al. eds., 2001) (criticizing the AB for stretching Article XX at all).

122. 16 U.S. Code § 1537.

123. Hiranya Fernando Senadhira, *The Shrimp-Turtle Dispute: A Brief Legal Analysis*, 1 *Bridges*, no. 3 (1997) <https://www.ictsd.org/bridges-news/bridges/news/the-shrimp-turtle-dispute-a-brief-legal-analysis> (last visited on 5 Apr. 2019).

124. *Id.*

name of environmental protection.¹²⁵ The United States argued that the ESA adhered to Article XX(b) and (g)¹²⁶ of the WTO which exempts protectionist measures if they are “necessary to protect human, animal or plant life or health... or [relates] to conservation of exhaustible natural resources.”¹²⁷

The AB agreed that Section 609 of the ESA furthered a legitimate environmental policy objective, and member states retain the authority and autonomy to pursue such policies under the WTO.¹²⁸ Nonetheless, environmental protection measures must still comply with the requirements established in both the text of the article and of WTO in general.¹²⁹ The AB held that the U.S.’ ban on imported shrimp constituted arbitrary discrimination and a disguised restriction on international trade under the “chapeau” (i.e., introductory clause) to Article XX.¹³⁰

The AB employed a two-step analysis to reach its conclusion.¹³¹ First, they examined whether the purported policy objective fell within the specific exceptions of the Article.¹³² The United States satisfied the first step of the analysis because all parties in the dispute agreed that protecting endangered species is a laudable goal and should be covered under Article XX’s language.¹³³ WTO member states should maintain the ability to protect the environment through individual and collective measures like Section 609 of the ESA.¹³⁴

The second step of the analysis examines whether a trade restriction violates Article XX’s chapeau, which requires states to respect multilateral trade rules even when using the general exceptions of Article XX.¹³⁵ The chapeau functions as a prerequisite to the general exceptions listed in Article XX.¹³⁶ The AB’s chapeau

125. *Shrimp-Turtle*, *supra* note 14, ¶ 198.

126. WTO Agreement, *supra* note 4, art. XX.

127. *Id.*

128. Panel Report, *United States- Standards for Reformulated and Conventional Gasoline*, ¶ 7.1, WTO Doc. WT/DS2/R (adopted Jan. 29, 1996).

129. *Shrimp Turtle*, *supra* note 14, ¶ 165.

130. *Id.*

131. *See Shrimp-Turtle*, *supra* note 14, ¶ 118 (first identifying the policy in question and second analyzing whether it complies with the chapeau of Article XX).

132. *Id.* ¶ 125.

133. *Id.* ¶ 178

134. *Id.* ¶ 142.

135. Sanford Gaines, *The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT’L L. 739, 741 (2001).

136. *Id.*

analysis corrected the initial Panel's findings¹³⁷ which had omitted specific reference to the WTO's object and purpose.¹³⁸ The AB interpreted the chapeau's margin of appreciation in light of the object and purpose of the WTO in general.¹³⁹ In sum, Article XX allows derogations from the WTO agreement, as long as they do not undermine the WTO's multilateral trading system.¹⁴⁰

The U.S.' argument floundered in step two of the analysis because it violated Article XX's chapeau in light of the WTO's object and purpose.¹⁴¹ The AB found its import ban on shrimp was "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."¹⁴² The AB explained even if the U.S.' individual measure did not constitute a threat to the system on its own, the type of measure used, if adopted by other WTO members could threaten the multilateral trading system.¹⁴³

2. The Parallels Between *Shrimp-Turtle* and U.S. Steel Tariffs

The WTO's AB has never analyzed how Article XXI should be applied in practice,¹⁴⁴ however, the two-step analytical framework employed in *Shrimp-Turtle* provides a roadmap for how Article XXI should be evaluated. The text in both articles provide broad exceptions to the WTO rules,¹⁴⁵ and both Articles need to be construed in light of the WTO's object and purpose.¹⁴⁶ The two-step analysis behind *Shrimp-Turtle* suggests the United States may (1) retain the authority to decide and enact tariffs in furtherance of

137. WTO disputes are first submitted to a panel of trade experts. Their decision is equivalent to a trial court in United States jurisprudence. Members may appeal a panel's decision to the WTO's Appellate Body. *See supra* note 84.

138. MALGOSIA FITZMAURICE ET AL., TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: THIRTY YEARS ON 170 (2010).

139. *Id.* at 172.

140. *Shrimp-Turtle*, *supra* note 14, ¶ 9.

141. *Id.* at ¶ 156.

142. *See id.* ¶ 184 (finding the environmental law applied in a manner that amounts to both "unjustifiable discrimination [and] arbitrary discrimination").

143. *Id.*

144. *See supra* note 49.

145. Compare WTO Agreement, *supra* note 4, art. XX(b) ("necessary for the protection of human, animal, or plant life or health"), with WTO Agreement, *supra* note 4, art. XXI(b) ("necessary for the protection of its essential security interests").

146. Compare Fitzmaurice, *supra* note 138, at 172 (noting Article XX's chapeau must be interpreted according to the WTO's object and purposes), with Part II(B) (arguing Article XXI's margin of appreciation requires interpretation of the WTO's object and purposes).

national security objectives, but (2) ultimately violate Article XXI of the WTO because the tariffs could threaten the trading system if adopted by other WTO members.¹⁴⁷

The United States likely passes the first step of the analysis because it rests on a legitimate, domestic policy objective. Similar to Section 609 of the ESA's effort to protect wildlife in *Shrimp-Turtle*, Section 232 of the Trade Expansion Act—the law behind the U.S.' steel tariffs—likely rests on valid legal reason to protect national security.¹⁴⁸ Congress passed Section 232 of the Trade Expansion Act in 1962 to empower the president to adjust trade policy in response to national security threats.¹⁴⁹ None of the opponents to the U.S.' tariffs, like the opponents in *Shrimp Turtle*, question the President's underlying authority to institute tariffs.¹⁵⁰ It is also unlikely the AB would criticize a member state for prioritizing national security interests in the same way it avoided criticizing a member state for pursuing environmental interests.¹⁵¹

The United States likely retains the authority to judge for itself whether its national security interest meets the criteria of Article XXI in the same way as it retained the authority to decide whether its environmental protection interest meets the definition of Article XX.¹⁵² The language of *Shrimp-Turtle* carefully avoided any repudiation of the U.S.' judgement in meeting the definition of Article XX because they the AB did not want to overstep its jurisdiction by commenting on the wisdom or quality of the law.¹⁵³ The AB also did not want to convey the message that member states lacked the authority to proactively enact domestic policies that served a legitimate policy objective.¹⁵⁴ Therefore, the AB will likely find

147. *Shrimp-Turtle*, *supra* note 14, ¶ 186.

148. Brown, *supra* note 108.

149. Rachel F. Fefer et al., *Section 232 Investigations: Overview and Issues for Congress*, CRS REPORT, 1 (2018).

150. The European Union's request for consultations—a preliminary dispute resolution procedure within the WTO—questioned the United State's as-applied interpretation of Section 232 of the Trade Expansion Act and not the act itself. *See supra* note 7.

151. *See Shrimp-Turtle*, *supra* note 14, ¶ 186 (“WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the WTO Agreement.”).

152. *US-Shrimp*, Summary of Key Panel/AB Findings, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds58sum_e.pdf (last visited Nov. 13, 2018).

153. *See Shrimp-Turtle*, *supra* note 14, ¶ 185 (“We have *not* decided that sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly they can and should.”) (emphasis added).

154. *Id.*

that the United States passes the first step of Article XXI analysis because the steel tariffs reflect a legitimate measure to further its national security interests.

Nevertheless, the U.S.' steel tariff fails step two of the analysis. Its steel tariff violates Article XXI because it would threaten the multilateral trading system if other members used the same type of national security justification to avoid its trade obligations.¹⁵⁵ The AB stressed in *Shrimp-Turtle* that member states can only rely on the treaty's exceptions if "they do not undermine the WTO multilateral trading system thus also abusing the exceptions contained in Article XX."¹⁵⁶ The AB worried that member states could start compiling an ever-growing list of valid environmental protections that could eventually eclipse the entire agreement.¹⁵⁷ The U.S.' argument that domestic steel protection furthers a national security interest could be similarly replicated and transferred to other industries by member states.¹⁵⁸ This concern closely reflects the intent of the original drafters of Article XXI who worried the exception could swallow the entire agreement.¹⁵⁹ While the national security is undoubtedly a serious concern for member states, the AB should be unwilling to uphold a unilateral protectionist measure that would undermine the international trading system.

3. U.S.' Counterargument Ignores How Their Tariffs Undermine the Multilateral Trading System

The United States anticipated this comparison and attempted to distinguish Article XX and Article XXI based on a plain text analysis that provides members greater autonomy in deciding what constitutes a national security exception for themselves.¹⁶⁰ The United States notes how Article XX lacks the crucial "*which it considers*" language contained in Article XXI.¹⁶¹ The United States contends that these three words unlock the gate to Article XXI's protection.¹⁶² Furthermore, unlike the chapeau in Article XX which requires members to consider the stability of the multilateral trading system,

155. *Id.* ¶ 9.

156. *Id.* ¶ 112.

157. Jayati Srivastava and Rajeev Ahuja, *Shrimp-Turtle Decision in WTO: Economic and Systemic Implication for Developing Countries*, 37 *ECON. & POL. WEEKLY* 3445, 3452 (2002).

158. *See supra* note 75.

159. *See discussion supra* Part I(A).

160. *See supra* note 75.

161. *Id.* (emphasis added).

162. *Id.*

Article XXI omission of a chapeau relieves member states of their responsibility to consider the impact of their protectionist measure on the multilateral trading system.¹⁶³

This argument misconstrues the essential holding of *Shrimp-Turtle* which never questioned a state's ability to declare and pursue policy objectives, but rather examined whether the practice would undermine the overall trading system in light of the WTO's object and purpose.¹⁶⁴ *Shrimp-Turtle* stands for the proposition that WTO exception language can be interpreted and adapted by states within reasonable margins of appreciation, but the integrity of the multilateral trading system serves as the ultimate limit to its application.¹⁶⁵ Nothing in the WTO's history,¹⁶⁶ the text of Article XXI,¹⁶⁷ or its jurisprudence¹⁶⁸ would permit reading Article XXI separately from the objects and purposes of the agreement. The United States may be able to declare and enact measures in furtherance of its national security interests, but that does not mean it can completely avoid the fundamental purpose of the WTO to lower trade barriers between its members.

The United States sole reliance on the text of Article XXI is insufficient in light of the nuanced analysis from the AB in the *Shrimp-Turtle* case. The AB's decision reflects a delicate balance between political and environmental concerns on one side and the integrity of the WTO's trading system on the other.¹⁶⁹ The U.S.' unadulterated use of Article XXI without any consideration for fellow WTO members constitutes an impermissible threat to the multilateral trading system. It creates the type of protectionist measure that could be easily copied and applied against WTO members, notwithstanding any good faith claims of national security.

163. *Id.*

164. *See supra* text accompanying note 114.

165. *See supra* Part III(A).

166. *See supra* Part I.

167. *See supra* note Part II.

168. *See supra* note Part III.

169. Former Director-General of the WTO, Renata Benedini, expressed the WTO's desire to cooperate with its member states to find both multilateral and unilateral decisions. Renata Benedini, *Complying with the WTO Shrimp-Turtle Decision*, in RECONCILING ENVIRONMENT AND TRADE 409-15 (Edith Brown Weiss & John H. Jackson, eds. 2001).

IV. CONCLUSION

Article XXI represents the last-ditch safety valve to WTO rules. Member states may place tariffs on other members, directly contradicting the object and purpose of the WTO agreement, but only in the extraordinary circumstances of national security emergency. Member states may even judge for themselves what counts as a national security emergency, but not beyond Article XXI's margin of appreciation in light of the WTO's object and purpose. The U.S. steel tariffs violate the terms of Article XXI, not because the United States lacks the ability to decide for themselves what counts as a national security interest, but because their unrestrained use of Article XXI threatens the multilateral trading system. The *Shrimp-Turtle* decision further illustrates how the U.S.' sweeping steel tariffs unreasonably exceeded the boundaries of Article XXI's national security exception.

Therefore, the Appellate Body of the WTO must review and reject tariffs merely invoked in the name of national security to avoid creating a precedent in which member states may indiscriminately apply tariffs without consideration of the consequences to members. Carefully analyzing and striking down such tariffs according to Article XXI's history, margin of appreciation, and comparison to similar precedents would send a powerful signal to all members within the WTO. No member state, not even the principal architect of the multilateral trading system,¹⁷⁰ can pretextually use national security to circumvent WTO rules.

170. See *supra* note 15.