TO JUDGE THE "SELF-JUDGING" SECURITY EXCEPTION UNDER THE GATT 1994 – A SYSTEMATIC APPROACH

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ABSTRACT

In April 2017, the Trump Administration initiated an investigation with regard to the effects of steel imports on United States (hereinafter "U.S.") national security under Section 232 of the Trade Expansion Act. If the investigation does lead to a trade restrictive measure, the U.S. is likely to invoke national security as one of the justification for the potential violation of the nation's obligations under the World Trade Organization (hereinafter "WTO"). Article XXI(b)(iii) of the General Agreement on Tariffs and Trade (hereinafter "GATT") provides that "Nothing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations . . . ." This provision has not been formerly adjudicated under the WTO, and how the WTO adjudicating bodies should review an invocation of this Article is highly controversial. The national security exception under the GATT has often been considered "self-judging". Many writers have provided analysis on the interpretation of the Article XXI and its practice with regard to the extent of the "self-judging" clause. It seems, however, that one critical issue in resolving this dispute—the standard of judicial review developed by the WTO

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adjudicating bodies—has not been adequately addressed by scholarly attention. This article discusses how a panel should review the invocation of a national security exception from the perspectives of the standard of review analysis developed under the WTO jurisprudence. This paper argues that based on the jurisprudence, the term "self-judging" is a misleading one. The analytical framework of the standard of review should be utilized to judge the "self-judging" invocation of the clause. Under the framework, the Member invoking the national security under Article XXI(b)(iii) is entitled to a high level of deference, but this deference is not absolute. The necessity consideration is still subject to panel review consisting of both formal and substantive aspect. In addition, the timing element is subject to full panel review. There is, however, still the need for the WTO adjudicating bodies to further develop the margin of discretion with regard to the national security exceptions. This paper suggests that a standard of abuse of discretion should be adopted for the review of the necessity consideration under Article XXI(b)(iii). The legal provisions of Section 232 do not contain sufficient procedural safeguard to meet the requirements of panel review under Article XXI(b)(iii) of GATT. It is therefore important for the United States to ensure the conditions of the security exception under the GATT is satisfied before an action pursuant to Section 232 is adopted.

KEYWORDS: *standard of review, WTO, security exception, Section 232 investigation, Trump Administration*

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I. INTRODUCTION

In April 2017, the Trump Administration initiated an investigation with regard to the effects of steel imports on U.S. national security under Section 232 of the Trade Expansion Act.[1] Under the Act, the U.S. president has the power to adjust imports through tariffs or quotas if excessive foreign imports are found to be a threat to U.S. national security.[2] The Department of Commerce indicated that U.S. military "often needs specialty steel alloys that require unusual production skills and are used for armor, vehicles, ships, aircraft, and infrastructure. As a result, a robust and healthy domestic steel production industry may be deemed necessary to guarantee military supply chains in the event of conflict."[3] It seems clear that if the investigation does lead to a trade restrictive measure, the U.S. is likely to invoke national security as one of the justification for the potential violation of the nation's obligations under the WTO. It also seems clear the measure's true purpose may be aiming at preserving the health of a specific industry, despite the invocation of national security. This has serious implications on the multilateral trading system.

Under the WTO, the national security exception on trade in goods is provided under Article XXI of the GATT of 1994. Article XXI of the GATT provides an exception that could be invoked to justify any violations of a Member's obligation assumed under the Agreement.[4] The relevant part related to Trump Administration's §232 investigations on steel is Article XXI(b)(iii), which provides that "[n]othing 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 . . . taken in time of war or other emergency in international relations . . . ." This provision has not been formerly adjudicated under the

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[1] Office of Public Affairs, *Presidential Memorandum Prioritizes Commerce Steel Investigation*, COM. GOV (Apr. 20, 2017, 12:59 PM), https://www.commerce.gov/news/press-releases/2017/04/presidential-memorandum-prioritizes-commerce-steel-investigation.

[2] *See id.*

[3] *Id.*

[4] Article XXI of the GATT provides that:

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

General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 194.

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WTO, and how the WTO adjudicating bodies should review an invocation of this Article is highly controversial.

Through "essential security interests" under Article XXI, the drafters of the provision recognized the necessity to allow actions for "real security reasons" under the GATT, but they also realized that this exception should not be limitless "so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance."[5] The texts of Article XXI were therefore drafted with a view to limiting "measures which really have a commercial purpose" "under the guise of security" .[6] The texts of the provision reflects this intention to seek balance between flexibility and fear for abuse. The balance is therefore the central issue in dealing with an invocation of the security exception.

Article XXI(b)(iii) is all-encompassing and provides security exception to violations of the GATT.[7] The terms of the Article allow a wide flexibility for the nation invocating security exception. The discretion afforded by the broad scope of the texts creates the potential for abuse.[8] It has always been recognized that the discretion, once abused, may undermine the proper function of the multilateral trading system.[9] It is therefore critical to determine the scope of the discretion given to Members in invoking the national exception and, on the other side of the coin, the extent of judicial review with regard to the exception.[10]

The national security exception under the GATT has often been considered "self-judging". Many writers have provided analysis on the interpretation of the Article XXI and its practice with regard to the extent of the "self-judging" clause. It seems to the author of this paper, however, that one critical issue in resolving this dispute—the standard of judicial review developed by the WTO adjudicating bodies—has not been adequately addressed by scholarly attention. This paper thus contributes to

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[5] Statement of one of the drafters of the original Draft Charter, J. M. Leddy, during discussions in the Geneva session of the Preparatory Committee. ECOSOC, *Verbatim Report: Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, at 20, U.N. Doc. E/PC/T/A/PV/33 (July 24, 1947).

[6] *Id.* at 21.

[7] Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19(2) U. PA. J. INT'L ECON. L. 263, 268 (1998); Ji Yeong Yoo & Dukgeun Ahn, *Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?*, 19(2) J. INT'L ECON. L. 417, 423 (2016).

[8] JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 204-05 (1989) (noting that the language of Article XXI is "so broad, self-judging, and ambiguous that it obviously can be abused").

[9] Contracting Parties, *Third Session—Corrigendum to the Summary Record of the Twenty-second Meeting*, GATT Doc. CP.3/SR.22/Corr.1 (June 20, 1949); Roger P. Alford, *The Self-Judging WTO Security Exception*, 3 UTAH L. REV. 697, 750 (2011).

[10] JACKSON, *supra* note 8, at 18 (noting that "[a] problem inherent in the national-security argument is that of determining its limits").

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this field from the perspective of the standard of review under the WTO, which should inform the interpretation of the provision at issue.

The abuse of the security exception could undermine the stability of the multilateral trading system. However, an overly intrusive review standard could also have adverse effect on the system. Some Members, such as the United States, have highly criticized the review standard adopted by the WTO adjudicating bodies in some cases for being too intrusive.[11] Certainly, a backlash from powerful Members could undermine the stability of the system itself.[12] The existence of criticism does not indicate the need for improvement, but it does highlight the need to treat the issue carefully, systematically, and coherently. Again, this indicates the need to analyze the likely standard of review a panel might adopt with regard to the national security in light of the analysis structure developed under the WTO jurisprudence as a whole.

The measures taken for security reasons are inherently a political question. Similarly, the issue of standard of review is involved with both law and politics. One aspect of the standard of review process involves ascertaining which WTO obligations the Member State has actually undertaken, which is a legal issue, while another aspect involves the allocation of power between the WTO adjudicating bodies and the Members, which is political in nature. The complexity makes the issue of standard of review a difficult one for the WTO tribunals, but it also makes the standard of review a critical tool for the WTO dispute settlement body to deal with political discontent form WTO Members who believe that the WTO has activated too intrusively. When dealing with political issues, the WTO tribunal's available choices are much more limited than its domestic counterparts. As observed by Michael W. Reisman, unlike national courts in a domestic context, which have more latitude in avoiding the rendering

[11] *See* Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court"—Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36(4) J. WORLD TRADE 605, 620-21 (2002). For the criticism within the United States, see, for example, House Concurrent Resolution 262, 107th Congress (as referred to the Committee on Finance, Nov. 21, 2001), which noted concerns about: "[T]he recent pattern of decisions by WTO dispute settlement panels and the WTO Appellate Body to impose obligations and restrictions on the use of antidumping[,] countervailing[, and safeguard] measures by WTO members under the Antidumping Agreement[,] the Agreement on Subsidies and Countervailing Measures . . . " and "that [] dispute settlement panels [of the WTO] and the Appellate Body [should] appropriately apply the standard of review contained in Article 17.6 of the Antidumping Agreement . . . ." THE TRADE LAWYERS ADVISORY GROUP, THE IMPORTANCE OF TRADE REMEDIES TO THE U.S. TRADE RELATIONSHIP WITH CHINA 12 (2005); *see also* GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION 151 (2003).

[12] For the importance of the cooperation from powerful Members for any international regimes, see SHIRLEY V. SCOTT, THE POLITICAL INTERPRETATION OF MULTILATERAL TREATIES 152 (2004).

of judgments, the international courts are rarely able, or choose, to do so.[13] As a result, for a WTO tribunal, political challenges seem inevitable.[14]

This sense of inevitability is compounded by the fact that the WTO dispute settlement system is "compulsory", "exclusive" and "automatic".[15] A proper standard of review could help WTO tribunals deal with these inevitable political challenges. A standard of review that enables "activist panels" could diminish support for the WTO dispute settlement process, which would undermine the legitimacy of the WTO. In order to lessen the dangers of inappropriate unilateral actions by governments, Steven P. Croley and John H. Jackson have noted that some level of deference is necessary.[16] However, a standard of review that is overly deferential could also impair the effects of the dispute settlement system. These difficulties do not mean that when making legal decisions the judicial branch should be affected by political influences.[17] On the contrary, a set of convincing bright line rules regulating the standard of review based on the legal mandates of the adjudicating branch would greatly enhance the ability of the judges to abstain from political considerations. Certainly, these rules of the standard of review have to be designed in such a way that WTO Members can accept them politically as well as legally. Accordingly, there is the need for clear and concrete rules for the standard of review. In order to address possible criticism, these rules must have a solid basis in the treaty provisions. This standard will also have to strike a proper balance between the contractual nature of the WTO treaties and the reserved regulatory sovereignty reflected in the legal provisions. This is especially true for the review of the Member States' invocation of national security justifications for measures violating WTO obligations. This article does not intend to give a detailed discussion of the proper interpretation of the national security exception. Instead, this article discusses how a panel should review the invocation of a national security exception from the perspectives of the analysis developed under the WTO jurisprudence. This paper argues that based on the jurisprudence with regard to the standard of

[13] WILLIAM MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 628 (1971) (noting that the reasons for national courts to avoid judgments include the existence of a more appropriate decision process or the comparative availability of the information necessary for a proper decision).

[14] For a similar opinion regarding international tribunals in general, see ARIE E. DAVID, THE STRATEGY OF TREATY TERMINATION: LAWFUL BREACHES AND RETALIATIONS 188 n.42 (1975) (noting that in addition to conceptual or technical difficulties, international tribunals also confront political ones).

[15] *See* SHARIF BHUIYAN, NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM 7-9 (2007).

[16] *See* Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90(2) AM. J. INT'L L. 193, 212 (1996).

[17] *See* Claus-Dieter Ehlermann & Nicolas Lockhart, *Standard of Review in WTO Law*, 7(3) J. INT'L ECON. L. 491, 492-93 (2004) (noting that a judge should reach decisions on purely legal standards).

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review in the WTO dispute settlement system, the term "self-judging" is a misleading one. The analytical framework of the standard of review should be utilized to judge the "self-judging" invocation of the clause. There is, however, still need for the WTO adjudicating bodies to further develop the margin of discretion with regard to the national security exceptions.

The second part of the paper analyses the national exception under the GATT 1994. Part III of the paper examines the definition and functions of the standard of review in the WTO. Part IV discusses the analytical structure of the general standard of review developed by the WTO adjudicating bodies. Part V discusses the application of the analytical structure of the general standard of review to national exception under the GATT 1994. Part VI reviews the elements of a Section 232 investigation and discusses how such a measure could comply with the standard of review with regard to Article XXI(b)(iii) of the GATT. Part VII concludes.

II. SECURITY EXCEPTION UNDER THE GATT

A. The Practices

Article XXI of the GATT has rarely been invoked in practice, and no GATT or WTO panel has exercised a meaningful standard of review in a litigation concerning this Article.[18] This paper briefly analyzes some of the representative practices below.

In 1975 Sweden adopted a global import quota system for certain footwear, and invoked Article XXI as its justification. The Swedish Government argued that the "continued decrease in domestic production has become a critical threat to the emergency planning of Sweden's economic defense as an integral part of the country's security policy. This policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such a capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations."[19] The measure at issue, aiming to protect Sweden's footwear industry, tested the scope of the security exception. It is doubtful whether a measure that fulfills industrial policy falls under the security exception. Therefore, "[m]any representatives . . . expressed doubts as to the justification of these measures under the [GATT]" and "[m]any delegations reserved their rights

[18] PETROS C. MAVROIDIS ET AL., THE LAW OF THE WORLD TRADE ORGANIZATION (WTO)– DOCUMENTS, CASES & ANALYSIS 726 (2010).
[19] *Sweden — Import Restrictions on Certain Footwear*, at 3, L/4250 (Nov. 17, 1975).

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under the GATT."[20] This measure, however, was not reviewed by a GATT panel.

During the GATT era, some of the Contracting Parties held the view that national security is self-judging. For example, during the Council discussion in 1982 on trade restrictions applied for non-economic reasons by the EEC, its Member States, Canada and Australia against imports from Argentina, the representative of the EEC stated that measures taken under Article XXI "required neither notification, justification nor approval".[21] The representative of the United States stated that "[t]he General Agreement left to each contracting party the judgment as to what it considered to be necessary to protect its security interests. The CONTRACTING PARTIES had no power to question that judgment."[22]

The opinions that Article XXI is self-judging have not been confirmed by the Contracting Parties.[23] The only GATT/WTO panel that has discussed Article XXI of the GATT was with regard to the US trade embargo against Nicaragua in 1985. The question of whether and to what extent the Contracting Parties can review the national security reasons for measures taken under Article XXI was discussed in the GATT Council.[24] On the one hand, Nicaragua argued that the text of Article XXI made it clear that the Contracting Parties were competent to judge whether a situation of "war or other emergency in international relations" existed.[25] On the other hand, the United States stated that Article XXI(b)(iii) of the GATT left it to each contracting party to judge what action it considered necessary for the protection of its essential security interest.[26]

A panel was later established with the special terms of reference stating that "the Panel cannot examine or judge the validity or motivation for the invocation of Article XX(b)(iii) by the United States."[27] Due to the restrictive terms of reference, however, the Panel was not able to examine

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[20] GATT Council, *Minutes of Meeting Held in the Palais des Nations, Geneva, on 31 October 1975*, at 8-9, GATT Doc. C/M/109 (Nov. 10, 1975).
[21] GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 7 May 1982*, at 10, GATT Doc. C/M/157 (June 22, 1982).
[22] GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 29-30 June 1982*, at 19, GATT Doc. C/M/159 (Aug. 10, 1982). *See also* GATT Council, *supra* note 21, at 8.
[23] *See* Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558, 595 (1991).
[24] *See* GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 29 May 1985*, at 2-16, GATT Doc. C/M/188 (June 28, 1985); GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 17-19 July 1985*, at 41-46, GATT Doc. C/M/191 (Sept. 11, 1985) [hereinafter *Minutes of Meeting on 17-19 July 1985*]; WTO, WTO ANALYTICAL INDEX — GUIDE TO GATT LAW AND PRACTICE 601 (1995).
[25] *United States — Trade Measures Affecting Nicaragua*, L/5802 (May 8, 1985); *Minutes of Meeting on 17-19 July 1985*, *supra* note 24.
[26] *Minutes of Meeting on 17-19 July 1985*, *supra* note 24, at 46.
[27] GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 12 March 1986*, at 7, GATT Doc. C/M/196 (Apr. 2, 1986).

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the validity of the United States' invocation of Article XXI "as this examination was precluded by its mandate".[28]

In the non-adopted report, the panel expressed its concern that the invocation of the national security exception could undermine the basic purposes of GATT, including ones to foster non-discriminatory and open trade policies and to reduce uncertainty in trade relations, and stated that "GATT could not achieve its basic aims unless each contracting party, whenever it made use of its rights under Article XXI, carefully weighed its security needs against the need to maintain stable trade relations."[29]

On the argument that the security exception is not justiciable, the panel expressed its reservation[30] and frustration[31] by noting "[i]f it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the Contracting Parties ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in this provision? If the Contracting Parties give a panel the task of examining a case involving an Article XXI invocation without authorizing it to examine the justification of that invocation, will they limit the adversely affected contracting party's right to have its complaint investigated in accordance with Article XXIII:2?"[32] Unfortunately, the panel was not afforded the opportunity to explore the issue of standard of review due to the limited mandate it had in this particular case. However, it should be noted that a panel at the WTO today would not face the same difficulty. According to Article 7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU"), standard terms of reference will be adopted unless the parties to the dispute agree otherwise. Accordingly, the restrictive terms of reference in the Nicaragua case are unlikely to be agreed to by both parties today. No jurisdictional issue would prevent a WTO panel from reviewing an invocation of the national security exception.[33]

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[28] Report of the Panel, *United States — Trade Measures Affecting Nicaragua*, ¶ 5.3, L/6053 (Oct. 13, 1986).
[29] *Id.* at ¶ 5.16.
[30] MAVROIDIS ET AL., *supra* note 18, at 738.
[31] Wesley A. Cann, *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26(2) YALE J. INT'L L. 413, 429 (2001).
[32] Report of the Panel, *supra* note 28, at ¶ 5.17.
[33] Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 379-80 (2003). *But see* Bhala, *supra* note 7, at 279 (suggested that similar to the GATT panel in the *United States — Nicaragua* case, a WTO panel would interpret its terms of reference narrowly to exclude a ruling on the substantive Article XXI arguments).

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B. Scholarly Analysis

As there was not any case formerly dealing with an invocation of Article XXI(b)(iii), scholars have proposed various views on the provision. It has been suggested that the wording of the provision does suggest some level of self-judging,[34] but the degree and the scope of the flexibility remains uncertain.[35]

One the one hand, some scholars interprets Article XXI(b)(iii) as mandating self-judging. Richard Sutherland Whitt noted that Article XXI(b)(iii) "mandates a unilateral interpretation and fails to raise even the possibility of a statutory stigma attached to its blatant misuse."[36] Andrew Emmerson raises the possibility of the argument that the "open-textured and ambiguous language" of "its essential security interests", which "seemingly places the avoidance of trade obligations squarely within a member's discretion of what it considers necessary".[37] Raj Bhala argues that "the implication of the word 'it' indicates that no WTO Member, nor group of Members, and no WTO panel or other adjudicatory body, has any right to determine whether a measure taken by a sanctioning member satisfies the requirements."[38] Artuhr E. Appleton and Veijo Heiskanen similarly argue that the provision grants a Member "exclusive authority to determine what is in its essential security interest and to deviate from WTO obligations to protect those interests."[39] Through the provision, Contracting Parties explicitly retained "exclusive competence" to determine their own interests for national security.[40] In addition, some scholars supported the wider flexibility based on State practice and historical reasons,[41] as the nations have long been insisting on the exclusive competency over security measures,[42] as discussed earlier. Other scholars support self-judging based

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[34] JACKSON, *supra* note 8, at 204-05.
[35] Alford, *supra* note 9, at 704.
[36] Richard Sutherland Whitt, *The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua*, 19 L. & POL'Y INT'L BUS. 603, 616 (1987).
[37] Andrew Emmerson, *Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse*, 11(1) J. INT'L ECON. L. 135, 142-43 (2008).
[38] Bhala, *supra* note 7, at 268-69.
[39] Artuhr E Appleton & Veijo Heiskanen, *Decision-making in Dispute Settlement: Bridging the Perception Gap, in* TEN YEARS OF WTO DISPUTE SETTLEMENT: COMMENTARY AND ANALYSIS FROM THE TRADE AND CUSTOMS LAW COMMITTEE OF THE INTERNATIONAL BAR ASSOCIATION 73, 76 (Dan Horovitz ed., 2007).
[40] *Id.* at 78.
[41] Alford, *supra* note 9, at 749.
[42] *Id.* at 705; Cann, *supra* note 31, at 430 ("[T]he United States, Canada, Japan, New Zealand, Australia, and the European Union have been unified in their belief that political, foreign policy, and national security issues are beyond the auspices of the agreement and that the GATT has no power, competence, or experience to resolve such disputes.").

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on the nature of Article XXI being "political questions" and are not subject to international judicial review.[43]

On the other hand, some scholars interpret Article XXI(b)(iii) as only partially self-judging. It has been argued that Article XXI(b)(iii) deals with different issues, and only part of them are self-judging.[44] Scholars point out that even though whether a measure is necessary to protect essential security interests is to some degree self-judging, the remaining provisions of Article XXI(b) (iii)(i.e., the subparagraph(iii) that describes the measure being taken in time of war or other emergency in international relations) should be subject to an objective judicial review, as the words "which it considers" only relate to the necessity of the measure taken.[45] It has also been argued that a certain degree of judicial review should be maintained, otherwise the provision would be prone to abuse without redress.[46]

For the degree of self-judging with regard to the necessity of the measure taken, scholars argue for a test of good faith[47] or a reasonableness test.[48] Akande and Williams calls for a test of good faith to review the subjective element of the measure, i.e., whether the Member State in fact considers that the measure taken is necessary.[49] Shin-yi Peng suggests a two-stage good faith test with both objective and subjective elements.[50] Hannes Schloemann and Stefan Ohlohff argue for a reasonableness test that requires a minimum degree of proportionality requirement between the measure taken and the protected threatened security interest.[51] Peter van den Bossche and Werner Zdouc argue that, at a minimum, the WTO adjudicating bodies should examine whether the explanation is reasonable and whether the measure constitutes an apparent abuse.[52]

The reviewability of whether protected interests fall into the scope of "essential security interests" is more controversial. Even for scholars calling for judicial review of Article XXI(b)(iii), some argue that a nation

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[43] *See* Hahn, *supra* note 23, at 612-14; C. Todd Piczak, *The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, the National Security Exception to the GATT and the Political Question Doctrine*, 61(1) U. PITT. L. REV. 287, 318-26 (1999).

[44] Akande & Williams, *supra* note 33, at 385; Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM. J. INT'L L. 424, 445-46 (1999).

[45] *See, e.g.*, Akande & Williams, *supra* note 33, at 399-400; Hahn, *supra* note 23, at 590-91; Shin-yi Peng, *Cybersecurity Threats and the WTO National Security Exceptions*, 18(2) J. INT'L ECON. L. 449, 464 (2015).

[46] PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES, AND MATERIALS 596 (3d ed. 2013).

[47] *See, e.g.*, Akande & Williams, *supra* note 33, at 390-96; Cann, *supra* note 31, at 479-80; Peng, *supra* note 45, at 467-68; Yoo & Ahn, *supra* note 7, at 429; Hahn, *supra* note 23, at 600-01.

[48] Schloemann & Ohlhoff, *supra* note 44, at 448-49.

[49] Akande & Williams, *supra* note 33, at 390.

[50] Peng, *supra* note 45, at 467-68.

[51] Schloemann & Ohlhoff, *supra* note 44, at 444-45.

[52] VAN DEN BOSSCHE & ZDOUC, *supra* note 46, at 596.

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invoking security exception has the power to define the scope of "essential security interests".[53] For scholars arguing for judicial review of the scope of the "essential security interests", the standard of good faith[54] or a reasonableness standard[55] has been suggested.

This paper agrees that the critical issue is how far the discretionary power can go in the event of the invocation of the security exception. This article further argues that, in addition to the interpretation of the provision, a more structural analysis of the judicial standard of review would help clarify this issue. Even though the WTO's adjudicating bodies have not had the chance of announcing the proper standard of review specifically for the national security exception, the WTO jurisprudence has developed a review structure that is generally applicable. Accordingly, a proper analysis of the standard of review of the national security could be developed in light of the structure developed under the WTO law.

III. THE DEFINITION AND FUNCTIONS OF THE STANDARD OF REVIEW IN THE WTO

A. The Definition of the Standard of Review

The notion "standard of review" represents the degree of intensity or thoroughness of the review during the judicial process.[56] It could be defined as "the level of intensity of the scrutiny that the reviewing body will exert over the decision or regulation being reviewed".[57] The concept of the standard of review addresses the limitations of judicial power. This restraint reflects a decision to grant certain degree of discretion to decision makers other than judges. When it is mandated by legal texts, the legislature or treaty founders may have made this decision. When such a clear mandate does not exist, judges themselves may have to make the decision.

In domestic legal systems, the mechanism of the standard of review usually ensures the separation of powers through the degree of deference that a judge grants to legislators and regulators.[58] It may also concern the

[53] Akande & Williams, *supra* note 33, at 399-400.
[54] Schloemann & Ohlhoff, *supra* note 44, at 448.
[55] Peng, *supra* note 45, at 467.
[56] Bhuiyan, *supra* note 15, at 148.
[57] CATHERINE BUTTON, THE POWER TO PROTECT: TRADE, HEALTH AND UNCERTAINTY IN THE WTO 164 (2004); *see also* LUKASZ GRUSZCZYNSKI, REGULATING HEALTH AND ENVIRONMENTAL RISKS UNDER WTO LAW: A CRITICAL ANALYSIS OF THE SPS AGREEMENT 50 (2010).
[58] Bhuiyan, *supra* note 15, at 148; Ehlermann & Lockhart, *supra* note 17, at 493 (noting that in the context of any legal system, the standard of review defines the parameters within which judges, and correspondingly, legislators and regulators should work, which is one of the mechanisms that guarantees the separation of powers); *see also* HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW: APPELLATE COURT REVIEW OF DISTRICT COURT

relationship between an appellate court and a lower court.[59] However, in the domestic context, the issue of judicial standard of review is not limited to allocation of power between governmental institutions. For example, in the area of corporate governance, there could be a deferential standard of review by which courts may abstain from second-guessing the corporate directors' business decisions.[60] The overarching rationale of the judicial standard of review for any given matter seems to rest on determining the most appropriate balance of power between decision makers.[61]

In the context of international law, such as the WTO dispute settlement regime, the standard of review concerns the degree of deference that an international adjudicator should grant to national decision makers, including national legislators, regulators, or judiciaries.[62] However, one should take special caution when comparing the standard of review in the WTO dispute settlements to those of domestic tribunals, because the function the concept is designed to achieve may differ according to its context.[63] For the WTO dispute settlements, the standard of review becomes an issue whenever the adjudicating body, that is, a panel or the Appellate Body, reviews the measure of a member's compliance with WTO obligations.[64] The standard of review determines the depth and intensity with which the WTO judicial organ reviews the national measure of the WTO Member.[65] Consequently this defines the margin of discretion and vertical power allocation enjoyed by the WTO Members.[66]

The dispute settlement system of the WTO is a "rule-oriented" one.[67] When the compliance of a WTO Member with the relevant WTO

DECISIONS AND AGENCY ACTION, at v (2007) (noting that standards of review "are critically important in determining the parameters of appellate review and in allocating authority between trial courts and agencies, on the one hand, and the appellate bench, on the other" in the context of the United States).

[59] Andrew T. Guzman, *Determining the Appropriate Standard of Review in WTO Disputes*, 42 CORNELL INT'L L.J. 45, 45 (2009); EDWARDS & ELLIOTT, *supra* note 58.

[60] *See* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57(1) VAND. L. REV. 81, 83 (2004) (exploring the abstention feature for the court of the business judgment rule, which enables efficient decision-making systems and processes in U.S. corporations).

[61] *See* Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 SOUTH DAKOTA L. REV. 469, 469 (1988) (noting that the standard of review "defines the relationship and power shared by decision makers").

[62] *See* Ehlermann & Lockhart, *supra* note 17, at 493; MATTHIAS OESCH, STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION 13 (2003); Bhuiyan, *supra* note 15, at 148.

[63] *See* GERNOT BIEHLER, PROCEDURES IN INTERNATIONAL LAW 39 (2008) ("[C]ertain procedural rules may fulfill an entirely different function in international law than they do in the national legal context.").

[64] *See* Oesch, *supra* note 62.

[65] *Id*.

[66] Gruszczynski, *supra* note 57, at 50; Oesch, *supra* note 62, at 25.

[67] *See* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 109 (2d ed. 1997); Steve Charnovitz, *Judicial Independence in the World Trade Organization*, *in* INTERNATIONAL ORGANIZATION AND INTERNATIONAL DISPUTE

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obligation is called into question, an independent third party determines whether the obligation has been violated based on rules of law.[68] When the national authority conducted the disputed measure, it may have made certain determinations. Since the WTO dispute resolution system is a semi-judicial process, there is no doubt that the adjudicating body cannot simply accept or respect *all* determinations made by the national authority, otherwise the dispute settlement system would be rendered ineffective.[69] Indeed, the rights and obligations contained in the WTO Agreements are results of trade negotiations, where the Members exchanged concessions during the bargaining process.[70] The contractual nature of the WTO Agreements prevents its tribunals from deferring to any one party in a dispute without proper legal basis. However, there are situations where it is not practical, warranted, or appropriate for the adjudicating body to simply substitute their own judgments for that of the national authorities. The question then becomes when, and to what extent, the adjudicating body should accept the determinations made by the national authority.[71]

A WTO panel should make an objective assessment of the matter brought before it for reviewing, which includes an objective assessment of the facts of the case, as well as the applicability of and conformity with the relevant covered agreements.[72] The standard of review then involves the manner—that is, the degree of intensity, thoroughness or deference—in which the panel (or the Appellate Body, if applicable) should review the Member's measure regarding its conformity with the claimed WTO obligation.[73] As Matthias Oesch has pointed out, the other side of the standard of review is the "margin of appreciation" that panels and the Appellate body grant national authorities with respect to their own WTO

SETTLEMENT: TRENDS AND PROSPECTS 219, 224 (Laurence Boisson de Chazournes et al. ed., 2002); Oesch, *supra* note 62, at 5.

[68] The predecessor of the WTO, the GATT 1947, has been described as a "power-oriented" system, which prefers "consensus" in dispute resolution. *See* JACKSON, *supra* note 67, at 109; R. E. Hudec, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 1 WORLD TRADE REV. 211, 220 (2002); Oesch, *supra* note 62, at 4-5 (since the legal aspect in the dispute resolution was not apparent, the issue of standard of review is not as important as in the WTO, but it did gain significance in later years of the GATT 1947 as the importance of rule of law gradually increased in the system).

[69] *See* Chad P. Bown & Joel P. Trachtman, *Brazil — Measures Affecting Imports of Retreaded Tyres: A Balancing Act*, 8 WORLD TRADE REV. 85, 86 (2009) (in the context of the retained flexibility relating to environmental concern, noting that "by establishing the WTO dispute-settlement system, member states decided that WTO panels, and the Appellate Body on appeal, would generally decide disputes about the scope of this flexibility").

[70] PETROS C. MAVROIDIS, THE GENERAL AGREEMENT ON TARIFFS AND TRADE : A COMMENTARY 66-71 (2005).

[71] Oesch, *supra* note 62, at 14.

[72] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 11, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

[73] *See* Bhuiyan, *supra* note 15, at 144.

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obligations.[74] When a Member is fulfilling its WTO obligations, it may have to interpret, that is, to give meaning to, the relevant WTO provisions and determine whether its would-be measures are consistent with relevant obligations. At the same time, the Member may also make factual determinations relating to this measure. The key issue that the standard of review deals with is how the panel should review national determinations. Daniel Lovric maintains that the standard of review is WTO's own concept of deference.[75] The so-called "deference" is shown through the certain degree of acceptance granted to the determinations made by others. Generally, the more "deference" the adjudicating bodies show to the responding Member, the more power is accorded to those Members. Accordingly, it is important to base the standard of review on the legal provisions negotiated by Members, otherwise the balance between Members reached by the negotiations may be lost.

B. Functions of the Standard of Review

1. Maintaining Legitimacy in Adjudicating Policy Choices and Conflicting Values — In the WTO dispute settlement system, the issue of standard of review becomes acute in situations where the adjudicating bodies have to deal with competing values between trade and non-trade issues such as environment, health, and human rights. In such situations, the legitimacy of the adjudicating bodies is at risk.[76] Christopher Arup argues that international tribunals, such as the WTO adjudicating bodies, "need to be particularly aware of the need for deference,"[77] since they do not have popular mandate. As a result, international courts have to be careful "not to act beyond their delegation".[78] Similarly, the need to respect national sovereignty has been invoked as an important reason for the need of such legitimacy.[79] However, even though national sovereignty is still one of the basic organizing principles in international law,[80] the international treaties that nation states choose to enter have limited their national sovereignty. Thus, it is very important to examine what has been conceded in the WTO contracts by the Member States, and what has not, in

[74] Oesch, *supra* note 62, at 14.
[75] DANIEL LOVRIC, DEFERENCE TO THE LEGISLATURE IN WTO CHALLENGES TO LEGISLATION 87 (2010).
[76] For the need of legitimacy under conflicting interests, see Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, *in* THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? 35, 38-39 (Joseph Weiler ed., 2000).
[77] Christopher Arup, *The State of Play of Dispute Settlement "Law" at the World Trade Organization*, 37(5) J. WORLD TRADE 897, 915 (2003).
[78] LOVRIC, *supra* note 75, at 61.
[79] *See, e.g.*, OESCH, *supra* note 62, at 27; Croley & Jackson, *supra* note 16, at 212.
[80] *See* OESCH, *supra* note 62, at 27.

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order to determine the appropriate standard of review. This point suggests that sovereignty, by itself, is not the reason to grant deference to a Member invoking security exception. As will be explained, this is why the content of the provisions themselves are critical for establishing an appropriate standard of review.

Indeed, an overly intrusive review standard would undermine the support of the system and reduce the legitimacy of the WTO. In the context of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter "TRIPS"),[81] for example, it has been argued that there should be some panel deference to avoid unduly straining the dispute settlement's authority and legitimacy.[82] On the other hand, if the standard of review is applied too leniently, it may undermine the legitimacy of the system. The coherence and integrity of interpretation is the key to any tribunal's legitimacy.[83] If the deference is given to individual Members to the point that "application of the same rules to the same factual issue"[84] is not achieved, the legitimacy of the adjudicator may be damaged. Matthias Oesch argues that it is particularly the case since the WTO dispute settlement system is relatively weak at the moment, there is still a structural deficiency, and that legislative response is not working properly. As a result, the WTO adjudicating bodies are "restricted in adopting a more activist and evolutionary interpretative approach since their rulings are definite and not subject to a process of trial and error."[85] A proper balance has to be struck between these two lines of thinking. In fact, a carefully crafted and consistently applied deferential standard of review in the sensitive hard choices areas is especially warranted when the adjudicating bodies are adopting an "activist and evolutionary interpretative approach." In most cases, the WTO founding Members have established the foundation of legitimacy for the WTO through legal provisions. The legitimacy of the WTO tribunals should be established based on the legal mandates provided in the WTO Agreements. The WTO tribunals should be particularly sensitive when determining the proper decision maker, and make this determination based on the structure of the treaty texts.

2. Fulfillment of the Mandates of the WTO Tribunals — For the WTO tribunals, the standard of review is an important tool for achieving the proper balance between the WTO institution and its Members, as codified

[81] 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.
[82] *See* Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 441 (1998).
[83] *See* Howse, *supra* note 76, at 60.
[84] DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 41 (1999).
[85] OESCH, *supra* note 62, at 45.

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in the WTO Agreements.[86] This balance is reflected by the Members' legal obligations and the WTO tribunals' legal mandates. The Appellate Body sees the standard of review as a tool to implement the functions and responsibilities of the adjudicating bodies as envisioned under the DSU.[87] By ensuring the panels' mandates under the DSU are fulfilled, the proper balance between the WTO and its Members, as well as the balance between Members, can be reached. It seems that the Appellate Body is reluctant to develop any sort of deference through standard of review other than the ones with basis in the legal texts.[88]

The core issue of the standard of review is the competence and proper role of the judges,[89] and the mandates of the WTO adjudicating bodies should be the starting point in deciphering this issue. The objectives of the WTO dispute settlement system are stipulated in Article 3.2 of the DSU. The Article declares that the system is "a central element in providing security and predictability to the multilateral trading system," which serves to "preserve the rights and obligations of Members under the covered agreements," and to "clarify the existing provisions of those agreements."[90] The same Article also stresses that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[91] When they review contested national measures, WTO panels and the Appellate Body should respect the rights and obligations of the WTO Members as they are expressed in the WTO covered agreements. These provisions represent the objectives of the WTO's dispute settlement system. The WTO adjudicating bodies have to achieve these objectives by preserving the values of the exchanged concessions obtained by Members during various rounds of negotiations.

The contractual nature of the WTO Agreements should be kept in mind when addressing the issues of the standard of review. According to Article 11 of the DSU, when dealing with a dispute between WTO Member States, a panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the

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[86] Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, ¶ 115, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (adopted Feb. 13, 1998) [hereinafter *EC — Hormones*] (holding that "[t]he standard of review appropriately applicable in proceedings under the *SPS Agreement*, of course, must reflect the balance established in that Agreement between the jurisdiction competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves.").

[87] DSU, *supra* note 72.

[88] *EC — Hormones*, *supra* note 86. (holding that "[t]o adopt a standard of review not clearly rooted in the text of the *SPS Agreement* itself, may well amount to changing that finely drawn balance; and neither a panel nor the Appellate Body is authorized to do that.").

[89] *See, e.g.*, Ehlermann & Lockhart, *supra* note 17, at 494 (noting that the goals stipulated in Article 3.2 of the DSU influence the standard of review applied by panels and the Appellate Body).

[90] DSU, *supra* note 72, art. 3.2.

[91] *Id.*

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applicability of and conformity with the relevant covered agreements . . . ."[92] This provision succinctly describes the functions of the WTO tribunals: to determine the relevant facts, to interpret the relevant legal provisions and to apply the law to the facts when determining, in most cases, whether the contested measure constitutes a violation of the responding Member's relevant WTO obligations. This task has to be conducted with the view of "[preserving] the rights and obligations of Members under the covered agreements." These mandates should apply in the panels' determination of their standards of review.[93] To conclude, when determining the standards of review adopted by panels and the proper deference afforded to Members, the objectives of the dispute settlement system, as well as the panels' mandates, are among the most important considerations.

IV. THE ANALYTICAL STRUCTURE OF THE STANDARD OF REVIEW UNDER THE WTO JURISPRUDENCE

Based on the mandate fulfillment function of the standard of review, the WTO adjudicating bodies have developed a structured analysis regarding this issue. The Appellate Body requires panels, when determining appropriate standard of review, to conduct the following steps: (1) conduct an object of review analysis to determine whether *de novo* review should be excluded. (2) Once the panel decides that *de novo* review should be excluded, the review will consist of two parts: a formal aspect and a substantive aspect.

A. The Legal Basis for the Standard of Review Analysis

1. DSU Article 11 — Article 11 of the DSU is the starting point for the Appellate Body's standard of review analysis. The WTO adjudicating bodies consider Article 11 of the DSU, which regulates the function of WTO panels, to be the applicable provision regulating the issue of the standard of review.[94] Article 11 requires that panels should conduct an objective examination of the matter before them.[95] However, on its face, the provision does not address when the WTO panel should review a matter *de novo* or when a more deferential attitude is warranted.

Scholars argue that the objectivity requirement is not an appropriate provision regulating the standard of review, as it does not specify an

[92] *Id.* art. 11.
[93] *See* Ehlermann & Lockhart, *supra* note 17, at 494.
[94] *EC — Hormones*, *supra* note 86, ¶ 116.
[95] *See* PETROS C. MAVROIDIS, TRADE IN GOODS: THE GATT AND THE OTHER AGREEMENTS REGULATING TRADE IN GOODS 410 (2007).

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appropriate level of scrutiny.[96] Notwithstanding the constant statements of the Appellate Body and the panels to the contrary, the scholars holding this view argue that the objectivity requirement and the appropriate standard of review are actually two different issues. Whatever standard of review the panel is adopting, it still has to conform to the objectivity requirement.[97] It is argued, therefore, that this provision does not regulate the applicable standard of review at all. In addition, Michael Trebilcock and Julia Soloway argue that the objective assessment standard is not helpful because it does not shed light on what facts are to be objectively assessed.[98]

It seems, however, that the WTO tribunals see the provision from a different perspective. The repeated statements of the Appellate Body and panels should be given some credit. The relevant part of the Article 11 of the DSU stipulates that, in its entirety, "a panel should make an objective assessment of the matter before it, including *an objective assessment of the facts of the case* and the applicability of and conformity with the relevant covered agreements" (emphases added). The Appellate Body has emphasized the importance of "an objective assessment of the facts of the case" when highlighting this sentence.[99] The WTO adjudicating body's emphasis, when referring to the concept of standard of review, is not on the word "objective" alone. When considering the practice of the WTO adjudicating bodies that will be elaborated below, the Appellate Body is expressing its characterization of the standard of review as the tool it adopts to implement panels' mandates under the DSU. In cases of factual determinations, for example, it is the "panel" that should make the assessment "of the facts of the case." This represents the Appellate Body's emphasis on the proper object of the panel review, because it has to be the facts "of the case" that are determined by the panel.[100] In other words, when the panel makes a factual determination that is not relevant to terms of the legal obligation at hand, it is not properly applying the standard of review. With respect to Michael Trebilcock and Julia Soloway's arguments on the object of review, for the Appellate Body, the object of review can

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[96] *See, e.g.*, Ehlermann & Lockhart, *supra* note 17, at 495-96 (stating that the objectivity requirement "must function with another, more detailed, underlying standard of review").
[97] *See id.*
[98] Michael Trebilcock & Julia Soloway, *International Policy and Domestic Food Safety Regulation: The Case for Substantial Deference by the WTO Dispute Settlement Body Under the SPS Agreement*, *in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC 537, 564 (Daniel L. M. Kennedy & James D. Southwick eds., 2002); TRACEY EPPS, INTERNATIONAL TRADE AND HEALTH PROTECTION: A CRITICAL ASSESSMENT OF THE WTO'S SPS AGREEMENT 277 (2008).
[99] Appellate Body Report, *United States — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, ¶ 68, WTO Doc. WT/DS192/AB/R (adopted Nov. 5, 2001) [hereinafter *US — Cotton Yarn*].
[100] Tsai-fang Chen, *What Exactly is the Panel Reviewing: The First Step in the Standard of Review Analysis in the WTO Dispute Resolutions*, 4 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 467, 483 (2009).

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and has to be determined through the substantive legal provision itself, instead of the general provision of the standard of review.

2. Object of Review: Substantive Provisions — When determining the appropriate standard of review, the Appellate Body puts great weight on substantive provisions contained in the relevant agreements. The determination of the applicable standard of review is not limited to Article 11 of the DSU in the abstract. The way to which the "objective assessment" standard is applied should be informed by the relevant substantive obligations.[101] For example, in *U.S. — CVD Investigations on DRAMS*, the Appellate Body pointed out that "the standard of review to be applied in a given case is also a function of the substantive provisions of the specific covered agreements that are at issue in the dispute."[102] The Appellate Body also held that "an 'objective assessment' under Article 11 of the DSU must be understood in the light of the obligations of the particular covered agreement at issue in order to derive the more specific contours of the appropriate standard of review."[103] This principle has been adopted in all types of cases. For example, when reviewing a "transitional product-specific safeguard measure" imposed under Paragraph 16 of China's Protocol of Accession, the Panel noted that "[i]t is well established that the Panel's standard of review 'must be understood in the light of the obligations of the particular covered agreement at issue." [104] In the Softwood Lumber AB Report, the Appellate Body noted that the existence of a specific standard of review provision, by itself, may not require a different review standard, but the difference in the substantive provisions may.[105] These instances imply that substantive provisions may have as much, if not more, influence on the applicable standard of review than Article 11 of the DSU.

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[101] *See* Appellate Body Report, *United States — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand*, ¶ 105, WTO Doc. WT/DS177/AB/R, WT/DS178/AB/R (adopted May 16, 2001) [hereinafter *US — Lamb*]; *US — Cotton Yarn*, *supra* note 99, ¶¶ 75-78.

[102] Appellate Body Report, *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, ¶ 184, WTO Doc. WT/DS296/AB/R (adopted July 20, 2005) [hereinafter *US — Contervailing Duty Investigation on DRAMs*]. *See also US — Cotton Yarn*, *supra* note 99, ¶¶ 75-78; *US — Lamb*, *supra* note 101, ¶ 105; Appellate Body Report, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada*, ¶ 95, WTO Doc. WT/DS277/AB/RW (adopted May 9, 2006) [hereinafter *US — Softwood Lumber VI*].

[103] *US — Contervailing Duty Investigation on DRAMs*, *supra* note 102.

[104] Panel Report, *United States — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, ¶ 7.15, WTO Doc. WT/DS399/R (adopted Oct. 5, 2011) [hereinafter *US — Tyres (China)*] (citing *US — Contervailing Duty Investigation on DRAMs*, *supra* note 102).

[105] *US — Softwood Lumber VI*, *supra* note 102, ¶ 92 (noting that whether separate consideration of a single determination with different standards of review is needed may depend on the substantive provisions involved because "the proper standard of review to be applied by a panel must also be understood in the light of the specific obligations of the relevant agreements that are at issue in the case.").

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The first step of the standard of review analysis should be a determination of the object of review.[106] The object of review based on the substantive obligation is an essential part in the standard of review analysis in the WTO dispute settlement system. By determining the object of panel review as the first step in the process, one can identify the role of panels in the dispute, which in turn affects the applicable standard of review. When a panel is reviewing a determination made by a Member that has a special status as explicitly stated or implied in the substantive obligation, its role is that of a reviewer. The object of the panel's review should be the process of the determination.[107] In other words, the panel is not the primary decision-maker in this situation. It is not, in the words of the Appellate Body, the initial trier of fact and should not substitute its judgment for that of the Member who made the determination. When the member's determination does not have a stated or implied special status, the panel should determine the issues independently and does not need to accord a certain weight to any party to the dispute. The object of review affects the applicable standard of review in that it decides whether the exclusion of *de novo* review is appropriate and warranted. The object of review analysis is important for the determination of standard of review because it directly provides the legal basis that WTO tribunals use to accord margin of discretion to national authorities. This step may seem obvious because it is also an inevitable step in all dispute settlement processes.[108] Indeed, the relation between the object of review and the applicable standard of review is not apparent. However, the right object of review directly affects the appropriate standard of review in the WTO dispute settlement system, because it determines whether to exclude *de novo* review. The jurisprudence in the WTO indicates that panels and the Appellate Body did not always correctly identify the appropriate object to review, which might have resulted in an erroneous standard of review. Such situations demonstrate the importance of the analytical step.

The exclusion of *de novo* review suggests a deferential standard of review. The need for a deferential standard of review is at its apex when the relevant WTO legal provision includes a national investigation/determination in the elements of the relevant legal obligation.[109] This gives the national activity a special status regarding the relevant WTO obligation, and it constitutes the legal mandates for the panel when dealing with the dispute. When the treaty texts require the Member to

[106] Chen, *supra* note 100, at 467.
[107] *Id.*
[108] It is inevitable because a judge will always have to find out the object of its review before making any meaningful judgments.
[109] *See US — Lamb*, *supra* note 101, ¶ 104 (stating that the "character of a panel's review is mandated by the nature of the specific obligations that Article XXI 4.2 of the *Agreement on Safeguards* imposes on competent authorities").

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make certain determinations, they implicitly entrust the task to the Member. The negotiators of the treaty, through this kind of text, reserve the right to conduct the determinations themselves. When the obligation is in dispute, panels should review whether the responding Member is in compliance with its obligation, i.e., whether the panel makes the determinations according to the requirements of the treaty texts (thus the exclusion of the *de novo* review), instead of making their own determinations about the underlying factors. Otherwise the panel would act beyond its own mandates. Rulings rendered beyond a panel's mandates would certainly result in serious backlashes and could diminish the legitimacy of the dispute settlement system as a whole. Obvious examples of the special status of Member determinations are the national security exception, as recognized in Article XXI of the GATT 1994, Article XIV *bis* of the GATS and Article 73 of the TRIPS Agreement.

The substantive obligation decides the proper object for panels to review. For any given WTO dispute, the responding Member may or may not have made several determinations regarding the contested measure. For the purpose of the panel standard of review, what matters is whether the national investigation or determination has special status in the substantive legal obligation. The status is recognized when the provision prescribes, requires, or allows the national determination, or otherwise makes the national activity as part of the elements of the relevant legal obligations.[110] When the national investigation or determination has special status in the relevant WTO provisions, the panel's review of the measure is affected by the substantive obligation regulating the related national activity.

The appropriate standard of review differs when the legal obligation changes. A treaty provision that simply requires the existence of certain facts entails a different panel review activity than a provision that requires the establishment of identical facts by a national authority. This results in a different level of judicial standard of review. To elaborate, when the legal provision directly requires the existence of certain facts, the panel should engage in a *de novo* review in order to determine the existence of such facts. Here, there is no national investigation or determination contained in the legal provision. The nature of the panel activity here is fact-finding, and the role of the panel is to serve the initial trier of fact. On the other hand, when the legal provision requires the establishment of certain facts by the national authority, the object of the panel review under the mandate of the provision is to determine whether the national establishment of the facts is consistent with this provision. Here the standard of review is more deferential. The nature of the national activity is fact-finding, while the

[110] *But see* Ehlermann & Lockhart, *supra* note 17, at 516 (arguing that only treaty-mandated national investigating procedure warrants deferential panel standards).

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panel's judicial activity involves legal determinations of whether the national determination is consistent with a certain legal standard. Comparing this with the earlier scenario in which the panel would be conducting factual inquiry, the nature of the panels' judicial activities is in stark contrast. This is because different legal provisions mandate different judicial activities, and the appropriate standard of review changes as a result.[111] The same reasoning also applies to other national factual determinations and legal determinations.

Article 31 paragraph 1 of the Vienna Convention on the Law of Treaties (VCLT) requires the panel to interpret the relevant provision in accordance with its ordinary meaning within their specific context and in the light of its object and purpose.[112] This Article regulates the methods of interpretation used by the WTO dispute resolution regime.[113] The provision provides three elements for a treaty interpreter to follow: first, the ordinary meaning of the texts; second, the context of the provisions; third, the object and purpose of the provisions. When the result of the interpretation leads to the conclusion that the obligation at issue requires the Member to make certain determinations, this determination should be the object of the panel review.

Based on the above analysis, there is no wonder that the Appellate Body has required a standard that excludes *de novo* review for many aspects of trade remedy cases, as many of the provisions require a national determination. However, it is equally relevant to note that not all provisions in trade remedy agreements warrant deferential review standard. When the provision itself does not regulate national determinations, or when it is not considered part of a package of provisions that regulate such determinations, the review standard for a claim under this provision is *de novo*. For example, in *U.S. — Steel Safeguards* case, the panel, following the ruling of *U.S. — Line Pipe*,[114] distinguished its review of the (conditional) right to take a safeguard measure (a deferential review) from that of the application of a chosen measure (a *de novo* review).[115] The difference lies within the various obligations embodied by these two sets of

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[111] *See US — Lamb*, *supra* note 101, ¶ 105 (ruling that the character of a panel's review is mandated by the nature of the specific obligations that the substantive provision imposes on competent authorities); Holger Spamann, *Standard of Review for WTO Panels in Trade Remedy Cases: A Critical Analysis*, 38(3) J. WORLD TRADE 509, 530-31 (2004).

[112] Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

[113] *See* DSU, *supra* note 72, art. 3.2.

[114] Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, ¶ 84, WTO Doc. WT/DS/202/AB/R (adopted Mar. 8, 2002) [hereinafter *US — Line Pipe*].

[115] Panel Report, *United States — Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶ 10.14, WTO Doc. WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R (adopted Dec. 10, 2003) [hereinafter *US — Steel Safeguards Panel Report*].

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provisions. For the (conditional) right of a safeguard measure to exist, Articles 2.1, 3 and 4 mandate the Member to make certain determinations according to the requirements of these provisions.[116] On the other hand, if the Member has the right to take such safeguard measures, Article 5.1 of the Agreement on Safeguards requires that the safeguard measures can only be applied to the extent necessary to prevent or remedy serious injury, and to facilitate economic adjustments.[117] For the Panel, this difference in obligations leads to different objects of panel inquiry, which in turn results in different standards of review. As the Panel acknowledged, "the standard of review applicable in the present dispute must be seen in light of the distinction between the first and second inquiry that the panel must perform when assessing a Member's compliance with the requirements of the Agreement on Safeguards and Article XIX of GATT 1994."[118] Regarding the first inquiry, WTO panels, with the role to "'review' determinations and demonstrations made and reported by an investigating authority," are not the initial fact finder based on the obligations prescribed in Articles 2, 3, and 4 of the Agreement.[119] However, for the second inquiry, since the obligation in Article 5.1, for example, it only concerns whether the measure is applied "to the extent necessary", and the Member's determination does not have a special status in this set of provisions under the Panel's interpretation.[120] Accordingly, in the Panel's view, the standard of review for the second inquiry is more intrusive.[121] Here the panel's mandate is to act as the initial fact finder and to determine whether the measures are applied to the extent necessary. In other words, the panel implies that the *de novo* review is appropriate here. The practice of applying different standards of review for claims within the same agreement suggests that the WTO adjudicating bodies recognize that the treaty as a whole does not dictate the appropriate standard of review. Instead, the individual obligation in question is what matters. This practice also confirms that the object of the panel review, as determined by the treaty obligations, should be the first step when the WTO panels determine appropriate standard of review, since this is the step that determines whether *de novo* review is applicable.

One can discern a structure of the standard of review analysis in the jurisprudence in the area of trade remedy law. The role of the panel in the case is the key factor that determines whether to accord the deference to the fact-findings of national authorities through standard of review. If the panel

[116] *US — Line Pipe*, *supra* note 114, ¶ 84.
[117] *Id.*
[118] *US — Steel Safeguards Panel Report*, *supra* note 115, ¶ 10.25.
[119] *Id.*
[120] *Id.* ¶ 10.26.
[121] *See* PETROS C. MAVROIDIS ET AL., THE LAW AND ECONOMICS OF CONTINGENT PROTECTION IN THE WTO 571 (2008) (observing that in the panel's view, a panel's examination could be more intrusive here).

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is the first trier of facts, then it should conduct its own factual inquiry. In this circumstance, the possible investigation conducted by national authorities does not carry weight in the panel's assessment. On the contrary, if the panel is considered a reviewer of factual determinations made by national authorities, the panel should refrain from *de novo* review. This key factor of panel's role regarding a disputed claim is determined by the substantive obligation regulated in the relevant provision through the object of review analysis.

The standard of review's structure is applicable in other areas of the WTO Agreements as well. The WTO adjudicating bodies have been determining the object of review based on the substantive texts of the provisions at issue. It has also been reflected in more recent Sanitary and Phytosanitary (hereinafter "SPS") cases. In the *Hormones Suspension* case, the Panel conducted its *de novo* assessment of the risk underlying the Member's SPS measure. When pointing out the problem of this standard of review, the Appellate Body observed that "[a] panel reviewing . . . the SPS measure with Article 5.1 must determine whether that SPS measure is 'based on' a risk assessment."[122] The Appellate Body held that "[i]t is the WTO Member's task to perform the risk assessment," and that "[t]he panel's task is to review that risk assessment." The Appellate Body thus ruled that "[w]here a panel goes beyond this limited mandate and acts as a risk assessor, it would be substituting its own scientific judgment for that of the risk assessor and making a *de novo* review and, consequently, would exceed its functions under Article 11 of the DSU."[123] By striking down the Panel's decision, the Appellate Body aligned the method to determine applicable standard of review used in the SPS cases with which used in, for example, trade remedy cases. This standard of review applying to the panel review of a Member's risk assessment has also been used in a later case, *Australia — Measures Affecting the Importation of Apples from New Zealand*.[124]

The basis of the Appellate Body's approach is the relevant obligation in the specific provision as interpreted. The *Australian — Apples* Panel noted that when it is reviewing a claim under Article 5.6, it should avoid engaging in a *de novo* review.[125] However, the Appellate Body reversed this finding and held that the provision, unlike Article 5.1, does not require

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[122] Appellate Body Report, *United States — Continued Suspension of Obligations in the EC — Hormones Disputes*, ¶ 590, WTO Doc. WT/DS320/AB/R (adopted Nov. 14, 2008) [hereinafter *US — Continued Suspension*].

[123] *Id.*

[124] Appellate Body Report, *Australia — Measures Affecting the Importation of Apples from New Zealand*, ¶ 220, WTO Doc. WT/DS367/AB/R (adopted Dec. 17, 2010) [hereinafter *Australia — Apples*].

[125] Panel Report, *Australia — Measures Affecting the Importation of Apples from New Zealand*, ¶ 7.1134, WTO Doc. WT/DS367/R (adopted Dec. 17, 2010).

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the Panel to avoid *de novo* review.[126] It seems that the basis of the Appellate Body's analysis is the structure of the specific legal texts. Here, the provision itself does not require a national determination. Therefore, the Appellate Body requires the panel to conduct *de novo* review.[127] Therefore, the substantive provision at issue determines whether the panel should preclude *de novo* review, and it could apply to any legal provision within the purview of the WTO.

3. Review the National Decision: Formal Aspect and Substantive Aspect — The WTO adjudicating bodies have been determining the object of review based on the substantive texts of the provisions at issue. Once the object of review determines that the substantive obligation of the provision at issue includes a national decision, *de novo* review should be excluded. The WTO adjudicating bodies will then conduct a review of the national decision. This review consists of two parts: a formal aspect and a substantive aspect.

The Lamb case is instructional. In the critical Lamb AB Report, the Appellate Body interpreted the "objective assessment" of Article 11 under Article 4.2(a) of the Agreement on Safeguards[128] into two elements: First, it stipulated that a panel must review whether "competent authorities have evaluated *all relevant factors*."[129] The Appellate Body has described this requirement as the "formal aspect" of the review. Second, a panel must review whether "the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination." The Appellate Body has described this second part of the review as the "substantive aspect."[130] Petros C. Mavroidis summarizes the panels' roles as asking

[126] *Australia — Apples*, *supra* note 124, ¶ 355.

[127] One may find that the Appellate Body's treatment of the legal texts in its object of review analysis here is too rigid. The Appellate Body did not address the possible contradiction with a panel's determination in its risk assessment analysis following this reading of the legal texts. A panel's *de novo* assessment of the risk associated with the alternative measure, as well as its determination regarding whether the alternative measure could achieve the appropriated level of protection, may well be contradictory to its finding in Article 5.1. It seems that it would be more coherent for the Appellate Body to see the provision together with Article 5.1 and require the panel to follow the Member's risk assessment to the extent possible, as in the case of Article 2.2/Article 5.1 of the SPS Agreement and the "unforeseen development" element in the Agreement of Safeguards case.

[128] Agreement on Safeguards art. 4.2(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154. This provision requires that when determining whether increased imports have caused or are threatening to cause serious injury to a domestic industry, the competent authorities "shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry."

[129] *US — Lamb*, *supra* note 101, ¶ 103.

[130] *Id.* ¶¶ 100, 106. The standard entailed by "the substantive aspect" is substantially applicable in all trade remedy cases, even including Anti-dumping cases, despite different language contained in the Anti-dumping Agreements standard of review clause. *See* Appellate Body Report, *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶¶ 55-56, WTO Doc. WT/DS184/AB/R (adopted Aug. 23, 2001) [hereinafter *US — Hot-Rolled Steel*].

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whether the national authority "diligently looked for all relevant facts," and whether the national decision is "reasonably supported by the facts before it."[131] Here, the Appellate Body excludes the application of *de novo* review, but it does not give away the need of a substantive aspect of the review.

The Appellate Body reaches its conclusion that *de novo* review should be excluded based on its interpretation of the substantive obligations contained in the relevant provisions. To examine further the standards declared by the Appellate Body in the Lamb AB Report, one would find that the review of formal aspect, on the one hand, is an *explicit* legal requirement embodied in the legal provision. On the other hand, the review of substantive aspect is not explicitly stipulated by the provision, but it does not prevent the Appellate Body from requiring this review. This is because the substantive requirement is necessarily *implied* by the substantive obligation at issue.[132] For the Appellate Body, whether this standard of review (the exclusion of *de novo* review) applies depends on the individual treaty provision itself, instead of the disputed WTO agreement as a whole, as it has been suggested by Claus-Dieter Ehlermann and Nicolas Lockhart.[133]

The "substantive aspect" of the review (the requirement for explanation) can be understood as a prerequisite for any meaningful panel review of a national decision. After all, without adequate explanation, it would be very difficult for the panel to review the domestic determinations.[134] Accordingly, it is the structure of the determination process envisioned by the treaty provision that should determine the object of the panel review, which in turn should determine whether the panel should engage in a *de novo* factual determination or focus on the *review* of the factual determination conducted by the national authority. If the legal provision simply requires the existence of an objective condition for the measure to be compliant with the relevant legal provisions, a panel should

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[131] MAVROIDIS, *supra* note 95, at 410-11.

[132] A panel reviewing whether there is an "adequate and reasoned" explanation is a process based on the panel's perception of the logic and coherence in light of the legal provision and the nature of the obligation. Its nature is similar to an appellate review in the domestic context (as opposed to the decision maker in the first instance), and a question of legal characterization. This is why the Appellate Body has jurisdiction with regard to this issue. *See, e.g.*, *US — Lamb*, *supra* note 101, ¶ 160 (ruling that the national authority did not adequately explain its determination). This panel review should not be characterized as a fact-finding activity.

[133] *See* Ehlermann & Lockhart, *supra* note 17, at 506-08.

[134] *See* Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶ 279, WTO Doc. WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R (adopted Dec. 10, 2003) [hereinafter *US — Steel Safeguards*] (in the context of the requirement of "unforeseen development", the Appellate Body noted that "[w]e do not see how a panel could examine objectively the consistency of a determination with Article XIX of the GATT 1994 if the competent authority had not set out an explanation supporting its conclusions on 'unforeseen development.'").

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conduct a *de novo* review. However, if the legal obligation requires a process to be conducted by the relevant national authority, as in trade remedy cases, the inclusion of the process indicates that the panel should focus its review on the substantive and procedural aspects in the national authority's factual determinations.

The "reasoned and adequate explanation" is also required by the Appellate Body under the context of Article XIX of GATT 1994[135] and subsidy determinations in Agreement on Subsidies and Countervailing Measures (SCM) cases,[136] and applies to safeguard measures provided in other agreements, such as Article 6 of the ATC[137] or Paragraph 16 of China's Accession Protocol.[138] Notably, this requirement also applies to anti-dumping cases, despite the fact that the Anti-dumping Agreement has its own specific standard of review provision.[139] Indeed, this standard seems to be applicable in all aspects of the national determinations except for legal interpretation across trade remedy cases.[140] For example, in the *U.S. — CVD investigation on DRAMS* case, the Appellate Body explained the applicable standard of review for subsidy determinations:

> [T]he "objective assessment" to be made by a panel reviewing [a domestic] investigating authority's subsidy determination will be informed by an examination of whether the agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination.[141]

In addition, the explanations should also address alternative explanations that "could reasonably be drawn from the evidence", and the reasons for rejecting such alternative explanations.[142]

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[135] *Id*. *See also* BHUIYAN, *supra* note 15, at 189.
[136] *US — Contervailing Duty Investigation on DRAMs*, *supra* note 102, ¶ 186. *See also* BHUIYAN, *supra* note 9, at 189-90.
[137] *US — Cotton Yarn*, *supra* note 99, ¶ 74.
[138] *US — Tyres (China)*, *supra* note 104, ¶ 7.15.
[139] *See, e.g.*, *US — Softwood Lumber VI*, *supra* note 102, ¶ 91. In this case, even when a panel is reviewing a national investigating authority's injury determination under both SCM Agreement and Anti-dumping Agreement at the same time, the Appellate Body does not require separate finding that applies different standard of review under different Agreements, even though in theory the Anti-dumping Agreement requires a specific standard of review provision.
[140] *See* Spamann, *supra* note 111, at 527-33 (analyzing that the substantive rules of the relevant agreements form the basis of the standard of review in the WTO case law with regard to areas of safeguards and countervailing duties).
[141] *US — Contervailing Duty Investigation on DRAMs*, *supra* note 102, ¶ 186.
[142] *Id.*

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This requirement of national explanation is similarly applicable in other areas of legal provisions that require a national decision. For SPS Agreement, regarding the applicable standard of review of risk assessment conducted by the responding Member, in the *Hormones Suspension* case, the Appellate Body has held that, first, the reviewing panel must "identify the scientific basis" underlying the SPS measure.[143] Second, the panel must "verify that the scientific basis comes from a respected and qualified source."[144] Third, the panel has to assess "whether the reasoning articulated on the basis of the scientific evidence is objective and coherent."[145] "The Appellate Body explained that this means that the panel should review whether the particular conclusions drawn by the Member assessing the risk find sufficient support in the scientific evidence relied upon."[146] Finally, the panel must "determine whether the results of the risk assessment 'sufficiently warrant[s]'" the SPS measure at issue.[147] Even though the SPS Agreement does not provide detailed procedural requirement on domestic investigation, the requirement of explanation from domestic authority is very similar to the review standard in the trade remedy cases, in which the panel should review whether the competent authority provided reasoned and adequate explanation regarding their factual and legal conclusions. Even though the Appellate Body did not describe this review as a formal aspect and a substantive aspect, the review structure mandated by the Appellate Body similarly require the existence of a risk assessment and an objective and coherent reasoning from the Member taking the SPS measure with regard to the basis of the decision.

In the *Australia — Apples* case, the Appellate Body provided the minimum requirement for the importing Member's "reasoning articulated on the basis of the scientific evidence" to be "objective and coherent."[148] The Appellate Body further defined this standard as "the particular conclusions drawn by the Member . . . find sufficient support in the scientific evidence relied upon."[149] This standard can find its counterparts in panel scrutiny of domestic investigating authorities' explanations in trade remedy cases. But unlike trade remedy rules, the SPS Agreement does not contain explicit and detailed procedural requirement, nor does the

[143] *US — Continued Suspension*, *supra* note 122, ¶ 591.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.* (citing *EC — Hormones*, *supra* note 86, ¶ 193).
[148] *Australia — Apples*, *supra* note 124, ¶ 214 (citing *US — Continued Suspension*, *supra* note 122, ¶ 591).
[149] *Id.* This is to be followed by and distinguished from the panel's determination of "whether the results of the risk assessment sufficiently warrant the challenged SPS measures." *Id.* ¶ 215 (citing *US — Continued Suspension*, *supra* note 122, ¶ 591, where the Appellate Body was referring to *EC — Hormones*, *supra* note 86, ¶ 193).

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Appellate Body explain the content of this standard or the legal basis for this standard.

As demonstrated in the Appellate Body's statements and the Panel's practice, the "objective and coherent" reasoning is a demanding standard. It is not simply a question of whether the risk assessor is objective, but also the "reasoning" has to be "objective and coherent." To determine whether the reasoning is "objective and coherent", the panel itself has to review whether the scientific evidence supports the particular conclusion made by the risk assessor. There is no meaningful restraint on the part of the panel when conducting this analysis. There is no requirement to respect the reasoning of the risk assessor. The national risk assessor does not enjoy any margin of discretion for its interpretation of scientific evidence.

In summary, the Appellate Body requires panels to conduct the following steps when determining appropriate standard of review:

(a) conduct an object of review analysis to determine whether *de novo* review should be excluded;

(b) once the panel decides that *de novo* review should be excluded, the panel review will consist of two parts: a formal aspect and a substantive aspect. This article argues that this analysis structure is applicable to security exception.

V. THE STANDARD OF REVIEW OF THE NATIONAL SECURITY EXCEPTION

Applying the above analysis, reviewing a panel's invocation of Article XXI(b)(iii) should be separated into two distinct elements, i.e.:

1. the necessity element — whether the Member considers the action necessary for the protection of its essential security interests, and
2. the timing element — whether the action is taken in time of war or other emergency in international relations. As stipulated above, the standard of review should be first determined by whether the substantive provision contains an explicit or implied national decision. As the two elements differ in this regard, the standard of review should be different.[150] Even though the two elements have different standards of review, the party invoking Art. XXI GATT carries the burden of proof that it has met both of these requirements.[151]

[150] Akande & Williams, *supra* note 33, at 385; Schloemann & Ohlhoff, *supra* note 44, at 445-46.

[151] Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 309, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005) ("It is well-established that a responding party invoking an affirmative defence bears the burden of demonstrating that its measure, found to be WTO-inconsistent, satisfies the requirements of the invoked defence.").

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A. The Necessity Element

With regard to the necessity element, the panel should exclude *de novo* review, as Member determination enjoys special status here. As the texts of subparagraph (b) indicates, a measure that can be justified under this subparagraph must be an action "which [the Member] considers necessary for the protection of its essential security interests." This element must be satisfied before the measure can be justified under subparagraph (b) under Article XXI. If the Member does not present this consideration to the panel, then the measure cannot be justified under the security exception. From this perspective, this is an element that needs to be satisfied for the security exception to be invoked.

The texts of the necessity element do not allow a panel reviewing this measure to conduct a *de novo* review. It is not the panel's task to conduct the necessity test as if the panel is reviewing a justification under GATT Article XX(a) or (b). It must be the Member who invokes the security exception to determine whether the measure is indeed necessary for the protection of its essential security interests. In this regard, Article XXI(b) is similar to legal provisions under trade remedy agreements that require a national investigation or the SPS Agreement that requires a risk assessment. The object of review should be the Member's decision process, not the underlying factual or legal situations.

Certainly, Article XXI(b) only asks for a "consideration" from a Member, and does not require a detailed procedure as in trade remedy agreements. But it is not the point here. The similarity lies in the role allocation between the invoking Member and the panel reviewing the measure. It should be noted that the SPS Agreement similarly does not require a specific procedure with regard to the needed risk assessment, but the Appellate Body nonetheless understood the legal provision as preventing a panel to conduct a *de novo* review. It should also be the case for the national security exception. For a measure to be justifiable under subparagraph (b), there must exist a consideration of a Member that satisfies the conditions of this subparagraph.

Not to conduct a *de novo* review, however, does not mean that the panel cannot conduct meaningful review. On the contrary, the Appellate Body has insisted that a review of this type should be conducted under two aspects—formal aspect and substantive aspect. Under the formal aspect, the panel should make sure that the formal aspect of the legal provision should be satisfied. In the context of subparagraph (b) of Article XXI, the panel should make sure that the Member does formally consider the measure at issue necessary for the protection of its essential security interests. If the Member refused to acknowledge that it has such considerations, then the measure cannot be satisfied under the formal aspect of review.

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Moreover, even if the Member insists that such consideration exists, it is not the end of the matter. The panel should continue to conduct the substantive aspect of the review. Under the WTO jurisprudence, a panel reviewing a Member's decision should review the explanation of the Member in order to make sure whether the requirements of the legal provision are satisfied, as required by Article 11 of the DSU. Under similar situations of trade remedy agreements and the SPS Agreement, the panel should review the explanation provided by the Member and should ensure that the decision process of the Member complies with the requirements of the legal provisions at issue—for example, whether the basis of the decision is legal, such as all relevant factors under Article 4.2(a) of the Agreement on Safeguards or scientific evidence under Article 5.2 of the SPS Agreement.

The necessity element under subparagraph (b) of Article XXI differs from trade remedy agreements or risk assessment under the SPS Agreement in that the security exception does not provide any requirement on the basis for the national decision. In this regard, a Member invoking the security exception does not need to be restricted to a particular type of evidence as required under those agreements. However, the freedom with regard to the basis of the decision does not prevent a panel from reviewing the decision. It simply means that the provision allows the flexibility for the Member invoking the exception due to the sensitivity of the subject covered by the provision.

Therefore, the Member invoking security exception under subparagraph (b) needs to provide an explanation regarding the consideration.[152] The Member would have to explain how the interests it sought to protect is its "essential security interests" under the meaning of Article XXI, and explain the basis of its consideration that the measure satisfies the necessity requirement.[153] This is a low threshold, as there is no requirement for the Member invoking security to "prove" necessity. Instead, the Member only needs to demonstrate that it truly "consider" that the necessity exists.[154] However, for a panel to conduct an objective assessment under DSU Article 11, and to ensure that the consideration truly exists, a sufficient explanation from the Member is required. The panel is therefore able to review the explanation, and if the explanation is not sufficient to support a true consideration of necessity, the measure must be considered not justifiable under subparagraph (b) of Article XXI GATT.

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[152] *See* Hahn, *supra* note 23, at 605 (arguing that the acting State should supply sufficient facts as it has a "duty to justify").

[153] *See* VAN DEN BOSSCHE & ZDOUC, *supra* note 46.

[154] *See* Akande & Williams, *supra* note 33, at 392 (arguing that a member invoking national security exception must "genuinely believe" the necessity of the measure for the protection of its essential security); Peng, *supra* note 45, at 472.

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With regard to whether the interests the Member invoking the security exception seek to protect an acceptable "essential security interests", for the same reason stated above, this paper argues that a panel should refrain from making *de novo* determinations.[155] A necessity test reserved for the Member to make cannot be conducted without the Member making its own determination on whether the protected interests belong to its essential security interests. The reviewing panel, however, is able to review the explanation provided by the invoking Member together with the review of the necessity element.

Certainly, this reviewing structure does provide a high level of deference for the Member invoking security exception under Article XXI(b)(iii), and the Member enjoys a high margin of discretion in its decision. But this deference is not absolute. As the burden of proof lies on the Member invoking the exception, if there is sign of abuse of the discretion, the panel still has the power to refuse to accept the explanation. Therefore, the term "self-judging" is a misleading one. The "judgment" of the Member is still subject to judicial review, albeit a loose one. A critical issue that remains is when should a panel consider the invoking Member is exceeding the discretion allowed under the security exception, and this threshold of judicial intervention will be discussed below.

B. The Threshold of Judicial Review for the Necessity Element

It should be noted that the analytical framework developed under the WTO jurisprudence discussed above does not contain a universal threshold of judicial intervention that is applicable to all cases. After all, different legal provisions afford different level of margin of discretion for each WTO Member. WTO tribunals need to develop specific threshold of judicial intervention for cases that require exclusion of *de novo* review. The standard reflects the required quality of national decision, the lack of which would suggest a need for judicial intervention. This standard would decide the margin of discretion afforded to Members in each type of cases.

It is a delicate task for the WTO adjudicating bodies to develop the margin of discretion afforded to WTO Members. WTO tribunals should respect the purpose of the discretion afforded to invoking Members under the security exception, which is to preserve the treaty-mandated role of national authorities to make security-related policy decisions without worrying about being second-guessed by WTO tribunals, even when legal provisions do not provide explicit parameters for intensity of review.

This paper suggests that the standard for national security exception should be a lenient one. As the legal provision does not provide any

[155] *See* Akande & Williams, *supra* note 33, at 399-400.

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procedural requirement or basis for the consideration, and only minimum requirement could be imposed on the Member's consideration. This paper therefore suggests that an abuse of discretion standard should be adopted for reviewing necessity element under Article XXI(b)(iii). The doctrine of *abus de droit* is recognized by the Appellate Body as an application of the principle of good faith, a general principle of law and a general principle of international law that "controls the exercise of rights by states."[156] The Appellate Body held that "[a]n abusive exercise by a Member of its own treaty right . . . results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting."[157] This could be considered as a minimum requirement for a Member exercising its rights under security exception. Even though the treaty texts do not explicitly provide this obligation, it should be the minimum requirement of the Member's necessity consideration. Accordingly, if a panel reviewing the measure considers that the Member invoking the exception abuses the discretion in a particular case, the measure cannot be justified under the security exception. For example, a Member that adopts a trade measure that aims for pure commercial reasons could be considered abusing its discretionary rights and cannot invoke Article XXI(b)(iii).

C. The Timing Element

With regard to the timing element, excluding *de novo* review is unnecessary. The phrase "taken in time of war or other emergency in international relations" qualifies the phrase "any action" in subparagraph (b), and is parallel to the phrase "which it considers necessary for the protection of its essential security interests."[158] This part of the legal provision does not contain a national investigation or determination, and the role of the panel is therefore different from the necessity element under the security exception. In other words, the timing element is an objective element that should be demonstrated separately, in addition to the necessity element. This element is therefore fully reviewable by the panel. The timing element is accordingly the strongest safeguard against misuse of the exception.

Together with the review of the timing element, the abuse of discretion standard under the necessity element should be sufficient to prevent abuse of the security exception. If a measure is indeed taken during the time of

[156] Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 158, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).
[157] *Id.*
[158] *See, e.g.*, Akande & Williams, *supra* note 33, at 399-400; Hahn, *supra* note 23, at 590-91; Peng, *supra* note 45, at 464.

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war or emergency recognized by a panel, as long as there is no abuse of discretion in the necessity consideration, the measure should be considered justifiable under Article XXI(b)(iii).

VI. A PRELIMINARY OBSERVATION ON A POTENTIAL REVIEW OF A SECTION 232 MEASURE

At the time of writing, the Trump Administration's steel investigation under Section 232 of the Trade Expansion Act has not been finalized and published. Whether the investigation would lead to a measure that is inconsistent with the legal provisions of GATT 1994 is not known. At this stage, it is premature to review whether the measure, if it is eventually adopted by the United States, can be justified under Article XXI(b)(iii) exception. This paper, however, would like to take the opportunity to make a preliminary observation on the provisions of Section 232 and its impact on a potential panel review of a measure adopted under the Section. In particular, the following discussion focuses on how would a potential Section 232 measure be able to invoke Article XXI(b)(iii) from the perspective of the standard of review discussed in this paper.

A. The Section 232 Investigation

The purpose of a Section 232 investigation is to determine the effect of imports of any article on the U.S. national security.[159] The investigation is conducted by the U.S. Secretary of Commerce.[160] The Secretary of Commerce is required to consult with the Department of Defense regarding the methodological and policy questions that arise during the investigation.[161] After concluding the investigation, the Secretary of Commerce will present the Department's findings and recommendations to the U.S. President for action or inaction regarding an adjustment of the imports of article.[162] If the Secretary finds that "an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security,"[163] the President shall determine whether he concurs with the finding.[164] If so, the President shall "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security."[165]

[159] 19 U.S.C. § 1862(a).
[160] *Id.* § 1862(b).
[161] *Id.* § 1862(b)(2).
[162] *Id.* § 1862(b)(3)(A); 15 C.F.R. § 705.2.
[163] 19 U.S.C. § 1862(c)(1)(A).
[164] *Id.* § 1862(c)(1)(A)(i).
[165] *Id.* § 1862(c)(1)(ii).

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1. National Defense Requirements — To determine the effect of imports on the national security, the Department of Secretary "shall consider the quantity of the article in question or other circumstances" related to it.[166] A key consideration of the determination is the effect of the imports on the satisfaction of national security requirements.[167] The national security requirements shall be considered in light of the following factors: domestic production needed for projected national defense requirements, the capacity of domestic industries to meet projected national defense requirements, the existing and anticipated availabilities of human resources, products, raw materials, production equipment and facilities, and other supplies and services essential to the national defense, the growth requirements of domestic industries to meet national defense requirements and the supplies and services including the investment, exploration and development necessary to assure such growth, and any other relevant factors.[168] These factors direct the Secretary to focus its investigation on "the national defense requirements", the fulfillment of which is required in order, for example, to sustain the military defense of the U.S. homeland, or the ability to project U.S. military capabilities globally.[169] The Department of Commerce has defined such defense requirements by projected needs estimated by Department of Defense.[170] It should be noted, however, that the Section 232 investigation is not limited to strict view of national security. Even when the projected needs estimated by Department of Defense can be satisfied, the Section 232 investigation could still lead to a conclusion that the threats to the national security exists.[171]

2. General Economy and Critical Industries — In addition to the military or "national defense" component, Section 232 includes consideration with regard to general national economy. The Section directs the Secretary to "recognize the close relation of the economic welfare of the Nation" to national security.[172] This is based on the idea that there exists a "close relation between" the strength of the national economy and the capacity of the United States to meet national security requirements.[173] Therefore, the investigation would also look into whether the imports have caused the weakening of the internal economy, and if so, whether the

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[166] *Id.* § 1862(d); 15 C.F.R. § 705.4.
[167] 15 C.F.R. § 705.4.
[168] *Id.*
[169] U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF IRON ORE AND SEMI-FINISHED STEEL ON THE NATIONAL SECURITY 5 (Oct. 2001) [hereinafter THE IRON ORE & STEEL REPORT].
[170] *Id.* at 5; U.S. DEP'T OF COMMERCE, THE EFFECT ON THE NATIONAL SECURITY OF IMPORTS OF CRUDE OIL AND REFINED PETROLEUM PRODUCTS, at II-14 (Nov. 1999) [hereinafter THE 1999 CRUDE OIL REPORT].
[171] *See* THE 1999 CRUDE OIL REPORT, *supra* note 170, at II-14, II-17.
[172] 19 U.S.C. § 1862(d).
[173] 15 C.F.R. § 705.4(b).

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weakening of the economy impairs the national security.[174] Accordingly, with regard for the quantity, availability, character, and uses of the imported article, the Department of Commerce shall consider the following factors: the impact of foreign competition on the economic welfare of any domestic industry essential to U.S. national security, the displacement of any domestic products causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects, and any other relevant factors that are causing or will cause a weakening of U.S. national economy.[175] Indeed, the legislative history indicates that some members of the Congress considered that certain domestic economic concerns beyond more strict defense ones should be covered by the term "national security." [176] Department of Commerce therefore could also interpret the term "national security" more broadly to include the general security and welfare of certain industries that are critical to the minimum operations of the economy and government ("critical industries").[177]

3. To Determine that the Imports Threaten to Impair the National Security: The Dependence Risk and the Industry Risk — Section 232 does not provide specific elements for the determination of whether imports threaten to impair the national security. Previously, the Department of Commerce has identified two major risks that could be created by such threats: (1) the dependence risk—the imports create the risk by fostering dependence on unreliable or unsafe imports, and (2) the industry risk—the imports create the risk by fundamentally threatening the ability of U.S. domestic industries to satisfy national security needs.[178]

With regard to the dependence risk, the Department of Commerce has previously considered whether such threat exists by examining if the United States is "excessively dependent on imports from unreliable or unsafe sources, and thereby is vulnerable to a supply disruption."[179] This view has been adopted in cases where the effect of imports of crude oil and refined petroleum products.[180]

With regard to the industry risk, the Department of Commerce has also considered that imports can threaten to impair U.S. national security "if they fundamentally threaten the viability of U.S. industries and resources

[174] 19 U.S.C. § 1862(d).
[175] 15 C.F.R. § 705.4(b).
[176] THE IRON ORE & STEEL REPORT, *supra* note 169, at 5 ("*See, e.g.*, S. Rep. No. 85-1838, at 12 (1958).").
[177] *Id.* at 5.
[178] *Id.* at 7.
[179] *Id.* at 6.
[180] THE 1999 CRUDE OIL REPORT, *supra* note 170, at ES-4 to ES-5.

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needed to produce domestically goods and services necessary to ensure U.S. national security."[181]

It should be noted that the two types of risks are not mutually exclusive or exhaustive. Accordingly, the Section 232 investigation could review both risks to determine whether the threats to the national security exists.

B. Section 232 Investigation and GATT Article XXI(b)(iii)

Assuming that the Section 232 investigation currently conducted by the Trump Administrative does lead to a trade restrictive measure that is inconsistent with the United States' obligations under the GATT 1994, and Article XXI(b)(iii) is invoked in a WTO dispute settlement before a panel, whether the United States could justify the invocation becomes essential. Article XXI(b)(iii) does not require a Member invoking national security exception to conduct a specific investigation. Therefore, the procedure or the consideration contained in the Section 232 investigation, by itself, does not affect whether an invocation of Article XXI(b)(iii) can be justified. However, it may be useful to examine elements needed to be satisfied for a successful invocation of the national security exception under the GATT. As stipulated above, a Member invoking Article XXI(b)(iii) needs to satisfy both the necessity element and the timing element. Below the paper analyzes these two elements in turn.

1. The necessity element — A panel reviewing the necessity element under an invocation of Article XXI(b)(iii) should conduct the review under two aspects—formal aspect and substantive aspect. With regard to formal aspect, the United States would have to demonstrate that, as a formal matter, it considers the measure at issue necessary for the protection of its essential security interests. As it is only a formal review, it would not be hard for the United States to satisfy this aspect of panel review.

With regard to the substantive aspect of panel review, the United States needs to explain how the interests it sought to protect is its "essential security interests" under the meaning of Article XXI, and explain the basis of its consideration that the measure satisfies the necessity requirement. The United States needs to demonstrate that it truly considers that the necessity exists. With regard to the threshold of judicial intervention, this paper argues that the explanation would not be acceptable if the reviewing panel considers that the invocation of the security exception constitutes abuse of discretion.

Specifically, the United States needs to explain that the interests it sought to protect falls under "essential security interests" within the

[181] U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF GEARS AND GEARING PRODUCTS ON THE NATIONAL SECURITY, at IX (1992) (review gear industry's ability to meet national security gear requirements); THE IRON ORE & STEEL REPORT, *supra* note 169, at 7.

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meaning of Article XXI. In addition, the United States is required to explain the basis of its necessity consideration. The panel is suggested to review the above explanation as a whole with the standard of abuse of discretion. The explanation would allow a panel to determine whether a true consideration of essential security interests exists, or, instead, the invocation is simply an abuse of discretion that does not warrant a justifiable invocation of the security exception. For example, the United States would need to explain how it considers that the imports threaten its national defense requirements or that the imports fundamentally threaten the ability of U.S. domestic industries to satisfy national security needs in order to invoke Article XXI(b)(iii).

2. The timing element — As previously discussed, in addition to, and separate from, the necessity element, the United States would also have to demonstrate that the measure is taken in time of war or other emergency in international relations in order to invoke Article XXI(b)(iii). A panel would review this element *de novo*. Here, a panel shall interpret the legal provisions and act as a fact finder to determine whether the timing element is satisfied.

Section 232 does not require the existence of war or other emergency in international relations. Therefore, in order for the United States to justify a potential violation of its GATT obligations, it would have to separately ensure that the measure is only taken under this condition.

3. Concluding remarks — Article XXI(b)(iii) is not a self-judging exception that is totally free from panel review. As discussed, the legal provisions of Section 232 do not contain sufficient procedural safeguard to meet the requirements of panel review under Article XXI(b)(iii) of GATT 1994. It is therefore important for the United States to ensure the conditions of the security exception under the GATT is satisfied before an action pursuant to Section 232 is adopted.

VII. CONCLUSION

The abuse of the security exception could undermine the stability of the multilateral trading system. However, an overly intrusive review standard could also have an adverse effect on the system. Measures taken for security reasons inherently involve political questions. Because of the political nature of the issue, there may be more potential for WTO Members to act in a way that destabilizes the credibility of the WTO dispute settlement system. A proper standard of review could help WTO tribunals deal with these inevitable political challenges. There is the need for clear and concrete rules for the standard of review. This standard will also have to strike a proper balance between the contractual nature of the

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WTO treaties and the reserved regulatory sovereignty reflected in the legal provisions.

This paper argues that the term "self-judging" that is often used to describe national security exception is misleading. The analytical framework of the standard of review should be utilized when dealing with this issue. Under the standard of review structure established under the WTO jurisprudence, the Member invoking the national security under Article XXI(b)(iii) is entitled to a high level of deference, but this deference is not absolute. The necessity consideration is still subject to panel review consisting of both formal and substantive aspect. In addition, the timing element is subject to full panel review. There is, however, still the need for the WTO adjudicating bodies to further develop the margin of discretion with regard to the national security exceptions. This paper suggests that a standard of abuse of discretion should be adopted for the review of the necessity consideration under Article XXI(b)(iii).

The legal provisions of Section 232 do not contain sufficient procedural safeguard to meet the requirements of panel review under Article XXI(b)(iii) of GATT. It is therefore important for the United States to ensure the conditions of the security exception under the GATT is satisfied before an action pursuant to Section 232 is adopted.

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