

## The WTO Security Exception and Limits of the Rules-Based System

by Stephan G. Schneider

It was once said that “[i]nsofar as international law is observed, it provides us with stability and order and with a means of predicting the behavior of those with whom we have reciprocal legal obligations.”<sup>1</sup> History shows that international politics is as complex as it can be contentious. Indeed, that is why our globalized world has resorted to the power of law to define the manner in which nation-states interact with each other. However, what does the system do when it is pushed to its boundaries? What happens when the means of predicting behavior is compromised?

An examination of the security exception within the WTO provides scholars an opportunity to discover what happens. Such an opportunity is presented by way of President Trump’s invocation of what some experts call “the nuclear option” of international trade law.<sup>2</sup> This manuscript serves to provide an overview of the WTO and its security exception, a description and analysis of President Trump’s invocation of the exception, and a look into the perceived Catch-22 such invocation now presents to the WTO.

### What is the WTO?

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<sup>1</sup> *Senator Fulbright's Quotes*, Fulbright Academy of Law, Peace and Public Health, <https://fulbrightacademylaw.org/quotes-of-senator-j-william-fulbright/>, (last visited Mar 21, 2019.)

<sup>2</sup> Daniel J. Ikenson, *The Danger of Invoking National Security to Rationalize Protectionism*, Cato Institute (2017), <https://www.cato.org/publications/commentary/danger-invoking-national-security-rationalize-protectionism>, (last visited Mar 21, 2019.)

The international system is built on years of negotiations. Following two devastating world wars, the international community realized that Westphalian politics was not a viable option for peaceful stability and sought to construct a rules-based system of cooperation. Realizing that trade was an avenue to cultivate cooperation and peace, the United States rallied other nations to create an international entity dedicated to fostering open trade.<sup>3</sup> Today, the WTO serves as the recognized forum to negotiate new trading rules and arbitrate trade disputes.<sup>4</sup> “At its heart are the WTO agreements, negotiated and signed by the bulk of the world’s trading nations. These documents provide the legal ground rules for international commerce. They are essentially contracts, binding governments to keep their trade policies within agreed limits.”<sup>5</sup>

### **The Security Exception**

The General Agreement on Tariffs and Trade (GATT) includes an Article on Security Exceptions.<sup>6</sup> Some call the security exception necessary while others call it a loophole, some could even say it is a necessary loophole. The problem with characterizing Article XXI of the GATT is that the few scholars who have actually analyzed the security exception are as sharply divided as to the appropriate interpretation as

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<sup>3</sup> Orin Kirshner, *American Trade Politics and the Triumph of Globalism*, (Rutledge, 2014).

<sup>4</sup> *What is the WTO? - Who we are*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm), (last visited March 22, 2019.)

<sup>5</sup> *Id.*

<sup>6</sup> *Security Exceptions, Article XXI* Of the General Agreement on Tariffs and Trade (GATT), (United Nations Charter for the maintenance of international peace and security), [https://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art21\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf), (last visited March 22, 2019.)

they are limited in numbers.<sup>7</sup> Legal scholar Roger Alford provided a comprehensive description in his 2011 law review article:

The security exception is an anomaly, a unique provision in international trade law that grants the Member States freedom to avoid trade rules to protect national security. In the long history of GATT and the short history of the WTO, that freedom has never been challenged seriously. Member States understand the exception to be self-judging and presume that it will be exercised with wisdom and in good faith. Thus far, the record has been impressive. While no doubt there have been departures, the self-judging security exception has worked reasonably well. It has certainly not undermined the effective functioning of the WTO.<sup>8</sup>

As for the actual text of Article XXI, it is fairly straightforward. It states as follows:<sup>9</sup>

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

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<sup>7</sup> Roger P. Alford, *The Self-Judging WTO Security Exception*, 697 *Notre Dame L.J.* 697, 705 (2011), [https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law_faculty_scholarship), (last visited March 22, 2019.)

<sup>8</sup> *Id.*

<sup>9</sup> *Article XXI – Security Exceptions & Analytical Index of the GATT*, 599-610, [https://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art21\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf), (last visited March 22, 2019.)

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

Adding to the desire to convey its exact meaning is the fact that the WTO includes an analytical index to provide interpretation and application of Article XXI. This index essentially provides commentary on a line-by-line basis so that the original intent and scope of the text is fully understood.<sup>10</sup>

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<sup>10</sup> Roger P. Alford, *The Self-Judging WTO Security Exception*, 697 Notre Dame L.J. 697, 705 (2011), [https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law_faculty_scholarship), (last visited March 22, 2019.).

## Understanding the Security Exception

The best way to understand the security exception is to view it as the international equivalent of a political question where a nation can exercise its political powers at its own discretion.<sup>11</sup> At the core of the exception is the doctrine of self-judging. Under this doctrine, the question of which factual circumstances satisfy the requirements of the exception is left to the discretion of the invoking Member State.<sup>12</sup> The requirement embraces five broad categories: national security information, nuclear material, military goods and services, war and international emergencies, and UN Charter obligations.<sup>13</sup>

Finding the balance between nation state interests and preservation of peace within the security exception has been noted since its inception at the Geneva session of the Preparatory Committee.<sup>14</sup> One of the drafters noted the contrasting equilibrium between respecting the sovereign security concerns of the member states and ensuring that the exception is not abused.<sup>15</sup> Thereafter, discussions have continued as documented in the WTO's analytical index.<sup>16</sup> Which contributes sixty years of analysis and the establishment of precedent and customary law points to develop an understanding of the security exception. As noted by Professor Alfred,

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<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Roger P. Alford, *The Self-Judging WTO Security Exception*, 697 Notre Dame L.J. 697, 705 (2011),

[https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law_faculty_scholarship), (last visited March 22, 2019.).

<sup>15</sup> Id.

<sup>16</sup> Id.

All states agree that the security exception can only be invoked in good faith and a strong majority of States maintain that the security exception is self-judging. States interpreting the exception as self-judging are concerned with the need to effectively protect their security interests and to subordinate trade commitments to those interests. They are also concerned about institutional competency and politicizing the WTO. The minority of States that oppose a self-judging interpretation express concerns about abuse of the security exception by economically powerful States.<sup>17</sup>

Indeed, historical precedent suggests that the stability of international law is resolute. A comparison between legal contestations of Article XX<sup>18</sup> and Article XXI shows that Article XX has been the subject of WTO litigation at least twenty-two times (one out of every six cases) while Article XXI has yet to be contested.<sup>19</sup> To the general observer, such a fact invites intrigue. How is it that there is such a stark contrast between the two? An examination between the two would provide that there have been twenty-two instances of a member state allegedly

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<sup>17</sup> Roger P. Alford, *The Self-Judging WTO Security Exception*, 697 Notre Dame L.J. 697, 705 (2011), [https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law_faculty_scholarship), (last visited March 22, 2019.)

<sup>18</sup> *GATT Article XX on General Exceptions lays out a number of specific instances in which WTO members may be exempted from GATT rules*, [https://www.wto.org/english/tratop\\_e/envir\\_e/envt\\_rules\\_exceptions\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm), (last visited March 22, 2019.)

<sup>19</sup> Roger P. Alford, *The Self-Judging WTO Security Exception*, 697 Notre Dame L.J. 697, 705 (2011), [https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law_faculty_scholarship), (last visited March 22, 2019.)

invoking Article XX in bad faith but not a single instance for Article XXI. This is quite an amazing feat considering the broad scope of the security exception.

Professor Alfred again provides insight to this issue by noting that there are three competing theories that would elucidate why nation states would obey international law – coercion theory, normative theory, and the rational choice theory.<sup>20</sup> Furthermore, these theories may clarify why Member States typically do not invoke the security exception in bad faith.<sup>21</sup>

Under coercion theory, one makes the assumption that states comply with an international obligation because they are compelled to do so by way of threats and force.<sup>22</sup> Observers of this theory would regard sanctions as the coercive force. However, this would not explain why more powerful states such as Great Britain and the United States have voluntarily submitted to the spirit of Article XXI. It also fails to consider the fact that the GATT and WTO do not contain any explicit coercive force.<sup>23</sup> While the victor of a WTO dispute resolution is given permission for retaliatory tariffs and the imposition of a fine on the losing party, some may question the coercive force of the WTO. Thus, it seems that there is more to the security exception than brute force.

The normative theory would fill in any gaps left by the coercion theory. Under this theory, the belief is that states see the rules as authoritative and binding, thus, they feel impelled to comply with an international

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<sup>20</sup> Id. at 752

<sup>21</sup> Id. at 752

<sup>22</sup> Id.

<sup>23</sup> Id.

obligation.<sup>24</sup> If coercion theory looks at sanctions for their brute force in compelling compliance, then normative theory sees sanctions as a way to identify established norms as legally binding and the manifestation of internalized respect for the legal rules.<sup>25</sup> Such a theory is connected to the principle of customary law. A basic understanding of international law provides that the patterned behavior of nation-states can create precedent and serve as law. Such a concept has been memorialized in case law.<sup>26 27</sup> However, even normative theory does not provide a full explanation. What would compel a nation-state to comply even if they did not respect customary law?

This is where the rational choice theory is useful. Under this theory, “States are rational, self-interested actors that do not concern themselves with the welfare of other States or the legitimacy of a rule of law, unless it fits into the States’ overall interest-maximization calculus.”<sup>28</sup> Under this theory, reciprocity, reputation, and the costs are what motivate one’s behavior to comply with international law.<sup>29</sup>

So the security exception embodies the balance between individual sovereignty and a collective rules-based system. Such a system relies on

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<sup>24</sup> Id. at 753

<sup>25</sup> Id. At 753

<sup>26</sup> *Treaty to Settle and Define the Boundaries Between the Territories of the United States and the Possessions of Her Britannic Majesty in North America, for the Final Suppression of the African Slave Trade, and for the Giving Up of Criminals Fugitive from Justice, in Certain Cases* [hereinafter the Webster- Ashburton Treaty], U.S. Department of State, Office of the Historian, U.K.-U.S., Aug. 9, 1842, The Avalon Project, <https://history.state.gov/milestones/1830-1860/webster-treaty>, (last visited March 22, 2019.)

<sup>27</sup> *The Scotia*, 21 F. Cas. 783 (C.C.S.D.N.Y. 1870).

<sup>28</sup> Id. at 755

<sup>29</sup> Id.



trust between nations and the expectation that all members of the international community will act in good faith. Interestingly enough, such a system has worked for over sixty years.

### **President Trump's Steel and Aluminum Tariffs**

The Economist article that identified the current administration's efforts to undermine the international order stated, "The rules-based order ushered in after the second world war provided both the greatest-ever increase in human wealth and global trade and a whole human lifetime without worldwide armed conflict."<sup>30</sup> However, many experts believe that United States President, Donald J. Trump, represents a meaningful threat to the international system.<sup>31</sup> If the international system relies on stability and predictability, President Trump has a reputation for usurping the status quo; it is as if he embraces chaos.<sup>32</sup>

Such chaos extended to the realm of international law and trade policy when President Trump formally ordered a steep tariff on steel (25%) and aluminum (10%) imports from almost every country, including close U.S. allies.<sup>33</sup> This was of course a manifestation of President

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<sup>30</sup> *Donald Trump Is Undermining the Rules-Based International Order*, The Economist, Jun. 7, 2018, <https://www.economist.com/briefing/2018/06/07/donald-trump-is-undermining-the-rules-based-international-order>, (last visited March 22, 2019.)

<sup>31</sup> Jake Sullivan, *The World After Trump: How the System Can Endure*, Foreign Affairs, March/April 2018, <https://www.foreignaffairs.com/articles/2018-03-05/world-after-trump>, (last visited March 22, 2019.)

<sup>32</sup> Russ Buettner and Maggie Haberman, *In Business and Governing, Trump Seeks Victory in Chaos*, The New York Times, Jan. 20, 2019, <https://www.nytimes.com/2019/01/20/us/donald-trump-leadership-style.html>, (last visited March 22, 2019.)

<sup>33</sup> Ana Swanson, *White House to Impose Metal Tariffs on E.U., Canada and Mexico*, The New York Times, May 31, 2018,

Trump's "America First" doctrine wherein he argued that the world was a mess and American foreign policy an abject failure. His 'America First' view [is] that it was no longer America's job to clean up that mess, but to pursue its own interests. [That] [i]t was time for America's enemies to fear it, for its allies to pay their fair share and for the country to be more selfish in pursuing what it wanted."<sup>34</sup> Whereas there is much to be said about the political aspects of such a case, this article will focus on the legal mechanism used to justify the action.

### **The Legality of the Trump Tariffs**

The Trump administration invokes two codifications of law to justify its tariffs under the notion of national security. At the domestic level, President Trump cites 19 U.S. Code § 1862,<sup>35</sup> at the international level, Article XXI. The controversy with invoking national security as an excuse is centered on the fact that such a move is seen as a tabooed behavior rather than an illegal one. As the previous section noted, there has not been a single ruling on the usage of Article XXI. That is not to say that it has not been considered. There are several manuscripts that document a country's consideration of challenging Article XXI: the Falkland War trade embargo, the Reagan trade embargo on Nicaragua in 1984, sanctions on Yugoslavia in 1992, a secondary US boycott against Cuba in 1996, and the inclusion of Saudi Arabia into the WTO.<sup>36</sup> In all

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<https://www.nytimes.com/2018/05/31/us/politics/trump-aluminum-steel-tariffs.html>, , (last visited March 22, 2019).

<sup>34</sup> Jake Sullivan, *The World After Trump: How the System Can Endure*, Foreign Affairs, March/April 2018, <https://www.foreignaffairs.com/articles/2018-03-05/world-after-trump>, (last visited March 22, 2019.)

<sup>35</sup> *Safeguarding National Security*, 19 U.S.C. § 1862 (1962), <https://www.law.cornell.edu/uscode/text/19/1862>, (last visited March 22, 2019.)

<sup>36</sup> <sup>36</sup> Roger P. Alford, *The Self-Judging WTO Security Exception*, 697 Notre Dame L.J. 697, 705 (2011),

instances, the parties saw the security exception as a tool meant for use on a good-faith basis and refrained from pressing the so called “nuclear button.” It would seem that in over 60 years, everyone but President Trump has recognized the danger of opening Pandora’s Box.<sup>37</sup> Indeed, U.S. House Democrats highlighted the danger in a 2006 letter to the U.S. Trade Representative that stated, “If the U.S. ... for any reason that it deems ‘necessary to its essential security interests’ can invoke a self-defining ‘essential security’ exception, what is to prevent other countries from using this exception to block U.S. exports or to affect other U.S. rights such as enforcement of intellectual property rights without ample justification?”<sup>38</sup>

To advocates of the rules-based system that see trade as a way to promote unity and peace, President Trump’s actions seem abhorrent and reckless. Perhaps they are if we are to accept the conclusions of the RAND Corporation who stated that, “[T]he system has boosted the effectiveness of American diplomacy and military strength and helped to advance American interests: A strong international order is strongly beneficial for the United States.”<sup>39</sup> However, one must consider President Trump’s perspective where he sees politics as a zero-sum game. If indeed trade is a game of winners and losers, Trump would

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[https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law_faculty_scholarship), (last visited March 22, 2019.)

<sup>37</sup> Id.

<sup>38</sup> Krzysztof J. Pelc, *The U.S. broke a huge global trade taboo. Here’s why Trump’s trade move might be legal*, The Washington 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/?utm\\_term=.cb4f59b1307c](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/?utm_term=.cb4f59b1307c), (last visited March 22, 2019.)

<sup>39</sup> Jake Sullivan, *The World After Trump: How the System Can Endure*, Foreign Affairs, March/April 2018, <https://www.foreignaffairs.com/articles/2018-03-05/world-after-trump>, (last visited March 22, 2019.)

place focus on perceived short-term wins as that would translate to election victory in 2020. Granted, there is much debate as to whether there is any actual validity to this protectionist/isolationist ideology but it is important to at least contemplate it while the current U.S. president manifests such beliefs in the policy.

### **An Overview of the Dispute Settlement Timeline**

Regardless, the international community has rallied in defense of the rules-based system. It is worth noting that some believe that the system is as robust as ever and will survive even after the Trump administration.<sup>40</sup> The Trump tariffs are facing resistance, such a scenario is pushing the boundaries of the system as the community moves into uncharted waters, so to speak. In response to the tariffs, the WTO received an unprecedented seven requests for WTO adjudication.<sup>41</sup> In addition, many countries have enacted retaliatory tariffs against the United States, targeting several politically sensitive items.<sup>42</sup>

Moving forward, the WTO would have to address both the invocation of Article XXI by the United States as well as the retaliatory tariffs. “At its meeting on 21 November, the WTO’s Dispute Settlement Body

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<sup>40</sup> Russ Buettner and Maggie Haberman, *In Business and Governing, Trump Seeks Victory in Chaos*, *The New York Times*, Jan. 20, 2019, <https://www.nytimes.com/2019/01/20/us/donald-trump-leadership-style.html>, (last visited March 22, 2019.)

<sup>41</sup> Tom Miles, *U.S. Steel tariff fight stirs up a swarm of WTO litigation*, *Reuters*, Oct. 29, 2018, <https://www.reuters.com/article/us-usa-trade-wto/u-s-steel-tariff-fight-stirs-up-a-swarm-of-wto-litigation-idUSKCN1N31NN>, (last visited March 22, 2019.)

<sup>42</sup> Jake Sullivan, *The World After Trump: How the System Can Endure*, *Foreign Affairs*, March/April 2018, <https://www.foreignaffairs.com/articles/2018-03-05/world-after-trump>, (last visited March 22, 2019.)

(DSB) agreed to requests from seven members for the establishment of panels to examine tariffs imposed by the United States on steel and [aluminum] imports. The DSB also agreed to four US requests for panels to examine countermeasures imposed by China, Canada, the European Union and Mexico on US imports in response to the steel and [aluminum] tariffs.”<sup>43</sup> At the core of the argument against the United States is the argument that “US measures, allegedly taken for national security reasons, were, in their content and substance, safeguard measures taken to protect the US steel and [aluminum] industries from the economic effects of imports.”<sup>44</sup> Furthermore, they denounced the U.S. argument stating that the WTO panels could not examine the issue because Article XXI was invoked.<sup>45</sup> Finally, they argue that resorting to Article XXI by the US would compromise the WTO dispute settlement and could render all WTO obligations effectively unenforceable.<sup>46</sup> Contrasting this, the United States argues that

[e]very sovereign has the right to take action it considers necessary for the protection of its essential security as enshrined in Article XXI, the US said; what is inconsistent with WTO rules is the unilateral retaliation against the US by various WTO members. These members base their actions on the pretense that the US actions are safeguards; this is the height of hypocrisy, the US said. The US has not invoked WTO safeguard provisions for its actions, and because the US has not

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<sup>43</sup> *Panels established to review US steel and aluminum tariffs, countermeasures on US imports*, WTO, [https://www.wto.org/english/news\\_e/news18\\_e/dsb\\_19nov18\\_e.htm](https://www.wto.org/english/news_e/news18_e/dsb_19nov18_e.htm), (last visited March 22, 2019.)

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

done so, other members cannot simply act as if these provisions should have been invoked to apply safeguard rules that are simply inapplicable.<sup>47</sup>

### A Catch-22

Opponents of President Trump's tariffs find themselves in a tough position. *The Economist* described their folly when it expounded,

“The power of Article XXI puts countries which might challenge Mr. Trump's tariffs in a jam. If they do not make a case at the WTO but retaliate anyway, they have given up the high ground and things will probably escalate. If they neither challenge nor retaliate, they keep the moral high ground—but Mr. Trump will claim victory, which will be galling, and will quite possibly be emboldened to go further. This will also be the case if they challenge and the court sides with America—which, given the broad exception for national security that Article XXI provides, is quite likely. And if they challenge and win they will have brought about the unedifying spectacle of a panel of judges in Geneva telling a sovereign nation that they know where its security interests lie better than its president does. That would not go down well.<sup>48</sup>

As indicated above, countries have retaliated and only time will tell

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<sup>47</sup> Id.

<sup>48</sup> *The looming global trade war*, *The Economist*, Mar 8, 2018, <https://www.economist.com/briefing/2018/03/08/the-looming-global-trade-war>, (last visited March 22, 2019.)

how the Trump administration will move forward. What is sure is that the WTO is, as some would say, on the hot seat so long as this issue continues. Some would say that this issue is the straw that broke the camel's back since the WTO is no longer updated in the way that it used to do with periodic rounds of trade negotiations.<sup>49</sup>

Indeed, it has been 20 years since the last major trade round.<sup>50</sup> If one seeks to empathize with Trump's "America First" then one would note that the U.S. has an argument to advocate disappointment with the WTO's perceived inability to create new rules, include digital trade in the system, and stop China's manipulation of the system.<sup>51</sup> Indeed, "[w]ithout new rules, [WTO] judges have found themselves interpreting the ambiguities in old ones in a way that looks to some like overreach."<sup>52</sup> Still, some would question whether it is fair to connect the WTO's shortcomings with the Trump tariffs.<sup>53</sup> Regardless, as described by *The Economist*, the WTO's choices are akin to being stuck between a rock and a hard place. On one hand, the WTO and the seven countries could let the Trump tariffs proceed without resistance. To do so would be to arguably compromise the very notion of the WTO and the liberal order. With the WTO and other liberal order institutions existing to promote open relations, free trade, and cooperative politics, allowing these arguable politicized tariffs to proceed unquestioned would be seen as a sign that such institutions are not needed. It would also set a dangerous precedent for countries like Russia and China.<sup>54</sup> And yet, the WTO and the system faces the same problem by contesting the

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<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup> Id.

invocation of national security.

As evidenced by the analysis of the security exception, the liberal order is built on a fine balance between respecting the individual sovereignty of nation-states and putting the needs of the collective over individual ones for the general gain of all the community. Indeed, balancing the competing needs between valuing individual sovereignty or devaluing it for the collective is shown nicely when examining the *Bogota 8*. Led by Colombia in 1976, eight equatorial countries lying along the geosynchronous orbit declared their claim over the parts of the orbit directly above their territory.<sup>55</sup> However, such an argument was essentially laughed at by representatives of the Soviet Union and United States. They argued that claims of sovereignty over the GSO or any other part of outer space are incompatible with the spirit of the *Outer Space Treaty* and should be dismissed (they also threatened to invade the Bogota 8's newly claimed territory since none of the eight even had space-capable aircraft).<sup>56</sup>

Still, Article XXI is quite different. The fact that the international community went over sixty years without truly invoking it, let alone in bad-faith, shows that it truly is a “nuclear option.” While the new precedent is of concern, contesting any national security claim would be to have the WTO panels essentially tell the leader of a sovereign nation that they know better than he/she as to what constitutes a national security threat. Such a scenario could lead to turmoil as disciples of the

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<sup>55</sup> Stephan Schneider and Garrett Faulkender, *The Final Frontier: Evolution of Space Law in a Global Society*, The Undergraduate Law Journal of Florida Atlantic University, 15-70, 48-49, Spring 2018, [http://journals.fcla.edu/FAU\\_UndergraduateLawJournal/article/view/106311/101858](http://journals.fcla.edu/FAU_UndergraduateLawJournal/article/view/106311/101858), (last visited March 22, 2019.)

<sup>56</sup> *Id.*



notion of individual sovereignty would criticize such a conclusion. While it is true that a nation can simply ignore the WTO, it would still have to save face in the international community as it faces a loss in soft power. Regardless, if the WTO wishes to maintain stability, any questions as to the underpinnings of the international order run contrary to that desire.

### Conclusion

This article started with a quote underlying the importance of stability in international politics. Such stability has resulted in overall peace, growth in trade, and prosperity. However, after sixty years without a questionably bad-faith invocation of Article XXI, such stability may see its greatest test, if not its end. Within United States domestic politics, many decry President Trump for seemingly turning democratic institutions on their head for his own gain.<sup>57</sup> Indeed, some could argue that Trump's invocation of Article XXI is more of the same and some would even point to a similar invocation of national security for his border wall. Lending credence to such an argument is the documented record of President Trump telling the media that the national emergency declaration he used to secure funding for the Southern border wall was not necessary.<sup>58</sup> Regardless, an argument can be made that the system was designed to operate for such a scenario and events are unfolding to show that everything is working as desired. Indeed, discussions during the creation of Article XXI pointed to such an event happening and its

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<sup>57</sup> David Frum, *America's Slide Toward Autocracy*, The Atlantic, Oct 2018, <https://www.theatlantic.com/magazine/archive/2018/10/building-an-autocracy/568282/>, (last visited March 22, 2019.)

<sup>58</sup> Eric Lach, "*I Didn't Need to Do This*": Donald Trump Declares a National Emergency, The New Yorker, Feb 15, 2019, <https://www.newyorker.com/news/current/i-didnt-need-to-do-this-donald-trump-declares-a-national-emergency>, (last visited March 22, 2019.)

inclusion and specific wording acknowledge that a member state has every prerogative to invoke Article XXI. The question is – does the right to do something mean that one should do it?