NATIONAL SECURITY EXCEPTION IN INVESTMENT TREATY ARBITRATION AND WTO DISPUTES: SETTLEMENT IMPLICATIONS FOR CHINESE STEEL & ALUMINUM

DR. LE THI ANH NGUYET

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I. INTRODUCTION

The national security exception is an escape clause for countries to temporarily derogate from the international obligations incurred from international agreements that the countries have acceded to. The exception is incorporated in International Investment Agreements (IIAs), the General Agreement on Tariffs and Trade 1994 (GATT 1994) and customary international law. In practice, the adjudicators reiterate that the national security exception covers not only military security but economic security as well. In some jurisdictions, State-Owned Enterprises (SOEs) are provided governmental subsidies, which may be actionable or non-actionable in accordance with the GATT/WTO Agreements and rulings of the Appellate Body. The subsidized SOE engages in its business activities in national security-related industries, and this is deemed to cause many trade distortions for international trade and investment.

However, the IIAs, GATT 1994, and World Trade Organization (WTO) Agreements are underdeveloped and have undervalued the trade distortions caused by subsidized SOE's investments. The regulations are rarely promulgated or enforced on the SOE's activities. In addition, the investment arbitral tribunals and WTO Dispute Settlement Bodies (DSBs) have inconsistently interpreted the legal standing of SOEs. For example, the investment tribunal recognizes that an SOE performs either commercial or governmental functions or both, depending on their national regulations and their actual functions in a particular investment. In practice, the SOE faces a potential conflict between engaging in economic activities that serve the competitive interest of the enterprise versus activities that benefit the non-economic goals of a foreign government,[1] including but not limited to, corporate espionage to achieve the national security interest of a foreign

* Senior Consultant of Arbitri & Dr. Le, Member of Scientific Council of Vietnam International Arbitration Center (the "**VIAC**").

[1] James K. Jackson, CONG. RSCH. SERV., RL33388, The Committee on Foreign Investment in the United States (CFIUS) 7 (2017).

government.[2] However, the criteria for the determination of the commercial or governmental function are not clear. Especially, where an SOE invests in essential industries of a hosting country (e.g., energy, semi-conductors, rare minerals), the determination of whether the SOE performs commercial or governmental functions is very challenging. The challenges are even more imminent when the SOE has been privatized and its government invokes a national security exception, among other exceptions, to justify the SOE's alleged violations.

Until now, Argentina has been the most frequent user of the national security exception incorporated in Article XI of the U.S. – Argentina bilateral investment treaty (U.S. – Argentina BIT), among other exceptions, to justify its alleged violations. The Argentinian government reasons that the national security exception in Article XI of the U.S. – Argentina BIT is a self-judging clause, and that Argentina has full discretion to determine which situations affect its national security (including, but not limited to, economic security). Following that, Argentina should be eligible to adopt any measure that it thinks is appropriate to protect its national security. The investment arbitral tribunals adopt different approaches to interpret the self-judging national security exception. Consequently, the interpretation of investment arbitral tribunals on the national security exception is inconsistent.

Like IIAs, the GATT/WTO agreements have not defined the term "SOE." Notably, the agreements do not prohibit the WTO members from incorporating a new SOE or maintaining the existence of an SOE, even if the SOE operates in a financially uneconomical manner. According to the Subsidy and Countervailing Measures Agreement (SCM Agreement),[3] WTO members are obliged to eliminate export subsidies (per Article 3), and the exported subsidized goods shall be subject to countervailing duties if they are imported into other WTO members (per Article VI.3,

[2] *Id.*
[3] *See* WTO Agreement: On Subsidies and Countervailing Measures (SCM Agreement) Apr. 15, 1994, 1867 U.N.T.S. 14 (1994).

VI.4, VI.5, VI.6 GATT 1994[4] and Article 19 of the SCM Agreement).[5] The SCM Agreement allows WTO members to provide domestic subsidies for its enterprises, both SOE and privately-owned (Article 5.6 and Article 8.7). If the domestic subsidy causes adverse effects on the imports of another WTO member in the subsidizing WTO member, the subsidizing member shall bring the domestic subsidy program into conformity with their obligations (Article 19, 22 of Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU)).[6] However, the WTO members shall not be obliged to eliminate the domestic subsidy due to its non-prohibitive nature. Notably, the remedies shall not be applied to the investment of the subsidized SOE because GATT 1994 and the SCM Agreement do not regulate trade in services, including investment. Until now, if the domestically subsidized SOE invests in national security-related industries, through either inbound or outbound investments, the adverse effects caused by that investment and the national security of other countries remained unregulated.

Article XXI GATT 1994 allows WTO members to invoke the national security exception to justify their failures to comply with a commitment under the GATT/WTO agreements. However, the interpretation of this article by the WTO DSB is not robust and developed. Some WTO members, including the U.S., reiterate that Article XXI GATT 1994 is self-judging. As a result, like Argentina, the U.S. exercises complete discretion to decide whether their allegedly unlawful measures are adequate to protect its national security. In December 2022, the Panel in United States-Certain Measures on Steel and Aluminum Products (China)[7] objected to the U.S. interpretation of national security situations against steel and aluminum originating from China and other countries. The Panel

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[4] *See* General Agreement on Tariffs and Trade 1994 (GATT 1994) art. 6, Apr. 15, 1994, 1867 U.N.T.S. 190 (1994).
[5] *See* Agreement on Subsidies and Countervailing Measures (SCM Agreement) art. 19, Apr. 15, 1994, 1867 U.N.T.S. 14 (1994).
[6] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 19, 22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter "DSU"].
[7] Panel Report, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS564 (adopted Dec. 9, 2022).

further advised that the increased U.S. tariffs on Chinese steel and aluminum were inconsistent with multiple obligations including those under Article I.1, XI.1 GATT 1994, and were not justified by Article XXI GATT 1994. However, on January 26, 2023, the U.S. appealed the Panel's recommendation.[8] This appeal has the effect of blocking implementation of the ruling because the Appellate Body has not been able to function since December 2019 due to ongoing vacancies, and prolonged by WTO Members not being able to reach a consensus to fill the outstanding vacancies.[9]

It is noteworthy that the number of disputes in which the DSB interprets the national security exception in Article XXI GATT 1994 is more limited than the number of disputes that the Investment Treaty Arbitration (ITA) has pursued. This article analyzes the ITA's rulings on the national security exception invoked by Argentina. Then, it suggests a threshold for applying the national security exception for the U.S. measures against Chinese-produced steel in United States-Certain Measures on Steel and Aluminum Products.

The article includes three main parts. First, it analyzes the current legal standing of the SOE in ITA and WTO dispute settlements. Next, it examines the relevant jurisprudence of the national security exception in interpreting Article XI of the U.S. – Argentina BIT. Finally, it proposes an interpretation of self-judging and national security of Article XXI GATT 1994 for steel in United States-Certain Measures on Steel and Aluminum Products.

II. LEGAL STANDING OF THE STATE-OWNED ENTERPRISE

A. IN INVESTMENT TREATY ARBITRATION

As previously stated, the term SOE has not been officially defined in IIAs. The definition varies from one agreement to another. The Organization for Economic Cooperation and

[8] WORLD TRADE ORG., Dispute Settlement: Appellate Body, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm#fnt-1 (last visited Feb. 27, 2024).
[9] Appellate Body Report, *Annual Report for 2019-2020*, 7, WTO Doc. WT/AB/30 (2020).

Development (OECD) states that an SOE is an enterprise in which the state is the ultimate beneficial owner of the majority, and even the minority in some circumstances, of voting shares,[10] performing both public policy[11] and/or the commercial objectives of their domestic economy.[12] According to the OECD, sixteen percent of more than 1800 treaties include and/or define state-owned enterprises, state-owned investment funds and government in the terminology of investors of other contracting members.[13]

Many international investment treaties recognize the SOE functions as an investor. Some treaties permit governments to qualify as investors in investment disputes.[14] To name but a few, NAFTA,[15] USMCA,[16] and CPTPP[17] classify SOEs as foreign investors, even though the treaties have not defined the term. However, other treaties exclude SOE from the definitions of foreign investors.[18] For example, the Panama-United Kingdom BIT states that "companies mean all those juridical persons constituted in accordance with the legislation in force in Panama . . . which have

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[10] ORG. FOR ECON. COOP. AND DEV., STATE-OWNED ENTERPRISES AS GLOBAL COMPETITORS: A CHALLENGE OR AN OPPORTUNITY? 18 (2016).
[11] *Id.*
[12] *Id.* at 27.
[13] YURI SHIMA, THE POLICY LANDSCAPE FOR INTERNATIONAL INVESTMENT BY GOVERNMENT-CONTROLLED INVESTORS: A FACT FINDING SURVEY (2015).
[14] Mark Feldman, *State-Owned Enterprises as Claimants in International Investment Arbitration*, 31 ICSID REV. 26, 26 (2016).
[15] North American Free Trade Agreement, art. 1139, ec. 17, 1992, 32 I.L.M. 289 (noting that "disputing investor means an investor that makes a claim under section B … [E]nterprise of a Party mean[s] an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carry out business activities there…. [An] Investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.").
[16] *See* Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada art. 1.5, Mex.-U.S., July 1, 2020, OFF. OF THE U.S. TRADE REPRESENTATIVE (noting that "enterprise means an entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association or similar organization…state enterprise means an enterprise that is owned, or controlled through ownership interests, by a Party").
[17] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 9(1), NZTS 10 (2018) (N.Z.) (noting that "investor of a Party means a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party… [An] enterprise means an enterprise as defined in Article 1.3 (General Definitions), and a branch of an enterprise …. [E]nterprise of a Party means an enterprise constituted or organized under the law of a Party, or a branch located in the territory of a Party and carrying out business activities there enterprise of a Party means an enterprise constituted or organized under the law of a Party, or a branch located in the territory of a Party and carrying out business activities there.").
[18] *See* Feldman, *supra* note 14, at 26. (citing Panama BITs with Germany (in German and Spanish) and Switzerland (in French).

their domicile in the territory of the Republic of Panama, excluding state-owned enterprises."[19]

Countries generally define SOEs differently and are silent on whether SOEs are foreign investors and/or governmental agencies. For example, Canada defines an SOE as a corporation that is wholly owned, directly or indirectly, by the government.[20] The U.S. has not used the term SOE in its regulations, although a range of entities linked to the federal government exist with varying degrees of government ownership, control, and participation in governance and funding. These include the Export-Import Bank, Amtrak, the Overseas Private Investment Corporation, the U.S. Postal Service, the Federal National Mortgage Association ("Fannie Mae"), and the Federal Home Loan Mortgage Corporation ("Freddie Mac").[21]

As another example, in Vietnam, the definition of SOE and the percentage ownership of the State in Vietnamese SOEs has changed significantly across time.[22] Namely, in the First Law on State Owned Enterprises of 1995, an SOE is noted as an economic organization of which the State owns its total charter capital. Namely, an SOE invests capital, establishes, and administratively manages its commercial activities or public activities for the purpose of carrying out its socio-economic objectives directed by the state.[23] After the ratification of the U.S.-Vietnam Bilateral Trade Agreement (BTA), Vietnam broadened the definition of SOE in the Law on SOE of 2003, and the number of Vietnamese SOEs increased afterward. Under the 2003 law, an SOE is an economic organization in which the State owns the entire charter capital, or holds the controlling shareholding or controlling capital contribution, and which is organized in the form of a state company, shareholding company, or limited liability company.[24] Next, the Law on SOEs of 2005 describes an

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[19] Panama – United Kingdom Bilateral Investment Treaty, art. 1(d)(i), Oct. 7, 1983, 1461 U.N.T.S. 141 (1983).
[20] Financial Administration Act, § 83(1) R.S.C., 1985, c. F-11.
[21] ORG. FOR ECON. COOP. AND DEV., STATE OWNED ENTERPRISES AND THE PRINCIPLE OF COMPETITIVE NEUTRALITY, 226 (2009).
[22] *See* LE THI ANH NGUYET, STATE-OWNED ENTERPRISE REFORMS IN THE TPP NEGOTIATION: IS IT A WIN-WIN FOR VIETNAM? 15-E-092 1, 17 (2015).
[23] Law on State Owned Enterprises, 2004 (Law No. 14-2003-QH11), art. 1 (Viet.).
[24] *Id.*

SOE as being an enterprise in which the state owns more than fifty percent of the charter capital.[25] Now, the prevailing regulation confirms that the SOE definition includes enterprises in which the state owns more than fifty percent of charter capital and total shares of voting rights.[26] The percentage of the state's ownership in SOEs fluctuated in Vietnamese regulations of SOEs due to the implementation of Vietnam's commitments under the BTA, the WTO Working Party Report on Vietnam's accession, the Trans-Pacific Partnership (TPP) and the Comprehensive and Progressive Agreement for the TPP (CPTPP). As a result, Vietnamese SOEs are equitized, not privatized,[27] with other domestic and foreign-owned enterprises. Until now, Vietnam has not indicated in its regulations that an SOE is a governmental authority.[28]

In practice, the SOEs of many countries have enjoyed privileges and favorable treatment that are not available to privately-owned enterprises by their governments in the form of, financing guarantees[29] and financially preferential treatment, among others.[30] They take important roles in domestic economies, even holding complete monopolies in some essential industries like mining, oil, gas, electricity, and communication. They also engage actively in international trade in the form of direct investment by incorporating wholly owned enterprises in other countries or portfolio investments by acquiring shares of other enterprises.[31] Therefore, SOEs as a practical manner distort, or at least threaten to distort, market practices.[32]

It is noteworthy that the Chinese government has provided a variety of subsidy programs

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[25] Law on Enterprises, 2005 (Law No. 60-2005-Qh11), art. 4, ¶ 22 (Viet.).
[26] Law on Enterprises, 2020 (Law No. 59-2020-QH14), art. 4 ¶ 11 (Viet.).
[27] Le, *supra* note 22, at 18.
[28] *See id.* (discussing how an SOE in Vietnam is owned in part by members of the Vietnamese government).
[29] *See id.* (illustrating loans from the Canadian government for aircraft production).
[30] Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Doc. WT/DS138 (adopted June 7, 2000) (noting that subsidies were granted to British Steel Corporation (BSC) before privatization in 1988).
[31] JEWALD SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT – NATIONAL, CONTRACTUAL AND INTERNATIONAL FRAMEWORKS FOR FOREIGN CAPITAL 10 (Oxford University Press 2013).
[32] ORG. FOR ECON. COOP. AND DEV., *supra* note 21, at 226; ORG. FOR ECON. COOP. AND DEV., STATE OWNED ENTERPRISES AND THE PRINCIPLE OF COMPETITIVE NEUTRALITY 226 (2009).

valued at billions of dollars for its SOEs under the "Going Abroad" policy and the "New Silk Road" initiatives to dominate their outbound investments in other regions and countries.[33] Some Chinese SOEs in steel and aluminum industries enlarged their investments in Africa. Other Chinese SOEs in similar raw materials increased their positions in Mongolia, Kyrgyzstan, Tajikistan, Uzbekistan, and Kazakhstan (in Asia) as well as Ecuador, Peru, Venezuela, Brazil, and Chile (in South America).[34] Still, other SOEs have enlarged their investments in high-technology industries in Europe and in power generation plants in Guyana, Ethiopia, Angola, Sudan, and Nigeria (in Africa).[35] Some other Chinese SOEs extended their investments in natural gas and coal power industries to Tanzania and Mozambique.[36] The Chinese SOEs have not only functioned as a tool to resolve the energy shortages in China but also for economic espionage in the hosting countries where SOEs are expected to buy unprofitable target foreign firms for geopolitical reasons.[37] Therefore, it is controversial to categorize Chinese SOEs as either foreign investors or Chinese governmental agencies.

In investment disputes relating to an SOE, the SOE's legal standing is problematic. In some cases, an SOE is found to perform *commercial* functions in its outbound foreign investments and, accordingly, shall establish the jurisdiction for investment arbitral tribunal in accordance with investment treaties. However, in other cases, an SOE represents *governmental* authorities because it executes governmental functions in disputing investment activities and/or transactions. In practice, the criteria to determine the *commercial* and/or *governmental* functions of an SOE have not been

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[33] ORG. FOR ECON. COOP. AND DEV., *supra* note 10, at 63.
[34] See Wenhua Shan, China and International Investment Law – Twenty Years of ICSID Membership, 7 Asian J. Int'l L. 1, 207 (2017) (describing how China Petroleum Corporation and Kazmunay gas jointly exploit a 2,220-kilometer oil pipeline between Atyrau in Kazakhstan and Xinjiang in China); ORG. FOR ECON. COOP. AND DEV., *supra* note 10, at 63.
[35] Wenhua Shan, China and International Investment Law – Twenty Years of ICSID Membership, 7 Asian J. Int'l L. 1, 207 (2017); ORG. FOR ECON. COOP. AND DEV., *supra* note 10, at 63.
[36] Wenhua Shan, *supra* note 35, at 207.
[37] ORG. FOR ECON. COOP. AND DEV., *supra* note 10, at 63.

incorporated in investment treaties. Rather, it is developed in customary international law.[38]

1. As An Investor in Investment Treaty Claims

IIAs were not originally designed to govern SOE investment.[39] Some investment agreements infer an SOE to be an investor that can theoretically be a claimant in investment disputes. This is because the definition of an investor in the agreements are blurry. The investor can be a privately-owned and/or state-owned enterprise as long as it is incorporated in accordance with the laws of the state. However, in practice, the investment tribunals may dismiss investment disputes raised by an SOE due to its *governmental* functions in the disputes. In *Impregilo v. Pakistan,* the tribunal considered whether an SOE which signed contracts with the Complainant was a state or private investor. The tribunal considered that the construction was much delayed due to the obstacles created by the local authority of Pakistan, not because the SOE signed the contract with the Complainant.[40] Consequently, it found that the Pakistan SOE was an autonomous corporate body that was legally and financially distinct from Pakistan.[41]

According to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID), "the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State."[42] The Centre has no jurisdiction to arbitrate disputes

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[38] INT'L LAW COMM., DRAFT ARTICLES ON STATE RESPONSIBILITY FOR INTERNATIONALLY WRONGFUL ACTS WITH COMMENTARIES, art. 5 (2001) ("The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the government authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.").
[39] Paul Blyschak, *State-Owned Enterprises and International Investment Treaties: When Are State-Owned Entities and Their Investments Protection*, 6 J. INT'L L. AND INT'L REL. 18 (2011).
[40] Impregilo S.p.A. ("Impregilo") v. Islamic Republic of Paki., ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶ 13 (Apr. 22, 2005).
[41] *Id.*, at ¶¶ 199-200.
[42] INT'L CENT. FOR SETTLEMENT OF INV. DISP., CONVENTION, REGULATION AND RULES, art. 25(1).

between two states; it also lacks jurisdiction to arbitrate disputes between two private entities.[43] Broches interprets a national of another Contracting State to include an enterprise owned by the government.[44]

> [T]here are many companies which combine capital from private and governmental sources and corporations all of whose shares are owned by the government, but who are practically indistinguishable from the completely privately owned enterprise both in their legal characteristics and in their activities. It would seem, therefore, that for purposes of the Convention, a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function.[45]

An SOE can initiate an investment claim against a hosting country when its investment has been executed. After the tribunal is established, it finds its jurisdiction by determining the legal standing of the SOE in the dispute based on the functions that the SOE performed in the investment. Notably, a state's ownership in an SOE does not always serve as a reliable indicator of performing governmental functions of a government agency, or being controlled by the state because a variety of voting leverage mechanisms can be used to provide certain shareholders with a disproportionate amount of decision-making power.[46] In *CSOB v. Slovak* the tribunal found that that CSOB (the SOE in that case) was publicly owned and operated for public purposes.[47] However, the tribunal reasoned that the focus must be on the *nature* of these activities and not their *purpose*.[48] Then, the tribunal further held that the continuous provision of banking services did not go so far as to transform the otherwise *commercial* or private transaction into a *governmental* one even if the

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[43] Emilio Agustin Maffezini ("Maffezini") v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶ 74 (Jan. 25, 2000).
[44] *See* Beijing Urban Construction Group Co. Ltd v. Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, ¶ 33 (May. 31, 2017) (referring to Aron Broches, the first Secretary-General of ICSID and one of principle drafters of the ICSID Convention).
[45] Aron Broches, Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction, 5 COLUM. J. TRANSAT'L INT'L L. 263, 265 (1966).
[46] Feldman, *supra* note 14, at 28.
[47] Ceskoslovenska Obchodni Banka, A.S. ("CSOB") v. Slovk. Republic, ICSID Case No. ARB/97/4, Objection to Jurisdiction, ¶ 15 (May 24, 1999).
[48] *Id.* at ¶ 20.

negotiation of Consolidation and Loan Agreements could be favorable to governmental interests.[49] The tribunal also asserted that the claimant's steps to solidify its financial position in order to attract private capital for its restricted banking enterprise during and post privatization, do not differ in their nature from measures taken by a private bank.[50] Consequently, CSOB was regarded as a private investor, not an agent of the state.[51]

Likewise, in *BUCG v. Yemen,* the tribunal still analyzed whether the claimant acted as an agent of its state, although it accepted that the Chinese government wholly owned BUCG.[52] According to *Yemen*, BUCG was an agent of the Chinese government, discharging governmental functions even in its ostensible commercial undertakings.[53] Yemen's complaint asserted it was acting in a *commercial* capacity and did not act under the direction or control of the Chinese government.[54] However, the tribunal determined that, during the tender-bidding and contract-dealing process, BUCG did not terminate the contract for any reason associated with the Chinese government's decisions or policies.[55] Therefore, the tribunal concluded that BUCG, even wholly owned by the Chinese government, was still a national of the contracting state within the meaning of the ICSID Convention.[56] BUCG is not an agent of the Chinese government; its contract termination decision originated from the failures to perform commercial services on an airport site to a commercially acceptable standard,[57] and not to exercise a Chinese governmental function in the project.[58]

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[49] *Id.* at ¶ 25.
[50] *Id.*
[51] *Id.* at ¶ 88.
[52] Beijing Urban Construction Group Co. Ltd v. Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, ¶ 32 (May. 31, 2017).
[53] *Id.* at ¶ 29.
[54] *Id.* at ¶ 30.
[55] *Id.* at ¶ 40.
[56] *Id.* at ¶ 147.
[57] *Id.* at ¶ 40.
[58] *Id.* at ¶ 43.

2. As a Governmental Authority in Investment Treaty Claims

In disputes where an SOE engages in inbound investment with other foreign investors in its own country, the investment tribunal determines whether the SOE has performed *governmental* or *commercial* functions in the investment. When found to perform governmental functions, *de jure* or *de facto*, the SOE is classified as a governmental authority of its home country.

In *Emilio Agustin Maffezini v. Spain*, the tribunal considered whether the state-owned entity of "Socieda para el Desarrollo Industrial de Galicia" ("SODIGA") that entered into a variety of contracts with the Claimant was an arm of Spain, and hence attributable to Spain.[59] Spain maintained, however, that SODIGA was a private commercial corporation established under the commercial laws of Spain and any governmental ownership did not alter the private commercial character of SODIGA.[60] This did not transform SODIGA into a state agency of Spain.[61] The tribunal reasoned that the significant ownership interest of Spain in SODIGA, increasing from fifty-one percent to eighty-eight percent of the capital,[62] was not sufficient to raise the presumption of an entity being an organ of the government.[63] Rather, the tribunal addressed the intention of the Spanish government when establishing SODIGA as a governmental agency approved by Spain's Ministry of Finance, and SODIGA's processes for receiving approval from Spanish authorities when investing in new enterprises, processing loan applications, and providing financing subsidies.[64] Therefore, the tribunal concluded that SODIGA could not be considered as having a c*ommercial* nature.[65] SODIGA was a state-owned entity acting on behalf of the Kingdom of Spain.[66]

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[59] Emilio Agustin Maffezini ("Maffezini") v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶¶ 71-72 (Jan. 25, 2000).
[60] *Id.* at ¶ 73.
[61] *Id.*
[62] *Id.* at ¶ 83.
[63] *Id.* at ¶ 84.
[64] *Id.* at ¶ 85.
[65] *Id.* at ¶ 86.
[66] *Id.* at ¶ 89.

Maffezini shows that the determination of governmental functions performed by an SOE is based not only on the regulations of an SOEs' home country but also those of international treaties to which the SOE's country had acceded. The SOE may still be found to execute *governmental* functions when its national regulations say the SOE is an enterprise, rather than a governmental agency, and the SOEs activities are subject to the enterprise law of that country. That said, the governmental confirmation of *commercial* functions in the regulations of an SOE's home country has not prevented the investment tribunal from finding that the SOE is a governmental authority. Consequently, the failures of the SOE's business activities result in a financial and reputational loss for its home country.

In the case of China, the Chinese SOEs' legal standing in international trade and investment is even more troublesome. The Chinese government has provided many financial incentives for its SOEs[67] that are raising concerns from many foreign governments.[68] In practice, many countries establish their investment reviews to screen the national security risks from foreign investments into their countries, including but not limited to Chinese investments. All G7 countries strengthened their investment review mechanisms in 2020.[69] China approved China's National Security Law in July 2015.[70] The law provides for a national security review and oversight mechanism to conduct a national review of foreign commercial investment.[71] Canada established the primary mechanism for reviewing foreign investment in Canada in 2015 (ICA) to determine whether they are likely to be of net benefit to Canada, and providing a mechanism for the review of investment by non-Canadians

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[67] James K. Jackson, CONG. RSCH. SERV., RL33388, The Committee on Foreign Investment in the United States (CFIUS) 36 (2017).
[68] *Id.* at 37.
[69] ORG. FOR ECON. COOP. AND DEV., FOSTERING ECONOMIC RESILIENCE IN A WORLD OF OPEN AND INTEGRATED MARKETS: RISKS, VULNERABILITIES AND AREAS FOR POLICY ACTION, ¶ 147 (2001); ORG. FOR ECON. COOP. AND DEV., OWNED ENTERPRISES AND THE PRINCIPLE OF COMPETITIVE NEUTRALITY, 226 (2009).
[70] Jackson, *supra* note 67, at 34.
[71] *Id.*

that could be injurious to its national security.[72] Accordingly, a non-Canadian seeking to acquire control of an established Canadian business valued at or above a certain threshold must apply for a review of that acquisition.[73] By the same token, the EU established its investment review mechanism, which has limited Chinese SOE investments to maintain a level playing field for its own enterprises.[74]

Likewise, the U.S., in November 2012, issued a report detailing concern over Chinese investment and the "potential economic distortions and national security concerns arising from China's system of state-supported and state-led economic growth."[75] The U.S. has also established the Committee on Foreign Investment in the United States ("CFIUS") to review foreign investments, including but not limited to investments by Chinese SOEs, based on the potential for a national security threat. In 2016, Chinese state-owned ChemChina notified CFIUS of its proposed acquisition of the Swiss seed and chemical company Syngenta for $43 billion in cash, which would make it the largest acquisition by a Chinese firm.[76] The CFIUS also recommended that the U.S. President block many foreign investments. In early 2011, President Obama blocked the acquisition of the 3Leaf System by Huawei Technologies over national security concerns.[77]

In another context, the U.S. Congress amended the Foreign Sovereign Immunities Act 1976 (FSIA 1976) to differentiate *governmental* functions from *commercial* ones implemented by SOEs. Accordingly, Chinese SOEs are required to waive any potential claim of sovereign immunity if they do business in the U.S.[78] To combat this, Chinese SOEs are seeking to evade legal action by invoking

[72] GTH v. Canada, ICSID Case No. ARB/16/16, Award, ¶ 609 (Mar. 27, 2020).
[73] *Id.*
[74] Eur. Ct. of Auditors, The EU's Response to China's State-Driven Investment Strategy, 15 (2020).
[75] Jackson, *supra* note 67, at 38.
[76] *Id.* at 31.
[77] *Id.* at 25.
[78] U.S.-China Econ. and Sec. Rev. Comm'n, 2017 Annual Report to the 115th Congress, 73 (2017).

their status as foreign government entities under FSIA 1976.[79]

B. GATT/WTO REGULATIONS AND JURISPRUDENCE EFFECTS

1. GATT/WTO Regulations

Like IIAs, the GATT/WTO agreements have also not officially addressed SOE issues. The GATT/WTO regulations on SOEs are limited in scope and ambition.[80] Namely, the agreements neither mention nor define the term SOE, except for the term "state trading enterprises" in Article XVII GATT 1994. Accordingly, state trading enterprises, whether government-owned or privately-owned, are subject to the requirement that they act on a non-discriminatory, commercial basis in their dealings with private entities.[81] The state trading enterprises "shall act in a manner consistent with the general principles of nondiscriminatory treatment under the GATT and shall make purchases solely in accordance with commercial considerations relating to factors such as price, quality, availability, and marketability."[82] In *Canada-Wheat,* the Appellate Body explained that until a complaining party proves that there has been a failure to act inconsistently with principles of non-discriminatory treatment, commercial considerations are not relevant.[83] The WTO members have discretion to define what an SOE is and they are not obliged to eliminate their SOEs.[84]

Regarding trade in goods, WTO members shall not provide export subsidies[85] and may grant

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[79] *Id.* at 86 (noting that "a foreign state shall not be immune from the jurisdiction of courts of the U.S. or of the States in any case … in which the action is based upon a commercial activity carried on in the U.S. by the foreign state; or upon an act performed in the U.S. in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the U.S. in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the U.S.").

[80] COAL. OF SERV. INDUS. & U.S. CHAMBER OF COM. GLOB. REGULATORY COOPERATION PROJECT, STATE-OWNED ENTERPRISES: CORRECTING A 21ST MARKET DISTORTION 13 (2011).

[81] *See* Le, *supra* note 22, at 17 (stating that state trading enterprises shall act in a manner accordant with nondiscriminatory practices under the GATT and shall make purchases in compliance with commercial considerations relating to promulgated factors).

[82] *See* General Agreement on Tariffs and Trade 1994 (GATT 1994) art. 18, Apr. 15, 1994, 1867 U.N.T.S. 190 (1994).

[83] *See* Appellate Body Report, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶ 145, WTO Doc. WT/DS276/AB/R (adopted Sept. 27, 2004).

[84] *See* Le, *supra* note 22, at 17 (stating that WTO body members have the discretion to define and SOE and are under no obligation to eliminate their SOE).

[85] *See* Agreement on Subsidies and Countervailing Measures (SCM Agreement) art. 3, Apr. 15, 1994, 1867 U.N.T.S. 14 (1994).

domestic subsidies for its enterprises with certain limitations.[86] First, the obligation of eliminating export subsidies is similarly applicable to all types of enterprises in the subsidizing country, regardless of whether the recipient enterprise is an SOE or privately-owned enterprise. For example, Article 3 in the SCM Agreement prohibits export subsidies, (e.g., export performance financial bonuses), and a WTO member is obligated to eliminate all export subsidy programs available to its own enterprises under Article VI, XVI GATT 1994. Where the subsidized export goods are imported to other countries, the authorities of the importing countries are eligible to impose countervailing duties in terms of additional import taxes on the goods.[87] Second, WTO members are eligible to maintain domestic subsidies as long as they are consistent with Articles 5 and 8 of the SCM; that is, they are not specific to a particular industry or industries. Put differently, the SCM Agreement does not require WTO members to eliminate non-export subsidy programs. The WTO members are at their discretion to adopt, renew, or terminate programs. The other WTO members affected can theoretically challenge domestic subsidy programs at the DSB because the domestic subsidy is inconsistent with the subsidizing country's obligation, causing adverse effects for the complaining country's products consumed in the subsidizing country.[88] However, other WTO members may instead bring national countervailing duty actions against domestically subsidized goods that do not meet the "generally available" non-specific rules of the SCM.

GATT/WTO Agreements only deal with the domestic or export subsidies and their correspondent remedies for trade in goods.[89] The remedies are similarly applied on all types of enterprises, without distinguishing whether the recipient of subsidies is an SOE or privately-owned

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[86] *See* Agreement on Subsidies and Countervailing Measures (SCM Agreement) art. 5, 8 Apr. 15, 1994, 1867 U.N.T.S. 14 (1994).
[87] *See* General Agreement on Tariffs and Trade 1994 (GATT 1994) art. 6, Apr. 15, 1994, 1867 U.N.T.S. 190 (1994).
[88] *See* General Agreement on Tariffs and Trade 1994 (GATT 1994) art. 6, Apr. 15, 1994, 1867 U.N.T.S. 190 (1994); Agreement on Subsidies and Countervailing Measures (SCM Agreement) art. 5, 8, 10, 19 Apr. 15, 1994, 1867 U.N.T.S. 14 (1994).
[89] *See* Le, *supra* note 22, at 17 (arguing that the GATT and other World Trade Organization agreements have only dealt with the domestic or export subsidies and their related remedies for trade in goods).

enterprise. The agreements neither regulate nor impose any specific remedies on any subsidized SOE's investment.

The remedies against subsidized goods are not applicable to subsidies granted in trade in services, including, but not limited to, investments.[90] Should a WTO member grant any subsidy to an SOE or confer any benefit to the SOE (regardless of whether it is performing any national security function), the WTO member is not subject to any remedies. Put differently, the WTO country can continuously grant subsidies to its SOE to make foreign investments in any other country, which might cause distortions to international trade and investment. Whether an SOE performs *governmental* or *commercial* functions and whether it triggers any national security threat to any countries, industries, or enterprises, through the resulting trade distortions and national security risks have yet to be addressed. The SOE's subsidized investments will continuously make it difficult for the enterprises of other countries to compete on a level playing field at home.[91]

2. Issues in GATT/WTO Jurisprudence

GATT/WTO agreements do not mention the terminology of SOEs. However, a definition of SOE can be inferred by Article XVII GATT 1994 as a state trading enterprise and public body in Article 1.1.(a) SCM Agreement. WTO members have discretion to regulate their own treatment of their SOEs as long as the SOE is not a public body under the terms of Article 1.1(a) of the SCM Agreement or where the SOE is a state trading enterprise and runs its activities under commercial consideration under Article XVII GATT 1994.

The WTO's jurisprudence sheds light on the interpretation of the public body of Article 1.1(a) GATT 1994 and, accordingly, an SOE may be interpreted under some circumstances as a

[90] MINISTRY OF ECON. TRADE, AND INDUS. REPORT ON COMPLIANCE BY MAJOR TRADING PARTNERS WITH TRADE AGREEMENTS – WTO, EPA/FTA, BIT 326 (2012).
[91] ROBERT E. LIGHTHIZER, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION 12 (2020).

public body and government authority. Notably, in *Korea-Commercial Vessels*, the DSB held that "an entity will constitute 'public body' if it is controlled by the state (or other public bodies)."[92] Likewise, in the *U.S.-Antidumping and Countervailing Duties from China*,[93] the U.S. affirmed an entity that was majority-owned by China's government was a public body. Accordingly, state-owned commercial banks of China are public bodies. The Panel denied the U.S.'s interpretation of a *per se* rule of majority government ownership in determining public bodies.[94] The Panel reiterated that a public body is an entity that is under state control and that ownership is highly relevant to the question of control.[95] At most, the Panel established that majority ownership would be sufficient to conclude that an entity was a "public body."[96] However, the Appellate Body addressed that both the government and public body terms suggested certain commonalities in the meaning of "government" in the narrow sense.[97] The performance of *governmental* functions and exercising the authority to perform such functions are core commonalities between government and public policy.[98] Consequently, the Appellate Body reversed that a public body was an entity that possessed, exercised, or was vested with governmental authority, because the entity has effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority.[99]

Many facets of the interpretation of a public body under the WTO have been criticized by the U.S.. First, the U.S. reasoned that this interpretation is not supported by any wording in the

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[92] Panel Report, *Korea–Measures Affecting Trade in Commercial Vessels*, ¶ 7.50, WTO Doc. WT/DS273/R (adopted Apr. 11, 2005).
[93] Panel Report, *United States–Definitive Anti-Dumping and Countervailing Duties On Certain Products From China*, ¶¶ 8.95-8.97, WTO Doc. WT/DS379/R (adopted Oct. 22, 2010).
[94] *Id.* at ¶¶ 8.5, 8.17.
[95] *Id.* at ¶¶ 8.69, 8.94.
[96] Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 22, WTO Doc. WT/DS379/AB/R (adopted Mar. 11, 2011).
[97] *Id.* at ¶ 288.
[98] *Id.* at ¶ 290.
[99] *Id.* at ¶ 97.

GATT/WTO Agreement.[100] Namely, the U.S. interprets "public" as meaning "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation," and "body" as referring to "an artificial person created by legal authority; a corporation; an officially constituted organization, an assembly, an institution, a society."[101] Essentially, a public body is an entity controlled by the government such that the government can use that entity's resources as its own.[102] Second, the U.S. distinguishes the government and "any public body" in Article 1.1(a)(1) of the SCM Agreement, while the interpretation of the Appellate Body on the governmental functions renders "any public body" redundant with the word "government."[103] Moving forward, the term "public body" should be interpreted as meaning something other than an entity that performs "functions of a governmental character."[104] Otherwise, a "public body" is a government, or part of a government, and there is no reason for the term "public body" to have been included in Article 1.1(A)(1) of the SCM Agreement.[105] A public body is no different from a government agency.[106] Third, the WTO's interpretation of the public body is so limited that the subsidizing government cannot be held responsible for any injurious subsidies provided.[107] As a result, the vast number of government-controlled entities which are effectively free to provide subsidies actually undermine the SCM Agreement.[108]

The U.S. applies a rule of majority ownership to determine whether an entity is a public

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[100] ROBERT E. LIGHTHIZER, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION 12 (2020).
[101] Panel Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, ¶ 8.58-.59, WTO Doc. WT/DS379/R (adopted Apr. 11, 2005) (citing *Public*, SHORTER OXFORD ENGLISH DICTIONARY (Vol. 2 1993); *Body*, FREE DICTIONARY ONLINE, http://www.thefreedictionary.com (accessed Apr. 28, 2010); *Body*, ACCURATE AND RELIABLE DICTIONARY ONLINE, http://ardictionary.com/ (accessed Apr. 28, 2010).
[102] ROBERT E. LIGHTHIZER, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION 83 (2020).
[103] *Id.*
[104] ROBERT E. LIGHTHIZER, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION 84 (2020).
[105] *Id.* at 84.
[106] Panel Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 130, WTO Doc. WT/DS379/AB/R 2011 (adopted Mar. 25, 2011).
[107] ROBERT E. LIGHTHIZER, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION 85 (2020).
[108] *Id.* at 85-86.

body, and if the government is the majority owner, that producer is a public body.[109] Meanwhile, the WTO DSB determines a public body by its governmental functions, regardless of the percentage of capital that a government owns in a public body. If an SOE performs *governmental* functions, it may be a public body and vice-versa. However, for any entity, including an SOE, the WTO DSB has not given any specific information on the level of *governmental* functions of the entity to be considered a public body. For example, the WTO DSB has not elaborated on whether the public body shall be obliged to perform *governmental* functions as a whole or in part of its activities. In practice, the *governmental* functions can be structured in both *de jure* and *de facto* manners. Accordingly, the public body as a *de facto* might execute some transactions to perform the *governmental* functions whereas the others might not. Unless and until the Appellate Body's limited interpretation of what constitutes a public body is reversed, by agreement of the Parties or through amendments to the SCM, the U.S. will not consent to the re-establishment of the Appellate Body.

III. NATIONAL SECURITY EXCEPTION ARBITRATION

A. NATIONAL SECURITY EXCEPTION IN INTERNATIONAL INVESTMENT TREATIES

In the law of treaties, the maxim *pacta sunt servanda* refers to the proposition that "treaties are binding on the parties and must be performed in good faith."[110] Countries are obliged to comply with the obligations that arise from international treaties to which they have acceded. However, in some cases, the treaties enable the countries to adopt allegedly inconsistent measures to protect their essential national security interests.[111] The investment arbitral tribunals frequently decided that

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[109] Panel Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 83, WTO Doc. WT/DS379/AB/R 2011 (adopted Mar. 25, 2011).

[110] COMM. TO THE GEN. ASSEMBLY, DRAFT ARTICLES ON THE LAW OF TREATIES WITH COMMENTARIES 211 (1966); *see* INT'L L. COMM'N, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1966, 117 (1967) (defining the term *pacta sunt servanda*).

[111] GEN. ACCT. OFF., GOV'T ACCOUNTABILITY OFF., NSIAD-96-61, FOREIGN INVESTMENT: FOREIGN LAWS AND POLICIES ADDRESSING NATIONAL SECURITY CONCERNS 6 (1996) (The Treaty of Rome allows European states to suspend European Union free trade and competition rules on grounds of national security.).

national security issues relate to the existential core of a state.[112] The arbitral tribunals' mandate is not to judge the determination by a state on its national security determinations.[113]

Among 3,322 BITs, as of 2023,[114] many treaties include national security exceptions, even in analogous terms. For example, the first national security exception was incorporated in the 19th century. "In the event either party engaged in war, it may enforce such import or export restrictions as may be required by the national interest."[115] Likewise, European countries agreed that "the members may take measures necessary for the protection of the essential interest of its security which is connected with the production of or trade in arms, munitions and war material."[116] In 1995, an OECD draft of a multilateral agreement on investment also provided 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."[117] It is noteworthy that the OECD language and grammatical structure, "which it considers necessary," are written in the same self-judging manner of national security exception of Article XXI GATT 1994 ("[n]othing 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 interest.)"[118]

In addition, customary international law also allows countries some flexibility in the execution of international obligations. Namely, Article 25 International Law Commission's Articles on Responsibility States for Internationally Wrongful Acts 2001 (ILC) reads:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness

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[112] Devas v. Republic of India, No. 2013-09 PCA, Award on Jurisdiction and Merit ¶ 245 (Perm. Ct. Arb. 2016).
[113] *Id.*
[114] *See* INTERNATIONAL INVESTMENT AGREEMENTS NAVIGATOR, https://investmentpolicy.unctad.org/international-investment-AGREEMENTS (last visited May 30, 2023) (demonstrating general tracking of bilateral investment treaties).
[115] William Moon, *Essential Security Interests in International Investment Agreements*, 15(2) J. INT'L ECON. L. 481, 495-96 (2012) (citing the Treaty of Friendship, Commerce and Consular Rights between the U.S. and Austria (May 27, 1931)).
[116] Treaty Establishing the European Economic Community art. 223 Mar. 25, 1957, 298 U.N.T.S. 3.
[117] *Id.*
[118] William Moon, *Essential Security Interests in International Investment Agreements*, 15(2) J. INT'L ECON. L. 481, 497 (2012) (citing from Jose E. Alvarez, *The Public International Law Regime Governing International Investment*, Hague Acad. of Int'l Law, at 302 (2011)).

> of an act not in conformity with an international obligation of the State unless the act:
> (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and,
> (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
> (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situations of necessity.

Article 25 ILC allows nations to act *voluntarily* under some conditions in violating an obligation, including but not limited to the obligation of investment protection, in order to safeguard an essential interest against a very significant threat.[119] Accordingly, countries may invoke the necessity test to justify their alleged wrongdoings regarding any international obligations.[120] According to the ILC's commentary, the necessity test is fulfilled when the invoking country is under "conditions narrowly defined in Article 25."[121] The necessity test in Article 25 ILC is subject to strict limitations to safeguard against possible abuse."[122]

In practice, when interpreting the necessary conditions set forth in Article 25 ILC, international arbitral tribunals refer to Article XXI GATT/WTO because the WTO DSB has extensively dealt with the concept and requirements of the necessity test in the context of economic measures derogating from the obligations contained in GATT.[123] For instance, in *CMS v. Argentina*, the Tribunal referred to Article XXI GATT 1994 and agreed with the U.S. claimant that the necessity test in Article XI as used in the U.S. – Argentina BIT, was not a self-judging provision and "if the State were to have discretion in this regard, such discretion should be provided expressly as

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[119] PETER D. CAMERON, INTERNATIONAL ENERGY INVESTMENT LAW: THE PURSUIT OF STABILITY 194 (2d ed. 2021).
[120] Gabčikovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. ¶ 51 (Sept. 25); INT'L LAW COMM., DRAFT ARTICLES ON STATE RESPONSIBILITY FOR INTERNATIONALLY WRONGFUL ACTS WITH COMMENTARIES, art. 25(14) (2001) ("to emphasize the exceptional nature of necessity and concerns about its possible abuse art. 25 is cast in negative language").
[121] INT'L LAW COMM., DRAFT ARTICLES ON STATE RESPONSIBILITY FOR INTERNATIONALLY WRONGFUL ACTS WITH COMMENTARIES, art. 2(2) (2001).
[122] *See id.* (offering commentary that strict limitations are in place to prevent abuse).
[123] Cont'l Cas. Co. v. Arg., ICSID Case No. ARB/03/9, Award, ¶ 192 (Sept. 5, 2008).

in Article XXI GATT 1994."[124]

In *Continental v. Argentina,* the tribunal further adopted the WTO reasoning on Article XXI GATT 1994 to evaluate the justification under the necessity test for Argentina as prescribed in Article XI of the U.S. – Argentina BIT. The tribunal requested Argentina prove that the disputed measure was a less distortive one among a series of measures available in Argentina. Namely, the tribunal reasoned that "the necessity of a measure should be determined through a process of weighing and balancing of factors which usually includes the assessment of the following three factors: the relative importance of interest or values furthered by the challenged measures, the contribution of the measure to the realization of the ends pursued by it, and the restrictive impact of the measure on international commerce."[125] In addition, the Tribunal considered imposing a less restrictive measure as envisaged in WTO cases, noting that "we do not exclude however that there may be circumstances in which a highly restrictive measure is necessary if no other less trade-restrictive alternative is reasonably available to the member concerned to achieve its objectives."[126]

The Tribunal asserted that if there were any other alternatives that were not in breach of the BIT available in Argentina, and if such alternatives would not have been reasonably available or would have been impracticable, the disputed measure was necessary under Article XI BIT.[127] The Tribunal denied the argument from Continental that Argentina should adopt better policies to avoid the financial crisis because the Tribunal said that its mandate was not to pass judgment upon Argentina's policy during 2001-2002, nor to censure Argentina's sovereign policies as an independent state.[128] Consequently, the Tribunal confirmed that the severe restrictions on withdrawing U.S.

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[124] *Id.* at ¶ 192.
[125] *Id.* at ¶ 194 (quoting Panel Report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, ¶ 7.211, WT/DS332/R (adopted June 12, 2007)).
[126] Panel Report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, ¶ 7.211, WT/DS332/R (adopted June 12, 2007).
[127] Cont'l Cas. Co. v. Arg., ICSID Case No. ARB/03/9, Award, ¶ 198 (Sept. 5, 2008).
[128] *Id.* at ¶ 199.

dollars from bank accounts in connection with the abandonment of the conversion of the peso to the U.S. dollar at 1:1 were adequate, effective, and justified by necessity within Article XI BIT.[129]

The burden of proof in a case of national security defense is relatively harsh. An investor who wishes to challenge a state decision on national security faces a heavy burden of proof, such as bad faith, absence of authority or application to measures that do not relate to essential security interests.[130] In *Global Telecom Holding* (GTH) *v. Canada*, GTH complained that Canada's national security review, as applied to its shareholding agreements to take voting control over Wind Mobile, was nontransparent, "completely left in the dark," arbitrary, unreasonable, and that the denial of due process was inconsistent with Canada's obligations under Fair and Equitable Treatment (FET).[131] In response to GTH's allegation, Canada reasoned that the national security reviews involve sensitive information and materials, and therefore cannot be completely transparent.[132] The arbitral tribunal understands the intelligence agencies of Canada might conduct an investigation before informing the target persons, or that information requests might not state the reasons therefore in full detail.[133] The tribunal dismissed GTH's allegation because GTH failed to meet the evidentiary burden of establishing its allegation.[134]

SOEs' investments are executed, outbound or inbound in industries, regardless of national security, which allows countries to invoke the national security exception of IIA and ILC 2001. First, the hosting country, i.e., Canada, China, and the U.S., can conduct national security reviews to screen the investment and stop the SOE's outbound investments from endangering their national security, when appropriate. Then the hosting country invokes national security exceptions as provided in its

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[129] *Id.* at ¶¶ 204-05.
[130] Devas v. Republic of India, PCA Case No. 2013-09, Award on Jurisdiction and Merit, ¶ 245 (July 25, 2016).
[131] Glob. Telecom Holding S.A.E. v. Canada, ICSID Case No. ARB/16/16, Award, ¶¶ 573–582 (Jan. 15, 2020).
[132] *Id.* at ¶ 593.
[133] *Id.* at ¶ 608.
[134] *Id.* at ¶ 617.

IIAs and/or Article 25 ILC, to defend their allegedly unlawful measures, *e.g., GHG v. Canada*.[135] Next, the hosting country, including their SOEs performing the governmental activities, can change their regulatory treatment of other foreign investments..

B. ARBITRAL AWARDS ON NATIONAL SECURITY: ARGENTINA CASE STUDY

Since the 1980s, the Argentinian government has issued several relevant laws, including Law No. 23696 on the Reform of the State of 1989, Law No. 23.928 on Currency Convertibility of 1991, and Decree No. 2129/91, to fix the Argentinian peso at par with the U.S. dollar.[136] Consequently, its SOEs in important industries and public utilities were privatized. For instance, *Gas del Estado*, a state-owned entity, was divided into two transportation companies and eight distribution companies, of which *Transportadora de Gas del Norte* (TGN) was created for gas transportation. The foreign-invested enterprise enjoyed tariffs calculated in dollars, converted to pesos at the time of billing, and tariffs would be adjusted every six months in accordance with the United States Producer Price Index (U.S. PPI).[137]

Between 1999 to 2002, Argentina suspended the U.S. PPI adjustment of the gas tariffs and enacted an emergency law reforming the foreign exchange system. The currency board which had pegged the peso to the dollar under the 1991 Convertibility Law was abolished, the peso was devalued, and different exchange rates were introduced for different transactions.[138] An investor affected by the policies challenged Argentina under ICSID to seek compensation for losses resulting from the alleged violations of Article IV BIT Argentina – U.S. by indirectly expropriating its investment without due process of law and compensation. Meanwhile, Argentina contended that

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[135] *Id.*
[136] CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award, ¶ 57 (May 12, 2005); LG&E Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability, ¶ 152 (Oct. 3, 2006).
[137] CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award, ¶ 57 (May 12, 2005); LG&E Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability, ¶ 160 (Oct. 3, 2006).
[138] CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award, ¶ 64 (May 12, 2005); LG&E Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability, ¶ 170 (Oct. 3, 2006).

"the measures necessary for the maintenance of public order,"[139] "constituted a national emergency sufficient to invoke the protections of Article XI BIT Argentina – U.S." and were consistent with the "state of necessity" as prescribed in Article 25 ILC 2001.[140]

Many arbitration tribunals recognize that the necessity test is promulgated in Article XI BIT Argentina – U.S. and Article 25 ILC 2001. Accordingly, the former relates to the protection of investment from a foreign investor under an international obligation, whereas the latter applies to any necessary situations, which are not necessarily related to investment protection.

The national security exception has been frequently incorporated in Argentina's BITs. According to Article XI BIT Argentina – U.S., "this Treaty shall not preclude the application[141] by either party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."[142] In practice, the legitimacy and necessity of the alleged inconsistent measures are interpreted under Article XI BIT Argentina – U.S. as *lex specialis* and customary international law as *lex generalis*.

In these disputes, the tribunals found that the actions of Argentina did not amount to indirect expropriations because the investors retained ownership and control of their investments.[143] The tribunals nevertheless concluded that Argentina's measures were in violation of the fair and equitable treatment standard of Article II(2)(a) of the BIT Argentina – U.S.

The economic situation of Argentina as a national security excuse for its inconsistency, invoked by Argentina, has been interpreted inconsistently. In some cases, the tribunal held that the

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[139] CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award, ¶ 332 (May 12, 2005).
[140] LG&E Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability, ¶ 215 (Oct. 3, 2006); Cont'l Cas. Co. v. Arg., ICSID Case No. ARB/03/9, Award, ¶ 172 (Sept. 5, 2008).
[141] Cont'l Cas. Co. v. Arg., ICSID Case No. ARB/03/9, Award, ¶¶ 170-180 (Sept. 5, 2008).
[142] Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, T.I.A.S. No. 94-1020.
[143] CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award, ¶¶ 263, 295, 303 (May 12, 2005); LG&E Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 198-202 (Oct. 3, 2006).

situations were not qualified for the national security requirements as prescribed in Article XI. By contrast, albeit under the same legal measures,[144] the tribunals in other cases concluded that Argentina's measures were justified by the national security exception.

First, the tribunal explained that the national security exception does not justify an international obligations violation. In *CMS v. Argentina* in 2005, as the holder of all shares in TGN, an Argentinian privatized gas SOE, CMS challenged Argentina's devaluation of foreign currency to the ICSID, under the BIT Argentina – U.S.[145] Argentina claimed that it could adopt a measure it considered appropriate without court reviews, and if the legitimacy of such measures was challenged, it was not the state but the international jurisdiction which would determine whether the plea of necessity might exclude wrongfulness by examining the conditions laid down by customary international law.[146] The tribunal confirmed that the claimant had a right to a tariff calculated in dollars and converted into pesos at the time of billing.[147] Specifically, the tribunal determined the three following sub-conditions to evaluate its consistency: (1) whether there was a grave and imminent peril in Argentina, (2) whether Argentina has only that step available to safeguard its interests, and (3) whether Argentina's government significantly contributed to the crisis.[148]

The tribunal discussed that the existence of necessity must be addressed in a prudent manner to avoid abuse "if strict and demanding conditions are not required or are loosely applied, any state could invoke necessity to elude its international obligations. This would be certainly contrary to the stability and predictability of the law."[149] The tribunal recognized that the Argentine

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144 August Reinisch, *Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases?,* 8 J. WORLD INV. & TRADE 191, 193 (2007).
145 CMS Gas Transmission Co., ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (July 17, 2003).
146 *Id.* at ¶ 373.
147 CMS Gas Transmission Co., ICSID Case No. ARB/01/8, Award, ¶ 138 (May 12, 2005).
148 *Id.* at ¶¶ 322-328.
149 *Id.* at ¶ 317.

crisis was severe but not a total economic and social collapse[150] and Argentina's essential interest was not impaired.[151] Most strikingly, the tribunal asserted that Argentina contributed to the crisis.[152] Therefore, the requirements of necessity as specified in Article 25 ILC 2001 were not fully met by Argentina so as to preclude the wrongfulness of its acts.[153] The Tribunal held that Argentina violated the fair and equitable treatment obligation in Article II(2)(a) BIT Argentina – U.S. and the umbrella clause in Article II(2)(c) BIT Argentina – U.S,[154] and that the violation could not be justified by the national security exception.

According to Argentina, the award was not well reasoned, explaining that U.S. investors could not have an enforceable legitimate expectation of total stability in Argentina, irrespective of the circumstances.[155] Argentina asserted that it had a sole sovereign right to prompt action to defend itself against threats to its public security and subject only to review for good faith, not subject to any other requirements not provided in Article XI BIT Argentina – U.S.[156] Therefore, the tribunal's manifestly excessive use of its power was such that in accordance with Article 52(b) ICSID, Argentina sought the annulment of the award. Nevertheless, the ad-hoc committee confirmed that the requirements under Article XI GATT 1994 are not the same as those under customary international law as codified by Article 25 ILC 2001, despite some analogous language.[157] Finally, the committee required Argentina to pay compensation of $133.2 million USD plus interest to the U.S. investor. [158]

Unlike *CMS v. Argentina,* in *LG&E v. Argentina* the national security exception was accepted

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[150] *Id.* at ¶ 355.
[151] *Id.* at ¶ 358.
[152] *Id.* at ¶ 329.
[153] *Id.* at ¶ 331.
[154] *Id.* at ¶¶ 280-284.
[155] Cont'l Cas. Co. v. Arg., ICSID Case No. ARB/03/9, Decision on Annulment Proceedings, ¶ 79 (Sept. 25, 2007).
[156] *Id.* at ¶¶ 111-112.
[157] *Id.* at ¶¶ 129-130.
[158] *Id.* at ¶¶ 151, 157.

as a defense for the respondent state to excuse its wrongfulness. In *LG&E v. Argentina,* the tribunal held that Article XI BIT U.S. – Argentina was not a self-judging provision. However, the tribunal did not specify who should decide the legitimacy of security measures: either Argentina, subject to a review under the good faith standard, or the tribunal.[159] The tribunal reasoned that economic, financial, or those interests related to the protection of the State against any danger seriously compromising its internal or external situation are also considered essential interests[160] and agreed that Argentina was in a period of crisis from December 1, 2001, to April 26, 2003.[161] "Extremely severe crises in the economic, political, and social sectors reached their apex and converged, threatening the total collapse of the government and the Argentine State."[162] The Tribunal admitted that when a state's economic foundation is under siege, the severity of the problem can be equal to that of any military invasion.[163] Then, the tribunal concluded that Argentina had to take necessary measures to deal with the extremely serious economic crisis, and excused it under Article XI BIT Argentina – U.S. from liability for any breaches of the treaty in the period; "the conditions as of December 2001 constituted the highest degree of public disorder and threatened Argentina's essential security interests and Argentina excluded from compensation for the period of 17 months of which economic emergencies had been occurring."[164] The damages suffered during the state of necessity should be borne by the investor.[165]

Customary international law further added that the "only way available" test under Article 25 ILC 2001 is for an invoking state to safeguard its essential security. In *Enron v. Argentina, (2007*), the tribunal held that national security in Article XI BIT Argentina – U.S. is a non-self-judging provision,

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[159] LG&E Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability, ¶ 211 (Oct. 3, 2006).
[160] *Id.* at ¶ 251.
[161] *Id.* at ¶¶ 238, 244.
[162] *Id.* at ¶ 231.
[163] *Id.* at ¶ 238.
[164] *Id.* at ¶¶ 231-66.
[165] *Id.* at ¶ 264.

since otherwise, the Treaty would be deprived of any substantive meaning.[166] The BIT Argentina – U.S. neither defined what it was to be understood as essential security interests nor gave specific requirements for national security.[167] Although the tribunal recognized there was a severe crisis, the existence of such a crisis did not amount to a legal excuse. Meanwhile, Argentina shows no convincing evidence that the country was out of control or had become unmanageable.[168] Most importantly, the tribunal observed that there were many approaches to address and correct the crisis albeit to the measures applied by Argentina. Therefore, the tribunal concluded that Argentina had not cumulatively met the various conditions in ILC 2001, and the state of necessity asserted by Argentina was inconsistent with Article 25 ILC 2001.[169]

By and large, the conditions for applying the national security exception in Article XI of BIT Argentina – U.S. and Article 15 ILC are different. The conditions for Article XI BIT Argentina – U.S. are less stringent than those of Article 15 ILC because the latter requires the "exceptional basis."[170] The language of the national security exception in Article XI BIT Argentina – U.S. are written differently from those mentioned in the OECD and Article XXI GATT 1994 because they do not include the phrase "*which it considers necessary."* In order to interpret the national security exception, there is a need to balance a government's regulations for applying national security regulations with the interests of investors for transparent and predictable procedures.[171] Accordingly, Article XI BIT Argentina – U.S. has consistently been found not to be a self-judging provision[172] and Article 25 ILC 2001's conditions are much stricter than those in Article XI BIT Argentina – U.S.[173]

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166 Enron Corp. and Ponderosa Assets, L.P. v. Arg., ICSID Case. No. ARB/01/3, Award, ¶ 332 (May 22, 2007).
167 *Id.* at ¶ 333.
168 *Id.* at ¶ 307.
169 *Id.* at ¶ 313.
170 Cont'l Cas. Co. v. Arg., ICSID Case No. ARB/03/9, Award, ¶ 167 (Sept. 5, 2008).
171 U.N. Conf. on Trade and Dev., World Investment Report 2016 93 (2016).
172 Peter D. Cameron, International Energy Investment Law: The Pursuit of Stability 196 (Oxford Univ. Press 2022).
173 Peter Tomka, *Defenses Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties*, Bldg. Int'l Inv. L., 489 (Meg Kinnear et al, 2016).

Therefore, if a state does not succeed with its defense based on an emergency clause in Article XI BIT Argentina – U.S., it will automatically fail with its defense based on necessity under customary international law, including Article 25 ILC 2001.[174]

IV. U.S. MEASURES ON CHINESE ALUMINIUM AND STEEL

A. NATIONAL SECURITY EXCEPTION IN GATT/WTO JURISPRUDENCE

The national security exception was first promulgated in GATT 1947. It remains undefined in Article XXI GATT 1994.[175] In international economic forums, GATT members proposed many approaches to interpret national security in Article XXI GATT 1947. First, the balancing approach was presented by the U.S. in 1947. The U.S. later suggested that the national security exception in Article XXI GATT 1994 was a self-judging clause, and its interpretation should be executed in a balanced manner such that:

> [N]o one would question the need of a country, or its rights to take action relating to its security interests and to determine for itself what its security interests are . . . we cannot make it too tight, because we cannot prohibit measures which are needed for purely security reasons. On the other hand, we cannot make it so broad that under the guise of security, countries will put on measures that really have a commercial purpose.[176]

In 1949, the U.S. further claimed the security necessity for its violation of Articles I and XIII GATT 1947 against Czechoslovakia on export licensing and short-supply control.[177]

The full discretion approach for national security exception was next introduced by Ghana in 1961. Ghana cited Article XXI(b)(iii) as justification to boycott goods from Portugal, arguing that

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[174] *Id.* at 494.

[175] General Agreement on Tariffs and Trade 1947 art. 21, Oct. 30, 1947, 55 U.N.T.S. 194 (1947) ("Nothing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests.").

[176] *See* Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 699 (2011); *see also* Panel Report, *Russia—Measures Concerning Traffic in Transit,* ¶ 7.92, WTO Doc. WT/DS512/R (adopted April 26, 2019).

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

"under this Article, each contracting party was the sole judge of what was necessary for its essential security interest. There could therefore be no objection to Ghana regarding the boycott of goods as justified by security interests."[178] The full discretion approach was later advocated by the European Communities and many other countries, (including Australia, Canada, and the U.S.), at the GATT Council meeting in 1982. The group of countries agreed that Article XXI GATT 1947 is a self-judging provision and a country invoking the national security exception has full discretion to decide "the existence of these rights constituted a general exception and required neither notification, justification nor approval . . . since every contracting party was in the last resort the judge of its exercise of these rights."[179] Nevertheless, the full discretion proposal was refused by other countries and was not legally binding, because the opposing countries argued that Article XXI GATT 1947 was a non-self-judging provision.

Following that, other countries invoked national security to justify their allegedly inconsistent measures. In 1975, Sweden imposed a global import quota on footwear under the national security exception of Article XXI GATT 1947 because the "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."[180] In 1985, the U.S. imposed a trade embargo on Nicaragua to fight the communist political regime under the rationale of a national security threat.[181] The Panel reasoned that the terms of reference put strict limits on its activities that it could not examine or judge the validity of, or the motivation for, the invocation of Article XXI(b)(iii) by the U.S. The Panel concluded that it was not authorized to examine the justification for the U.S.'s invocation of a

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[178] *Id.* at 269.
[179] Panel Report, *Russia—Measures Concerning Traffic in Transit,* WTO Doc. WT/DS512/R (adopted April 26, 2019); U.S., THIRD PARTY EXECUTIVE SUMMARY, 3 (2018).
[180] Daria Boklan & Amrita Bahri, *The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box?* 19 WORLD TRADE REV. 123, 124 (2020).
[181] Prabhash Ranjan, *Russia – Ukraine War and WTO's National Security Exception*, 58 FOREIGN TRADE REV. 2, 4 (2022); Report of the Panel, *United States—Trade Measures Affecting Nicaragua*, L/6053 (May 9, 1985), GATT B.I.S.D. (1985).

general exception to the obligations under the general agreement, and it could find the U.S. neither to be complying with its obligations under the Agreement nor to be failing to carry out its obligations under that Agreement.[182] The Panel noted that embargos imposed for security reasons create uncertainty in trade relations and reduce the willingness of governments to engages in open trade policies and of enterprises to make trade-related investments.[183] In addition, the Panel further added that embargos imposed by the U.S., independent of whether or not they were justified under Article XXI GATT 1994, ran counter to non-discriminatory and open trade policies and would not reduce uncertainty in trade relations.[184] Needless to say, the GATT's decisions have never come with any binding interpretation of Article XXI GATT.

At the WTO, members did not propose any other approach to interpret the national security exception in Article XXI GATT 1994. The European Community (EC) claimed that import restrictions allegedly maintained by India in its Export and Import Policy (1997-2002) were inconsistent with India's obligations pursuant to, among others, Article III on national treatment and Article XI on qualitative restriction.[185] In 2016, Russia still urged WTO Members to develop a General Council decision on the interpretation of the scope of rights and obligations of WTO Members under Article XXI GATT 1994, *inter alia,* the identification of circumstances when the application of the security exceptions is justified, the specific transparency requirements, and possible retaliatory measures.[186]

Another case is *Russia – Transit Measures*.[187] In the dispute, Russia imposed a restriction and ban on the transit of goods by road and rail from Ukraine to Kazakhstan and Kyrgyzstan. Russia

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[182] ORG. FOR ECON. COOP. AND DEV., UNITED STATES – TRADE MEASURES AFFECTING NICARAGUA, ¶ 5.3 (1986).
[183] *Id.* at ¶ 5.16.
[184] *Id.*
[185] Notification of Mutually Agreed Solution, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc. WT/DS94 (Feb. 23, 1998).
[186] World Trade Organization, Proposal on MC10 Ministerial Declaration of 11 November 2015, WT/MIN(15)/W14 (2015).
[187] Panel Report, *Russia—Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted April 26, 2019).

asserted it had full authority to assess the national security situation because the phrase "it considers necessary" is self-judging and non-justiciable in nature.[188] It was outside the jurisdiction of the Panel to review the ban because Article XXI GATT 1994 was written as "self-judging."[189] In addition, Russia applied the measures when its essential security interest was threatened. Therefore, Russia argued that it was justified by Article XXI(b)(iii) GATT 1994.[190] Nevertheless, Ukraine claimed that Russia acted inconsistently with Article V GATT 1994 and Russia's commitments under its WTO Accession Protocol. In addition, Ukraine urged that the Panel should examine whether Russia had abused Article XXI GATT 1994 to pursue protectionist objectives, causing a disguised restriction on trade.[191]

Referring to the good faith principle in DSU Article 3.10 that "all Member[s] will engage in these procedures in good faith in an effort to resolve the dispute" and the application of customary international law in Article 31.1 of the Vienna Convention on the Law of Treaties (VCLT)1969, the Panel concluded that the interpretation of Article XXI GATT 1994 should be done in good faith. Accordingly, the Panel held that Article XXI(b)(iii) is not totally "self-judging" in the manner asserted by Russia.[192] The Panel shall must make an objective decision on the necessity of the measure rather than the invoking member itself.[193] The Panel shall make a determination based on the existence of war or another emergency in international relations such as armed conflicts, high tension, emergency, or general volatility overwhelming a country.[194] Furthermore, the Panel must determine whether the Russia's measure was implemented in a time of war or emergency. Consequently, the Panel reasoned that "an invoking country did not take national security measures

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[188] *Id.* at ¶ 7.28.
[189] *Id.* at ¶ 7.57.
[190] *Id.* at ¶¶. 7.27-7.29.
[191] *Id.* at ¶ 7.34.
[192] *Id.* at ¶ 7.102.
[193] *Id.* at ¶ 7.100.
[194] Panel Report, *Russia—Measures Concerning Traffic in Transit,* ¶ 7.263, WTO Doc. WT/DS512/R (adopted April 26, 2019).

as a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade."[195] As a result the Panel ruled that Russia had not satisfied the requirements of enumerated subparagraphs of Article XXI(b) GATT 1994.[196]

GATT/WTO jurisprudence considers the phrase "it considers necessary to protect its essential security interests" in the chapeau of Article XXI GATT 1994, the national security exception, to be a self-judging provision. On the one hand, the country invoking the national security exception has discretion to determine whether particular factual circumstances that occurr in its territory satisfy the requirements as specified in Article XXI GATT 1994.[197] On the other hand, the threshold of the self-judging standard shall be reviewed by the DSB in accordance with customary rules of interpretation so as to ensure the predictability of the multilateral trading system. GATT/WTO panels refer to VCLT Article 31.1 to interpret the obligations of its member where "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given in the terms of the treaty in their context and in the light of its object and purpose." To that extent, the national security exception interpretation of Article XXI GATT 1994 is reviewable by international tribunals, including but not limiting to the DSB, and it is really a question of balance.[198]

The interpretation of the national security exception in Article XXI GATT 1994 has been diversified. According to Raj Bhala, Article XXI GATT 1994 provides the indispensable textual basis for unilateral national security measures.[199] By the phrase "which it considers necessary,"[200] no GATT/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

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[195] *See* Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 705-06 (2011).
[196] Panel Report, *Russia—Measures Concerning Traffic in Transit,* ¶ 7.84, WTO Doc. WT/DS512/R (adopted April 26, 2019).
[197] *Id.* at 703.
[198] Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the U.S. Does,* 19 U. PA. J. INT'L ECON. L. 263, 274 (1998).
[199] *Id.* at 267.
[200] Vienna Convention on the Law of Treaties, art. 31.1, May 23, 1969, 1155 U.N.T.S. 331.

requirement.[201] The word "it" allows the invoking member to have a strong, if not sole, discretion to determine whether an action conforms to the requirement set forth in Article XXI(b).[202] In addition, the *travaux preparatoire* of Article XXI GATT 1994 shows a lack of proper regulatory structures in the provision, particularly in guidance for implementation.[203] The negotiators understood that the essential security exception was so wide in its coverage that it was not justiciable; in that a Member could not claim that another Member had violated the security exception and therefore unsuccessfully invoked that exception.[204]

Meanwhile, Schill reasoned that the self-judging clauses can be classified into four categories depending on the different level of discretion being invoked.[205] First, the countries shall have full discretion to restrict the international obligations in the relation of recognizing and enforcing the international arbitration awards as specified under Article V(2)(b) New York Convention 1958.[206] Second, the countries shall only be allowed to unilaterally terminate their obligations in the form of permanent exit-clauses concerning an entire treaty regime.[207] For example, as North Korea did when it announced its withdrawal from the Non-Proliferation of Nuclear Weapons Treaty (NPT) on January 6, 2003.[208] Third, the countries do not recognize the jurisdiction of the International Court Justice under Article 36(2) of the statute of the court.[209]

Finally, the countries reserve their international treaties aimed at avoiding *ex-ante*, a state from

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[201] Bhala at 269.
[202] Shin-yi Peng, *Cybersecurity Threats and the WTO National Security Exceptions*, 18 J. INT'L. ECON. L. 449, 463 (2015) (citing Stephan Schill & Robyn Briese, *If the State Considers: The Self-Judging Clauses in International Dispute Settlement*, 13 MAX PLANCK Y.B. U.N. L. 61, 69 (2009)).
[203] Ji Yeong Yoo & Dukgeun Ahn, *Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?*, 19 J. INT'L. ECON. L. 417, 442 (2016).
[204] Panel Report, *Russia—Measures Concerning Traffic in Transit,* ¶ 1, 3, WTO Doc. WT/DS512/R (adopted April 26, 2019).
[205] Stephan Schill & Robyn Briese, *If the State Considers: The Self-Judging Clauses in International Dispute Settlement*, 13 MAX PLANCK Y.B. U.N. L. 61, 69 (2009).
[206] *Id.* at 86.
[207] *Id.* at 85.
[208] *Fact Sheet on DPRK Nuclear Safeguards*, INT'L ATOMIC ENERGY AGENCY, https://www.iaea.org/newscenter/focus/dprk/fact-sheet-on-dprk-nuclear-safeguards (last visited June 30, 2023).
[209] Schill & Briese, *supra* note 205, at 87.

becoming bound by an international trade obligation.[210] With respect to Article XXI GATT 1994, Schill observes that the self-judging clause does not limit the mandate of the Panel.[211] Article XXI GATT 1994 grants a state discretion to unilaterally opt out of international obligations.[212] As a matter of law, the article does not constitute a bar to the jurisdiction of the DSB.[213] The discretion is not wholly uncontrollable and unreviewable.[214] The self-judging clauses do not oust the jurisdiction of international dispute settlement bodies, but it is clear that they affect the standard of review that a court or tribunal has to apply.[215] The standard of review that is generally accepted by international dispute settlement bodies, and championed by legal scholars, is review for good faith.[216] However, the standard of review in investment arbitration, due to its non-self-judging feature of "it considers," is set at a lower threshold compared to the full-bodied substantive standard of review in Article XXI GATT 1994.[217]

The GATT/WTO jurisprudence on national security exception in Article XXI GATT 1994 is underdeveloped although the exception is adopted under many other free trade agreements (FTAs) between GATT/WTO members, such as, Article 10.2 Canada and Israel FTA (1997),[218] Article 23.2 BIT the U.S. – Korea (2012),[219] Article 28.6 CETA,[220] and Article 29.2 CPTPP.[221] In the WTO, many contracting parties have reasoned that the phrase "which it considers necessary" is a self-judging clause which enables countries to interpret national security as they wish. Put differently,

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[210] *Id.* at 91.
[211] *Id.* at 103.
[212] *Id.* at 67.
[213] *Id.* at 105.
[214] *Id.* at 95.
[215] *Id.* at 120.
[216] *Id.*
[217] *Id.* at 113.
[218] Canada-Israel Free Trade Agreement, Can.-Isr., art 10.2, July 31, 1996, Dep't of Foreign Aff. and Int'l Trade, CA1 EA 96C13 EXF.
[219] *See* Free Trade Agreement Between the United States of America and the Republic of Korea, art. 23.2, S. Kor.-U.S., Mar. 9, 2012, OFF. OF THE U.S. TRADE REPRESENTATIVE.
[220] *Id.*
[221] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 29.2, NZTS 10 (2018) (N.Z.).

the countries further added that national security is non-reviewable and not susceptible to review by WTO dispute settlement. For example, Russia argues that the Panel lacked jurisdiction to review Russia's invocation of national security exception in Article XXI(b)(iii) GATT 1994 and argues that it renders its action immune from scrutiny by a WTO dispute settlement panel.[222] Likewise, the U.S. argues "[what] it considers necessary for the protection of its essential security interests" is "non-justiciable" and "is therefore not capable of findings by a panel."[223] The U.S. asserts that the only requirement for the member invoking Article XXI GATT 1994 is that the member consider a particular action necessary to protect its essential security interests in any of the circumstances identified in Article XXI(b) GATT 1994.[224]

The Panel emphasizes that Article XXI(b) GATT 1994, establishes a right to take action for the protection of a member's essential security interests and explicitly enumerates conditions in the subparagraphs that are an integral part of that right.[225] Rather, the scope and nature of such review derives from the terms of Article XXI(b) GATT 1994 and requirements of the DSU established under the WTO Agreement, which acknowledges *inter alia* the role of the WTO dispute settlement system in "providing security and predictability to the multilateral trading system."[226] Consequently, the Panel concludes that the terms "which it considers" in Article XXI(b) GATT 1994 do not qualify to render them "self-judging" or "non-justiciable" as argued by the U.S.[227]

Furthermore, as for the alleged national security concerns of the U.S., the Panel notes that the U.S. has referred its arguments regarding Article XXI(b)(iii) GATT 1994 to factors considered by

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[222] Panel Report, *Russia—Measures Concerning Traffic in Transit,* ¶ 7.26, 7.31-7.32, 7.57, WTO Doc. WT/DS512/R (adopted April 26, 2019).
[223] Panel Report, *Russia—Measures Concerning Traffic in Transit,* ¶ 7.26, 7.52, 7.57, WTO Doc. WT/DS512/R (adopted April 26, 2019); Panel Report, *United States—Certain Measures on Steel and Aluminum Products*, ¶ 6.17, WTO Doc. WT/DS564 (adopted Dec. 9, 2022).
[224] Panel Report, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS564 (adopted Dec. 9, 2022).
[225] *Id.* at ¶ 7.125.
[226] *Id.*
[227] *Id.* at ¶ 7.128.

the U.S. Department of Commerce (USDOC) in the Steel and Aluminum Reports, that is "in such quantities or under such circumstances" that the imports threaten to impair national security.[228] The analysis and conclusions of the USDOC in the Steel and Aluminum Reports do not purport to identify or address the existence of an "emergency in international relations" within the meaning of Article XXI(b)(iii) GATT 1994.[229] In the Panel's view, however, the gravity or severity of an "emergency in international relations" within the meaning of Article XXI(b)(iii) GATT 1994, particularly regarding the impact on international relations of situations falling under that provision, has not been established based on the evidence and arguments submitted in this dispute.[230] Therefore, the Panel finds that the inconsistencies of the measures at issue with Articles I:1 and II:1 GATT 1994 are not justified under Article XXI(b)(iii) GATT 1994.[231]

B. CHINESE INVESTMENT IN U.S. NATIONAL SECURITY[232]

The growing international investments of SOEs are raising concerns among policymakers over the economic and security implications.[233] Some policymakers are concerned that an SOE may engage in foreign investment activities that could compromise national security objectives.[234] As for SOE treatment and the interrelationship with national security, U.S. legislation is relatively specific. In theory, like any sovereign country, the U.S. has a right to limit and ban investments, mainly based on considerations of national security in strategic industries.[235] Given the self-judging nature of national security in international commitments and lack of a precise definition of national security,[236]

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228 *Id.* at ¶ 7.142.
229 *Id.* at ¶ 7.143.
230 *Id.* at ¶ 7.148.
231 *Id.* at ¶ 7.149.
232 August Reinisch, *Necessity in International Investment Arbitration - An Unnecessary Split of Opinions in Recent ICSID Cases - Comments on CMS v. Argentina and LG&E v. Argentina*, 8 J. WORLD INV. TRADE 191, 191-214 (2007).
233 James K. Jackson, CONG. RSCH. SERV., RL33388, The Committee on Foreign Investment in the United States (CFIUS) 36 (2017).
234 *Id.*
235 U.N. CONF. ON TRADE AND DEV., WORLD INVESTMENT REPORT 83 (2018).
236 See GOV'T ACCOUNTABILITY OFF., GAO-09-320, FOREIGN INVESTMENT: LAWS AND POLICIES REGULATING FOREIGN INVESTMENT IN 10 COUNTRIES 9 (February 2008).

the U.S. may exercise wide discretion to refuse to grant or withdraw the investment licenses involving investments by SOEs.[237]

In 1988, the U.S. first adopted a federal law on national security (the Exon-Florio legislation) which was later amended by the Foreign Investment and National Security Act (FINSA) of 2007.[238] The FINSA 2007 amendment tackled the CFIUS' concerns raised after the U.S. declined the acquisition of six major U.S. seaports by state-owned Arab company, Dubai Port World.[239] FINSA does not define national security terminology. The two regulations empower the U.S. President to suspend or prohibit foreign acquisitions, mergers, or takeovers of U.S. businesses that threaten to impair national security based on the proposal from CFIUS,[240] chaired by the U.S. Department of the Treasury.[241] As such, CFIUS also reviews any merger, acquisition, or takeover that would result in foreign control of any person engaged in interstate commerce in the U.S. that threatens to impair national security.[242]

As of 2018, the U.S. President has blocked acquisitions in only four cases.[243] The first prohibited transaction was the divestiture of a Chinese company's acquisition of a U.S. aircraft parts

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[237] *Id.* at 3, 16.
[238] Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (2007).
[239] Debroah Mostaghel, *Dubai Ports World Under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?,* 70 Alb. L. Rev. 583 (2007) (Dubai Port World was created in November 2005 by integrating Dubai Port Authority and Dubai Ports International, one of the largest commercial port operators in the world with operations in the Middle East, India, Europe, Asia, Latin America, the Caribbean, and North America.); James K. Jackson, CONG. RSCH. SERV., RL33388, The Committee on Foreign Investment in the United States (CFIUS) 36 (2017).
[240] James K. Jackson, CONG. RSCH. SERV., RL33388, The Committee on Foreign Investment in the United States (CFIUS) 18 (2017) (The CIFUS internal review process normally is conducted through three stringent stages (1) 30 days' national security reviewed by CFIUS; (2) a national security investigation (45 days); (3) the President must make final determination within 15 days. Particularly, CFIUS national security review, if a foreign investment transaction, either or notified or non-notified, (1) poses a threat to the U.S. national security; (2) involves a foreign entity controlled by foreign investment; or (3) result in control of any critical infrastructure that could harm U.S. national security interests.).
[241] See GOV'T ACCOUNTABILITY OFF., GAO-09-320, FOREIGN INVESTMENT: LAWS AND POLICIES REGULATING FOREIGN INVESTMENT IN 10 COUNTRIES, 9 (February 2008).
[242] U.S.-CHINA ECON. AND SEC. REV. COMM'N, REPORT TO THE 115TH CONGRESS 73 (2017).
[243] *Id.* (In 1990, President Bush blocked the acquisition of MAMCO, a manufacturing company from China National Aero-Technology Import & Export Corporation. In 2012, President Obama directed Rall Corporation to divest itself of an Oregon wind farm project. In 2016, President Obama blocked Chinese firm Fujian Grand Chip Investment Fund from acquiring Axton, a German-based semiconductor firm with U.S. assets.).

company.[244] The two most recent cases, blocked by President Trump, involve SOEs. On September 13th, 2017, the President followed a recommendation of CFIUS to deny the acquisition of the U.S. Lattice semiconductor, Canyon Bridge, by a Chinese linked corporation.[245] And, in March 2018, the President also blocked the acquisition of Qualcomm by Singapore-based Broadcom for national security reasons.[246] This hostile takeover bid for 117 billion U.S. dollars would have been the largest technology-related foreign investment transaction to date.[247]

Theoretically speaking, the divestiture of foreign acquisitions focuses on the national security threat and not the ownership of the foreign enterprises. Both private and state-owned enterprises are subject to the same internal review by CFIUS and the President. In practice, the majority of inbound investments in the U.S. are from privately owned companies.[248] However, where the investments of SOEs are concerned, CFIUS applies greater scrutiny.[249]

With respect to China, the U.S. recognized that the Chinese government continues to support SOEs by offering direct and indirect subsidies and other incentives to influence business decisions and achieve state goals.[250] In practice, the size of Chinese SOEs are growing; accounting for eighty-six percent of Chinese firms listed in the top Global 500 largest firms, compared to only fourteen percent of private enterprises.[251] In China, the top ten most valued companies listed in China's Shanghai Composite Index are Chinese SOEs, and, in the U.S., the top four biggest SOEs

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244 GEN. ACCT. OFF., GOV'T ACCOUNTABILITY OFF., NSIAD-96-61, FOREIGN INVESTMENT: FOREIGN LAWS AND POLICIES ADDRESSING NATIONAL SECURITY CONCERNS 6 (1996).
245 GOV'T ACCOUNTABILITY OFF., GAO-18-249, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: TREASURY SHOULD COORDINATE ASSESSMENT OF RESOURCES NEEDED TO ADDRESS INCREASED WORKLOAD 13 (2018).
246 U.N. CONF. ON TRADE AND DEV., WORLD INVESTMENT REPORT 87 (2018).
247 *Supra* note 240, at 66.
248 U.S.-CHINA ECON. AND SEC. REV. COMM'N, STATE-OWNED ENTERPRISES, OVERCAPACITY, AND CHINA'S MARKET ECONOMY STATUS 62 (2016) (In 2015, private Chinese companies accounted for eighty-four percent of total Chinese FDI.).
249 JAMES E. MENDENHALL, *Assessing Security Risked Posed by State-Owned Enterprises in the Context of International Investment Agreements*, 31 ICSID REV. 1, 42 (2016).
250 *Id.* at 93.
251 U.S.-CHINA ECON. AND SEC. REV. COMM'N, STATE-OWNED ENTERPRISES, OVERCAPACITY, AND CHINA'S MARKET ECONOMY STATUS 65 (2016).

listed on the New York Stock Exchange are also Chinese state enterprises (PetroChina, China Mobile, Sinopec, and China Telecom).[252] Moreover, the foreign expansion of Chinese SOEs has been exceptionally rapid. [253] Accordingly, the outbound Chinese FDI strategic investments in the U.S., which are dominantly in the form of mergers and acquisitions in sensitive industries, including information and communications technology, agriculture, and biotechnology, have demonstrated the potential risks to national security.[254] Therefore, CFIUS recommended that the U.S. Congress should extend the power of CFIUS so that it can prohibit the acquisition of U.S. assets by Chinese state-owned or state-controlled entities.[255] In January 2018, the administration supported Congress in adopting the Foreign Investment Risk Review Modernization Act, (FIRRMA).[256] The law aims to more effectively guard against the risk to the national security of the U.S. posed by certain types of foreign investment, including, but not limited to, SOE outbound investment.[257]

C. U.S. APPLICATION OF ARTICLE XXI ON CHINESE STEEL AND ALUMINUM

In 2017, President Trump requested that the Department of Commerce invoke the national security exception as provided in Section 232 of the Trade Expansion Act 1962 (Section 232) to eliminate threatened essential interests.[258] This was the first time that the U.S. invoked its national security law and the security exception of Article XXI GATT 1994 to justify excessive applied tax rates and the allegedly unlawful quotas on certain imported goods originating from many WTO members, including but not limited to, China. The U.S. reasoned that the measures were necessary to

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[252] *Id.*
[253] *Supra* note 246, at 33.
[254] U.S.-CHINA ECON. AND SEC. REV. COMM'N, REPORT TO THE 115TH CONGRESS 73 (2017).
[255] *Id.* at 29.
[256] *Supra* note 246, at 84.
[257] S. 2098, 115th Cong. (as introduced on May 22, 2018).
[258] U.S. DEP'T OF COM., FACT SHEET: SECTION 232 INVESTIGATIONS: THE EFFECT OF IMPORTS ON THE NATIONAL SECURITY (2017) (It authorizes the Secretary of Commerce to conduct comprehensive investigations to determine the effects of imports of any article on the national security of the U.S. The USDOC report to the President focuses on whether the importation of the article in question is in such quantities or under such circumstances as to threaten to impair national security).

remove the threatened impairment of its national security. However, other WTO members asserted that the measures were inconsistent with the obligations under GATT/WTO agreements and, accordingly, the measures could not be justified by the national security exception of Article XXI GATT 1994. Since 2017, other WTO members brought ten cases to the WTO DSB to challenge the U.S.'s excessively high tax rates and quotas measures.[259]

In *U.S. – Certain Measures on steel and aluminum products*, China argued that high U.S. tariffs applied to Chinese-origin steel and aluminum were inconsistent with a multitude of U.S. obligations including those incurred in Article II:1 GATT 1994, Article 2.1 of the Agreement of Safeguard, and Article XIX:1 of the GATT 1994. In addition, China asserted that the U.S. measures were not justified by the national security exception in Article XXI(b) GATT 1994.[260] Meanwhile, the U.S. explained that the imported steel and aluminum caused severe injury to its domestic industry and national security.[261] In the U.S. economy, steel and aluminum are essential products for national defense requirements.[262] The increase of Chinese steel and aluminum placed the U.S. steel industry at substantial risk and also weakened the U.S. internal economy.[263] The U.S. stressed the "self-judging" and "unjustifiable" characteristic of Article XXI(b) GATT 1994 to advocate for its full discretion in increasing the imported tax rates on Chinese-origin steel and aluminum. The U.S. regulation on national security in Section 232 requires the administration to consult the appropriate U.S. departments regarding the effects of Chinese imports on national security.[264] In practice, the U.S. Department of Defense, the U.S. Department of State, the U.S. Department of the Treasury, the

[259] Request for Consultation by China – Addendum, *United States—Measures on Certain Semiconductor and other Products, and Related Services and Technologies*, WTO Doc. WT/DS615 (Sept. 19, 2023).
[260] *Supra* note 224, ¶ 7.105.
[261] U.S.-CHINA ECON. AND SEC. REV. COMM'N, STATE-OWNED ENTERPRISES, OVERCAPACITY, AND CHINA'S MARKET ECONOMY STATUS 103-14 (2016).
[262] *Supra* note 224, ¶ 2.24.
[263] *Id.* at ¶ 2.14.
[264] *Id.* at ¶ 7.87.

U.S. Department of Homeland Security, and the International Trade Commission[265] were invited to discuss whether the increase of Chinese steel and aluminum was an "emergency in international relations" within the meaning of Section 232 and whether "it [is] consider[ed] necessary for the protection of its essential security interests" in accordance with Article XXX(b)(iii) GATT 1994.[266]

The U.S. Secretary of Commerce concluded that the import of foreign steel and aluminum impairs national security,[267] which includes general security and the welfare of certain industries.[268] By the phrase of "the measures were taken in time of war or other emergencies in international relations," the U.S. referred to a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention.[269] Following that, the U.S. issued the Presidential Proclamation of January 11, 2018, to set an additional twenty-five percent *ad valorem* duty on Chinese steel and the Presidential Proclamation of January 19, 2018, to set an additional ten percent *ad valorem* duty[270] on Chinese aluminum.[271] The additional *ad valorem* duty was classified in a list of 1,333 tariff subheadings, with an annual trade value of approximately $50 billion.[272]

Based upon the interpretation principles set forth in Article 3.2 of the DSU and the customary rules of public international law, the Panel concluded that the U.S.'s high tax measures were inconsistent with its tax obligations Article II GATT 1994. The Panel further concluded that the U.S. measures could not be justified by Article XXI(b) GATT 1994. In particular, the additional

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[265] *Id.* at ¶ 2.10.
[266] *Id.* at ¶ 6.21.
[267] CONG. RSCH. SERV., R45249, SECTION 232 INVESTIGATION: OVERVIEW AND ISSUES FOR CONGRESS 6 (2019).
[268] Panel Report, *United States—Certain Measures on Steel and Aluminum Products*, ¶ 2.12, 2.3, WTO Doc. WT/DS564 (adopted Dec. 9, 2022).
[269] *Id.* at ¶ 7.133.
[270] 83 C.F.R. § 11619-624, (2018); 83 C.F.R. § 1335-59 (2018); 83 C.F.R. § 20677-82 (2018); U.S. DEP'T OF COM., INVESTIGATION OF THE IMPORTED ALUMINUM EFFECT ON THE NATIONAL SECURITY CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 (2018).
[271] *Supra* note 224, ¶ 2.28, 2.38, 2.50.
[272] 83 C.F.R. § 40823 (2018).

U.S. duties of twenty-five percent on steel products and ten percent on aluminum products exceeded the bounding rates in its Schedule which range from 0-2.5% for aluminum and 2.5-5.7% for steel.[273] These excessively applied rates were unlawful in accordance with Article II.2 GATT 1994, as they were not the results of unforeseen development as prescribed in Article XIX GATT 1994 and Article 2.2 of the Agreement of Safeguard.

Most strikingly, though the Panel confirmed that Article XXI GATT 1994 was "self-judging," the Panel further observed that self-judgment did not mean the WTO review of U.S. measures was "unjustifiable.". Rather, the Panel concluded that the "self-judging" of Article XXI GATT 1994 enables the U.S. to adopt a particular action in any of circumstances listed in the three subparagraphs of that article.[274] Put differently, the Panel reasoned that the phrase "which it considers" in Article XXI(b) GATT 1994 needs to be interpreted limitedly, where the invoking country is in a critical situation, such as a time of war. In the case at hand, the Panel asserted that the U.S. measures were not "taken in the time of war" as in paragraph (iii) of Article XXI(b) GATT 1994.[275] Finally, although it acknowledged the importance of high U.S. tax rates to U.S. military systems and critical infrastructure,[276] the Panel held that U.S. reasoning represented its domestic situation, not the international aspects of the situation as required by Article XXI GATT 1994.[277]

The U.S. strongly objects to these interpretations.[278] The U.S. has taken a clear and unequivocal position for more than seventy years that national security issues cannot be examined under WTO dispute settlement rules.[279] On January 26, 2023, the U.S. submitted notification of its

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[273] *Supra* note 224, ¶ 7.45.
[274] *Id.* at ¶ 7.105, 7.127.
[275] *Id.* at ¶ 2.10.
[276] *Id.* at ¶ 7.90.
[277] *Id.* at ¶ 7.142.
[278] SWI Swissinfo.ch, *EEUU se Opone al Dictamen de la OMC Crítico con los Aranceles Sobre el Acero y el Aluminio Chinos [U.S. Opposes WTO Ruling Critical of Chinese Steel, Aluminum Tariffs,* CE NOTICIAS FINANCIERAS (Dec. 9, 2022, 5:01 PM) (Sp.) https://www.swissinfo.ch/spa/eeuu-se-opone-al-dictamen-de-la-omc-crítico-con-los-aranceles-sobre-el-acero-y-el-aluminio-chinos/48123642.
[279] *Id.*

decision to appeal to the Appellate Body based on certain issues of law and legal interpretations in the panel report.[280] Due to the ongoing vacancies[281] at the Appellate Body,[282] no official reviews by the Appellate Body have been issued since 2020, and none are likely in the foreseeable future. As of now, there are thirty pending appeals.[283] The future of the national security exception on steel and aluminum from Chinese sources is unpredictable.

In some contexts, the steel and aluminum industries in China are significantly administrated by Chinese SOEs. Two of the six biggest aluminum Chinese exporters to the U.S. are Chinese state-owned companies, the Power Investment Group, and the Chinese SOE Chalco. According to the U.S., the steel companies had been at their lowest utilization rates and China had granted prohibited subsidy programs to these SOEs to produce steel-related products.[284] Likewise, the majority of Chinese aluminum producers had been granted so many subsidy programs that sixty percent of Chinese aluminum producers were non-profitable in 2015; meanwhile the country produced a record 32 million metric tons of aluminum. The U.S. found that the production of aluminum in 2015 was higher than that of 2014 by twelve percent.[285] The U.S. reasoned that the government of China reformed and even strengthened state control while making limited attempts to incorporate market drivers, and that China's state-run economy will continue to worsen.[286]

During the last twenty years, the U.S. invoked anti-dumping measures, countervailing

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[280] Panel Report, *United States—Certain Measures on Steel and Aluminum Products*, ¶ 2.12, 2.3, WTO Doc. WT/DS564 (adopted Dec. 9, 2022).
[281] *Appellate Body Members*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm, (last visited on May 30, 2023).
[282] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 19, 22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter "DSU"].
[283] *Appellate Body Members*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm, (last visited on May 30, 2023).
[284] *Id.* (For example, China banks provided preferential loan, input materials (coal, aluminum, electricity, etc.) to China Hongqiao Group, Aluminum Corporation of China Limited (Chalco), State Power Investment Corporation. Accordingly, the corporations receive more favorable treatment and pay less than adequate remuneration.).
[285] U.S.-CHINA ECON. AND SEC. REV. COMM'N, STATE-OWNED ENTERPRISES, OVERCAPACITY, AND CHINA'S MARKET ECONOMY STATUS 93 (2016).
[286] *Id. at* 120.

measures, and safeguards to counter the adverse effects caused by Chinese products on its domestic industries. For example, in 2002, the U.S. imposed very high applied import rates, even quotas, on Chinese steel for a period of three years.[287] Following that, China submitted to the DSB that the U.S. had acted inconsistently with its obligations under Article 6 SCM Agreement.[288] In some cases, the DSB confirmed that the U.S. acted inconsistently with WTO agreements by conducting no investigation of the unforeseen developments of Chinese steel, unlawfully imposing higher import taxes than the bounding rates in the U.S.'s schedules on Chinese steel. In addition, the U.S. illegally limited the quantity of Chinese steel on the U.S. market, which was inconsistent with Article XI GATT 1994.[289] As a result, the U.S. affirmed to the WTO that it would bring the measures into conformity with WTO agreements by issuing a proclamation terminating all the safeguard measures on the steel.

Put differently, U.S. steel and aluminum have been uncompetitive with subsidized Chinese steel and aluminum for a long time. The national security exception was invoked after the U.S. had failed to protect its domestic steel and aluminum industries through discretion and clear regulations of trade remedies.

Therefore, with the purpose of preventing the abuse of national security exceptions, the scrutiny of the U.S. authorities regarding Chinese steel and aluminum is essential for the predictability of the multilateral trade system. To that end, determining whether the U.S. was justified by national security under Article XXI GATT 1994 should be subject to the factual orientation and international context, not the domestic context of the national industry as the U.S.

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[287] Appellate Body Report, *United States–Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶ 13, WTO Doc. WT/259ABR (adopted Nov. 10, 2003).
[288] Request for Consultations by the United States, *China—Subsidies to Producers of Primary Aluminium*, WT/DS519 (Jan. 12, 2017).
[289] Panel Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Product*, ¶ 11.3, WTO Doc. WT/DS252 (Dec. 10, 2003).

claimed. However, under the present situation where the Appellate Body is inoperable, this is unlikely to happen.

V. CONCLUSION

The national security exception is the Achilles' heel of international trade law, giving rise to some sort of loophole.[290] Historically, hosting countries invoked the exception more frequently in investment disputes than the WTO members had, until recently. The investment tribunals' interpretation of the exception is much stricter than that of the DSB because the investment tribunals invoke the attribution test, where the only test specified under the ILC is the "unless the only" test.

The exception nevertheless fluctuates in specific BITs. In some of Argentina's BITs, the flexible interpretation is rooted in the diverse establishment of tribunals. Different tribunals interpret applicable provisions in their own manner, and there is no common appellate mechanism. In some investment disputes, the tribunals establish a consistent principle of national security. Most strikingly, in *LG&E,* the national security exception could be extended to the economic situation because "when a state's economic foundation is under siege, the severity of the problem can equal that of any military invasion."[291] Economic security, it should be noted, was one of the arguments made by the United States for its Section 232 actions on steel and aluminum imports.

Under GATT/WTO, invoking WTO countries are not provided an unlimited and non-reviewable *carte blanche*.[292] GATT/WTO DSB limits the flexible interpretation of a national security exception in Article XXI GATT 1994 through the "good faith review."[293] GATT/WTO enables its members to self-evaluate whether a critical situation of imported goods is a threat to its national

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[290] Stephan Schill & Robyn Briese, *If the State Considers: The Self-Judging Clauses in International Dispute Settlement*, 13 MAX PLANCK Y.B. U.N. L. 61, 69 (2009).
[291] LG&E Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability, ¶ 238 (Oct. 3, 2006).
[292] *Supra* note 290, at 66.
[293] *Id.*

security or essential interest and whether it is necessary to impose inconsistent measures to protect national security. The members can set specific criteria in their domestic laws to determine the existence of a national security threat and the competent authority investigating the national security threat. Then, the invoking WTO members may adopt measures inconsistent with their WTO obligations if they are considered necessary, including excessively high applied tax rates and/or limited quotas on the imported goods. However, the self-evaluation is not as absolute as if it were subject to the review of the DSB in accordance with the good faith principle as specified in DSU Article 3.2 and international customary law under Article 31.1 VCLT 1969. If the "double-edged sword" principle is not employed, WTO members can impose protectionist measures in the name of national security without having its necessity reviewed.[294] During the review, the DSB confines the emergency for the national security exception to war and the military interest to maintain law and public order interest and excludes political or economic interests.[295] The DSB has not broadened the coverage of the national security exception to cover economic security threats in the manner of the LG&E arbitral tribunal.

As far as SOEs are concerned, the percentage of governmental ownership in an SOE is not specified in any WTO agreements; although, as noted earlier, the Appellate Body has considered SOEs not to be "public bodies" in several rulings. Although investment treaties mention the ownership percentage of the state in an SOE, there are no regulatory indications confirming that the higher ratio capital ownership causes higher national security threats than a lower one. In practice, the influence of SOEs have existed in a *de jure* and *de facto* manner, even where the SOE owns a minority ten percent of shares. An SOE with a low level of government ownership is still the

[294] Daria Boklan & Amrita Bahri, *The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box?* 19 WORLD TRADE REV. 123, 135 (2020).
[295] Panel Report, *United States—Sections 301-310 of the Trade Act 1974*, ¶¶. 7.75, 7.111, WTO Doc. WT/DS152 (adopted Jan. 27, 2000).

beneficiary of many favorable financial treatments from that government. Chinese SOEs' investments are on the rise, which is likely causing trade distortions and national security (including economic security) threats to many other WTO members. The members closely monitor imports from China into their territories and refrain from granting market economy labels for Chinese goods (both specifically and generally) out of concern over their unfair trade cases and investment screening. For example, the CFIUS has adopted measures to block, at any time, any notified or non-notified transaction where it finds a danger to national security; a practice that is unrelated to potential violations of its GATT/WTO obligations under Article XXI GATT 1994. In addition, the U.S. Department of Commerce has remained unchanged in its pursuit of anti-dumping and countervailing proceedings against imported goods from China (a methodology which many observers believe is unfair and not justified under the SCM or anti-dumping agreements).

The often-inconsistent international regulations on SOE investments have been loosely adopted. Neither GATT/WTO nor BITs prohibit a country from maintaining an SOE and providing domestic subsidies for the SOE to embark into national and international markets, because this is effectively within the power of a sovereign country. Rather, GATT/WTO and BITs have sought solutions to limit the potential trade distortions caused by the SOE investments. The review of the national security exception by the DSB is one of the solutions. In the case of steel and aluminum, if the U.S. finds that the Chinese SOE-related products have benefited from Chinese subsidy programs, the products would be subject to the corresponding remedies available at the WTO, including but not limited to, anti-dumping, countervailing measures, and even safeguards. The application of the WTO trade remedies by the U.S. should be executed in accordance with the WTO agreements.

The U.S. and other WTO members should not invoke the self-judging nature of national security in Article XXI GATT 1994 to adopt any inconsistent measures and justify the inconsistency

by the non-reviewability of the self-judging capability. The non-reviewability of the measures can lead to abuse of the national security exception by WTO members, cause disguised trade protectionism, and endanger the predictability of the multilateral trading system. If the U.S. and Russia can invoke the self-judging nature of national security, what would prevent China, India, Brazil, or other members from doing so as well in the future? The good faith interpretation by the DSB should be the equilibrium of the self-judging of Article XXI GATT 1994. There are no WTO cases to date in which an SOE has been found to have carried out political strategies, which could imply economic espionage causing a security threat to the invoking country. The invocation of the national security exceptions to SOE-produced goods should be done cautiously and on a case-by-case basis. Otherwise, having a wide security exception that allows members to escape their obligations is dangerous because it would permit anyone to "justify anything under the sun."[296]

[296] Daria Boklan & Amrita Bahri, *The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box?* 19 WORLD TRADE REV. 123, 126 (2020).