A Proposed Interpretation of GATT Article XXI (b) (ii) in Light of its Implications for Export Control

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GATT Article XXI(b)(ii) has received little scholarly attention, but increasing measures taken under the name of national security require heightened attention to it, especially with regard to export control measures. We need a detailed interpretation of the clause that can be used to distinguish measures permissible under the clause from impermissible ones. This paper presents an interpretation of the Article based on existing arguments, especially those of the DS512 Panel Report, that deny the self-judging nature of the clause. It analyses how a panel should apply the principle of good faith with regard to the chapeau of the Article and then interprets each component of subparagraph (ii), which concerns the taking of actions considered necessary to protect essential security interests "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment". Relying on tools such as the drafting history, authoritative interpretations of other parts of World Trade Organization (WTO) law, and the structure and context of the Article, this Article proposes the following criteria for determining measures that do not satisfy the requirement of the latter half of the subparagraph: the likelihood that the restricted trade item could get to a military establishment, its military sensitivity and scope of use, and the existence of military tension involving the invoking country.

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Introduction

Article XXI of the General Agreement on Tariffs and Trade (GATT) provides for security exceptions to countries' obligations under GATT, the central pillar of the world trade system.[1] Article XXI of GATT grants a broader exemption than Article XX of GATT, which provides for general exceptions.[2] If abused, this broad security exception clause could undermine the significance of the World Trade Organization (WTO) regime itself, but until recently, countries rarely invoked the clause to justify their trade-restrictive actions in the WTO Dispute Settlement (DS) procedures.[3] In thereby avoiding abusive use of Article XXI, they showed self-restraint.

However, this self-restraint seems unlikely to continue. In 2016, the United States, the country which led the formation of the WTO, imposed special tariffs on steel and aluminum products from almost all countries in the world,[4] justifying the move by insisting that it took the measure for national security purposes. Although a WTO panel has not yet issued a decision on the legality of the U.S. tariffs, many countries have criticized these measures as an abuse.[5] Furthermore, countries other than the

1. General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (emphasis added).

2. *Id.*

3. Krzysztof J. Pelc, *The U.S. broke a huge global trade taboo. Here's why Trump's move might be legal,* WASH. POST (Jun. 7, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/07/the-u-s-broke-a-huge-global-trade-taboo-heres-why-trumps-move-might-be-legal/ [https://perma.cc/Y7QK-2ZZY].

4. Steel: all countries of origin except Argentina, Australia, Brazil, Canada, Mexico and South Korea; aluminum: all countries of origin except Argentina, Australia, Canada and Mexico (as of May 20, 2019). U.S. CUSTOMS AND BORDER PROTECTION, SECTION 232 TRADE REMEDIES ON ALUMINUM AND STEEL (last updated on Feb. 10, 2020), https://www.cbp.gov/trade/programs-administration/trade-remedies/section-232-trade-remedies-aluminum-and-steel [https://perma.cc/N7NP-V5NH].

5. *See* CONGRESSIONAL RESEARCH SERVICE, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS, R45249, 34 (last updated Apr. 7, 2020), https://fas.org/sgp/crs/misc/R45249.pdf [https://perma.cc/9WPM-N7U5] (Figure 7. WTO Cases Challenging the United States' Section 232 Actions).

United States have recently adopted trade-restrictive measures on grounds of national security and thereby triggered DS procedures against them.[6]

While up to the recent, Article XXI has not been actively invoked in the DS, countries appear to have long taken several measures on the basis of the Article. One of these is the maintenance of an export control system. Many countries have such a system to prevent the transmission of military or sensitive items to their adversaries.[7] Countries usually inspect plans to export these items before they are executed, and if they judge that an export is going to go to an adversary country or entity, they prohibit the export.[8] Sometimes countries ban a category of good for export altogether without checking the risks arising from the transaction.[9] Among a wide range of items restricted by export controls, so-called "dual use" items, which are items that are not directly military but that are deemed to be sensitive, cover the largest number, and "dual use" items are important to the international trade regime because they are often traded for purely commercial purposes.[10] To date, many countries have operated export control systems, but they have not abused them to pursue economic gain, at least in a grave way.[11] Export control is an area that has been maintained free of controversy thanks to countries' self-restraint.

So far, therefore, no WTO Appellate Body or panel precedent has dealt with a security export control measure.[12] Nor have they interpreted GATT Article XXI(b)(ii), the clause on which most countries seem to base the legality of their export control regulations.[13] Further, there are only a few academic analyses focusing on Article XXI(b)(ii) or the relationship of

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6. *E.g.*, *Japan – Measures Related to the Exportation of Products and Technology to Korea* (DS590), *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights* (DS567). *See* Panel Report, *Japan – Measures Related to the Exportation of Products and Technology to Korea, Request for Consultations by the Republic of Korea*, WTO Doc. WT/DS590/4 (adopted Sep. 16, 2019) [hereinafter *Japan – Measures Related to the Exportation of Products and Technology to Korea, Request for Consultations by the Republic of Korea*]; Panel Report, *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, WT/DS567/R/, ¶ 7.241-7.242, 7.249-7.252 (adopted June 16, 2020) [hereinafter *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*].

7. Congressional Research Service, The U.S. Export Control System and the Export Control Reform Initiative (2020), https://sgp.fas.org/crs/natsec/R41916.pdf [https://perma.cc/2JWN-XU8C].

8. *Id.*

9. *Id.*

10. *Id.*

11. Major multilateral export control regimes have many countries as members, demonstrating that there are many countries that have export control systems. *See, e.g.*, *Multilateral Export Control Regimes*, Bureau of Indus. & Sec., https://www.bis.doc.gov/index.php/policy-guidance/multilateral-export-control-regimes [https://perma.cc/7CBD-EG5E] (last visited Nov. 6, 2021).

12. *See* Gustavo Duque, *Interpreting WTO Rules in Times of Contestation (Part 2): A Proposed Interpretation of Article XXI (b) ii-iii of the GATT 1994 in the Light of the Vienna Convention of the Law of the Treaties*, 14.1 Global Trade and Customs Journal 31, 34-36 (2019).

13. *See id.* at 32.

export controls to GATT.[14] However, the scope and impact of countries' export control measures are expanding rapidly in response to the eroding boundary between military and civilian items/technologies, and also probably due to the rise of China as a technological and military power.[15] For example, it is well known that in 2019, the United States added Huawei to its "entity list", a kind of blacklist of entities banned from importing almost anything from U.S. companies.[16] The United States also announced that it added over two dozen Chinese tech companies to the list on the grounds of their role in human rights violations in Xinjiang.[17] It is reported that China is considering the option of banning exports of its rare earth as a bargaining chip in the U.S.-China trade war.[18] The Chinese government, in 2020, promulgated a comprehensive export control law that enables it to use export control as a retaliatory measure.[19] Another example is South Korea's accusations against Japan of utilizing export control measures as a tool to fulfill its non-security diplomatic goals.[20]

A debate on geo-economics has also flourished in recent years. Scholars anticipate that the relationship between security and the economy will become more ambiguous in the future.[21] It has been argued that the sup-

14. *See e.g.*, Christoph Hoelscher & Hans-Michael Wolffgang, *The Wassenaar-Arrangement between International Trade, Non-Proliferation, and Export Controls*, 32 J. WORLD TRADE 45 (1998) (only briefly touching on the GATT Article XXI issue); Gustavo Duque, *supra* note 12, at 31 (2019) (providing brief textual interpretation of Article XXI(b)(ii)). There are not many papers that focus on GATT Article XXI, and most of them center on the chapeau of the article and do not discuss the subparagraphs. *See, e.g.*, Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, U. PA. J. INT'L ECON. L. 263 (1998); Roger P. Alford, *The Self-Judging WTO Security* EXCEPTION, 3 Utah L. Rev. 697, 746–49 (2011). Even when they talk about the subparagraphs, they mainly analyze subparagraph (iii). *See, e.g.*, Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalizatio" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93(2) AM. J. INT'L L. 424 (1999); Dapo Akande & Sope Williams, *International Adjudication of Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 388 (2003).

15. *See* Noah Barkin, *Export controls and the US-China tech war* (2008), MERCATOR INST. FOR CHINA STUD. [MERICS], https://merics.org/en/report/export-controls-and-us-china-tech-war [https://perma.cc/4FKJ-FAER].

16. Addition of Entities to the Entity, 84 Fed. Reg. 22961 (May. 21, 2019).

17. Addition of Certain Entities to the Entity List, 84 Fed. Reg. 54003 (Oct. 9, 2019) (to be codified at 15 C.F.R. pt. 744).

18. Keith Johnson, *China Raises Threat of Rare-Earths Cutoff to U.S.,* FOREIGN POL'Y (May. 21, 2019, 4:39PM), https://foreignpolicy.com/2019/05/21/china-raises-threat-of-rare-earth-mineral-cutoff-to-us/ [https://perma.cc/9535-PR36].

19. Export Control Law of China (中华人民共和国出口管制法) (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 17, 2020, effective Dec. 1, 2020), art. 48, available at http://www.xinhuanet.com/2020-10/18/c_1126624518.htm. *See also* Kate Yin et al., *China's New Export Control Law: Ten Highlights*, FANGDA PARTNERS (Oct. 2020), https://www.fangdalaw.com/wp-content/uploads/2020/10/China's-New-Export-Control-Law-Ten-Highlights.pdf [https://perma.cc/9G7K-USVU].

20. *Japan – Measures Related to the Exportation of Products and Technology to Korea, Request for Consultations by the Republic of Korea*, *supra* note 6, at 2.

21. Mark Leonard, *Geopolitics vs Globalization: How Companies and States Can Become Winners in the Age of Geo-economics*, WORLD ECON. F., 5-8 (Jan. 2015), http://www3.weforum.org/docs/WEF_Geo-economics_7_Challenges_Globalization_2015_report.pdf [https://perma.cc/F6VQ-X85E].

ply not only of weapons, but also of essential products in the supply chain of military products and the supplies needed to raise the level of military technology, will be a source of power in international relations, as national economies and militaries become more integrated.[22] If struggles for strategic control of such goods become widespread, it is very likely that Article XXI (b), especially Article XXI(b)(ii), of the GATT will be invoked as a basis, since it would be difficult to justify such a geo-economical measure under the general exceptions of Article XX.[23] The blurring of the line between security and economy could also lead to an increase in "security" measures that are actually motivated by commercial considerations. A legal limit must therefore be made clearer before countries greatly expand their use of measures that contravene their WTO obligations in the name of national security.

The main aim of this Article is to establish criteria for applying Article XXI(b) to security-related measures, including export control. More specifically, this paper aims to present an interpretation of Article XXI(b)(ii) that contributes to preventing abuse of the clause while satisfying the genuine security needs of WTO members. Unlike prior works on Article XXI(b) that mainly focused on a general discussion about the fundamental nature of the Article—namely, whether the Article is "self-judging" or not—this Article intends to provide a more detailed guideline for countries and future WTO panels that deal with practical cases that rest on the interpretation of Article XXI(b)(ii).

GATT Article XXI(b) has a chapeau and three paragraphs. The text is as follows:

> Article XXI: Security Exceptions
>
> Nothing in this Agreement shall be construed
>
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) *relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment*;

22. *See* Mark Leonard, *Geopolitics vs Globalization: How Companies and States Can Become Winners in the Age of Geo-economics*, WORLD ECON. F., 5–8 (Jan. 2015), http://www3.weforum.org/docs/WEF_Geo-economics_7_Challenges_Globalization_2015_report.pdf [https://perma.cc/U7XY-BZ4U]. *See also* Long Haibo, *The Development of Civil-Military Integration in National Defense and Hi-tech Industries in the U.S.: Experience and Enlightenments*, DEV. RSCH CENTER OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, http://www.chinadaily.com.cn/m/drc/2019-02/15/content_37437117.htm; Lorand Laskai, *Civil-Military Fusion: The Missing Link Between China's Technological and Military Rise*, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/blog/civil-military-fusion-missing-link-between-chinas-technological-and-military-rise [https://perma.cc/F4W6-YCDJ] (last visited May 4, 2020).

23. *See* GATT, *supra* note 1, art. XX.

> (iii) taken in time of war or other emergency in international relations.[24]

As mentioned above, export control systems, the focus of this Article, are primarily related to Article XXI(b)(ii). There has been little discussion of this subparagraph. However, academic debates and WTO judicial decisions are comparatively abundant with respect to Article XXI(b)(iii), and they affect the interpretation of Article XXI(b)(ii), as they include discussion of the chapeau and the overall structure and purpose of Article XXI(b).[25] In particular, the panel that decided DS512 in April 2019 presented an interpretation of Article XXI(b)(iii) that provided a strong baseline for debates over the interpretation of the security exception.[26] Another WTO panel that dealt with a security exception case, DS567, followed the interpretation DS512 presented.[27]

Regarding the interpretation of the chapeau and the overall structure of Article XXI(b), a big point of contention exists on whether the Article allows countries to self-judge.[28] Those who argue for self-judging claim that a panel cannot scrutinize whether or not a measure is compatible with Article XXI(b) once a country declares that it invokes the Article.[29] Under a self-judging interpretation, the abuse of the Article can be avoided only by countries' self-restraint.[30] On the other hand, opponents of the self-judging reading argue that GATT Article XXI(b) allows a WTO panel to objectively review whether a measure is consistent with the international trade law.[31]

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24. GATT, *supra* note 6, art. XXI(b).

25. *Id.*

26. Panel Report, *Russia – Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/7 (adopted Apr. 29, 2019) [hereinafter *Russia – Measures Concerning Traffic in Transit*].

27. DS567 is a case that dealt with security exception, regarding the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), not GATT. Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (adopted June 28, 2019), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm [https://perma.cc/8S4A-U4DT]. However, Article 73 of the TRIPS Agreement has the same language as the GATT Article XXI. Agreement on Trade-related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]. DS567's focus was on the applicability of TRIPS Article 73(b)(iii), which is a copy of GATT Article XXI(b)(iii). GATT art. XXI(b)(iii). The DS567 panel's interpretation of the security exception basically follows that of DS512. *See Russia – Measures Concerning Traffic in Transit*, *supra* note 26; *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, *supra* note 6. It takes the position that a panel can objectively review the measure's compatibility with the subparagraphs and that the discretion conferred by the phrase "which it considers" is limited by the "good faith" principle. *See Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, *supra* note 6, ¶ 7.241–7.242, 7.249–7.252. Therefore, this article mainly discusses DS512 as a representative.

28. Alford, *supra* note 14, at 705.

29. *Id.* at 749–50.

30. Some proponents of a self-judging interpretation admit the possibility of the use of non-violation claim even after a country invokes Article XXI(b). *See id.* at 746–49.

31. *See Id.* at 705–06.

A self-judging interpretation clearly contradicts the purpose of this paper, which aims to present a clearer legal line to prevent abuse and therefore presupposes the possibility of an objective review by a judicial body regarding the security exceptions. An interpretation of Article XXI(b)(ii) that seeks to discriminate abusive from licit measures is only meaningful under theories that deny self-judging. But existing interpretations of Article XXI(b)(ii) or Article XXI(b) that deny self-judging, including the one advanced by the DS512/DS567 panels, do not provide a legal line fine enough for a country to rely on when it designs export control measures. This Article therefore builds on existing non-self-judging interpretations to present criteria to determine the abusive invocation of Article XXI(b)(ii) in relation to practical security-related measures, including export control.

The structure of this paper follows the structure of Article XXI(b) and the flow of existing debates explained above. In Section I, I give an overview of the grounds of the self-judging interpretation and the arguments against it. This chapter also provides an overview of other major issues related to the interpretation of the chapeau of Article XXI(b) and the structure of the Article that are important for the interpretation of Article XXI(b)(ii). I then briefly justify the position I take on each issue. Section II provides an interpretation of Article XXI(b)(ii) that contributes to setting finer criteria for judgment. The Section first illustrates the limitation of the existing arguments on which I build my interpretation. It then examines how the principle of good faith should be applied in the context of the Article, especially with regard to export control, and subsequently presents my interpretation of subparagraph (ii). Since the language of the subparagraph itself does not provide definitive clues to determine its meaning, this paper employs a holistic interpretation method that relies on multiple interpretative tools such as the drafting history, authoritative interpretations of other parts of WTO law, other international norms related to security-related items, and the structure and context of the Article. The final section concludes the arguments.

I. Overview of the Interpretation of Article XXI(b) Chapeau and the Relationship Between the Chapeau and The Subparagraphs

Three main points of contention have arisen concerning Article XXI(b): (1) is it self-judging; (2) what is the scope of reference of the adjectival clause "which it considers" in the chapeau clause, "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"?; and (3) does the principle of "good faith" limit the discretion given to countries by the phrase "which it considers"? These three issues have different levels of specificity. Issue 1 is the general point of contention, while issues 2 and 3 express the contention in terms of the structure of the Article. For each issue, there are two or three positions. This Section explains each position and presents the their reasoning. The aim of this Section is to clarify the structure of the contention and

introduces a background of the arguments in Section II, including the interpretation of drafting history from each side and the values each side emphasizes, such as sovereignty and predictability/security of international trade. For the record, as explained in the previous chapter, all of my arguments in Section II assume the validity of the position of the DS512 panel report[32] on each issue.

A. Issue 1: Is Article XXI(b) Self-judging?

1. Arguments in Favor

The proponents of a self-judging interpretation of the security exception argue that a WTO panel cannot judge whether or not a measure is compatible with Article XXI(b) if a country invokes the Article.[33] According to this interpretation, only the country that triggered Article XXI(b) can judge whether or not its measure satisfies the requirements of the Article.[34] Several grounds are proposed for this position, and the arguments of proponents sometimes overlap and sometimes differ slightly. I illustrate them with the arguments of the two major proponents of a self-judging interpretation—the United States and Russia—and scholarly arguments.

a. Wording

The first ground for self-judging is the wording of Article XXI(b). The chapeau clearly states, "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."[35] According to the U.S. government in their third-party arguments in DS512, the meaning of "considers" is "regard (someone or something) as having a specified quality", and the "specified quality" here is that the measure is "necessary for" the protection of essential security interests.[36] Thus, the meaning of the text indicates that a member country, not a panel, must regard a measure as being necessary.[37]

Some governments and scholars add contextual support to this line of reasoning. One such support is that a similar phrase in Article 26.1 of the Dispute Settlement Understanding (DSU)—"where and to the extent that such party considers and a panel or the Appellate Body determines"—

32. The panel, composed of international trade law scholars and practitioners, based its decision on its extensive analysis of the provision's structure, the drafting history of GATT, the purpose of the WTO Agreements, and states' practices as well as general principles of international law. *Russia – Measures Concerning Traffic in Transit*, *supra* note 26.

33. *E.g.*, Bhala, *supra* note 14, at 268-69. *See also* Alford, *supra* note 14, at 705.

34. *E.g.*, Bhala, *supra* note 14, at 268-69.

35. GATT art. XXI(b).

36. Addendum to Panel Report, *Russia—Measures Concerning Traffic in Transit*, WT/DS512/R/Add.1, Annex D-10 ¶ 2 (adopted Apr. 5, 2019) (Executive Summary of the Third-Party Arguments of the United States) [hereinafter *Addendum to Russia - Measures Concerning Traffic in Transit*].

37. *Id.* Annex D-10 ¶ 2 (Executive Summary of the Third-Party Arguments of the United States).

explicitly states that the country's subjective determination is not enough, whereas GATT Article XXI(b) lacks such limiting words.[38] Another support is adduced from the language used by the International Court of Justice in a case concerning the Friendship, Commerce and Navigation (FCN) treaty.[39] The court implied that the language of GATT Article XXI(b) was more discretional than a phrase in the FCN treaty that provided for measures "necessary to protect [the party's] essential security interests" and lacked the word "considers" found in GATT Article XXI(b).[40]

b. Drafting History

The second ground is the drafting history of Article XXI(b). The U.S. government submitted its analysis of the drafting history in its third-party submission at DS512.[41] It noted that in a drafting session in 1947, the delegate from the United States who proposed the prototype for Article XXI(b) responded to concerns about it by explaining that the exception would not "permit anything under the sun," but that there must be some latitude for security measures, and that the question was one of balance.[42] The delegation then explained that in situations such as times of war, "no one would question the need of a Member . . . to take action relating to its security interests and to determine for itself what its security interests are."[43] The U.S. government's submission at DS512 also noted that the chairman of the session concluded a discussion about the risk of the exception with the observation that "the atmosphere inside the ITO will be the only efficient guarantee against abuses."[44]

Also, the U.S. submission noted a discussion that arose during the drafting negotiation on whether "we are in agreement that these clauses [on national security] should not provide for any means of redress."[45] In response to that question, the U.S. delegate stated that "[i]t is true that an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that the Member was violating the Charter," and that only a non-violation nullification or impairment claim was

38. *Id.* Annex D-10 ¶ 6 (Executive Summary of the Third-Party Arguments of the United States) (emphasis added).

39. Akande & Williams, *supra* note 14, at 388. The authors of this article are not proponents of a self-judging interpretation. They argue that the chapeau of Article XXI(b) is subject to the determination of the triggering country, but that the subparagraphs of the article should be objectively reviewed by a panel. *Id.* at 392.

40. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J.14, ¶ 222 (June 27).

41. *Addendum to Russia – Measures Concerning Traffic in Transit, supra* note 36, Annex D-10 ¶ 18–29 (Executive Summary of the Third-Party Arguments of the United States).

42. *Id.* Annex D-10 ¶ 25.

43. *Id.*

44. *Id.* Annex D-10 ¶ 26. Note that the Chairman stated "I think" before the cited statement. Second Session of the Prep. Comm. of the U.N. Conf. on Trade & Employment, Verbatim Report of the Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33, at 21 [hereinafter *Verbatim Report of the Thirty-Third Meeting of Commission A*].

45. *Addendum to Russia – Measures Concerning Traffic in Transit,* supra note 36, Annex D-10 ¶ 27.

possible.[46] The submission concluded, therefore, that "the negotiators understood that the essential security exception was 'so wide in its coverage' that it was not justiciable."[47]

c. Sovereignty

The third argument supporting a self-judging interpretation is respect for the sovereignty of countries. Protecting its national security is a basic function of a sovereign state. Russia expresses this view as follows: "Each of the WTO Members individually and without any external involvement determines what its essential security interests are and how to protect them. Other readings of this Article will result in interference in internal and external affairs of a sovereign state."[48] Proponents of a self-judging interpretation see national security issues as beyond the scope of trade and economic relations established by the WTO system.[49]

d. State Practice

The fourth ground for the self-judging view is state practice from the beginning of the GATT regime. The proponents argue that at various WTO meetings the majority of the member states have expressed their view that Article XXI is self-judging.[50] They say countries have prioritized their needs to protect their security interests and subordinate trade rights and obligations to them.[51]

e. Expectation of Panels' Self-restraint

Still another explanation supporting self-judging is the expected self-restraint of WTO panels. According to this position, realpolitik requires that countries prioritize national security, but forcing countries to admit this would significantly damage the world trade system.[52] Thus "as a practical matter . . . a WTO panel . . . would interpret its terms of reference narrowly to exclude a ruling on the substantive Article XXI arguments"[53] This view comes from a precedent where a WTO panel avoided judging issues on Article XXI(b) by narrowly interpreting the terms of reference to the panel, which determines the panel's scope of authority.[54] Though this prediction was not borne out in 2019 in the DS512 panel's judgment pertaining to Article XXI(b), panels may still seek to avoid judging on security issues as far as possible.

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46. *Id.*
47. *Id.*
48. *Id.* Annex C-3 ¶ 47.
49. *Addendum to Russia – Measures Concerning Traffic in Transit, supra* note 36, Annex C-3 ¶ 60 (First Executive Summary of the Arguments of the Russian Federation).
50. Alford, supra note 14, at 708.
51. *Id.*
52. Bhala, *supra* note 14, at 279.
53. *Id.*
54. Panel Report, *United States – Trade Measures Affecting Nicaragua*, L/6053, ¶ 5.2–5.3. (Oct. 13, 1986) (unadopted). *See also* Bhala, *supra* note 14, at 279.

2. Arguments Against Self-judging

Most of the theories against self-judging do not deny that the chapeau of Article XXI(b) gives countries substantial discretion in determining what measures are necessary to protect their security interests. However, opponents of self-judging differ from those who favor it on two important points. First, they argue that the discretion of states is not completely unbound, and is limited by the principle of "good faith."[55] Therefore, an abuse of discretion is reviewable by a WTO panel.[56] Also, in their view, though the phrase "which it considers" covers elements of the chapeau of Article XXI(b), it does not cover the three subparagraphs.[57] Therefore, whether a measure satisfies the requirements of subparagraphs is reviewable by a WTO judicial body.[58] The following subsections illustrate the grounds for these points. Subsection *b* covers the issue of whether subparagraphs are under the scope of the adjectival clause "which it considers," while Subsection *c* covers the applicability of "good faith".

B. Issue 2: Up to What Part of Article XXI(b) Does the Adjectival Clause "Which it Considers" Cover?

1. Covers Only "Necessary"

The minimal possible interpretation is that the phrase "which it considers" only modifies the word immediately adjacent to "considers," i.e., "necessary." In this view, the interpretation of "essential security interests" is left to the objective judgment of a panel, and the measure's conformity to the three subparagraphs is also objectively reviewable by a WTO panel. Though this interpretation is textually possible, it seems none of the proponents of non-self-judging theories adopt it because it denies countries any discretion to determine their essential security interests.[59]

2. Covers "Necessary" and "Essential Security Interests"

The second interpretation is that the phrase "which it considers" covers two key elements in the chapeau, "necessary" and "essential security interests," but that it does not cover the three subparagraphs of Article XXI(b). This is the view of the panel of DS512.[60] Many arguments support this interpretation, and I will explain them below based mostly on the arguments of the DS512 panel.

a. Structure—The Relationship Between the Chapeau and the Subparagraphs

The first ground for this position is the logical structure of the clause. The three subparagraphs specify the kinds of circumstances that may legit-

55. *Russia – Measures Concerning Traffic in Transit*, *supra* note 26, ¶ 7.132–7.133.
56. *Id.* ¶ 7.138–7.139.
57. *Id.* ¶ 7.65
58. *Id.* ¶ 7.63
59. *See* Alford, *supra* note 14, at 704.
60. *Russia – Measures Concerning Traffic in Transit*, supra note 26, ¶ 7.82.

imately necessitate the protection of essential security interests, the focus of the chapeau. If each country could freely determine whether a measure satisfied the requirements of the subparagraphs in addition to that of the chapeau, they would have no independent function that the chapeau alone cannot perform. They provide a function by limiting what can count. The panel of DS512 questions, "[what] would be the use . . . and added value of these limitative qualifying clauses in the enumerated subparagraphs of Article XXI(b) under such an interpretation?"[61]

b. Objective Nature of the Subject-Matters of the Subparagraphs

The second premise of this position is that the subject-matter of the three subparagraphs, and particularly of subparagraph (i), fissionable materials, is not suitable for purely subjective determination. If countries could determine the interpretation of this subparagraph, it would, as the European Union put it in its submission to DS512, lead to "the absurd result that a Member could unilaterally define pigs as fissionable materials in paragraph (i)."[62] The subject matters of subparagraph (ii) and (iii) are also capable of objective determination.[63]

c. Purpose of the WTO System

Third, the purpose and objective of the WTO support this view. The Appellate Body has shown that the purpose and objective of the WTO Agreement, as well as of the GATT 1994, is "to promote the *security and predictability* of the reciprocal and mutually advantageous agreements and the substantial reduction of tariffs and other barriers of trade."[64] The self-judging interpretation of Article XXI (b) as an "outright potestative condition" that subjects "the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member" is contrary to this purpose.[65]

d. Drafting History

The fourth ground of the position against self-judging is the Article's drafting history. In contrast to the allegation by the proponents of a self-judging interpretation, the proponents of this view argue that its drafting history indicates that Article XXI was not intended to be self-judging.[66]

61. *Id.* ¶ 7.65.

62. *Addendum to Russia–Measures Concerning Traffic in Transit, supra* note 36, Annex D-5 ¶ 16 (Executive Summary of the Third-Party Arguments of the European Union).

63. *Russia–Measures Concerning Traffic in Transit, supra* note 26, ¶ 7.66–7.77.

64. *Id.* ¶ 7.79 (citing Appellate Body Report, *EC – Computer Equipment*, WTO Doc. WT/DS62/AB/R (adopted June 22, 1998); Appellate Body Report, *EC – Bananas III*, WTO Doc. WT/DS27/AB/R (adopted Nov. 8, 2012); Appellate Body Report, *Argentina–Textiles and Apparel*, WTO Doc. WT/DS56/AB/R (adopted June 3, 1999); and Appellate Body Report, *EC – Chicken Cuts*, WTO Doc. WT/DS269/AB/R (adopted July 19, 2006)) (emphasis added).

65. *Id.* ¶ 7.79.

66. *Id.* ¶ 7.83–7.100.

The DS512 panel gave a very detailed analysis of the drafting history in its report, and concluded that the negotiation history supported its interpretation that the phrase "which it considers" does not qualify the subparagraphs.[67] For example, the panel report cites the U.S. delegate's response to the question concerning the risk of abuse of the prototype of Article XXI(b), where the delegate stated that "[we] recognized that there was a great danger of having too wide an exception. Therefore we thought it well to draft provisions which would take care of real essential security interests and *at the same time, so far as we could, to limit the exception. . .*" It also points out another U.S. delegate's response: "I think there must be some latitude here for security measures. It is really a question of a balance. . . . *[W]e cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.*"[68]

e. Wording

In addition, some point out that the wording of Article XXI(b) makes it hard to understand how the phrase "which it considers" could cover the subparagraphs. The European Union argued in DS512 that "subparagraphs (i) to (iii) refer to 'action' and not to 'it considers.'"[69] Recall, especially, that subparagraph (iii) starts with "taken in time of war."[70] Together with the chapeau, subparagraph (iii) reads: "[Nothing prevents] any action which [a state] considers necessary for the protection of its essential security interests . . . taken in time of war."[71] The panel of DS512 stated that during the writing of Article XXI (b), the U.S. delegation actually had an internal debate over the coverage of "which it considers."[72] After it presented the original draft to other countries, the delegation discussed whether to change the expression to "which [a member] may consider to be necessary *and to* relate to" the enumerated topics, to lead to the reading that the invoking state is to determine the enumerated situations.[73] However, after a vote, it chose not to make this modification.[74] Before the vote, a delegate who argued that security exceptions should be subject to review "stated that 'it would be better to abandon all work on the Charter' than to place a provision that would . . . 'provide a legal escape from compliance with the provisions of the Charter.'"[75] The panel of DS512 concluded that the discussions among countries after the vote reflected the U.S. delegation's interpretation that the scope of "which [a

67. *Id.* ¶ 7.100, 7.101.
68. *Id.* ¶ 7.93 (emphasis added).
69. *Addendum to Russia – Measures Concerning Traffic in Transit, supra* note 36, Annex D-5 ¶ 16 (Executive Summary of the Third-Party Arguments of the European Union).
70. GATT, *supra* note 1, art. XXI(b)(iii).
71. *Id.*
72. *Russia – Measures Concerning Traffic in Transit, supra* note 26, ¶ 7.89.
73. *Id*, ¶ 7.89 (emphasis added).
74. *Id.* ¶ 7.91.
75. *Id.* ¶ 7.90.

member] considers" would not extend to the enumerate elements.[76]

f. State Practice—No Common Understanding

Regarding the state practice of member states, those who oppose a self-judging interpretation have a different view than its proponents. The panel of DS512 made a detailed analysis of state practice so far and concluded that there have been "differences in positions and the absence of a common understanding regarding the meaning of Article XXI."[77]

3. Covers "Necessary," "Essential Security Interests," and All of the Subparagraphs

The arguments supporting a self-judging reading are seemingly based on the interpretation that "which it considers" covers all the subparagraphs, because this interpretation is logically necessary to establish a state's complete discretion. However, proponents of a self-judging interpretation do not often discuss this point clearly.[78] One proponent just states, "[textually] the phrase 'which it considers' requires at least *some* of the exception to be self-judging, but it is not clear whether those words modify all or part of Article XXI(b)."[79]

C. Issue 3: Does the Principle of Good Faith Limit the Discretion Given to Countries by the Adjectival Clause "Which it Considers"?

1. Arguments Against the Limitation

The proponents of a self-judging interpretation deny any limitation on the discretion of states to determine what is necessary to protect their essential security interests.[80] Each of the grounds for a self-judging reading supports the view that there should not be a "good faith" limitation imposed by a panel to a state's discretion.

2. Arguments in Favor of the Limitation

a. General Principles of International Law

The first reason to argue for "good faith" review by a panel rests in the general principles of international law. The DSU, Article 3.2, provides that members recognize that the Dispute Settlement Mechanism serves to clarify the existing provisions of the WTO agreements "in accordance with customary rules of interpretation of public international law."[81] The

76. *Id.* ¶ 7.91–7.92.

77. *Id.* ¶ 7.80, Appendix.

78. See the arguments presented by the United States and Russia in *Addendum to Russia – Measures Concerning Traffic in Transit, supra* note 36, Annex D-10 (Executive Summary of the Third-Party Arguments of the United States) and Annex C-3 (First Executive Summary of the Arguments of the Russian Federation).

79. Alford, *supra* note 14, at 706.

80. Akande & Williams, *supra* note 14, at 396–97.

81. 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.

Appellate Body has confirmed that these customary rules of interpretation include the obligation of good faith, which are codified in the Vienna Convention on the Law of Treaties.[82] Article 31(1) and Article 26 of the Vienna Convention on the Law of Treaties provide that every treaty "shall be interpreted in good faith" and "must be performed in good faith."[83] Thus, the discretion of states is "limited by its obligation to interpret and apply" Article XXI (b) in good faith.[84]

b. Drafting History, the Purpose of WTO, etc.—Similar to Arguments in C-ii

Also, some argue that the drafting history of Article XXI supports review for "good faith," as the drafters were concerned that the security exception not be "so broad that, under the guise of security, countries will put on measures which really have a commercial purpose."[85] Others argue that the Ministerial Declaration of 1982, which provides guidance for the use of security exceptions, states that the discretion allowed in the phrase "which it considers" is not unlimited.[86] In addition, it is possible to argue that the objective of the WTO system requires this interpretation. A key feature of the WTO system is that it has compulsory jurisdiction over disputes arising from its provisions, and this feature brings the rule of law to international trade.[87] A self-judging interpretation nullifies this inherent feature of the system by effectively allowing a country "to determine the scope and existence of its obligations under the GATT."[88] More broadly, with the self-judging interpretation, "[Article XXI(b)] would have a 'corrosive effect on the multilateral trading system from abusive invocations.'"[89]

D. What Matters is the Balance, but DS512's Position on the Three Issues is Appropriate

Both the proponents of the self-judging interpretation and those against them base their interpretations on the wording and drafting history of Article XXI (b). Neither side denies that "[i]t is really a question of a balance," an essential note that the U.S. delegate stated during the drafting sessions.[90] We cannot interpret it too narrow, "because we cannot prohibit measures which are needed purely for security reasons."[91] On the other hand, we cannot interpret it "so broad that, under the guise of security,

82. *See Russia – Measures Concerning Traffic in Transit, supra* note 26, ¶ 7.132 n.212.
83. *Id.*
84. *Id.* ¶ 7.132.
85. *Verbatim Report of the Thirty-Third Meeting of Commission A, supra* note 44, at 21. *See also* Akande & Williams, *supra* note 14, at 390. Note that the authors introduced this "inherent feature" argument as a counterargument to a *pure* self-judging interpretation. *Id.* at 402–03. This argument can support either, or both, the objective review of the subparagraphs or the "good faith" review. *See id.* at 395–96.
86. Duque, *supra* note 12, at 38.
87. Akande & Williams, *supra* note 14, at 402.
88. *Id.* at 384, 402.
89. Duque, *supra* note 12, at 40.
90. *Verbatim Report of the Thirty-Third Meeting of Commission A, supra* note 44, at 21.
91. *See id.*

countries will put on measures which really have a commercial purpose."[92] The proponents of the self-judging interpretation put more emphasis on a country's sovereign rights to protect its security interests, whereas those against it put more emphasis on the purpose of WTO (reciprocity and predictability) and the need to prevent disguised protectionist measures.[93]

This Article does not aim to settle the contention between self-judging theories and the theories against self-judging, but, rather, aims to build upon the latter theories. As noted at the beginning of this chapter, the following portions of my discussion will proceed based on the position taken by the DS512 panel in its judgment. In other words, I take it that Article XXI(b) is not self-judging; the phrase "which it considers" covers "necessary" and "essential security interests," but not the subparagraphs; and the "good faith" principle limits the discretion conferred by the phrase "which it considers."

That being said, the panel's position on each issue has a solid basis. First, Article XXI(b) cannot be a self-judging clause. An interpretation in favor of self-judging would give countries complete discretion to abuse the security exceptions. Countries could "consider" that any measure under the sun falls under this clause and free themselves from every obligation arising from GATT. Such an interpretation would deprive the world trade system of reciprocity and predictability, which are the key principles of the WTO/GATT system.[94]

Second, regarding Issue 2, the subparagraphs of Article 21(b) should be objectively judged. The subparagraphs are limitative, qualifying clauses to limit the circumstances giving rise to what can count as an "essential security interest." If each country, at its complete discretion, judges the applicability of a subparagraph, the subparagraph loses its independent meaning, because the judgment of whether the conditions of the subparagraph are met will be in effect the same as the judgment of whether "essential security interests" exist.[95] Also, the drafting history of Article XXI(b) better supports an interpretation that requires an objective review of a measure's compatibility with the requirements of the subparagraphs.[96] Moreover, the subjects of the subparagraphs do not allow purely subjective, discretionary determinations.[97]

Last, with regard to the phrase "which it considers necessary for the protection of its essential security interests," the good faith principle constrains the discretion of countries to decide what their essential security interests are and which measures are necessary to protect. This is clear from the general principle of public international law, which the DSU, Arti-

92. *Id.*
93. *See* Alford, *supra* note 14, at 706.
94. *See Russia – Measures Concerning Traffic in Transit, supra* note 26, ¶ 7.79.
95. *See id.* ¶ 7.65.
96. *See id.* ¶ 7.83–7.100.
97. *See Addendum to Russia – Measures Concerning Traffic in Transit, supra* note 36, Annex D-5 ¶ 16 (Apr. 5, 2019) (Executive Summary of the Third-Party Arguments of the European Union). *See also* discussion, *supra* subsection I.B.2.b.

cle 3.2, recognizes as a principle to interpret WTO treaties.[98] Article 31 of the Vienna Convention on the Law of Treaties, which is referred to as a general principle of international law, states that the interpretation of a treaty must be made in "good faith," and Article 26 states that the exercise of a treaty right shall be carried out in "good faith."[99]

However, taking such an interpretation does not mean that countries cannot take measures arising from genuine security interests. An interpretation that rejects self-judging still allows countries ample discretion to take measures to protect their genuine security interests. As for the interpretation of the chapeau, it only requires that a panel reviews it indirectly—for compatibility with the good faith principle.[100] Regarding the subparagraphs, a panel can objectively review a measure's compatibility, but their relatively loose requirements allow states ample room for decision. Section II shows how the chapeau and subparagraph (ii) tests work and how they allow countries to protect their genuine security interests, while restricting abusive measures.

II. The Effect of the "Good Faith" Principle in the Context of Article XXI(b) and the Interpretation of Subparagraph (ii)

A. The Limitations of the DS 512 Panel's Positions

Despite its contribution to the debates on the interpretation of Article XXI, the interpretation the DS512 panel (and DS567 panel) presented is not sufficient for clarifying the limits of Article XXI(b)(ii), especially in relation to export control measures. First, while the panels' interpretations of the chapeau sufficed to resolve the cases it dealt with, their holdings were based on extraordinary circumstances and are not adequate to determine whether more nuanced measures, such as individual export control measures, pass the chapeau test. Especially, the panels did not clarify what standard of judgment of "good faith" should apply to Article XXI(b). The DS512 panel's answer—"simply re-labeling trade interests as security interests is outside of 'good faith'"—is correct in itself, but it is unclear how to determine whether or not a measure merely re-labels a hidden economic interest.[101]

It is also unclear how far a measure with a weak security interest qualifies as taken in good faith when the motivation is not entirely economic/trade interests. For example, for one state, the improvement of economic or technological power of another state that is not in a strong alliance with it may pose a potential security threat, because economic and technological power is the foundation of military power. Are measures taken to impede the development of another country's economic and technological power always permissible as a good faith measure necessary to protect its security

98. Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 87.

99. *See Russia – Measures Concerning Traffic in Transit, supra* note 26, ¶ 7.132 n.212.

100. *See id.* ¶ 7.131-7.133; *see also id.*, ¶ 7.138-139.

101. *Id.* ¶ 7.133.

interests? The arguments the WTO panels made do not clearly answer this question.

Second, as some parts of the DS512 panel's interpretation of the chapeau rely on the wording of subparagraph (iii), these parts cannot be directly transposed to the context of subparagraph (ii). The DS512 panel report states, after disapproving mere re-labeling, that "a sufficient level of articulation [of its essential security interests] will depend on *the level of emergency in international relations*."[102] This formula cannot be directly utilized in the case of subparagraph (ii) or export control, because the degree of emergency in international relations is not necessarily determinative of whether restrictions on imports and exports of a certain sensitive item should be allowed.

Last, naturally, the DS512 panel gives no interpretation of the language of subparagraph (ii), as the case concerned Article XXI(b)(iii).[103] Together with a more detailed analysis of the meaning of the "good faith" principle in the context of Article XXI(b), the interpretation of subparagraph (ii) will contribute to presenting a somewhat finer legal line, especially in relation to export control measures. In the following parts, I will first analyze how the "good faith" principle should apply in the context of Article XXI(b)(ii), and then present an interpretation of subparagraph (ii).

B. The Application of the 'Good Faith' Principle in the Context of Article XXI(b)(ii)

In the context of Article XXI(b)(ii), two primary occasions can be conceived where the existence of good faith will be in question. The first is a situation where the alleged security interest is obviously disguised, and it is clear that the measure was in fact taken for the sake of other interests. The second is when the invoking state's argument differs too greatly from objective interpretations of "essential security interest" and "necessary." This is the case where the asserted interest does not seem to be "essential" at all, and where it does not seem that a measure and the stated interest it is supposed to represent are linked by necessity. In other words, the first case concerns subjective abuse, the second one, objective abuse.

1. Case of Deception

The first case concerns occasions where it is clear that a country subjectively took a measure without a reason for thinking that the measure was necessary for its essential security interests. Such instances involve the deceptive allegation of the country's interests and considerations that it

102. *Id.* ¶ 7.135 (emphasis added). Note that the DS567 panel does not seem to have strictly followed this idea, but just required that articulation of its essential security interests was "minimally satisfactory". *See Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights*, *supra* note 2, ¶ 7.279–7.281.

103. The DS567 panel does not give a relevant interpretation either, since DS567 is a case concerned with TRIPS Article 73(b)(iii), which is equivalent to GATT Article XXI(b)(iii). *Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights*, *supra* note 2, ¶ 7.230.

had when it took the measure at issue. The DS512 report gives "simply relabeling trade interests" as security interests as a typical example.[104] These instances contravene "good faith," and the jurisprudence of the Appellate Body supports that conclusion. In *US-Shrimp*, the Appellate Body held in relation to the good faith principle, "[W]henever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.'"[105] The Oxford Dictionary describes bona fide as "genuine; real", "without intention to deceive,"[106] so deception is an act that certainly does not fall under good faith. The invocation of Article XXI(b) would therefore be contrary to the good faith principle if the essential security interest asserted by the invoking state or the relationship between the interest and the measure was clearly disguised.

Regarding deception, some might argue that there can be measures with dual purposes, i.e., measures that have an economic purpose and a security purpose at the same time. Whether such a dual-purpose measure passes the chapeau test will depend on whether the country "considered" that the measure was necessary. In the context of GATT, the interpretation of "necessary" is established in the Appellate Body precedents regarding Article XX.[107] For a measure to be "necessary," it must be least trade-restrictive among possible alternatives that provide an equivalent contribution to the achievement of the objective pursued.[108] Thus, if the design of a security-related measure is distorted to pursue a trade interest, the measure is unlikely to be least trade-restrictive. If a country intentionally bent the design of the measure to achieve its trade interests, it is unlikely to have considered the measure "necessary" to protect its security interests.

Such an interpretation of a dual-purpose measure will not impede countries' ability to protect their essential security interests. A country may still favor its domestic products or disfavor products of specific countries if it considers such discrimination necessary to achieve its essential security interests. What this interpretation requires is that countries consider security interests exclusively when they design a measure, in which case a panel will not intervene. Even when a panel finds strong evidence that a country distorted the design of a measure to achieve a trade benefit unrelated to security and concludes that the measure is not compatible with WTO rules, the respondent country only needs to redesign the measure with genuine security considerations in mind, i.e., without aiming at realizing trade interests.

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104. *Russia – Measures Concerning Traffic in Transit*, supra note 26, ¶ 7.133.

105. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 158, WT/DS58/AB/R, (adopted Oct. 12, 1998) [hereinafter *United States– Import Prohibition of Certain Shrimp and Shrimp Products*].

106. *Bona fide*, LEXICO.COM, OXFORD UNIV. PRESS, https://www.lexico.com/en/definition/bona_fide [https://perma.cc/YBV4-KPN6] (last visited Mar. 10, 2020).

107. Report of the Appellate Body, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, ¶ 156 (Dec. 3, 2007) [hereinafter *Brazil – Measures Affecting Imports of Retreaded Tyres*].

108. *Id.* Note that in the dispute settlement process where Article XX is the issue, the responding party must first identify possible alternatives. *Id.*

2. Objective Abuse

The other case where the existence of good faith will be in question is when the invoking state's argument is too far away from objectively considered interpretations of "essential security interest" and "necessary." As the Appellate Body has previously shown, under the good faith principle, "the assertion of a right . . . must be exercised . . . *reasonably*."[109] In the context of Article XXI(b), the good faith doctrine applies in relation to the way the invoking state "considers."[110] The point to be examined in an objective abuse case is therefore whether it is unreasonable to consider an action as "necessary" or an interest as an "essential security interest."

Two situations in which considering in such a way will be unreasonable are (1) when the asserted interest differs greatly from an objectively "essential" security interest, and (2) when the link of necessity between the alleged essential security interest and the measure taken is poor. Thus, a panel should judge a case of seemingly objective abuse based on how greatly the invoking state's allegation differs from an objective interpretation of "essential security interest" and "necessary," respectively.

Based on DS512, "essential" under an objective interpretation can be understood as "those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally."[111] The Cambridge Dictionary defines "quintessential" as "being the most typical example or most important part of something," and in this context, the proper meaning of the word must be the latter, "most important."[112] Another possible interpretation of "essential" from prior academic work is "absolutely necessary, extremely important, fundamental or central."[113] In either case, the scope of the word "essential" limits the qualified interests to the most important interests of a country. Regarding "necessary", as discussed above, the objective interpretation of the word presented in Appellate Body precedents requires the measure to be least trade-restrictive.

3. Presumption of Deception in Case of Seemingly Objective Abuse

As discussed above, theoretically, the panel can judge that a country is not acting in good faith when it is objectively unreasonable even to consider a measure to be necessary for its essential security interests. However, Article XXI is an exemption clause related to national security, and the extent of security needs in a situation is highly dependent on the strat-

109. *United States– Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 106, ¶ 158 (emphasis added).

110. *See Russia – Measures Concerning Traffic in Transit*, *supra* note 26, ¶ 7.127-132.

111. *Russia – Measures Concerning Traffic in Transit, supra* note 26, ¶ 7.130 (emphasis added).

112. *Quintessential*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/ja/dictionary/english/quintessential [https://perma.cc/N54J-5ZCC] (last visited Mar. 10, 2020).

113. Duque, *supra* note 12, at 38.

egy and circumstances of each country. In light of this point, it would be difficult, in practice, for a panel tasked with resolving trade disputes to say that some interests are clearly not essential for the state's security, or that a certain measure is obviously not necessary to protect its alleged security interests, and that therefore such measures should be modified or abolished in conformity with GATT obligations. For example, a complaining country could theoretically argue that a less trade-restrictive alternative measure exists, if the measure seems clearly excessive to protect the security interests. However, it would be difficult for a panel with trade expertise to assert that the proposed alternative measures would have a "comparable security effect," as a measure's impact on a security interest would be difficult to calculate precisely.

It would thus be reasonable for a panel in a clear case of objective abuse to avoid immediately declaring that the measure does not fall under Article XXI(b)(ii) and instead to presume the invoking country's bad faith. The invoking state would then be required to present a more detailed explanation to overturn that presumption, and if it failed to do so, the panel could find deception. It would arguably be problematic for a panel to seek a detailed explanation, as Article XXI(a) provides for a security exception to information-providing obligations required under GATT.[114] However, it should be an abuse of Article XXI(a) for an invoking country to avoid making an explanation in a situation where its allegation seems plainly unreasonable.

C. Interpretation of Subparagraph (ii)

1. Overall

In interpreting subparagraph (ii), it is important to note that the subparagraphs of Article XXI(b) are placed in order to limit the situations to which Article XXI(b) applies to three specific types from the many potential situations in which actions to protect "essential security interests" might be necessary.[115] Subparagraph (ii) must, therefore, be interpreted as imposing some limitation on the scope of the measures which Article XXI permits.[116]

This understanding gives guidance for interpreting subparagraph (ii)—it needs to be interpreted to work as a limitation, at least to some extent. Such guidance is especially important when interpreting the latter half of the subparagraph. The latter part of subparagraph (ii)—"[relating to] such traffic in other goods and materials as is carried on directly or

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

115. *See* discussion, *supra* subsection I.B.2.a.

116. This understanding of the "subparagraph as a limitation" is consistent with what the U.S. government cited in its submission at DS512 as the drafting history of the article: "[at a meeting of the negotiating committee] the delegate from the United States explained the exception would not 'permit anything under the sun' and that the limitation on actions not consistent with the Charter related to the time in which such actions would be —i.e., 'in the time of war or other emergency in international relations.'" *Addendum to Russia – Measures Concerning Traffic in Transit, supra* note 36, Annex D-10 ¶ 25 (Executive Summary of the Third-Party Arguments of the United States).

indirectly for the purpose of supplying a military establishment"—could perhaps be interpreted quite broadly if one tried hard.[117] If broadly interpreted, this phrase could include essentially all traffic in goods and materials other than arms, because supply chains are globally interconnected, and it is impossible to deny the possibility that a product will be supplied indirectly through the global supply chain to military installations. For instance, it is very hard to deny the possibility that cotton exported from the United States will be turned into clothing used by the military of some country. However, such an expansive interpretation that prevents the subparagraph from performing any limiting function is unacceptable.

In this section, based on this overall understanding, I present an interpretation of subparagraph (ii). To interpret the language of the subparagraph that does not provide definitive clues to determine its meaning, I employ a holistic interpretation method that relies on multiple interpretative tools such as the drafting history, the structure and context of the Article, authoritative interpretations of other parts of WTO law, and other international norms related to security-related items. The major issues concern the interpretation of each phrase that makes up the subparagraph, especially (1) "relating to"—a fundamental term that regulates the mode of a panel's review; (2) "the traffic/such traffic"—terms that work as a basis for interpreting other parts; (3) "implements of war"—the phrase defining the line between the first and second half of the subparagraph; and (4) "directly or indirectly for the purpose of"—an important component of the latter half of subparagraph (ii).[118] In addition, I examine what it means for an action to be "relating to" such traffic as is stipulated in the latter half of the subparagraph—namely, "traffic . . . as is carried on directly or indirectly for the purpose of supplying a military establishment."[119] This inquiry is especially important in the context of the security exception, because no country could, in practice, certainly know what trade would be destined to get to a military establishment. I will look at these issues in turn. First, however, I summarize the debates found in the drafting documents of this particular subparagraph. They provide guidance for the overall direction of interpretation as well as clues to introduce three criteria that I propose in subsection 7.

2. *Drafting History of Subparagraph (ii)*

There is not much discussion of the drafting process for Article XXI in general, but there is even less for subparagraph (ii). Article 32 of the United States Suggested Charter in 1946—the general exceptions clause with a combined role of the present Articles 20 and 21—included paragraph (d), which reads: "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for

117. GATT, *supra* note 1, art. XXI(b)(ii).

118. *Id.* at 39.

119. *Id.*

the purpose of supplying a military establishment."[120] At this early stage, paragraph (d) was not substantively discussed.[121] Concerning subparagraph (d) along with several other subparagraphs, a sub-committee report in November 1946 stated only that "[t]hese paragraphs were generally accepted."[122]

The only substantive discussion of subparagraph (ii) in the published material appears to be that found in relation to an amendment proposed by Australia on 6 August 1947.[123] Australia proposed to include an amended clause in then-Article 37 (general exceptions) to read as follows: (g) Relating to the conservation, by export prohibitions, of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption or are considered by the Member to be necessary to its long term plans for defence or security; or [sic][124]

Australia gave the following reasons for its proposal:

> After a careful examination of these Articles, it is considered that insufficient provision is made for conservation, by the imposition of export prohibitions, of materials which are essential to the security interests of a Member. Pre-war experience in Australia showed that it was necessary to prohibit the exportation of iron ore, partly on the grounds that it seemed likely to be used for military purposes by the purchasing country.[125]

During the discussion of this proposal in the committee, on 12 August 1947, the country elaborated as follows:

> It was found necessary in the year or so immediately preceding the outbreak of the last war to prohibit the exportation of iron ore from Australia, because we had reason to believe that it was being, or would be, used for military purposes by Japan. I do not doubt that that iron ore would have been used, first of all at any rate, in ordinary smelting works in Japan, and I doubt whether you could describe such smelting works as a military establishment.[126]

Australia based its argument for the proposal on its need to ban the export

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120. U.S. Dept. State, Suggested Charter for an International Trade Organization of the United Nations, Publication 2598, Commercial Policy Series 93, at 24 (1946).

121. Prep. Comm. of the U.N. Conf. on Trade & Employment, Committee II, *Draft Report of the Technical Sub-Committee*, U.N. Doc. E/PC/T/C.II/54, at 33 (1946).

122. *Id.* Note that the London Draft adopted after the deliberations in the First Session of the Preparatory Committee, including the Technical Sub-Committee, only put a placeholder for the "General Exceptions" clause that noted "[t]o be considered and drafted at a later stage." Rep. of the First Session of the Prep. Comm. of the U.N. Conf. on Trade & Employment, U.N. Doc. E/PC/T/33, at 33 (1946).

123. Second Session of the Prep. Comm. of the U.N. Conf. on Trade & Employment, *Amendment Proposed by the Australian Delegation - Article 37*, E/PC/T/W/264, at 1 (1947) [hereinafter *Amendment Proposed by the Australian Delegation - Article 37*] (emphasis added).

124. *Id.*

125. *Id.*

126. Second Session of the Prep. Comm. of the U.N. Conf. on Trade & Employment, *Verbatim Report of the Thirty-Sixth Meeting of Commission A*, E/PC/T/A/PV/36, at 18 (1947) [hereinafter *Verbatim Report of the Thirty-Sixth Meeting of Commission A*].

of iron ore against Imperial Japan prior to WWII.[127] Specifically, it was concerned that if the direct destination of the iron ore exported from Australia was "a factory which was engaged . . . partly in the production of materials of war" or if a factory "produced the materials, semi-fabricated, from which materials of war were themselves produced," that export might not fall in the scope of the prototype of Article XXI(ii).[128]

In response to Australia's proposal, countries expressed concern that the language of the proposal was too wide. The U.S. stated, "the Australian proposal may be a little too broad, because it is very difficult to say what may be necessary to a Member's long-term plans for security. I think that *perhaps you could restrict almost anything in the world on that ground*."[129] Canada and Norway similarly pointed out the dangers. Canada, for example, pointed out that "[t]he words 'long-term plans' are extremely wide and we feel that they *may allow the taking of action which is contrary to the general intent of the Charter* under those broad terms. Long-term plans may include almost anything."[130]

As a solution to the danger of including too broad an exception and to accommodate the purpose of Australia's proposal, the U.S. proposed to address them by adding the phrase "directly or indirectly" to the prototype of the current subparagraph (ii), which was then located in Article 91.[131] The U.S. delegation stated the following:

> [I]t was always our interpretation of this clause that if a Member exporting commodities is satisfied that the purpose of the transaction was to supply a military establishment, immediately or ultimately, this language would cover it. It would not do violence to our understanding of it to add the words "directly or indirectly for the purpose of supplying a military establishment," I think that would meet this difficulty.[132]

At a meeting several days later, on 15 August 1947, Australia stated that "[if] the Commission was of opinion that restrictions in respect of the export of arms were covered by that clause" it would drop its proposal, provided that the commission would write that opinion in its report and recommend that "directly or indirectly" be added.[133] Other countries represented on the committee did not object to this request for additional lan-

127. *Id.*

128. *Id.*

129. *Id.* at 17 (emphasis added).

130. *Id.* at 19 (emphasis added).

131. *See* Second Session of the Prep. Comm. of the U.N. Conf. on Trade & Employment, *Report of the Committee on Chapters I, II and VIII*, E/PC/T/139, at 26 (1947) [hereinafter *Report of the Committee on Chapters I, II and VIII*] (regarding the location of the current subparagraph (ii) then).

132. *Verbatim Report of the Thirty-Sixth Meeting of Commission A, supra* note 127, at 19.

133. Second Session of the Prep. Comm. of the U.N. Conf. on Trade & Employment, *Summary Record of the 40th (2) Meeting of Commission A*, U.N. Doc. E/PC/T/A/SR/40(2), at 9–10 (1947) [hereinafter *Summary Record of the 40th (2) Meeting of Commission A*].

guage.[134] As a result, when countries adopted the Geneva Draft of the ITO Charter on 22 August 1947, its version of Article 94 was nearly identical to the current Article XXI, including subparagraph (ii) with the phrase "directly or indirectly."[135]

This history reveals a few things about the negotiating countries' perceptions of the present subparagraph (ii) of Article XXI. Firstly, its language was undoubtedly understood as a clause more *limited in scope* than the Australian proposal of 6 August 1947. Similarly, the criticisms toward the proposal reveal that the current wording was understood to prevent countries from restricting "almost anything in the world."[136] In particular, the strong concerns expressed about the Australian proposal's wording "(necessary to) its long term plans for defence or security" suggest that the wording of the present subparagraph (ii) was seen to be focused on restricting items with a clearer and closer military association, covering "restrictions in respect of the export of arms" as a target.[137]

On the other hand, countries clearly thought that the present subparagraph (ii)'s language responded to Australia's concern by covering a measure to prevent a transaction destined for "a factory which was engaged . . . *partly* in the production of materials of war" or for a factory that "produced the *materials, semi-fabricated, from which materials of war* were themselves produced."[138] Thus, transactions that go through several steps in the supply chain after exporting and then reaching a military establishment would be covered by this Article. Also, as the U.S. delegation noted that "if a *Member . . . is satisfied* that the purpose of the transaction was to supply a military establishment,"[139] it was assumed that countries understood that the final destination of a transaction was decided primarily on the subjective judgment of each country.

However, it is worth noting that, although in the discussion Australia pointed out that it had in mind exports of iron ore to Japan in the period prior to the Pacific War, this commodity probably had greater military significance at the time than it does today. In those days, iron ore and steel were products with a stronger military tone. As early as 1939, two years before the start of the Pacific War, Japan had drawn up a national supply and demand management plan for steel due to military necessity.[140] Look-

134. *Id.* at 10–11. *See also* Second Session of the Prep. Comm. of the U.N. Conf. on Trade & Employment, *Verbatim Report of the Thirty-Third Meeting of Commission B*, E/PC/T/B/PV/33, at 69–70 (1947).

135. Second Session of the Prep. Comm. of the U.N. Conf. on Trade & Employment, Rep. of the Second Session, U.N. Doc. E/PT/T/186, at 56 (1947).

136. *Verbatim Report of the Thirty-Sixth Meeting of Commission A*, *supra* note 127, at 17.

137. *Verbatim Report of the Thirty-Sixth Meeting of Commission A*, *supra* note 127, at 17, and *Summary Record of the 40th (2) Meeting of Commission A*, supra note 134, at 9–10.

138. *Verbatim Report of the Thirty-Sixth Meeting of Commission A*, *supra* note 127, at 18 (emphasis added).

139. *Id.* at 19 (emphasis added).

140. It could be said that the proportion of military demand for iron was already so high before the Pacific War began. SHIRO YAMAZAKI, PLANS FOR MATERIAL MOBILIZATION IN

ing at the demand for steel by application, general civilian demand was 1,266,000 tons, while Army and Navy combined demand was 1,429,000 tons.[141] Iron was a product for which military supplies exceeded civilian supplies.[142] In comparison, the steel for defense supply was only 3% of total steel supply in the United States even in 2010, the year when the country tripled the size of its military force dispatched to Afghanistan.[143] In the same year, construction and automobiles used almost ten times the military demand.[144] Also, the fact that all supply and demand for steel in a country was controlled by the state because of military necessity itself suggests the military image of iron over 70 years ago.

During the discussion on Australia's proposal, only Belgium argued that the issue could be addressed by the clause equivalent to current Article XXI(b)(iii).[145] The Belgian delegation said that if Australia's aim was to "make prohibition for certain countries at certain times" like that against pre-War Japan, "[t]here is the danger of war, and I believe that Article 91 . . . already answers. It speaks of measures to be applied in cases of war or of international tension, and therefore I believe that it is sufficient."[146] However, other countries did not agree to this suggestion.[147] Australia had begun to embargo iron ore against Japan as early as in 1938, four years

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THE PACIFIC WAR ERA (太平洋戦争期の物資動員計画), 4–9 (2016). Note that the U.S. ban on the export of iron scrap to Japan, which is said to have been a factor in Japan's decision to start the Pacific War, did not start until October 1940. *See* Akira Suzuki, *U.S. Economic Sanctions against Japan and Aid to China during the Sino-Japanese War* (日中戦争期におけるアメリカ対日経済制裁と対華援助), *in* 33(1) ASIAN STUD. (アジア研究) 41, 57 (1986), available at https://www.jstage.jst.go.jp/article/asianstudies/33/1/33_41/_pdf [https://perma.cc/7724-USUB]; *see also* Chihiro Hosoya, *The Breakdown of U.S.-Japan Relations 1939–1941: Deterrence Policy and its Miscalculations* (日米関係の破局 一九三九-一九四一 : 抑止政策とその誤算), *in* 54(1) HITOTSUBASHI REVIEW OF ARTICLES (一橋論叢) 55, 71–72 (1965), available at http://ezproxy.lib.hit-u.ac.jp/rs/bitstream/10086/2980/1/ronso0540100550.pdf; The first time Japan attacked Australia was in 1942. *Australia bombed, strafed and shelled*, AUSTRALIAN WAR MEMORIAL, https://www.awm.gov.au/visit/exhibitions/underattack/bombed [https://perma.cc/C6MT-FE9H] (last visited May 13, 2020).

141. YAMAZAKI, *supra* note 143, at 9. In addition to the direct military demand, the plan separately calculates the demand for the implementation of a "productive capacity expansion plan" to increase the military production capacity. *Id.* Adding this, military-related demand at the time was about three times that of general civilian demand. *Id.*

142. *Id.* at 9.

143. AM. IRON & STEEL INST., PROFILE OF THE AMERICAN IRON AND STEEL INSTITUTE 2010–2011, 6, https://www.yumpu.com/en/document/read/43773629/profile-of-the-american-iron-and-steel-institute-2010-2011 (last visited May 2, 2020).

144. *Id.*

145. Article XXI(b)(iii) reads, "taken in time of war or other emergency in international relations." GATT, *supra* note 1, art. XXI(b)(iii). At the time of the committee, it was positioned in Article 91. *Report of the Committee on Chapters I, II and VIII, supra* note 132, at 26.

146. *Verbatim Report of the Thirty-Sixth Meeting of Commission A, supra* note 127, at 20. Note that though the Belgium delegation said Article 91 "speaks of measures to be applied in cases of war or of international tension," the language of the relevant part of Article 91 at that time was "In time of war or other emergency in international relations." *Report of the Committee on Chapters I, II and VIII, supra* note 132, at 26.

147. *Verbatim Report of the Thirty-Sixth Meeting of Commission A*, *supra* note 127, at 20-21.

before the Japanese launched an attack on Australia.[148] Australia and other countries were probably concerned with ensuring the permissibility of precautions taken at a time of "other emergency in international relations."[149]

3. Interpretation of "Relating to" Alone

The phrase "relating to" is essential in interpreting subparagraph (ii). Though no panel or Appellate Body report has interpreted this subparagraph of the security exception provision, nor does the drafting history summarized above inform the interpretation of this phrase, a number of Appellate Body findings discuss this term in relation to a general exception clause of GATT, namely Article XX(g).[150] They use such language as that there must be "a close and genuine relationship of ends and means" between the measure and the interests to be protected,[151] or that the measure must be "primarily aimed at" the protection of the target interests.[152] However, subparagraph (ii) of Article XXI does not directly provide for any particular interest or ends, as opposed to Article XX (g), which provides an exception for the ends "*conservation* of exhaustible natural resources."[153] There is no word in subparagraph (ii) that corresponds to "conservation" in Article XX(g).[154] Therefore, the interpretation of "relating to" from Article XX jurisprudence cannot be applied to Article XXI cases as it is.

However, no significant revisions from the existing interpretation of the phrase "relating to" are required in the context of Article XXI(b). When it comes to the subject matter of Article XX(g), exhaustible natural resources, only protection deserves an exception. In the case of the military-related goods at issue in Article XXI(b)(ii), a country may not only need to prevent transactions but also promote certain transactions for security purposes. For example, if export control measures are introduced to prevent traffic of arms, a country might seek to loosen its export restrictions in order to promote the export of arms to its allies. While such a

148. *See id.* at 18.
149. GATT, *supra* note 1, art. XXI(b)(3).
150. For reference, the text of this clause is as follows:

> Article XX: General Exceptions
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, *nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures*:
>
> . . .
>
> (g) *relating to* the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

GATT, *supra* note 1, art. XX(g) (emphasis added).
151. Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, *supra* note 108, ¶ 145.
152. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, at 45 (adopted Apr. 29, 1996).
153. GATT, *supra* note 1, art. XX(g).
154. GATT, *supra* note 1, arts. XX(g), XXI(b).

measure would violate the MFN obligation by advantaging allies only, it should be permitted under Article XXI(b)(ii) to facilitate arms traffic. Subparagraph (ii) should be interpreted to enable both the prevention and the facilitation of military-related traffic in correspondence with the "conservation" of exhaustible natural resources of Article XX(g).

4. Interpretation of "the Traffic/Such Traffic"

The only interpretations of "traffic in transit" exist with respect to GATT Article V. However, they do not interpret "traffic" itself.[155] The Oxford Dictionary identifies two senses of "traffic": the "transportation of goods or passengers," and "the action of dealing or trading in something illegal."[156]

In narrowing down the interpretation of the term for our purposes, the French rendering of subparagraph (ii) provides an important clue. It reads "se rapportant au trafic d'armes, de munitions et de matériel de guerre et à tout *commerce* d'autres articles et matériel destinés directement ou indirectement à assurer l'approvisionnement des forces armées."[157] (relating to the traffic in arms, munitions and war material and to any *trade* in other articles and material intended directly or indirectly to supply the armed forces").[158] In short, the French word that corresponds to "traffic" in subparagraph (ii) means "trade" in English. (For reference, the definition of "commerce" in the dictionary is "operation of sale, or purchase and resale of goods, of value. Provision of this type of service"[159]). The words

155. A scholar interprets "traffic . . . carried on" almost entirely relying on the meaning of "traffic in transit." Duque, *supra* note 12, at 40-41. He concludes that "traffic . . . carried on" signifies "passage or transport to and across the territory of a Member and that "[i]t also includes production, the passage across a territory warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes". *Id.* As this interpretation seems heavily influenced by "in transit" element and the author does not specify where some of the elements of his interpretation comes from (including why it includes "production"), I present here a definition based on ordinary meaning and the text in another authoritative language.

156. *Traffic*, LEXICO.COM, https://www.lexico.com/definition/traffic [https://perma.cc/8HK7-XSFB] (last visited Mar. 10, 2020).

157. ACCORD GÉNÉRAL SUR LES TARIFS DOUANIERS ET LE COMMERCE (GATT DE 1947), WTO, https://www.wto.org/french/docs_f/legal_f/gatt47_02_f.htm [https://perma.cc/N8Z5-UWVJ] (last visited Mar. 12, 2020) (emphasis added).

158. *Se rapportant au trafic d'armes, de munitions et de matériel de guerre et à tout commerce d'autres articles et matériel destinés directement ou indirectement à assurer l'approvisionnement des forces armées*, GOOGLE TRANSLATE, https://translate.google.com/?hl=EN#view=home&op=translate&sl=Auto&tl=EN&text=SE%20rapportant%20au%20trafic%20d'armes%2C%20de%20munitions%20et%20de%20mat%C3%A9riel%20de%20guerre%20et%20%C3%A0%20tout%20commerce%20d'autres%20articles%20et%20mat%C3%A9riel%20destin%C3%A9s%20directement%20ou%20indirectement%20%C3%A0%20assurer%20l'approvisionnement%20des%20forces%20arm%C3%A9es [https://perma.cc/UC8B-P3HH] (last visited May 13, 2020) (emphasis added).

159. *Commerce*, LeRobert dictionary, https://dictionnaire.lerobert.com/definition/commerce (last visited Mar. 13, 2020); *Opération de vente, ou d'achat et de revente d'une marchandise, d'une valeur. Prestation de ce type de service.*, GOOGLE TRANSLATE, https://translate.google.com/?hl=EN#view=home&op=translate&sl=auto&tl=EN&

"such traffic" in subparagraph (ii) thus refer to "trade" or "the action of dealing or trading."

5. Interpretation of "Implements of War" and the Distinction Between the First Half and the Latter Half of Subparagraph (ii)

The first half of the subparagraph requires measures to relate to "traffic in arms, ammunition and implements of war."[160] In contrast, the latter half requires two elements: the measure must relate to (1) "traffic in other goods and materials," and be (2) "carried on directly or indirectly for the purpose of supplying a military establishment."[161]

Whether a measure falls in the realm of the first half of subparagraph (ii) or the latter half is determined by the concept "implements of war." The first half covers arms, ammunition and implements of war, and the latter half covers anything else.[162] Thus, items covered by the first half and the latter half are clearly mutually exclusive. Among arms, ammunition and implements of war, the last is broadest. Therefore, "implements of war" works as the line between the first half and the latter half. If an item falls in the definition of "implements of war," it is covered by the first half, and it does not fit in the definition of "implements of war," it is covered by the latter half.

Then, what is the appropriate interpretation of "implements of war" in this context?[163] The ordinary meaning of "implement" is "tool, utensil, or other piece of equipment that is used for a particular purpose."[164] This ordinary definition allows both broad and narrow scopes of "implements" depending on how strictly a piece of equipment must be suited to be used for a particular purpose. If reading it broadly, one might be able to say a pair of shoes that a soldier wears is used for war. If taking that broad definition, shoes in general fall in the definition of implements of war.

However, in the context of subparagraph (ii), and connected with the words "of war," "implements" cannot be read so broadly. Rather, a narrower definition of implements of war suits the structure of subparagraph (ii). In other words, "implements of war" cannot be anything that might possibly be used in the military, but it should be interpreted as something mainly used for a military purpose, or something designed for such a purpose. First, "implements of war" here is listed with arms and ammunitions, i.e., items that are specifically designed for war, or battles more

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text=OP%C3%A9ration%20de%20vente%2C%20ou%20d'achat%20et%20de%20revente%20d'une%20marchandise%2C%20d'une%20valeur.%20Prestation%20de%20ce%20type%20de%20service. [https://perma.cc/VA2M-AQQ4] (last visited May 13, 2020). The original French definition is "Opération de vente, ou d'achat et de revente d'une marchandise, d'une valeur. Prestation de ce type de service."

160. GATT, *supra* note 1, art. XXI(b)(ii).

161. *Id.*

162. *See id.*

163. Other papers that interpreted GATT Article XXI(b)(ii), though only very few in number do not analyze "implements of war." *See, e.g.*, Duque, *supra* note 12, at 40–42.

164. *Implement*, LEXICO.COM, https://www.lexico.com/definition/implement(last visited Mar. 10, 2020).

broadly, and have no use other than that. This nexus to "arms" and "ammunitions" supports an interpretation that "implements of war" also fall within items designed for or used mainly for a particular purpose, i.e., war, as arms and ammunition.

Also, if one takes an expansive interpretation like mentioned before, almost everything that is possibly used during a war can be implements of war. These items include any material or product that the military might use during a war. Such interpretation nullifies the significance of the latter half, which provides a different scope and requirement in contrast to the first half. It is clear from the structure of the subparagraph that the latter half's function is to let goods and materials that are not categorically military-related, as opposed to "arms, ammunition, and implements of war," be included in the security exception. As a substitution for the items' categorical relation to military use, the latter half requires an additional condition that they must be directly or indirectly purported to supply a military establishment. Shoes that a soldier wears should obviously be included in the latter half, as it is an ordinary good that happens to be supplied to the military. Similarly, articles, cloths, and household supplies needed to maintain military activity, naturally fall in the latter half. If the first half absorbs items with little categorical relation to military use, the meaning of the latter half is lost.

Thus, a narrower definition of "implements of war", items designed for or used mainly for a particular purpose, suits the context and the structure of subparagraph (ii). For example, even if it does not fall in the definition of "arms," a special semiconductor designed in military-spec would be covered by the first half as "implements of war". However, ordinary high-spec semiconductors mainly used for commercial purposes would not fall in the first half and would need to be examined to determine whether they satisfy the additional requirement of the latter half of the subparagraph. Similarly, generally used goods or materials are covered by the latter half, even if they might sometimes be used in the military or to produce military equipment.

6. Interpretation of "Directly or Indirectly for the Purpose Of"

"Directly or indirectly for the purpose of" is a major component of the latter half of subparagraph (ii).[165] An important point regarding this component is that the phrase is "[carried on] directly or indirectly for the purpose of supplying a military establishment" rather than "goods and materials that might be directly or indirectly supplied to a military establishment."[166] The phrase requires the purpose or intention of supplying to a military establishment. In other words, this does not cover trade that goes around in supply chains and arrives at military installations merely as a coincidental result. Even if it is indirect, it must be "traffic", the "pur-

165. Despite the importance of this phrase, the author did not find a reliable article that interpreted this phrase. *See, e.g.*, Duque, *supra* note 12, at 40-42.

166. GATT, *supra* note 1, art. XXI(b)(ii).

pose" of which is to supply military installations. Given the term "purpose," mere negligence seems insufficient; the trade to a military establishment must be carried out, at least to some extent, knowingly.

In practice, however, it is difficult for a state to discern the intentions that trading parties have concerning their trade. Therefore, if the only permissible measures under Article XXI(b)(ii) are those that require proof of trading parties' clear intent as a condition to ban the trade, then permissible options for a state will be severely limited. Such extensive limitation is unacceptable in light of the purpose of Article XXI, which is to strike a balance between respecting states' security interests and preventing an abuse.[167] In other words, such limitation is too restrictive and allows only measures with too many loopholes. Therefore, we cannot take such an overly narrow interpretation of "indirect."

It is important to note, however, that whether an action is permissible under Article XXI(b)(ii) does not depend on whether the subject trade was intended to supply a military installation, but on whether the action had "a close and genuine relationship of ends and means" with the prevention (or facilitation) of such trade.[168] Considered in conjunction with the "probability" criterion that is discussed later, a trade may fall within the scope of subparagraph (ii) if the circumstances are such that the parties to the trade recognize that the trade may lead to the supply of goods to a military installation. For example, if the buyer in the trade is a wholesaler with a track record of supplying goods to military installations, it would be natural for the parties to assume that the traded item might go to a military installation, and disapproving such a trade could be a measure "primarily aimed at" preventing traffic "carried on . . . indirectly for the purpose of supplying a military establishment."[169]

7. *A Guideline for Interpreting the Latter Half of Article XXI(b)—An Interpretation That Bridges "Relating to" and "Such traffic. . ."*

In light of the foregoing considerations, to satisfy the latter part of Article XXI(b)(ii), the measure must be primarily aimed at the prevention (or promotion) of such action of dealing or trading of goods (other than arms, etc.) as is carried on directly or indirectly for the purpose of supplying a military establishment. However, the interpretation I have presented so far does not give sufficient insight as to what kind of export control measures are and are not permitted under Article XXI(b)(ii). In this subsection, this Article tries to give a practicable guideline that can be a support in judging whether a measure satisfies the requirement of the latter

167. *See Verbatim Report of the Thirty-Third Meeting of Commission A, supra* note 44, at 21 ("It is really a question of a balance. . . . We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose."); *see also Russia—Measures Concerning Traffic in Transit, supra* note 26, ¶ 7.93; discussion, *supra* subsection I.B.2.d.

168. *See* discussion, *supra* section II.C.3.

169. GATT, *supra* note 1, art. XXI(b)(ii).

half of subparagraph (ii). For the record, I will focus my discussion here on the context of export control measures. Though Article XXI(b)(ii) does not only apply to the cases of export control, the discussion here will still be valid as an interpretation of the Article, as export control is a typical measure that the subparagraph is supposed to deal with,[170] and the three perspectives I will introduce in this section—probability of getting to military establishments, an item's military sensitivity and limited usage, and military tension in international relations—are common considerations for measures targeting military-related traffic.

a. Probability of Getting to a Military Establishment

In the context of export control, measures that may fall under Article XXI(b)(ii) fall into two main categories:[171] (1) A measure that would prohibit "an export trade that *is actually* purported (directly or indirectly) for supplying a military establishment,"; and, (2) A measure that would prohibit "an export trade that *might possibly* be purported directly or indirectly for supplying a military establishment." As to the former, there is no issue in principle with Article XXI (b)(ii), because it covers the exact traffic as stipulated in the Article, and only that. However, in the actual operation of export control systems, it is assumed that few exporters will honestly declare that they are exporting items to the military organizations of a hostile country. Therefore, no matter how much a country uses its intelligence capabilities to screen exports that are destined to foreign military establishments, it is rare that the country knows that an export is to be directly or indirectly supplied to a military installation. In many actual cases, without 100% certain information, exports that are highly suspected of being delivered to military installations need to be denied to be realized. Thus, it is a measure in category (2) that must be closely examined.

The question to be asked regarding such measures is how likely a banned export must be traffic purported (directly or indirectly) to supply a military establishment (hereinafter "military-linked" traffic), for a panel to judge it as being "relating to" such traffic. I will call this question "Question 1." For example, in a case where country A blocks an export deal of semiconductors, the export is likely military-linked if the importer is a wholesaler that frequently does business with country B's military factory. Then, a measure that targets such a transaction would be "relating to" preventing military-linked trade. However, if the export destination was a local data center of Netflix, a private online entertainment company, in country B, and the export screening officer blocked the export transaction just because he hated Netflix, it is highly unlikely that the blocked transaction was to get to a military installation. In this case, the measure of banning the export is unlikely to be "relating to" preventing traffic supplying a

170. *See Addendum to Russia – Measures Concerning Traffic in Transit, supra* note 36, Annex C-3 ¶ 55 (First Executive Summary of the Arguments of the Russian Federation).

171. For simplicity of argument, I will proceed here by discussing the permissibility of *actually banning* the export of designated goods. I will discuss the conformity with Article XXI of subjecting export trades into export *screening* itself separately.

military establishment. A related but separate question—Question 2—is, who judges how likely it is? In other words, is it judged based on the country's recognition, or is it judged objectively? Both Questions 1 and 2 are a part of an interpretation of "relating to" in connection with "such traffic . . ." of Article XXI(b)(ii).

First, I will examine Question 2. As discussed above, "relating to" shall be interpreted as "primarily aimed at."[172] In addition, the Appellate Body in *China—Rare Earths* found, concerning the phrase "relating to," that "a GATT-inconsistent measure that is merely incidentally or inadvertently aimed at a conservation objective would not satisfy the 'relating to' requirement."[173] The Appellate Body also noted that "Article XX(g) does not prescribe an empirical effects test," i.e., it does not matter in principle whether the measure had an effect.[174] Summarizing the above, in determining whether a measure is "primarily aimed at" specific ends, the point is whether the invoking state is actively aimed at a certain objective.

Question 2, who decides the degree of likelihood that a banned trade is military-linked, is an element to decide the compatibility to the "relating to" requirement. Because the "relating to" requirement checks whether an invoking state using the measure at issue "aimed" at a certain objective, the panel should review the degree of likelihood based on the recognition of the invoking country. This interpretation corresponds to the drafting history examined above, given the U.S. delegation's statement that an export restriction measure should be covered by the subparagraph, "if a Member . . . is satisfied that the purpose of the transaction was to supply a military establishment."[175]

However, the panel's review should not be based only on the assertions that states make in dispute settlement procedures. With respect to Article XX, the Appellate Body also found that: "[n]evertheless, consideration of the *predictable effects of a measure*, being those effects inherent in, and discernible from, the design and structure of a measure, *may be relevant* for the analysis under Article XX(g)."[176] Furthermore, the Appellate Body "has consistently emphasized the *primacy of the design and structure* of the measure at issue in the assessment of whether that measure is related to the conservation of exhaustible natural resources."[177] Whether the measure had a particular objective is to be judged from the design and structure of the measure, rather than on the invoking state's mere asser-

172. *See* II.C.3 of this Article.

173. Appellate Body Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, ¶ 5.90, WT/DS431,432,433/AB/R (adopted Aug. 29, 2014) [hereinafter *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*].

174. *Id.* ¶ 5.112

175. *Verbatim Report of the Thirty-Sixth Meeting of Commission A, supra* note 127, at 19.; *see also* discussion, *supra* subsection II.C.2.

176. *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, *supra* note 174, ¶ 5.113 (emphasis added).

177. *Id.* ¶ 5.111 (emphasis added).

tion.[178] And, if the degree of predictable effects that can be objectively inferred (in this case, the degree of probability that the prohibited trade is military-linked) is obviously low, then it may be suspected that state's actual aim was not to prevent military-linked trade.

This interpretation to deny a review based merely on arbitrary assertions is consistent with the countries' remarks during the drafting negotiation. In the drafting process, countries discussed the subparagraph with cases in mind where the country "had reason to believe that it was being, or would be, used for military purposes" at the time it took the measure, such as when Australia imposed the embargo against Japan in the period before the Pacific War.[179] It is also obvious that they did not envisage an interpretation that would allow a country to ban almost any trade based on purely subjective considerations because they rejected Australia's proposal to permit any measure that is "considered by the Member to be necessary to its long term plans for defence or security."[180] They refused this language because it could allow countries to "restrict almost anything in the world."[181]

Now let us consider Question 1. In light of the conclusion to Question 2, Question 1 does not have much independent significance. A panel would ask whether the probability was low that the state aimed at the prevention of the military-linked traffic when considered in conjunction with findings pertaining to the design and structure of the measure. Thus, the level of probability functions as a guide to assess the plausibility of a country's allegation. For example, a measure is unlikely relating to "such traffic" if the probability of being military-linked is so low that it is unimaginable that a state would reasonably take such a measure for intercepting certain allegedly targeted military-linked traffic.

b. Case of a Total Ban Without Inspection Process

It should be noted that the discussion above concerned an export control system where the approval or disapproval of export is determined based on individual export inspection. However, a system that prohibits exports without export screening should also be permissible under Article XXI(b), subparagraph (ii). At the same time, in a system without export screening, the likelihood that the forbidden transactions are supplying the military is lower than in a system with export screening. That, in turn, heightens the difficulty of verifying that the measure is "related to" military-linked traffic because a large percentage of these banned transactions are likely to comprise ordinary, non-military-linked traffic.

For example, if the target of an export ban is a special type of commercial semiconductor used for missile guidance, then there is a high possibil-

178. *See id.* ¶ 5.96.

179. *See* II.C.2 of this article.

180. *Amendment Proposed by the Australian Delegation—Article 37*, *supra* note 124, at 1. *See also* discussion, *supra* subsection II.C.2.

181. *Verbatim Report of the Thirty-Sixth Meeting of Commission A, supra* note 127, at 17.

ity that the banned transaction is actually military-linked, even if there is no inspection process. However, if mere cotton exports are banned with no screening process, it would be difficult to say that the banned transactions are supplying a military establishment. To further illustrate this point, I present a hypothetical example in a case of Article XX(g), where a country prohibits the export of (imaginary) Madagascar Turtles for the protection of the endangered species. The country also bans the export of (imaginary) American Turtles, which are similar to the Madagascar Turtles. It is not so easy for customs officers to distinguish Madagascar Turtles from American Turtles, so subparagraph (g) may permit a measure banning the export of American Turtles altogether, even if the measure does not even try to check whether an exported turtle is American or Madagascar. However, if the number of American Turtles exported in a normal year was 100,000, and that of the Madagascar Turtles was 1, it is natural to question whether the aim of the measure was to protect Madagascar Turtles.

c. The Permissibility of Inspection Measure

Another issue related to the probability criterion is whether subjecting an item to export inspection itself is permissible under Article XXI(b)(ii). The framework to review such an action is similar to the case of a blanket prohibition without inspection. The gauge for judgment is the extent to which the state believed that the export trade subject to inspection might be military-linked. The design and structure of measure and objective probability are important elements to judge whether subjecting an item to export inspection is permissible. However, the hurdle for the required degree of probability should naturally be lower than in the case of a blanket prohibition, since the inspection is intended to obtain information to determine the degree of probability. If the degree of probability of being military-linked is low enough to be highly improbable, then one might question whether the purpose was really to prevent military-linked trades.

d. Item's Military Sensitivity and Limited Usage

So far, I have argued, based on the relationship of "relating to" and the latter part of subparagraph (ii), that the requirement of "relating to" may not be satisfied if the probability of prohibited trade being military-linked is extremely low. However, a country's security needs might be too tightly restricted if a panel denies the relation of the measure to the traffic supplying a military establishment just based on low probability. For example, there might be a situation where there is a transaction of a very militarily sensitive item that is not likely to go to a military establishment, but if the item by any means falls into the hands of other countries' militaries, it will drastically change the military power balance. Highly purified fissionable materials, though covered by another subparagraph, are one example of such military sensitivity.[182] Another contemporary example might be a high-level supercomputer. The facial language of the latter half of subpara-

182. *See* GATT, *supra* note 1, art. XXI(b)(i).

graph (ii) does not account for the sensitivity of goods or materials.[183] However, considering the purpose of the security exception—balancing security needs and necessity to prevent measures that disguise a commercial purpose under the guise of national security concern—it is necessary to consider military sensitivity.

The rationale for subparagraph (ii), inferable from its structure, supports this interpretation. The contrast between the first and the latter half of the subparagraph is particularly informative. The first half does not impose the limitative requirement that the measure must be instituted for the purpose of supplying military installations. In other words, it does not require the probability check discussed above. This wording is consistent with the purpose of Article XXI, which is to strike a balance between respecting the security interests of each country and preventing abuse with hidden commercial purposes.[184] In other words, in light of the purposes of Article XXI, it is natural that the arms, ammunition, and implements of war referred to in the first part of subparagraph (ii) would be the object of looser scrutiny. It is natural because (1) arms, ammunition and implements of war have a direct impact on a country's military capabilities and pose a significant threat to security, and because (2) the use of arms and other listed goods is limited to combat and difficult to use for commercial purposes.

One should apply the same set of reasons to interpret the latter part of subparagraph (ii) in light of the purpose of Article XXI. In other words, even if an article does not fall under the category of "arms, ammunition or other implements of war," restrictive measures should be allowed in some occasions under a looser probability check. One should apply a loose probability check to the extent that the item falls under the following two points: (1) it has a higher capacity to influence military capabilities, or (2) it has a usage relatively limited to military purposes and is comparatively difficult to use for commercial purposes. These criteria are also reasonable in light of the original objective of the probability test, which is to check for the probability that a transaction intends to supply a military installation.[185] Broadly speaking, the more an item is militarily capable and less likely to be used for economic purposes, the more likely it is to supply military installations through trade.

e. Support from an International Arrangement Related to the Issue of Sensitive Goods—Wassenaar's Criteria

Such supplemental criteria are supported by deliberations made in other international regimes related to security and trade. There are four major multilateral regimes for controlling sensitive items that are not necessarily arms, and the regime that covers the broadest range of sensitive

183. *See id.*, art. XXI(b)(ii).

184. *See Verbatim Report of the Thirty-Third Meeting of Commission A*, *supra* note 127, at 21. *See also Russia – Measures Concerning Traffic in Transit*, *supra* note 26, ¶ 7.93.

185. *See* discussion, *supra* subsection II.C.7.a.

items is the Wassenaar Arrangement.[186] Some diplomats call its control lists "the international standard for export controls on conventional arms and dual-use goods and technologies."[187] The criteria for selecting dual-use items controlled by Wassenaar are as follows:

> Dual-use goods and technologies to be controlled are those which *are major or key elements for the indigenous development, production, use or enhancement of military capabilities*. For selection purposes the dual-use items should also be evaluated against the following criteria:
>
> - Foreign availability outside Participating States.
> - The ability to control effectively the export of the goods.
> - *The ability to make a clear and objective specification of the item.*
> - Controlled by another regime.[188]

The ability to make a clear and objective specification is required to establish the clearest possible line between a military-spec item and a commercial item, therefore, minimizing the risk of impeding "bona fide civil transactions."[189] Furthermore, the selection criteria for more sensitive items in the Wassenaar Arrangement are as follows:

> Those items from the Dual-use List which are key elements directly related to the indigenous development, production, use or enhancement of advanced conventional military capabilities whose proliferation would significantly undermine the objectives of the Wassenaar Arrangement.
> N.B.
>
> 1. General commercially applied materials or components should not be included.
> 2. As appropriate, the relevant threshold parameters should be developed on a case-by-case basis.[190]

From the above selection criteria for Wassenaar, one can say that (1) the item's ability to influence military capability, (2) the limitedness of its usage are major criteria in deciding the need to control the item in an international regime concerning security and trade. Though not all members of WTO are members of the Wassenaar Arrangement, this still supports the reasonableness of the above-proposed criteria for interpreting the article concerning the control of the import and export of security-related goods.

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186. *See* BUREAU OF INDUS. & SEC., U.S. DEP'T COM., MULTILATERAL EXPORT CONTROL REGIMES, https://www.bis.doc.gov/index.php/policy-guidance/multilateral-export-control-regimes [https://perma.cc/VMZ8-7PGV] (last visited 3 May 2020).

187. *See* PERMANENT MISSION OF FRANCE TO THE UNITED NATIONS AND THE INTERNATIONAL ORGANISATIONS IN VIENNA, *Wassenaar Arrangement : an interview with ambassadors Falconi and Griffiths* (Mar. 3, 2017), https://onu-vienne.delegfrance.org/Wassenaar-Arrangement-an-interview-with-ambassadors-Falconi-and-Griffiths [https://perma.cc/B69T-JRVF].

188. WASSENAAR ARRANGEMENT, CRITERIA FOR THE SELECTION OF DUAL-USE ITEMS (2011), https://www.wassenaar.org/app/uploads/2019/consolidated/Criteria_for_selection_du_sl_vsl.pdf [https://perma.cc/P8BH-K372] (emphasis added).

189. *See* PERMANENT MISSION OF FRANCE TO THE UNITED NATIONS AND THE INTERNATIONAL ORGANISATIONS IN VIENNA, *supra* note 187, at 2.

190. *See* WASSENAAR ARRANGEMENT, *supra* note 189, at 2.

f. Military Tension in International Relations

In addition to an item's military sensitivity and limited usage, another element that supplements the probability test is military tension in international relations. Country A's export of militarily sensitive goods to Country B will pose much graver security threats if the export is conducted amid a time of military tension with Country B. The extreme case of this is the situation written in subparagraph (iii), the time of war or other emergencies in international relations.[191] Though subparagraphs (ii) and (iii) provide for distinct limitative situations, it is undeniable that trade of sensitive goods amid international tension, less than "other emergencies in international relations," would still have a greater impact on security interests of a country. One should consider this aspect in the interpretation of subparagraph (ii) to balance the need to respect the state's security needs with the need to prevent measures with a commercial purpose.

This supplemental criterion is reasonable in light of the probability test's objective. The test's objective is to check for the probability that a transaction is purported for supplying a military installation.[192] The demand for an item of some military usage will increase in a hostile country's military supply-chain if there is military tension between another country, including the country of export. It would be, therefore, more likely that the export of the same item would ultimately get to the military of a hostile country.

The drafting history of subparagraph (ii) also supports this supplemental criterion. The negotiating countries had in mind the export ban against Japan several years before the Pacific War started.[193] These countries shared the view that the export prohibition of iron ore amid such an ominous, but not emergent, situation would be covered by the subparagraph.[194] Such a shared understanding is compatible with this supplemental criterion of international tension.

Conclusion

In this Article, mainly in Section II, I have presented an interpretation of how to apply the "good faith" standard in the context of subparagraph (ii), based on prior interpretations of Article XXI(b), especially that of the DS512 panel. Although I have argued that a panel should base its review on the subjective determination of a country, if the alleged subjective determination differs from the country's true assessment at the time it took the measure, then the country should not get the benefit of Article XXI(b). Also, if the alleged subjective determination differs too greatly from the result of an objective review, then the existence of pretext should likely be presumed.

191. *See* GATT, *supra* note 1, art. XXI(b)(iii).
192. *See* discussion, *supra* subsection II.C.7.a.
193. *See Verbatim Report of the Thirty-Sixth Meeting of Commission A, supra* note 127, at 18-21. *See also supra* subsection II.C.2.
194. *See* discussion, *supra* subsection II.C.2, especially the last part.

I based my interpretation of subparagraph (ii) on the precedents of other parts of WTO agreements, the context and structure of Article XXI(b), and the drafting history. I argued the following:

1. the phrase "relating to the traffic/such traffic" means "*primarily aimed at* the prevention/promotion of the traffic/such traffic";
2. "implements of war" are "items designed for or used mainly for the purpose of war"; and
3. in order to say that a measure is primarily aimed at "such traffic" as stated in the latter half of the subparagraph, there must be a certain *probability* that the trade restricted by the measure are military-linked.[195] Though probability should be judged on the basis of the subjective recognition of the country taking the measure, the recognition must be decided from the structure and design of the measure. An alleged subjective determination would be suspected when the objective probability is clearly low; but
4. if the restricted item has considerable military sensitivity and usage relatively limited to military purposes, and if the measure is taken in the context of military tension in international relations, the probability check can be looser than otherwise.

Though the interpretation advanced above aims to strike a balance between respecting the security interests of states and preventing abuse with hidden commercial purposes, one may argue some concerns against it. One possible concern would be that my interpretation might too tightly bind states' actions to protect security interests. To some extent such a concern would be understandable. As I mentioned in Section I, the distance between commercial trade and military traffic is narrowing, so countries might actually need to employ a wider range of export control measures than in the past.

However, my interpretation would not prevent measures arising from genuine, non-commercial security concerns because review would be based primarily on the challenged country's subjective judgment. As for the chapeau, a measure would easily pass the test unless the asserted subjective judgment was a disguised one. The subparagraph (ii) test is similar. Though my interpretation asserts that consistency concerning the requirements of the subparagraphs should be objectively reviewed, the most sensitive part, how to decide the probability that an export is military-linked, would be judged based on the country's assessment made at the time it took the measure. As long as a genuine national security concern necessitates a measure taken, then the measure would be unlikely to appear to diverge from that concern. A genuine concern would naturally appear in the design and structure of the measure and would lead to passing the test.

Of course, not all measures would be allowed. A measure with disguised security concern could not, of course, be permitted. Also, some actions directly aimed at damaging another country's economy might not pass the test, even for pure security concerns. For example, militarily

195. I am using the term "military-linked" trade for the meaning defined in section II.C, namely, trade as is carried on directly or indirectly for the purpose of supplying a military establishment.

speaking, economic damage to a potentially hostile country might be a military gain, as the economy is always a fundamental ground of military power. However, such a measure simply aiming at damaging commercial transactions in other countries, with a scarce link to military supply, would not pass the subparagraph (ii) test. Perhaps a country might want to implement such an extraordinary measure even in ordinary times for security concerns, but in such a situation, the targeted country would at least deserve the right to retaliate against a violation of GATT obligations. (Note that such a measure would still be permissible under subparagraph (iii) in time of war or other emergencies in international relations.)

Another concern raised against my interpretation could come from those who worry that it would regulate countries' discretion too loosely. Although the interpretation grants a substantial role to the subjectivity of states, it would not allow a panel to scrutinize the effect and grounds of the measures in detail. However, such scrutiny would be inappropriate in light of the security context and the structure of Article XXI and would be impossible for a WTO panel to conduct. Nonetheless, my interpretation would still catch most disguised measures or measures not primarily aimed at securing national security. As for the chapeau, a panel could presume a country's allegation to be a disguise if it differed too greatly from an objective interpretation of "essential" or "necessary."[196] Regarding the subparagraph, the probability test would contribute to screening out measures not primarily aimed at preventing military-related traffic, together with the objective criteria of an item's military sensitivity, limited usage, and the existence of international tension.

This Article has aimed to present an interpretation that will contribute to preventing abuse of Article XXI(b)(ii) and satisfying the genuine security needs of WTO members at the same time. By realizing the purpose of Article XXI, as stated by the U.S. delegation during the drafting process,

> It is really a question of a balance. . . . We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose[.][197]

This Article thereby contributes to debates that arise at the intersection of trade and security.

196. *See* GATT, *supra* note 1, art. XXI(b).

197. *Verbatim Report of the Thirty-Third Meeting of Commission A, supra* note 44, at 21.