Export Controls Under the General Agreement on Tariffs and Trade: An Analysis of the United States-China Semiconductor Dispute at the World Trade Organization

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ABSTRACT

The GATT-legality of the variety of export controls the United States has imposed on semiconductors and semiconductor-related technology bound for China has not been thoroughly explored in WTO caselaw or academia despite their salience in modern international economic relations. This article interrogates recent and historical international trade jurisprudence to weigh the merits of China's recent claims that the United States' export control regime is both impermissible under a variety of GATT articles, as well as indefensible under the GATT's national security exception. Relying on WTO caselaw, interpretive guidance, and expert analysis, this article concludes that whether the United States' export control regime amounts to a prima facie *violation of GATT Articles I and XI, and the viability of a defense under Article XXI, is a surprisingly close call in spite of long-held assumptions as to the legality of export controls under international trade law. This article makes a relevant contribution to the legal analysis of an ongoing WTO dispute in an underexplored frontier of trade law. How the WTO ultimately adjudicates this dispute could substantially impact the willingness of the United States and China to participate in the international forum going forward.*

I. INTRODUCTION

In 2022, China filed a Request for Consultations with the United States at the World Trade Organization ("WTO") in response to the United States' promulgation of export controls to limit the sale of semiconductors and semiconductor-related technology to Chinese entities.[1] In its Request, China complained that the United States' export control policies, justified on national security grounds, violated multiple provisions of the 1994 General Agreement on Tariffs and Trade ("GATT") and other treaties designed to liberalize international trade.[2] Among

1. Request for Consultations by China, *United States – Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*, ¶ 1, WTO Doc. WT/DS615/1 (Dec. 15, 2022) [hereinafter Request dated December 15, 2022].

2. *Id.* ¶¶ 34–40.

other issues, China argued that these export controls violate the GATT's bars on Most Favored Nation treatment and Quantitative Restrictions.[3]

While dozens of complaints are alleged at the WTO every year, the nature of China's filing stood out from the rest. Very rarely in the history of the GATT have nations alleged that the imposition of national security-based export controls amounts to a contravention of international trade laws. This unique complaint presents an opportunity for this article to answer the discrete, supremely important, and relatively novel question of whether there are sufficient grounds for China to pursue these claims at all in the international forum.

Notably, the dispute has not yet proceeded to litigation before an arbitral panel. However, whether it does so is not critical to the development of legal knowledge about the international trade law system's treatment of export controls. This is particularly so when it comes to determining whether a colorable claim can even be made as to the illegality of national security-based export controls under the affirmative obligations of the GATT. This dispute thus raises pertinent questions about the history, purpose, and modern application of some of the foundational, substantive terms of arguably the most important treaty on international trade in the world. That similar questions have never been litigated – much less answered in a satisfying fashion – in the eighty-year history of the GATT (and thus, the modern international trade system), despite the fact that export controls are pervasive, presents an opportunity for this article to conduct novel analysis into the facial legality of a major policy tool of international economic relations and international security that the U.S. government and its allies have utilized for decades. Other publications have discussed the interaction between the GATT and export controls, but none have comprehensively interrogated their legality under Articles I and XI, and most predate the bulk of twenty-first century caselaw on the applicability of Article XXI.[4]

In the course of evaluating the validity of the arguments for and against the legality of U.S. export controls under the GATT, this article also interrogates some of the gaps and inconsistencies in the jurisprudence of the GATT's foundational articles. By delving into legal arguments presented over the last eighty years in some of the most relevant cases, this article not only concludes that it is very much an open question whether national security-based export controls are *prima facie* violations of primary GATT obligations and covered under the derogation for national security present in the WTO treaties (such as GATT Article XXI) but also that the nations and experts making up the international trade arbitration

3. *Id.* ¶¶ 34–35.

4. *See generally* Michael Gaugh, *GATT Article XXI and U.S. Export Controls: The Invalidity of Nonessential Non-proliferation Controls*, 8 N.Y. INT'L L. REV. 51 (1995); Michael Rom, *Export Controls in GATT*, 18 J. WORLD TRADE L. 125 (1984). More recent articles have suggested that export controls might violate the affirmative trade liberalization commitments, but the analyses were brief and conclusory. *See generally* Tao Du & Ziwen Ye, *Trade Control and WTO Law: Examining the Adequacy of the GATT Exception*, *in* A CHINESE PERSPECTIVE ON WTO REFORM (Lei Zhang & Xiaowen Tan eds., 2023); Iryna Bogdanova, *Targeted Economic Sanctions and WTO Law: Examining the Adequacy of the National Security Exception*, 48 LEGAL ISSUES ECON. INTEGRATION 171 (2021).

system have intentionally left that question vague. Recent caselaw elucidating the tests for the application of the national security exception has been followed up by just one other in-depth scholarly analysis of one narrow aspect of Article XXI(b)'s applicability to export controls, discussed in the final section.[5]

Along the way, this paper explores some of the reasons for the international community's lack of clearly controlling jurisprudence surrounding export controls and other national security-based trade restrictions. Not only have the GATT's Contracting Parties and WTO adjudicators never before concluded that export controls violate the treaty's primary obligations, but never before have they given jurisprudentially sound justifications for their approach. This raises interesting questions regarding motive and treaty interpretation. In the scarce instances where the international community has been asked to weigh in on the GATT's treatment of export controls, it has offered somewhat conflicting, procedurally incoherent analyses that do little to inspire confidence in the future treatment of export controls at the WTO.[6]

Ultimately, no literature, caselaw, or interpretive guidance has before now comprehensively inspected the legality of export controls at the WTO, much less interrogated the broader functional legal interaction between the operative articles of the GATT and the national security derogation in the context of export controls. While the novelty of this subject may suggest something about its relative importance in the world of international trade law, perhaps it says more about how far countries are willing to go to avoid dissecting and analyzing each other's rights and privileges under trade law when national security is implicated. This is the value of historical analysis of the early caselaw: it helps derive fundamental principles out of the legal arguments that took place closest in time to the origination of the rules that continue to govern. This article therefore conducts an exercise in trade law originalism that reveals early support for an idea that much of the world has come to rely on in trade law jurisprudence: that the national security exception truly is a powerful tool for the circumvention of "fundamental" operative articles. This analysis certainly implicates the future of the United States' commitment to the WTO in the twenty-first century and offers insight into the conditions under and degree to which the United States was willing to let itself be bound as the world's superpower in the immediate aftermath of World War II.

Given the historical gravity of the issues it raises, the case at hand puts the international community squarely between a rock and a hard place: unable to say with much certainty whether export controls are GATT violations and, thus, facing down the reality that a decision one way or the other is likely to further drive at least one of the world's two biggest economies away from the main forum for

5. *See generally* Kentaro Ikeda, *A Proposed Interpretation of GATT Article XXI(b)(ii) in Light of Its Implications for Export Control*, 54 CORN. INT'L L. J. 437 (2021).

6. *See* Request for Consultations by Czechoslovakia, *Article XXI – United States Exports Restrictions*, GATT Doc. GATT/CP.3/33 (May 30, 1949); Request for Consultations by South Korea, *Japan – Measures Related to the Exportation of Products and Technology to Korea*, WTO Doc. WT/DS590/1 (Sep. 16, 2019).

international trade law and diplomacy. Perhaps that is why the international community has, as this article reveals, opted for intellectually fraught, quick-and-dirty approaches to adjudicating the relationship between export controls, the substantive articles of the GATT, and the national security exception.

II. THE UNITED STATES-CHINA EXPORT CONTROL DISPUTE

A. China's Request for Consultations

On December 12, 2022, China's delegation to the WTO circulated a letter in accordance with Article 4.4 of the Dispute Settlement Understanding ("DSU")[7] to the Dispute Settlement Body ("DSB") requesting consultation with the United States "concerning certain measures of the United States related to trade restrictions on certain advanced computing semiconductor chips, supercomputer items, semiconductor manufacturing items and other items, as well as their related services and technologies destined for or in relation to China."[8] China's complaint referenced provisions for the initiation of consultations under Article XXII of the GATT,[9] Article XXII of the General Agreement on Trade in Services ("GATS"),[10] Article 8 of the Agreement on Trade-Related Investment Measures ("TRIMS"),[11] and Article 64.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS")[12] because it believes the United States' trade restrictions are "inconsistent with the United States' obligations under various provisions of the covered agreements."[13]

B. The United States' Export Control Regime

The core of China's complaint is the "export control regime of certain items, including certain commodities, software and technology" administered by the U.S.

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7. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 4.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

8. Request dated December 15, 2022, *supra* note 1. China submitted three amended complaints that generally expanded on its grievances. *See* Request for Consultations by China, *United States – Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*, WTO Doc. WT/DS615/1/Rev. 1 (Feb. 10, 2023); Addendum to China's Revised Request for Consultations, *United States – Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*, WTO Doc. WT/DS615/1/Rev. 1/Add. 1 (Sep. 19, 2023) [hereinafter Addendum dated September 19, 2023]; Second Addendum to China's Revised Request for Consultations, *United States – Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*, WTO Doc. WT/DS615/1/Rev.1/Add.2 (Jan. 10, 2025) [hereinafter Second Addendum dated January 10, 2025].

9. General Agreement on Tariffs and Trade 1994 art. XXII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT].

10. General Agreement on Trade in Services art. XXII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

11. Agreement on Trade-Related Investment Measures art. 8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMS].

12. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 64.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I. L.M. 1197 [hereinafter TRIPS].

13. Request dated December 15, 2022, *supra* note 1, ¶ 2.

Department of Commerce's Bureau of Industry and Security ("BIS") through "Export Administration Regulations" ("EAR").[14] The EAR are guidelines and regulations governing, among other things, the issuance of licenses required to export or transfer (reexport) products – both of U.S. and foreign origin – containing U.S.-origin components or derived from U.S.-origin technology or software.[15] The United States assigns Export Control Classification Numbers to products "controlled" by EAR and publishes those numbers in its Commerce Control List ("CCL").[16] China noted the United States' CCL covers 2,800 items, "far exceeding that of the international export control regime," which "covers approximately 1,800 controlled items" found across

> multilaterally recognized agreements or resolutions, which include but not limited to, United Nations Security Council Resolution 1540 (2004), the Treaty on the Non-Proliferation of Nuclear Weapons, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.[17]

Some "low-technology consumer goods" are also controlled by the Department of Commerce, which require application for a license to export or transfer such products "to an embargoed country, to an end-user of concern, or in support of a prohibited end-use."[18]

The United States provides traders with several tools to determine the requirements for obtaining a license to export/reexport their controlled good. For example, the Commerce Country Chart helps traders determine the U.S. government's country-specific reasons for controlling items bound for those countries, utilizing the following codes: Chemical & Biological Weapons, Nuclear Nonproliferation, National Security, Missile Tech, Regional Stability, Firearms Convention, Crime Control, and Anti-Terrorism.[19]

Next, the Entity List is a U.S. government compilation of foreign individuals, companies, and organizations deemed a national security concern, subjecting them to export restrictions and licensing requirements for certain technologies and goods.[20] It identifies which foreign parties are prohibited from receiving items controlled by EAR without the exporter pre-securing a license for the transfer, and includes individuals, businesses, research institutions, and governments.[21] According

14. *Id.* ¶ 3.
15. *Id.* ¶ 4.
16. *Interactive Commerce Control List*, U.S. DEP'T OF COM., BUREAU OF INDUS. & SEC., https://perma.cc/7J72-HNGF [hereinafter *Commerce Control List*].
17. Request dated December 15, 2022, *supra* note 1, at n.1.
18. *Commerce Control List*, *supra* note 16.
19. *Interactive Commerce Country Chart*, U.S. DEP'T OF COM., BUREAU OF INDUS. & SEC., https://perma.cc/2HSD-84F9.
20. *Entity List*, U.S. DEP'T OF COM., BUREAU OF INDUS. & SEC., https://perma.cc/JW2E-BESQ.
21. Entity List, 15 C.F.R. § 744 (Supp. No. 4 2025).

to China, "In most instances, license exceptions are unavailable for the export, reexport, or transfer (in-country) to a party on the Entity List of items subject to the EAR. Rather, prior license authorization is required, usually subject to a policy of denial."[22] In contrast, as China noted in its third revised complaint, an updated version of the U.S. export control rules calls for a "presumption of approval" to be applied to requests for licenses to export to countries other than China.[23] China also asserted that U.S. export control rules require a license for exports, reexports, and in-country transfers to entities who are headquartered in, or whose parent company is headquartered in, China.[24]

The Military End User List identifies foreign parties that are prohibited from receiving certain controlled items without the exporter securing a license. These parties have been determined by the U.S. government to be "military end users," and "represent an unacceptable risk of use in or diversion to a 'military end use' or 'military end user' in China, Russia, or Venezuela."[25]

Finally, the Unverified List contains "parties whose bona fides BIS has been unable to verify," the export to whom the United States grants no license exceptions and from whom the United States requires "a statement" prior to the trade of any product, even those that do not otherwise require a license.[26] All told, "[t]o ensure the compliance with the EAR, traders from not only the United States but also other WTO Members must go through as many as 29 steps to determine and carry out their EAR obligations."[27]

C. China's Allegations

China alleges that the United States "abuses its export control regime as a tool to achieve its objectives of maintaining 'its leadership in science, technology, engineering and manufacturing sectors'" and "implements export control on items for civilian use or on activities of commercial entities, with a view *to weaken the scientific and technological development of other WTO Members and to preserve its technology edge*" (emphasis added).[28] China asserts that, to achieve these purportedly illegitimate goals, the United States "adopted a series of disruptive measures targeting China's development in related sectors and in the global semiconductor supply chain," including by amending the EAR in such a way that the United States "not only imposes export controls itself on China, but also compels other WTO Members to follow suit by virtue of its extra-territorial control."[29] The United States' conduct, according to China, causes a "severe disruption to

22. Request dated December 15, 2022, *supra* note 1, at n.3.
23. Second Addendum dated January 10, 2025, *supra* note 8, ¶ 12.
24. *Id.* ¶ 13.
25. *Guidance on End-User and End-Use Controls and U.S. Persons Controls*, U.S. DEP'T OF COM., BUREAU OF INDUS. & SEC., https://perma.cc/R3DL-N3DB.
26. Request dated December 15, 2022, *supra* note 1, at n.5.
27. *Id.* ¶ 6.
28. *Id.* ¶ 7 (citing 50 U.S.C. § 4811 (Statement of policy)).
29. *Id.* ¶ 8.

international trade and risk[s] the disintegration of the global semiconductor supply chain."[30]

In particular, China claims an interim final rule published by BIS in October 2022 adversely impacted global semiconductor trade.[31] The rule, titled "Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification" (the "Interim Final Rule"), amends the EAR in three specific ways that China says injures its trade interests.[32]

First, it "places trade restrictions on certain advanced computing semiconductor chips, supercomputer items, semiconductor manufacturing items and their related products, services and technologies destined for China, certain Chinese entities and, in some cases, transferred within or exported from China."[33] Second, it

> tightens the control against China's ability to manufacture semiconductor-related products from various regulatory perspectives, including, among others, controlling semiconductor manufacturing equipment and other items for civil use, adding certain Chinese semiconductor companies to the Entity List, imposing a broad end-use control, and imposing broad and vague controls on activities of U.S. corporations and individuals.[34]

Third, its Foreign-Direct Product Rules, which pertain to "U.S. items overseas, and items produced overseas using U.S.-origin components or made using U.S. technology," "compel[] other Members to follow suit and exert controls on shipments from outside the United States with respect to non-U.S.-origin items."[35] Ultimately, China says this new rule from BIS, in combination with its application of a presumption-of-denial policy for export control license applications and the way in which the rule was promulgated,[36] "overstretches the extent and effect of the export control regime to an extreme."[37] China claims these measures

30. *Id.*

31. *Id.* ¶ 9.

32. Addendum dated September 19, 2023, *supra* note 8, at n.11.

33. *Id.* ¶ 9. Plainly, this policy makes it more difficult to sell certain semiconductor-related products to China or to certain Chinse entities. It also restricts the transfer of certain products within or from China.

34. *Id.* Plainly, this policy limits the ability of firms to manufacture semiconductor-related products in China by controlling the equipment used to create semiconductors, even for civil uses. It also adds some Chinese semiconductor companies to the Entity List, imposes trade restrictions based on the end-use of covered products, and restricts the conduct of some Americans.

35. *Id.* Plainly, this policy compels other Members to restrict the reexport of covered U.S.-origin products or products of non-U.S. origin that contain covered U.S.-origin products or that were made using U.S.-origin technology.

36. *Id.* ¶¶ 9, 16. China suggested procedural defects in the promulgation of the Interim Final Rule may have violated the United States' Administrative Procedure Act in hindering traders' and other interested parties' exercise of their substantive Due Process rights to provide notice and comment on proposed rules, thus bolstering its argument that the United States violated terms in GATT Article X and GATS Article VI concerning the proper procedure for parties to promulgate domestic regulations affecting trade in services. *Id.* ¶ 42.

37. *Id.* ¶ 9.

constitute a disguised restriction on trade based on political and economic motivations which cannot be justified by the national security exceptions of the covered agreements, resulting in the nullification or impairment of the benefits China legitimately expects under multilateral trade rules.[38]

In addition to taking issue with the Interim Final Rule, China's complaint takes aim at the Export Control Reform Act of 2018 (50 U.S. Code §§ 4801, *et. seq.*), the EAR, and other decisions adding or revising Chinese entities in the Entity List.[39]

D. Legal Bases for China's Complaint

China alleges that the U.S. export control regime violates the United States' commitments under the GATT, TRIMS, TRIPS, and GATS in the following ways:

(1) GATT Article I:1: "[T]he United States fails to accord, with respect to rules and formalities in connection with exportation, immediately and unconditionally the advantage, favor, privilege and immunity granted to products destined for other WTO Members to like products destined for China."[40]

(2) GATT Article XI:1: "[T]he measures at issue, individually and collectively, constitute restrictions instituted and maintained by the United States on the exportation or sale for export of the products destined for China."[41]

(3) TRIMS Article 2: "[T]he measures at issue, individually [and] collectively, constitute investment measures related to trade in goods, which are inconsistent with Article XI of GATT 1994."[42]

(4) TRIPS Article 28: "[T]he measures at issue, individually and collectively, prevent patent owners from (a) assigning, or transferring by succession, the patent and (b) concluding licensing contracts."[43]

(5) GATT Article X:1: "[T]he United States has instructed certain semiconductor companies to make applications in relation to the new license requirements set forth in the Interim Final Rule before such requirements were officially published. The United States failed to publish promptly the Interim Final Rule pertaining to trade restrictions in such a manner as to enable governments and traders to become acquainted with them."[44]

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38. *Id.*

39. *Id.* ¶¶ 11–18.

40. *Id.* ¶ 36.

41. *Id.* ¶ 37.

42. *Id.* ¶ 38. Despite not formally being a claim brought under the GATT, China's TRIMS claim is related to the GATT and thus will be discussed briefly after Article XI is analyzed.

43. *Id.* ¶ 39.

44. *Id.* ¶ 40. Since China's Article X claims are highly fact-dependent (and better suited for a standalone review of whether U.S. administrative law is sufficient to meet the nation's treaty commitments on the promulgation of rules), as well as the fact that a discussion of discretionary

(6) GATT Article X:3: "[T]he measures at issue constitute laws, regulations, decisions, and/or rulings of general application relating to trade restrictions and the United States fails to administer those measures in a uniform, impartial and reasonable manner."[45]

(7) GATS Article VI: "[T]he United States, through its U.S. Persons' Activities Rules, fails to ensure that its trade-restrictive measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. Furthermore, the United States fails to maintain or institute objective and impartial procedures which, at the request of an affected entity, provide for the prompt review of and appropriate remedies for administrative decisions affecting trade in services."[46]

China's addendum also emphasized that the U.S. export control regime has impeded trade in a way that exceeds the permissible limits of GATT Article XXI's national security exceptions.[47]

E. Requests by Russia and Taiwan to Join Consultations

China's claims piqued the interest of other WTO Members. On December 22, 2022, Russia's delegation circulated a letter in accordance with DSU Article 4.11 requesting to join the consultations initiated by China given its substantial trade interest in the matter.[48] Russia's interest, the letter reasoned, stems from the impact of U.S. export controls on the exportation of certain products, including non-U.S. made products, to Russia.[49]

On January 3, 2023, Taiwan's delegation also circulated a letter requesting to join the consultations.[50] Taiwan reasoned its interest lies in the importance of the U.S.-Taiwan trade relationship, as well the fact that Taiwan supplies "an important share of the world market in semiconductors."[51]

F. Responses by the United States

The United States accepted China's request to enter into consultations while stating that the measures at issue were taken by the United States "to protect U.S. national security."[52] "Issues of national security," the letter continued, "are

application is already incorporated into this paper's Article XI analysis, this article will not explore the merits of this claim or the claim made in ¶ 41.

45. *Id.* ¶ 41.

46. *Id.* ¶ 42.

47. *Id.* ¶ 43.

48. Request to Join Consultations by Russia, *United States – Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*, WTO Doc. WT/DS615/2 (Dec. 22, 2022).

49. *Id.*

50. Request to Join Consultations by Taiwan, *United States – Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*, WTO Doc. WT/DS615/3 (Jan. 3, 2023).

51. *Id.*

52. Response to China's Request for Consultations by the United States, *United States – Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*, WTO Doc. WT/DS615/4 (Jan. 12, 2023) [hereinafter Response dated January 12, 2023]. The United States submitted a

political matters not susceptible to review or capable of resolution by WTO dispute settlement."[53] Citing the national security exceptions found in GATT Article XXI, GATS Article XIV *bis*, and TRIPS Article 73, the United States maintained it "retains the authority to determine for itself those measures that it considers necessary to the protection of its essential security interests."[54]

Furthermore, the United States rejected Russia's request to join the consultations for two reasons: the United States "does not intend to engage in business-as-usual activity with the delegation of the Russian Federation" in light of its "premeditated and unprovoked invasion of Ukraine," and the United States "does not consider Russia's claim of substantial interest to be well-founded."[55] In contrast, the United States accepted Taiwan's request to join the consultations, stating that Taiwan's "close bilateral trade ties with the United States" and its share of global semiconductor revenue convinces the United States that Taiwan's claim of substantial interest in the consultations is well-founded.[56]

III. LEGAL ANALYSIS: MOST FAVORED NATION TREATMENT

A. Alleged Violations of GATT Article I

According to China's complaint, the United States accords products destined for China less favorable treatment than it does like products destined for other WTO Members.[57] Under the GATT, this amounts to a claim that U.S. export control policies violate Article I, which outlaws Most Favored Nation ("MFN") treatment. The article states, in relevant part, that

> with respect to all rules and formalities in connection with . . . exportation, . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[58]

Per the DSU, a violation of a party's obligations under GATT creates a *prima facie* case that there has been some sort of nullification or impairment of another

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nearly identical letter in response to China's first revised complaint. *See generally* Response to China's Revised Request for Consultations by the United States, *United States – Measures on Certain Semiconductor and other Products, and Related Services and Technologies*, WTO Doc. WT/DS615/7 (Mar. 3, 2023).

53. Response dated January 12, 2023, *supra* note 52.

54. *Id*.

55. Response to Russia's Request to Join Consultations by the United States, *United States – Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*, WTO Doc. WT/DS615/5 (Feb. 16, 2023).

56. Response to Taiwan's Request to Join Consultations by the United States, *United States – Measures on Certain Semiconductor and other Products, and Related Services and Technologies*, WTO Doc. WT/DS615/6 (Feb. 16, 2023) (citing DSU art. 4.11).

57. Addendum dated September 19, 2023, *supra* note 8, ¶ 36.

58. GATT art. I, ¶ 1.

party's rights.[59] Therefore, to prevail in litigation over this matter, China need not demonstrate that it has actually been injured by the U.S. export control policies. Rather, as the agreement protects competitive *conditions*, China must prove the U.S. export control regime violates the GATT.[60] Thus, while China has not yet alleged that an injurious instance resulting from a violation has already occurred (*i.e.* it has not identified a specific attempted transaction where U.S. rules have resulted in the denial of a trader's full exportation rights to China), it need not do so in order to build its case against the United States. China may challenge the U.S. policies "as such," meaning it need not wait for a violation to occur if the policy at issue requires a U.S. official to violate the GATT.[61] Even if the United States argues that its laws do not mandate actions that amount to MFN violations, China's pleading that applications for licenses to export to Chinese entities on the U.S. Entity List are "usually subject to a policy of denial" and that the Interim Final Rule applies "a presumption-of-denial policy for export control license applications"[62] enables it to argue that regular violation of the GATT is a *de facto* "rule [or] norm that [is] intended to have general or prospective application" in the United States subject to challenge at the WTO.[63]

B. Merits of China's Claims

China's argument for why U.S. export controls violate Article I is straightforward: the BIS policies seem to impose more onerous requirements on the exportation of covered products to Chinese entities than they do on like products destined for non-Chinese entities. Where China's argument falters, however, is the conspicuous dearth of caselaw applying Article I to export controls of the variety the United States has imposed, diminishing the likelihood of China being able to successfully convince a neutral adjudicator of its claim that U.S. export controls are inherently violative of the MFN principle. There are many plausible reasons for this lack of precedent. For one, the GATT, WTO, and their bar on policies that accord MFN treatment are contemporaries of international regimes designed to coordinate nations' imposition of export controls (*e.g.* the 1949 Coordinating Committee for Multilateral Export Controls [COCOM] and the 1996 Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies), meaning the practice of imposing such limitations on outbound products enjoys a long-standing presumption of legitimacy that will be difficult for China to overcome.[64] Furthermore, China acknowledges

59. DSU art. 3, ¶ 8.

60. *See* Report of the Panel, *United States – Taxes on Petroleum and Certain Imported Substances*, L/6175 (June 17, 1987), GATT B.I.S.D. (34th Supp.), ¶ 5.1.9 (1988).

61. *See* Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, ¶¶ 73–74, WTO Doc. WT/DS322/AB/R (Jan. 23, 2007).

62. Addendum dated September 19, 2023, *supra* note 8, n.5, ¶ 9.

63. *United States – Measures Relating to Zeroing and Sunset Reviews*, *supra* note 61.

64. Chad P. Bown, *Export Controls: America's Other National Security Threat*, 30 DUKE J. COMPAR. & INT'L L. 283, 303 (2020).

the array of legitimate, multilateral export control regimes in its attack on the breadth of products subject to U.S. export controls.[65]

Additionally, given the historical hesitancy of countries to bring complaints at the WTO regarding policies implemented in the name of national security, there is little precedent for China's claim that U.S. export controls violate the MFN principle.[66] Few disputes have ever been brought challenging the legality of security-based export controls, and seemingly none have reached the merits of claims that such policies violate Article I.[67] As a result, legal analysis of MFN claims with respect to export controls is exceedingly rare in the body of international trade law. This article appears to be the first to seriously attempt such analysis.

C. Export Control Disputes Under the GATT

A very early attempt by Czechoslovakia in 1949 (the fourth-ever GATT dispute) to challenge U.S. export controls – a case in which Czechoslovakia challenged a U.S. licensing regime for exports and reexports to Europe (and particularly countries in Eastern Europe) post-war[68] – illustrates the international community's reluctance to develop caselaw on the matter. A review of the archival notes detailing the arguments and decisions of the Contracting Parties reveals that, in the very first of few disputes in which export controls have been challenged under the GATT, Contracting Parties, including the complainant Czechoslovakia, were eager to skip adjudication of the core MFN claims and instead resolve the dispute on the basis of the national security exceptions in Article XXI.[69] Tellingly, in its original complaint, Czechoslovakia merely relied on conclusory statements that "requesting licenses for exports to some destinations and none to others" is "contrary to the basic principles of Article I."[70] It offered little more than this by way of rigorous legal analysis in the prosecution of its claims that the United States' post-war export licensing regime violated Article I.

To the extent the United States argued the merits of the MFN claims at all in its response, it took the position that "the provisions of Article I would not require uniformity of formalities, as applied to different countries, in respect of restrictions imposed for security reasons."[71] With little elaboration of the point, it is

65. Addendum dated September 19, 2023, *supra* note 8, n.2.

66. Bown, *supra* note 64, at 303–05 (explaining that "hesitations arose out of recognition that the WTO would be put in a lose-lose position if forced to rule on any country's national security defense").

67. The WTO Analytical Index: Guide to WTO Law and Practice, a WTO publication which "covers the reports of the WTO Appellate Body and panels, the decisions or awards of arbitrators as well as related decisions and other significant actions taken by other relevant WTO bodies," does not contain *any* practice notes relating to Article I's applicability to export controls, suggesting the matter has not been explored in WTO jurisprudence. *See* GATT 1994 – Article I (Practice), *WTO Analytical Index* (July 2024 Version), https://perma.cc/R9CU-8JN9; *see also* GATT 1994 – Article I (DS Reports), *WTO Analytical Index* (June 2024 Version), https://perma.cc/79HD-GFYE.

68. *See generally* Request for Consultations by Czechoslovakia, *supra* note 6.

69. *See generally* Summary Record of the Twenty-Second Meeting, *Article XXI – United States Exports Restrictions*, GATT Doc. GATT/CP.3/SR.22 (Jun. 8, 1949).

70. Request for Consultations by Czechoslovakia, *supra* note 6, at 8.

71. Summary Record of the Twenty-Second Meeting, *supra* note 69, at 4–5.

unclear from this statement and the broader historical record whether this argument was the United States' interpretation of Article I (*e.g.* an argument that it is legally impossible for differential application of export controls to violate Article I) or merely an extension of the position the United States took in a reply that the Contracting Parties must dismiss Czechoslovakia's claims out of hand on the basis of Article XXI's national security exemption.[72] However, an argument made by the delegate from Pakistan suggests that, at the time, nations may have considered the existence of Article XXI as evidence that an exception for measures taken in the name of national security can be properly read into the treaty's hallmark MFN provisions, which would be a novel argument this author has not before seen in other trade law jurisprudence. Per the record, "As regards Article I, it was the opinion of his delegation [Pakistan] that the United States Government, as a pioneer of the General Agreement, would not have seen fit to violate the provisions of such a fundamental Article and thus deliberately destroy the structure of the Agreement."[73] This suggests that Pakistan views the "fundamental" Article I as incorporating an exception for export controls, for, if it did not, the United States would be destroying the GATT so early on in its existence. However, the viability of interpretating the potentially prevailing view of the time is further muddled by the rest of the delegate from Pakistan's position: "Article XXI, embodying exceptions to all other provisions of the Agreement, should stand by itself notwithstanding the provisions of other Articles including Article I, and therefore the case called for examination only under the provisions of that Article."[74]

Nevertheless, in reply to the U.S. position, Czechoslovakia relied on a literal reading of the GATT notwithstanding any security exceptions, arguing "Article I stated clearly that the provisions of non-discrimination were to be observed with respect to all rules and formalities in connection with importation and exportation. If exports were to be controlled, the same formalities must be applied to all countries wishing to purchase from the country concerned."[75] This position seemingly ignores the possibility for Article XXI to exempt the U.S. while asserting that uneven application of export control rules and formalities is sufficient for a finding of treaty violation.

Regardless, in perhaps the clearest expression of the proper interaction between Article I claims and the Article XXI derogation, the delegate from Cuba agreed with Pakistan's position that "[t]he question asked by the Czechoslovakian representative in relation to the provisions of Article I did not require an answer since the United States representative had justified his case under Article XXI whose provisions overrode those of Article I."[76] Ultimately, this position prevailed. A proposal to form a

72. *GD/4*, GATT DISPUTES DATABASE (WTO), https://perma.cc/F7DG-6MDG (citing Reply by the United States, GATT/CP.3/38 (Jun. 2, 1949)).

73. Summary Record of the Twenty-Second Meeting, *supra* note 69, at 6.

74. *Id.*

75. *Id.* at 5–6.

76. *Id.* at 5.

Working Party to further investigate Czechoslovakia's claims failed.[77] The Chairman (the delegate from Canada) called for the Contracting Parties to "give a decision," explicitly rejecting as inappropriate Czechoslovakia's proposal that the parties consider "whether or not such regulations conform to the provisions of Article I," and instead instructing the parties to decide the case on the basis of whether it was convinced the United States had, "particularly on the ground of security covered by the latter . . . defended its actions under Articles XX and XXI which embodied exceptions to the general rule contained in Article I."[78] The United States won decisively on a vote of 17-1, with Czechoslovakia supplying the lone vote for its position.[79] Therefore, it is evident from the historical record that from the beginning of the modern international trade law order, the GATT"s Contracting Parties largely believed it unnecessary to consider whether, absent Article XXI, export controls could be construed as Article I violations. They refused to conduct such legal analysis of the merits of the Article I allegations at all and quickly dismissed Czechoslovakia's claims on the basis of the Article XXI defense.[80] The official name of the dispute, *Article XXI – United States Exports Restrictions*, is revealing of the Contracting Parties' general view of what pertinent legal question laid before them.

D. Viability of the Article I Claim at the WTO

The most recent dispute involving export controls resolved at the WTO is *Japan – Measures Related to the Exportation of Products and Technology to Korea*, in which South Korea brought, among other claims, a complaint that Japan's export controls violated GATT Article I.[81] Much like Czechoslovakia did, South Korea relied on conclusory statements that Japan's export control regime impaired its rights under that GATT provision. Its only elaboration was that, "In particular, Japan no longer allows 'bulk licenses' when the exportation of the three identified products and their related technologies are destined for Korea while not imposing similar restrictions on the exportation of the like products destined for other WTO Members," which suggests South Korea's Article I claim is aimed at Japan's administration of its export controls and, unlike China's claims in instant case, not the export controls themselves.[82] Ultimately, the merits of South Korea's claims with respect to Article I were never further elaborated and went un-adjudicated as South Korea withdrew its request for WTO intervention in 2023.[83]

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77. *Id.* at 8–9.

78. *Id.*

79. *Id.* at 9.

80. Decisions, etc. from the Twenty-Second Meeting, 1, B.I.S.D. IIS/28 (Aug. 6, 1949) (writing, under the heading "Article XXI," that "[t]he Contracting Parties decided to reject the contention of the Czechoslovak delegation that the Government of the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licences").

81. *See generally* Request for Consultations by South Korea, *supra* note 6.

82. *Id.* at 3.

83. *See generally* Withdrawal by South Korea, *Japan – Measures Related to the Exportation of Products and Technology to Korea*, WTO Doc. WT/DS590/5 (Mar. 24, 2023).

Perhaps the shortage of caselaw expounding on the applicability of Article I to export controls is evidence of the international community's acceptance that such argument is a losing one, even absent the element of such claims having to overcome the respondent's claimed national security interests. In *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (Rare Earths)*, a series of disputes in which the United States, European Union, and Japan challenged the legality of China's export controls on rare earths, tungsten, and molybdenum, and in which the Article XXI defense played no role despite the dual-use potential of such materials, the claimants did not bother invoking Article I.[84] This suggests that, even without the natural deterrence against countries bringing claims against export control policies that could be batted away with an Article XXI defense, states generally do not consider Article I an appropriate stick with which to strike down an opposing party's export controls.

Ultimately, there is insufficient evidence for the notion that the international community is willing to take China's stance on Article I's applicability to export controls, even if the BIS policies resemble MFN violations at first blush. Rather, as in *China – Rare Earths*, the applicability of Article XI's bar on quantitative restrictions to export controls has generally been a more active area of litigation that could yield more interesting legal arguments helping us understand the correct interaction between export controls, primary obligations to liberalize trade under the GATT, and the Article XXI national security defense.

IV. LEGAL ANALYSIS: QUANTITATIVE RESTRICTIONS ON EXPORTS

A. Alleged Violations of GATT Article XI

The second element of China's argument is that the U.S. export control regime constitutes unlawful restrictions on the exportation or sale for export of products destined for China.[85] Under the GATT, this amounts to a claim that U.S. export control policies violate Article XI, which outlaws quantitative restrictions. The Article states, in relevant part, that

> No prohibitions or restrictions . . . whether made effective through . . . export licences or other measures, shall be instituted or maintained by any contracting party on . . . the exportation or sale for export of any product destined for the territory of any other contracting party.[86]

B. Arguments Under Article XI: Caselaw and Scholarship

China could try to convince a neutral adjudicator of its claim that U.S. export controls are inherently violations of Article XI. However, the relevant caselaw is exceedingly sparse.

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84. WORLD TRADE ORG., WTO DISPUTE SETTLEMENT: ONE-PAGE CASE SUMMARIES 1995–2020 187 (2023), https://perma.cc/8QKF-NHTW (summarizing *China – Rare Earths*).

85. Addendum dated September 19, 2023, *supra* note 8, ¶ 37.

86. GATT art. XI, ¶ 1.

First, China could argue that its action is justified by Article XI's bar on "export licenses." However the United States could respond that this language in the GATT, as evidenced by the goal of Article XI to standardize barriers to trade in the form of tariffs instead of quotas,[87] was intended to bar licenses distributed for the purposes of allocating quota shares and not licenses as they are understood in the context of national security export control regimes. In *Japan – Trade in Semi-Conductors*, export licenses limiting the export of semiconductors to the United States (in an effort by Japan to voluntarily allay U.S. dumping concerns) were argued successfully by the European Economic Community as functionally licenses for the exportation of semiconductors under a quota system; this analysis benefits a potential U.S. argument in the instant case that the bar on "export licenses" was intended to bar licenses implementing export quotas, not licenses implementing national security export control regimes.[88] Also bolstering the U.S. argument is the relative dearth of caselaw specifying that national security-based export licenses are covered under Article XI. However, that could be due to the chilling effect of Article XXI and other taboos on the adjudication of this issue.

In the alternative to arguing that the plain language barring "export licenses" makes the U.S. export control licensing regime illegal, China could argue that, after *Japan – Trade in Semi-Conductors* held that voluntary export restraints (on semiconductors, no less) violate the bar on "other measures" restraining trade, the term "other measures" intends to bar virtually all non-tariff barriers.[89] This argument is further bolstered by the fact that none of the exceptions provided for in Article XI cover export restrictions enacted for the purpose of ensuring national security, but cover other seemingly legitimate reasons for controlling exports (such as for the preservation of food and other essential goods in times of shortage or for the maintenance of commodity quality).[90]

Some scholarship has very briefly touched on the question of Article XI's applicability to export control measures, but much like in the case of Article I, examiners are wont to brush aside any notion that Article XI is violated by export control regimes like the one the United States implemented for semiconductors because "the national security exception of Article XXI allows export controls for national security reasons."[91] It is possible that the issue of whether export controls of the kind China complains about in the instant case could constitute Article XI violations (Article XXI notwithstanding) was truly left unaddressed by the GATT's framers. The most recent edition of a series of trade law casebooks first written by renowned scholar of WTO law, Professor John Jackson, gives a historical account of Article XI's scope. It notes that the 1970s Arab oil embargo

87. *See* JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT 353–54, 361 (7th ed. 2021).

88. *See* Report of the Panel, *Japan – Trade in Semi-Conductors*, L/6309 (May 4, 1988), GATT B.I.S. D. (35th Supp.), ¶¶ 99, 102–118 (1989).

89. *Id.*

90. GATT art. XI, ¶ 2.

91. JACKSON ET AL., *supra* note 87, at 363.

resulted in negotiations on the subject of access to raw materials and finished goods in the Tokyo Round of multilateral trade negotiations, but that "[t]hese negotiations were difficult" and "[t]he only result was an understanding that the GATT export provisions should be reassessed in the near future."[92] Later, expert controls ended up not being a significant issue in Uruguay Round negotiations and were similarly left unresolved in the Doha Round.[93] Ultimately, the late Professor Jackson's book concluded that "the lack of GATT restrictions on the use of export taxes is a major reason why commentators suggest that GATT does not effectively control export restrictions."[94]

Another scholar from the Peterson Institute for International Economics suggested that members of the international community have generally understood that "[w]hen imposing export controls, as long as countries respected the spirit of Article XXI, matters addressed by COCOM did not generally come up under the GATT."[95] The same scholar also suggested that, besides China and its voluntary commitment to eliminate all export taxes and charges, most other WTO Members have undertaken fewer legal obligations, meaning there is less "constraint on their use of export restrictions and thus there were fewer disputes" over export controls in Geneva.[96]

The relative rarity of cases involving export restrictions coupled with the taboo against litigating national security matters in the international trade realm and Article XXI's possible chilling effect on bringing claims in this area means that the international community has, once again, little precedent that directly addresses the matter China has raised. Notably, the 1949 complaint by Czechoslovakia in *Article XXI – United States Exports Restrictions* is even less instructive for the resolution of China's Article XI claims than it is for the resolution of its Article I claims. In that case, Czechoslovakia did not raise a complaint on the basis of Article XI, but rather on the basis of Article XIII, which bars discriminatory administration of quantitative restrictions.[97] Once again, however, Czechoslovakia's complaint offered conclusory statements on the issue, merely alleging, alongside its Article I claim, discrimination between it and other countries facing lesser export restrictions from the U.S.[98] There was no discussion of Czechoslovakia's Article XIII claim by the Contracting Parties, suggesting they found it sufficient to resolve the matter of discrimination within the context of Article I and, of course, Article XXI.[99]

Interestingly, the unadjudicated complaint in *Japan – Measures Related to the Exportation of Products and Technology to Korea* sheds some light on how nations interpret the applicability of Article XI to national security-based export

92. *Id.*
93. *Id.*
94. *Id.*
95. Bown, *supra* note 64, at 303.
96. *Id.* at 306.
97. Request for Consultations by Czechoslovakia, *supra* note 6.
98. *Id.*
99. Summary Record of the Twenty-Second Meeting, *supra* note 69.

controls in the twenty-first century. South Korea alleged Japan's export controls violated Article XI:1 because Japan's "Amended Export Licensing Policies and Procedures constitute restrictions other than a duty, tax or other charge, that is made effective through an export license on the exportation or sale for export of the three identified products and their related technologies destined for Korea."[100] This allegation that Japan's export control policies restricted exports using a licensing regime in violation of Article XI suggests that South Korea does not see the bar on "export licenses" in Article XI as pertaining solely to licenses for the allocation of quotas, since that dispute did not involve quotas but rather export controls akin to those promulgated by the United States.

However, while in *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, China's non-quota limitations on the enterprises allowed to export rare earth products were found to be violations of China's Accession Protocol, the Panel made no finding as to whether they violated Article XI; complainants did not argue such policies violated Article XI like they did with respect to China's export quotas.[101] Specifically, in that case, the complainants asserted that "China imposes restrictions on the trading rights of enterprises seeking to export various forms of rare earths and molybdenum, such as prior export performance and minimum registered capital requirements."[102] While these requirements are not facially related to national security, this suggests that the complainants (the United States, E.U., and Japan) do not view non-quota-related limitations (meaning limitations placed on companies unrelated to how much of the quota is left in a quota system) on the ability of companies to acquire an export license as being under the purview of Article XI's bar on "export licenses." This fully adjudicated case appears to cut against South Korea's unadjudicated implication that Article XI bars non-quota-based licensing regimes like export controls.

C. WTO Guidance

Conversely, a decision by the Council for Trade in Goods ("CTG") and the WTO's interpretation of it leaves a door open for national security export controls to fall under the purview of Article XI. The CTG's "Decision on notification procedures for quantitative restrictions" requires Members to notify (and concurrently provide a WTO justification for) "*all* quantitative restrictions in force, including import and export related measures, as well as seasonal ones" (emphasis in original).[103] Potentially relevant measures covered by the notification requirements include prohibitions, non-automatic licensing procedures, and voluntary export restraints.[104] This insistence on covering "*all*" quantitative

100. Request for Consultations by South Korea, *supra* note 6, at 3–4.

101. *See generally* Panel Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO Docs. WT/DS431-33/R (Aug. 29, 2014).

102. *Id.* ¶ 2.14.

103. *Decision on Notification Procedures for Quantitative Restrictions*, ¶ 8, WTO Doc. G/L/59/Rev.1 (July 3, 2012), https://perma.cc/TX3E-JDRW.

104. GATT 1994 – Article XI (Practice), *WTO Analytical Index*, ¶ 8 (May 2023 Version), https://perma.cc/G3AY-J2JC.

restrictions suggests national security-based export control policies *are* intended by the WTO to be included under Article XI's bar on quantitative restrictions. However, this author is unaware of any steps the United States has taken to formally notify (and provide justification to) the WTO of these restrictions in accordance with the CTG decision. Furthermore, neither China's complaint nor a publication by China purporting to track the United States' failures to comply with WTO rules mentions a failure by the United States to notify the WTO of its revised export control policies.[105]

Interestingly, the WTO's Analytical Index succumbs to the same habit that states had in 1949 when faced with the question of whether Article XI bars export controls: it collapses the question in with Article XXI analysis. Under the heading "Exceptions to the general prohibition of quantitative restrictions," the WTO's Article XI Practice guide states

> There are several provisions in the GATT 1994 and other WTO covered agreements that allow for the introduction or maintenance of quantitative restrictions as an exception. Since practically all Members maintain some form of quantitative restrictions (e.g. prohibitions or restrictions relating to nuclear material, narcotic drugs, weapons, etc.), the [CTG decision] seeks to provide transparency on the policy reason that justifies them. Provisions under the GATT 1994 that may allow a Member to introduce or maintain a quantitative restriction include, inter alia: Article XI:2, Article XII (restrictions to safeguard the balance of payments), Article XVII (import or export restrictions made effective through State-trading operations), Article XVIII (governmental assistance for economic development through protective or other measures), Article XIX (safeguard actions), Article XX (general exceptions), and Article XXI (security exceptions).[106]

This frames the analytical process as one in which nations are expected to provide a justification for quantitative restrictions that facially violate Article XI – including those imposed for national security purposes – at the time of notification. This suggests that Article XI was indeed intended to cover export controls like those of the United States in China's complaint. It would be incumbent upon the United States to justify its measures on the basis of Article XXI. This implies that it would be possible to find that U.S. export controls are *prima facie* out-of-compliance with the country's obligations under the GATT. Interestingly, the WTO also suggests that prohibitions or restrictions to trade adopted by Members

105. *See generally* Ministry of Commerce of the People's Republic of China, *2024 Report on WTO Compliance of the United States* (Sep. 2024), https://perma.cc/C2NA-SQC6. Notably, while this document briefly details the facts of China's grievances with U.S. export controls, it does not elaborate on the legal basis for the complaint under the GATT, merely pointing out that "the U.S. export control measures are under the guise of 'national security'. In fact, they have been pan-securitized, thus violating the principles of good faith and proportionality of international law." *Id.* ¶ 2.107.

106. GATT 1994 – Article XI (Practice), *supra* note 104, ¶ 14.

"as a result of international obligations undertaken outside the WTO framework," including

> a number of international conventions that regulate or restrict trade in certain goods, such as the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, or the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,

must also be notified and justified using a "WTO provision."[107] This suggests the WTO does not automatically give credence to obligations undertaken by states under other international export control regimes absent a justification recognized by the CTG (presumably Article XXI). It is thereby possible to further argue that *all* nations undertaking national security-based export controls as part of international export control regimes could technically be found facially out-of-compliance with GATT Article XI until such justification is provided. This potentially opens up every nation to the risk of (tedious) legal proceedings over their export controls that necessarily boil down to a national security analysis under Article XXI, much like China has chosen to do with the United States. Given the recency with which the WTO published this guidance flies in the face of any potential argument that export controls are so historically widespread among Members that the need to notify and justify every export control regime is obviated by longstanding practice, clarification of this rather technical issue is warranted.[108]

D. The Role of U.S. Discretion in Granting Export Control Licenses

The fact that export license applications can be rejected by the United States at all also poses a problem for the United States when determining whether its export control regime is a *prima facie* Article XI violation. In *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, the Panel held that discretionary or non-automatic import licensing systems are prohibited by Article XI, meaning that, unless licenses were granted automatically upon request, such a regime would amount to a quantitative restriction.[109] The Panel in that case also pointed to *Japan – Trade in Semi-conductors*, in which

> the panel found that 'export licensing practices by Japan, leading to delays of up to three months in the issuing of licences for semi-conductors destined for contracting parties other than the United States, had been non-automatic and

107. *Id.* ¶ 15.

108. *See* GATT 1994 – Article XI (Practice), *supra* note 104; Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

109. *See generally* Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc. WT/DS90/R (Sep. 22, 1999).

> constituted restrictions on the exportation of such products inconsistent with Article XI:1.'[110]

Accordingly, the *India – Quantitative Restrictions* Panel held that

> discretionary or non-automatic licensing systems by their very nature operate as limitations on action since certain imports may not be permitted. Thus, in light of the terms of Article XI:1 and these adopted panel reports, we conclude that a discretionary or non-automatic import licensing requirement is a restriction prohibited by Article XI:1.[111]

The Panel holding in *China – Measures Related to the Exportation of Various Raw Materials* is also pertinent here and may offer the United States some safe harbor from a finding of *prima facie* violation. While that case did not involve a national security question, it is the clearest case addressing whether an export restriction regime can be found *prima facie* in violation of Article XI despite the respondent invoking an exception. There, the Panel found that China's export licensing regime was *per se* inconsistent with Article XI:1 because it operated in a restrictive manner whereby discretion arose from "undefined and generalized requirements to submit an unqualified number of 'other' documents."[112] Much like in *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, the Panel determined that this amounted to "an additional restriction inconsistent with Article XI:1."[113] Notably, the rest of the Panel decision is potentially helpful for the United States. It held that, while a licensing regime implementing an underlying measure justified by another provision of the WTO Agreement, "such as GATT Article XI:2, XII, XVIII, XIX, XX or XXI," is consistent with Article XI if the license "does not by its nature have a limiting or restrictive effect."[114] A licensing requirement that imposes any restrictions "additional to that inherent in a permissible measure," (e.g. where licensing agencies have "unfettered or undefined discretion to reject a licence application," as in that case) would be inconsistent with Article XI.[115] Thus, the Panel held that China's export licensing regime, while a violation of Article XI due to its undefined requirements, was not *per se* inconsistent with Article XI because it – by collapsing an Article XX analysis in with the Article XI analysis – permitted China's export licensing agencies to require licenses for export restrictions justified by

110. *Id.* ¶ 5.130 (citing *Japan – Trade in Semi-Conductors*, *supra* note 88, ¶ 118).

111. *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, *supra* note 109, ¶ 5.130.

112. Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, ¶ 7.958, WTO Docs. WT/DS394, 395, 398/R (Feb. 22, 2012).

113. *Id.*; GATT 1994 – Article XI (DS reports), *WTO Analytical Index*, ¶ 34 (June 2025 Version), https://perma.cc/X9C6-Y9K9.

114. *China – Measures Related to the Exportation of Various Raw Materials*, *supra* note 112, ¶ 7.957.

115. *Id.*

other WTO measures.[116] This suggests that, so long as the United States can argue its discretionary licensing regime does not rely on undefined and generalized requirements like China's,[117] and so long as the adjudicator believes the United States will ultimately succeed in an Article XXI defense, it can avoid a finding that the U.S. export control regime is a *prima facie* violation of Article XI. Such analysis would therefore require a highly fact-specific inquiry as to the United States' export control licensing regime and would turn on the application of the national security exception.

E. Conclusions on Article XI Claims

Ultimately, as is the case with Article I claims, Article XI claims have never been adjudicated specifically with respect to national security-based export control matters.[118] There is little existing caselaw or interpretive guidance to approximate how a WTO adjudicator might analyze such a claim; what is available is dizzyingly contradictory. Therefore, it seems that, with respect to adjudication of China's claims that the U.S. export control policies amount to unlawful quantitative restrictions, we are once again instructed to skip to the national security exception analysis under Article XXI.

V. LEGAL ANALYSIS: TRADE-RELATED INVESTMENT MEASURES

Another element of China's complaint is that the U.S. export control regime constitutes a trade-related investment measure that, in violating GATT Article XI, also violates TRIMS Article 2.[119] Specifically, TRIMS Article 2 states, "no Member shall apply any TRIM that is inconsistent with the provisions of . . . Article XI of GATT 1994."[120] The TRIMS Annex further contains an illustrative list of trade-related investment measures inconsistent with the obligation to eliminate quantitative restrictions "provided for in paragraph 1 of Article XI of GATT."[121] The Annex states that trade-related investment measures restricting the exportation of products, "*whether specified in terms of particular products*, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production," (emphasis added) are inconsistent with "the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI" and thus TRIMS Article 2.[122] While this initially suggests the United States' export control regime is a facial violation of GATT Article XI, it is likely that, in the same tradition of collapsing Article XXI exception analysis into

116. *Id.*

117. China has separately alleged that the U.S. export control regime has not been administered impartially, so presumably this fact-specific analysis would occur in an inquiry into whether the United States has violated GATT Article X, which this article does not delve into further.

118. *See* GATT 1994 – Article XI (Practice), *supra* note 104; GATT 1994 – Article XI (DS reports), *supra* note 113.

119. Addendum dated September 19, 2023, *supra* note 8, ¶ 38.

120. TRIMS art. 2, ¶ 1.

121. *Id.* art. 2, ¶ 2.

122. *Id.* Annex 2(c).

the initial violation inquiry, TRIMS Art. 3, which states that, "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement," will be read as exculpatory for the United States from the beginning of the adjudication.[123] Were the national security exception non-existent, or a neutral panel were determined to make a technical finding of initial violation of fundamental trade principles prior to assessing whether the national security exception applies, China could argue the U.S. export control policy constitutes an unlawful trade-related investment measure, just as South Korea alleged in its complaint against Japan. [124] After all, the United States' measure, in limiting the exportation of U.S.-origin semiconductor-related products, dissuades further investment in that industry. Ultimately, however, an export control limiting the sale of dual-use items for national security reasons has never actually been adjudicated as a trade-related investment measure and, as previously established, history suggests that the most enticing question for any adjudicator in such a dispute would, frustratingly, be the applicability of the national security exception.[125]

VI. LEGAL ANALYSIS: THE NATIONAL SECURITY EXCEPTION

A. Applicability of GATT Article XXI

Given the analysis conducted in the previous sections, it is evident that the applicability of the GATT Article XXI national security exception to the United States' export control policy is critical, if not of singular importance, to the adjudication of the instant dispute. Article XXI states, in relevant part, that nothing in the GATT should be construed

> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests. . . (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations[.][126]

Recognizing the importance of this derogation, China's complaint argues that "the measures at issue have impeded trade in a way that exceeds the permissible limits of security exceptions under such provisions as Article XXI" because they "arbitrarily over-stretch the normal scope of export controls by seeking to use security exceptions to preserve the United States' economic and technological

123. *Id*. art. 3.

124. Request for Consultations by South Korea, *supra* note 6, at 4; 2024 Report on WTO Compliance of the United States, *supra* note 105, ¶ 2.107 (citing a study arguing "unbridled U.S. export controls on foreign adversaries disrupt global investment, production chains, and the flow of skilled workers, placing a burden on U.S. private firms," https://perma.cc/T23H-56BU). *See* GATS art. XIV *bis*, *supra* note 10.

125. *See* TRIMs Agreement – Article 2/Illustrative List (DS reports), *WTO Analytical Index* (June 2025), https://perma.cc/8LHZ-8A3N.

126. *See* GATT art. XXI(b)(ii), (iii).

'leadership.'"[127] The result, China argues, is a significant disruption to "normal international trade concerning semiconductor-related products," imperiling "the multilateral trade order that all Members benefit from."[128]

In response, the United States stated that, because its export control regime protects national security, it is a political matter not susceptible to review or capable of resolution at the WTO.[129] This suggests a position that Article XXI precludes *any* review of matters that would otherwise fall under the national security exception. The United States also asserted that GATT Article XXI and equivalent measures in other trade agreements give it the authority to judge for itself whether its measures are necessary to protect its essential security interests, meaning the United States reserves the right to make a final determination as to whether the national security derogation applies.[130]

B. Article XXI and Export Controls

The longstanding U.S. view that Article XXI renders claims against it non-justiciable has contributed to the taboo against fully adjudicating the merits of a nation's Article XXI defense. In the case Czechoslovakia brought against the United States in 1949, the former alleged that the United States could not rely on Article XXI because the export controls at issue were not restricting the trade of "war material."[131] Responding to a statement by U.S. Assistant Secretary of State for Economic Affairs William Thorp that the U.S. regulations were intended to limit goods "that would contribute 'to the military potential,'" Czechoslovakia implored the Contracting Parties to set limits on Article XXI(b)(ii) because, if they accepted a meaning that "[p]ractically everything may be a possible element of war potential," it would result in "rooting out important sections of vital peacetime industry, narrowing the field of important research and changing the face of modern civilization and make peaceful co-operation impossible."[132] The result is "[w]ar power stretch[ing] away from the actual organizations until it covers the whole nation."[133] Because the GATT speaks "only about 'military establishments,' which are something entirely different," it was Czechoslovakia's opinion that "war potential" has no place in the Contracting Parties' considerations.[134]

Notably, whether Article XXI applies at all to dual-use export controls was never discussed in the short-lived dispute between South Korea and Japan over the latter's export controls.[135] Japan never formally responded in writing at the WTO to South Korea's complaint; instead, its Minister of Economy, Trade, and

127. Addendum dated September 19, 2023, *supra* note 8, ¶ 43.
128. *Id.*
129. Response dated January 12, 2023, *supra* note 52.
130. *Id.*
131. Request for Consultations by Czechoslovakia, *supra* note 6, at 2.
132. *Id.* (citation omitted).
133. *Id.*
134. *Id.*
135. *See generally* Request for Consultations by South Korea, *supra* note 6.

Industry merely stated in a press conference that its updated export control regime is "WTO-consistent and does not disrupt supply chains."[136]

C. Russia – Measures Concerning Traffic in Transit

The WTO has only recently elucidated the test for applying Article XXI. In *Russia – Measures Concerning Traffic in Transit* (*Russia – Traffic in Transit*), following its invasion of Ukraine's Crimean Peninsula, Russia restricted road and rail-based transit of goods coming from Ukraine that were destined for Kazakhstan and Kyrgyzstan.[137] Ukraine alleged that Russia's restrictions on traffic in transit from Ukraine through Russia to third countries was inconsistent with Article V's freedom of transit obligations, among other GATT provisions and Russia's Accession Protocol.[138] This was the first case decided by a WTO Panel that featured the Article XXI defense (and its equivalent GATS and TRIPS provisions) and thus the Panel first took it upon itself to decide the "order of analysis" of the relevant GATT provisions.[139] While Ukraine insisted that the case was "an ordinary trade dispute in which Russia has imposed measures that are inconsistent with certain of its obligations under the GATT," Russia asserted that the panel "lacks jurisdiction to address any of the issues in this dispute owing to [its] invocation of Article XXI(b)(iii)."[140] On this matter, Ukraine stated that it interprets Article XXI "as laying down an affirmative defence for measures that would otherwise be inconsistent with GATT obligations" and rejected "the notion that Article XXI provides for an exception to the rules on jurisdiction laid down in the GATT 1994 or the DSU."[141] Russia argued the dispute "involves obvious and serious national security matters that Members have acknowledged should be kept out of the WTO" and that "involving the WTO in political and security matters will upset the very delicate balance of rights and obligations under the WTO Agreements and endanger the multilateral trading system."[142] Notably, in support of its argument that a "historic perspective" indicates the WTO lacked jurisdiction over this matter, Russia cited the 1949 *Article XXI – United States Exports Restrictions*.[143] Russia also declined to present defenses to Ukraine's specific claims that its policies were inconsistent with the substantive obligations of the GATT, instead confining its argument to a jurisdictional one on the basis of Article XXI.[144]

136. Press Conference by Minister of Economy, Trade and Industry Kajiyama, METI (June 30, 2020).

137. WORLD TRADE ORG., WTO DISPUTE SETTLEMENT: ONE-PAGE CASE SUMMARIES 1995–2022 227 (2023), https://perma.cc/MA92-LU7D (summarizing *Russia – Traffic in Transit*).

138. *Russia – Measures Concerning Traffic in Transit (Ukraine)*, U.S. TRADE REP., https://perma.cc/7T5X-N84C.

139. Panel Report, *Russia – Measures Concerning Traffic in Transit*, at 29 ¶ 7.20, WTO Doc. WT/DS512/R (Apr. 5, 2019).

140. *Id.* ¶¶ 7.21, 7.23.

141. *Id.* ¶ 7.31.

142. *Id.* ¶ 7.22.

143. *Id.* app. ¶ 1.1.

144. *Id.* ¶ 7.23.

For the first time in the history of the GATT, the Panel determined that the Article XXI defense amounts to a threshold issue of jurisdiction warranting its consideration prior to addressing the substance of the complaint.[145] The Panel claimed that the authority to make this decision stems from past Appellate Body decisions which give WTO Panels "freedom to structure the order of their analysis as they see fit, unless there is a 'mandatory sequence of analysis which, if not followed, would amount to an error of law' or would 'affect the substance of the analysis itself.'"[146] This justification, however, strikes the author as insufficient for the assertion that the invocation of Article XXI itself necessarily raises a jurisdictional question. Nothing on the face of the Article, and nothing in the history of Article XX's application for general exceptions, points to this derogation being a jurisdictional matter raised at the beginning of an adjudication to preclude any further inquiry rather than an exonerative one raised at the end. Moreover, the Panel made no finding as to whether its decision to analyze Article XXI's application before the application of other articles would amount to an error of law or affect the substance of the analysis itself. Instead, the Panel explained that Article XXI(b)(iii) "acknowledges that a war or other emergency in international relations involves a fundamental change of circumstances which radically alters the factual matrix in which the WTO-consistency of the measures at issue is to be evaluated."[147] According to the Panel, "a prior determination that [the measures at issue] would be WTO-inconsistent if they had been taken in normal times" is unnecessary because "there is no need to determine the extent of the deviation of the challenged measure from the prescribed norm in order to evaluate the necessity of the measure."[148]

In deciding whether Article XXI barred the WTO from exercising jurisdiction over Russia in the transiting dispute, the Panel grappled with the extent to which it should further restrict its own adjudicatory powers in the face of a defending nation claiming that Article XXI(b)(iii) is fully "self-judging" and thus preclusive of the Panel making any findings as to Ukraine's claims that Russia was facially out of compliance with the GATT.[149] Russia argued for a muscular approach to the self-judging principle of Article XXI, saying both "the determination of a Member's essential security interests" under paragraph (b) and "the determination of whether any action is necessary for the protection of a Member's essential security interests" under subparagraph (iii) are "at the sole discretion of the Member invoking the provision," thereby leaving the Panel with just one option: decline to exercise further jurisdiction over the matter.[150] While Russia "acknowledged that the Panel was established with standard terms of reference under Article 7.1 of the DSU," it argued nevertheless that the Panel "lacks jurisdiction

145. *Id.* ¶ 7.24.
146. *Id.* n.59 (citations omitted).
147. *Id.* ¶ 7.108.
148. *Id.*
149. *Id.* ¶¶ 7.25–26.
150. *Id.* ¶ 7.27.

to evaluate measures taken pursuant to Article XXI" because the Article "confers sole discretion on the Member . . . to determine the necessity, form, design and structure of the measures taken."[151] In Russia's own words:

> [T]he WTO is not in a position to determine what essential security interests of a Member are, what actions are necessary for protection of such essential security interests, disclosure of what information may be contrary to the essential security interests of a Member, what constitutes an emergency in international relations, and whether such emergency exists in a particular case.[152]

Ukraine balked at Russia's assertion that Article XXI was fully self-judging, as a finding that the exception's applicability was "non-justiciable" would "imply that in a dispute involving a measure that is WTO-inconsistent, *the invoking Member, rather than a panel*, would decide the outcome of the dispute by determining that the WTO-inconsistent measure is nonetheless justified" (emphasis added).[153] At minimum, according to Ukraine, Russia should be burdened with proving

> the legal and factual elements of a defence under Article XXI(b)(iii) of the GATT 1994, namely, that there was a serious disruption in international relations constituting an emergency that is alike a war that is sufficiently connected to Russia so as to result in a genuine and sufficiently serious threat to its essential security interests and therefore to justify each and every measure at issue as being necessary to protect those interests.[154]

China concurred in Ukraine's assertion that the Panel has jurisdiction to review Russia's invocation of Article XXI and urged the body to exercise "extreme caution" in its decision so as to "maintain the delicate balance between preventing abuse of Article XXI and evasion of WTO obligations, on the one hand, and not prejudicing a Member's right to protect its essential security interests, including a Member's 'sole discretion' regarding its own security interests, on the other."[155] It also argued that "Members invoking Article XXI(b) should adhere to the principle of good faith" found in the Vienna Convention on the Law of Treaties.[156]

The United States, on the other hand, largely agreed with Russia, saying the Panel lacks "authority to review the invocation of Article XXI and to make findings on the claims raised in this dispute."[157] It argued that "every WTO Member retains" an "inherent right" to "determine for itself those matters that it considers necessary for the protection of its essential security interests."[158] However, in this

151. *Id.* ¶ 7.28.
152. *Id.*
153. *Id.* ¶ 7.31.
154. *Id.* ¶ 7.32.
155. *Id.* ¶ 7.41.
156. *Id.*
157. *Id.* ¶ 7.51.
158. *Id.*

case, the United States drew a difference without a true distinction between its position and Russia's: it claimed that "it considers the Panel to have jurisdiction in the context of this dispute" per the DSU, but "it considers that the dispute is 'non-justiciable' because there are no legal criteria by which the issue of a Member's consideration of its essential security interests can be judged."[159]

Ultimately, the Panel held that "any action which [a contracting party] considers necessary for the protection of its essential security interests" from paragraph (b) of Article XXI was largely self-judging (though subject to a good faith review of whether there is a nexus between the action taken and the security interest being protected), though a finding must still be made by the Panel as to whether the factual circumstances of subparagraph (iii) are met.[160] The Panel had no difficulty concluding that Russia's invasion of Ukraine and subsequent implementation of trade-restrictive policies following the outbreak of armed conflict satisfied the requirements of subparagraph (iii), noting that "it is not relevant to this determination which actor or actors bear international responsibility for the existence of this situation."[161]

Interestingly, the Panel proceeded to briefly analyze the aspects of Ukraine's claims that, were it not for Russia meeting the conditions of Article XXI, would enable the Appellate Body to complete its legal analysis in the event of a reversal of the Panel's jurisdictional decision.[162] As Russia did not present arguments in response to Ukraine's substantive complaints, the Panel concluded that, "had the measures been taken in normal times," Ukraine would have successfully made a *prima facie* case that Russia's measures were inconsistent with its obligations under GATT Article V and the Working Party Report of Russia's Accession Protocol, though it declined to reach a conclusion on whether Ukraine successfully made out a *prima facie* case of violation of GATT Article X and Russia's Accession Protocol.[163]

D. Subsequent Article XXI Caselaw

While the Panel decision in *Russia – Traffic in Transit* completed much of the legwork for modern legal analysis of Article XXI, it was not the WTO's final word on the correct application of national security exceptions. In *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (*Saudi Arabia – IPRs*), the Panel conducted a somewhat more searching inquiry into the exercise of TRIPS Article 73, which is identical to GATT Article XXI and treated by the parties as such.[164] This case concerned Saudi Arabia's refusal to enforce criminal penalties against a Saudi Arabian broadcaster for the large-scale piracy

159. *Id.*
160. *Id.* ¶¶ 7.131–38.
161. *Id.* ¶¶ 7.121–25.
162. *Id.* ¶ 7.154
163. *Id.* ¶¶ 7.161, 7.183, 7.196–97, 7.224, 7.257.
164. Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, ¶ 7.231, WTO Doc. WT/DS567/R (June 16, 2020).

of Qatari and non-Qatari intellectual property licensed by a Qatari television network, in contravention of TRIPS Article 61.[165] The Panel held that, while Saudi Arabia's asserted concern for terrorism and extremism on the Arabian Peninsula qualified as an essential security interest within the meaning of paragraph (b) and that certain political actions around the time of the dispute evidenced an emergency of international relations within the meaning of subparagraph (iii), Saudi Arabia failed to prove there was a good faith nexus between the protection of its national security interest and its refusal.[166] Thus, the WTO suggested it would take a stricter approach to the good faith necessity requirement of paragraph (b), searching for "a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests."[167]

Notably, the Panel in the Qatar-Saudi Arabia case declined to approach the national security exception as a threshold jurisdictional matter. It held that, because it is "common practice for panels to begin with an examination of the claims of inconsistency with the relevant covered agreement, to be followed, if any such inconsistency were found to exist, with an assessment of whether the aspect(s) of the measure(s) at issue would be covered by one or more exceptions," and because Qatar argued the Panel should "follow the traditional approach" without disagreement from Saudi Arabia, and with express agreement from Brazil, Canada, China, the European Union, Japan, Norway and Singapore, it would first make a *prima facie* finding of violation by Saudi Arabia before considering the application of TRIPS Article 73(b)(iii).[168] Only the United States lodged an objection to this order of analysis, arguing the Panel should adhere more closely to that followed in *Russia – Traffic in Transit* by "begin[ning] and end[ing] its analysis by taking note of a respondent's invocation of a security exception."[169] Addressing its deviation from the order of analysis in the Ukraine-Russia dispute, the Panel noted that, "[t]he different order of analysis followed by the panel in *Russia – Traffic in Transit* appears to have been influenced by circumstances that are distinguishable from the present dispute, most notably 'the specific way Russia presented its arguments with regard to the jurisdiction of the panel.'"[170] The Panel suggested this occurred because "[a] panel may be guided by the manner in which the complainant has presented its claims, and equally, by the manner in which the respondent has presented its defences."[171] Ultimately, the Panel found *prima facie* violations of Saudi Arabia's obligations under TRIPS Articles 41, 42, and 61, with the violations of Articles 41 and 42 (whereby

165. *See generally id.*

166. JACKSON ET AL., *supra* note 87, at 669–70.

167. *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, *supra* note 164, ¶ 7.288 (citing *Russia – Measures Concerning Traffic in Transit*, *supra* note 139, ¶ 7.138).

168. *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, *supra* note 164, ¶¶ 7.1–7.6. (internal citations omitted).

169. *Id*. at 49 n.216.

170. *Id*. at 49 n.215.

171. *Id*. at ¶ 7.3.

Saudi Arabia made it difficult or impossible for Qatari nationals to travel to Saudi Arabia to enforce their intellectual property rights or otherwise secure local representation in Saudia Arabia to protect their intellectual property rights) ultimately being excused under Article 73(b)(iii).[172]

Most recently, Article XXI was applied in a dispute between Hong Kong and the United States regarding the latter's requirement that imported goods produced in Hong Kong must be marked to indicate "China," as well as in a series of disputes brought by China, Norway, Switzerland, and Turkey in response to the United States' assessment of duties on steel and aluminum imports.[173] The United States lost roundly. In each of these disputes, WTO Panels found the U.S. policies at issue were *prima facie* in contravention of its trade-liberalizing obligations under the GATT. They also declined to treat Article XXI as a threshold jurisdictional issue – despite U.S. arguments that they must do so – explaining their order of analysis decisions rested on preference for a traditional approach, as well as a belief that Article XXI(b)(iii) not being entirely self-judging mitigates the need to consider it first.[174] The Panels in these cases also held that the United States failed to meet its burden of proving the existence of an emergency of international relations under subparagraph (iii).[175]

E. Applying Article XXI to the Instant Case

The WTO has produced a body of caselaw that allows for serious interrogation of the applicability of Article XXI in the instant dispute between China and the United States regarding the latter's imposition of export controls on semiconductors and related materials bound for the former. First, a Panel formed to adjudicate the dispute would have to determine whether to treat the United States' invocation of Article XXI as a threshold jurisdictional/justiciability issue or an exculpatory one. The United States would likely argue for the former, as it did as an interested third party in *Russia – Traffic in Transit* and *Saudi Arabia – IPRs* and as a respondent in *United States – Origin Marking Requirements* (*US – Origin* Marking) and *United States – Certain Measures on Steel and Aluminum Products* (*US – Steel and Aluminum*); China, on the other hand, would likely argue for the latter treatment as it did as an interested party in the former three disputes and as a claimant in the last one.[176] While the Panel in *Russia – Traffic in*

172. WTO Dispute Settlement: One-Page Case Summaries, *Saudi Arabia – Protection of IPRs*, https://perma.cc/7MDF-6W8Z; JACKSON ET AL., *supra* note 87, at 669.

173. WTO Dispute Settlement: One-Page Case Summaries, *US – Origin Marking (Hong Kong, China)*, https://perma.cc/THU9-79W8; WTO Dispute Settlement: One-Page Case Summaries, *US – Steel and Aluminum (China), US – Steel and Aluminum (Norway), US – Steel and Aluminum (Switzerland), US – Steel and Aluminum (Turkey)*, https://perma.cc/Q8P2-FGKE.

174. *See generally* Panel Report, *United States – Origin Marking Requirement*, WTO Doc. WT/DS597/R (Dec. 21, 2022); *see also* Panel Report, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS-544, -552, -556, 564/R (Dec. 9, 2022).

175. *See generally United States – Origin Marking Requirement*, *supra* note 174; *see also United States – Certain Measures on Steel and Aluminum Products*, *supra* note 174.

176. *See generally Russia – Measures Concerning Traffic in Transit*, *supra* note 139; *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, *supra* note 164; *United States –*

Transit took the United States' preferred approach in its order of analysis, subsequent panels changed course, making it much more likely that Article XXI will not be treated as a jurisdictional issue going forward. This would mean that the Panel must make findings – with real stakes rather than as a result of a *pro forma* exercise – as to the facial permissibility of the United States' export controls.

Next, the Panel would assess whether the United States' export controls qualify as an "action which it considers necessary for the protection of its essential security interests" under paragraph (b). This is subject to a finding that the United States has an "essential security interest," as well as a good faith review of the nexus between the United States' chosen policy and the achievement of its security goals. The United States will have little difficulty convincing the Panel that it has an "essential security interest" in restricting China's access to semiconductors, as in no case has a respondent's alleged "essential security interest" been found insufficient to satisfy paragraph (b). Here, the United States will be able to point to a record of actions and statements that preceded and accompanied the export controls at issue. For example, as part of a series of statements accompanying the Bureau of Industry and Security's announcement of an updated package of export controls designed to further limit China's access to semiconductor technology, then-U.S. Assistant Secretary of Commerce for Export Enforcement Matthew Axelrod explained that the measures were part of an effort to "imped[e] the PRC's military modernization, WMD programs, and ability to repress human rights."[177] Other measures implemented for the purpose of limiting China's oppression of human rights and protecting Saudi Arabians from the threat of terrorism have previously survived this test.[178] It is also likely that a Panel would determine the United States meets the threshold for proving its export controls satisfy the good faith necessity requirement of paragraph (b). There is a strong nexus between controlling the export of U.S.-origin semiconductors to China and limiting Chinese entities' access to semiconductors that could strengthen its abilities to harm the United States' essential security interests. China may try to argue that the extraterritorial effects of the U.S. export control policies mirror Saudi Arabia's failure to police the abridgment of non-Qatari intellectual property rights. That assertion, though, would likely be unavailing because in *Saudi Arabia – IPRs*, the Panel was not persuaded that failure to police violation of *Qatari* intellectual property rights was plausibly connected to Saudi Arabia's claimed interest in protecting its population from terrorism, let alone failure to enforce the rights of non-Qatari third parties.[179] Overall, the United States will be

Origin Marking Requirement, *supra* note 174; *United States – Certain Measures on Steel and Aluminum Products*, *supra* note 174.

177. BIS, COMMERCE STRENGTHENS EXPORT CONTROLS TO RESTRICT CHINA'S CAPABILITY TO PRODUCE ADVANCED SEMICONDUCTORS FOR MILITARY APPLICATIONS (2024), https://perma.cc/54YN-ZLCW.

178. *See generally United States – Origin Marking Requirement*, *supra* note 174; *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, *supra* note 164.

179. JACKSON ET AL., *supra* note 87, at 670.

able to present a much stronger claim that its export controls are plausibly linked to its security interest than Saudi Arabia could in its dispute with Qatar.

In *US – Steel and Aluminum*, the Panel did not find a defect in the nexus between the United States' duties on steel and aluminum and its interest in preserving domestic industries critical to its national security. Rather, the Panel principally took issue with the United States' arguments under subparagraph (iii).[180] Furthermore, in *US – Origin Marking*, the Panel decided that the United States' concerns about China's actions abridging human rights in Hong Kong had not yet escalated to "a state of affairs, of the utmost gravity, that represents a breakdown or near-breakdown in the relations between states or other participants in international relations" that "would provide justification for taking actions that are inconsistent with obligations under the GATT."[181] Thus, given that Panels have consistently declined to find the application of those terms self-judging and have, in the last two cases in which the United States invoked the defense, decided that it failed to prove the existence of an emergency within the meaning of subparagraph (iii), the United States will face the greatest challenge in justifying its export controls are warranted in the face of an "international emergency." While the Panel in *US – Origin Marking* was careful to disclaim that "each situation will need to be considered on its individual merits" and that it would "refrain from suggesting that an emergency must necessarily involve defence and military interests," this does not necessarily make it easier for the United States to argue that its concerns about the PRC's military development justifies protection under subparagraph (iii).[182] Recognition that defense and military concerns are not necessary for an "emergency in international relations" to exist does not make the presence of military and defense considerations alone sufficient to prove the salience of such an emergency. As the Panel in *US – Steel and Aluminum* noted, generalized military supply considerations, even when coupled with a desire to maintain stocks of metals needed for "critical infrastructure," are insufficient to prove the existence of such an emergency.[183]

Rather, the United States is likely to find greater success by justifying its measure as one "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment" under subparagraph (ii). In *US – Origin Marking*, the Panel implied that the test for finding a responding state's actions were consistent with subparagraphs (i) and (ii) would be less searching than the test for compliance with subparagraph (iii) because

> unlike subparagraph (iii) that refers to a specific situation, subparagraphs (i) and (ii) refer to areas of action where particular aspects of essential security interests may be implicated. To that extent, these subparagraphs do not speak

180. *United States – Certain Measures on Steel and Aluminum Products*, *supra* note 174, ¶ 7.161.
181. *United States – Origin Marking Requirement*, *supra* note 174, ¶¶ 7.304, 7.358.
182. *Id.* ¶ 7.301.
183. *United States – Certain Measures on Steel and Aluminum Products*, *supra* note 174, ¶ 7.105.

> to the magnitude or gravity of the situation, as the terms "war or other emergency in international relations" do in the context of subparagraph (iii).[184]

Furthermore, while in *Russia – Transit in Traffic*, the Panel suggested that the phrase "relating to" within subparagraph (ii) implies that there must be a connection between the ends and means of the state invoking the national security exception, this should be a relatively easy standard for the United States to meet given that it is already likely to satisfy the good faith nexus requirement in paragraph (b).[185] While no other WTO caselaw or interpretive guidance has given clear directions on how to apply subparagraph (ii) thus far, one scholar has recently attempted to apply it specifically to export controls.[186] Though his analysis predated *US – Origin Marking* and *US – Steel and Aluminum*, Kentaro Ikeda's logical approach to analysis of the subparagraph and review of the history of Article XXI's drafting has persuasive value. He ultimately concludes that a test for the correct application of subparagraph (ii) should rely on factual findings as to "the likelihood that the restricted trade item could get to a military establishment, its military sensitivity and scope of use, and the existence of military tension involving the invoking country."[187] Ikeda briefly posited that, in the case of export controls limiting the trafficking of semiconductors, even if they are not "arms," he could envision a situation where semiconductors designed with military-grade specifications would be covered by subparagraph (ii) as "implements of war."[188] In contrast, high-grade but otherwise ordinary semiconductors used for commercial purposes may not be considered such implements presumptively covered by the subparagraph, meaning the trade of such semiconductors would likely need to be analyzed to determine whether they are nonetheless being procured "for the purpose of supplying a military establishment."[189] This therefore necessitates a finding as to the likelihood of the products in question being obtained by a military establishment. Recent reporting has suggested that the Chinese military has succeeded in surreptitiously acquiring commercial-grade Nvidia semiconductors of varying quality in spite of U.S. export controls; it is therefore likely that bans on the exportation of even sub-military-grade semiconductors from the United States will satisfy the second half of subparagraph (ii), even if they are not "implements of war" as Ikeda understands them to be.[190]

Accordingly, it would behoove the United States to argue that its actions are covered by subparagraph (ii) in addition to subparagraph (iii); restricting the Chinese military's access to semiconductor-related technology that could be used to augment its warfighting capabilities likely fits within the plain text of the

184. *United States – Origin Marking Requirement*, *supra* note 174, ¶ 7.300-01.
185. *Russia – Measures Concerning Traffic in Transit*, *supra* note 139, ¶ 7.69.
186. Ikeda, *supra* note 5.
187. *Id.* at 437.
188. *Id.* at 467
189. *Id.*
190. Eduardo Baptista, *China's Military and Government Acquire Nvidia Chips Despite US Ban*, REUTERS (Jan. 15, 2024), https://perma.cc/N4CN-GJVG.

subparagraph. The Chinese military's actual demand for chips covered by the United States' trade restrictions strengthens the prospect of this derogation's application. Ultimately, however, the bounds of subparagraph (ii) have not been adjudicated in an adversarial context, and the WTO has provided states with little, if any, guidance on the subparagraph's correct implementation, making it difficult for one to say with certainty that the United States will be able to satisfy the requirements of Article XXI(b)(ii) in the alternative.[191]

VII. CONCLUSION

The viability of China's claims that the United States has breached its obligations under international trade laws is a close call. On their faces, GATT Articles I and XI seem to disapprove of export control regimes of the variety the United States has instituted in the instant case, though the history of adjudication under those articles and the limited relevant guidance and scholarship cast some doubt on that assertion. Furthermore, for the United States, the availability of the Article XXI defense is somewhere between likely and a close call, depending on its framing of the essential security interests implicated and the tests for compliance with subparagraph (ii) the WTO ultimately adopts. Therefore, adjudication of this dispute, were it to ever occur, has the potential to break new ground in international trade law as well as to disrupt expectations that have largely been settled since the 1940s.

Perhaps the most interesting findings of this article are not those specific to the adjudication of export controls, but rather its observations about the idiosyncrasies of GATT jurisprudence over the last eighty years. For example, what continues to puzzle the author was the international community's largely unexplained hostility to Czechoslovakia's 1949 claim on its face and why, after seventy years, it decided to treat Article XXI as a threshold jurisdictional matter in *Russia – Transit in Traffic*, only to reverse course a year later in *Saudi Arabia – IPRs*. Arguably, this article uncovers as much about the interaction between Article XXI and the trade-liberalizing obligations as it does about said obligations, the institution of export controls, and the viability of China's claims against the United States overall.

This dispute between the United States and China over the future of trans-Pacific semiconductor trade has persisted since China first requested consultations on the export control matter three years ago. Even though the dispute has not been referred to a Panel for adjudication at the WTO, that does not mean consultations have succeeded in mitigating the international economic relations dilemma that these export controls have caused. In December 2024, the United States announced a new round of measures controlling the export of semiconductors and semiconductor-related technologies to China.[192] China responded at the WTO by updating its request for consultations in January 2025.[193] It also

191. *See* GATT 1994 – Article XXI (DS Reports), *WTO Analytical Index* (June 2025), https://perma.cc/JLC5-KWZ7.

192. BIS, *supra* note 177.

193. *See* Second Addendum dated January 10, 2025, *supra* note 8.

expressly retaliated against the United States for its semiconductor export controls by banning exports of gallium, germanium, antimony, "and other key high-tech materials with potential military applications" to the United States, resulting in higher prices for said products.[194] A spokesperson for China's Ministry of Foreign Affairs said in a statement on the new ban in December that "China has lodged stern protests with the U.S. for its update of the semiconductor export control measures, sanctions against Chinese companies, and malicious suppression of China's technological progress," while reiterating China's position at the WTO that "China firmly opposes the U.S. overstretching the concept of national security, abuse of export control measures, and illegal unilateral sanctions and long-arm jurisdiction against Chinese companies."[195] Furthermore, industry analysts have warned of further "revenue risk for manufacturers exporting to China" as they predict Donald Trump's return to the White House will result in "more aggressive, expansive semiconductor export controls to draw in US allies."[196] In September 2025 the Trump Administration expanded the applicability of Entity List restrictions to "any entity that is at least 50 percent owned by one or more entities on the Entity List," however, it agreed to pause the application of this rule for one year in exchange for China reducing export controls it had imposed on critical minerals in 2024 and 2025.[197]

Moreover, while the recent dispute between South Korea and Japan regarding the former's control of semiconductor-related chemical exports bound for the latter did not yield much in the way of useful caselaw with which to analyze the strength of China's claims against the United States, the matter is nonetheless illustrative of the effects of export controls on trading relations. A recent investigation into the impact of Japan's export controls on South Korea revealed the policy's impact on trade in the Pacific. Analysts at the Center for Economic and Policy Research found that these export controls "drastically cut trade of affected chemical inputs between Japan and South Korea, but increased trade of both countries with the U.S."[198] The researchers also found that South Korean exports of semiconductor manufacturing equipment to China increased, "consistent with the interpretation that these South Korean firms reallocate some of their production to China" where they can more easily source the chemical materials necessary for the production of semiconductors.[199]

194. Elaine Kurtenbach, *China Bans Exports to US of Gallium, Germanium, Antimony in Response to Chip Sanctions*, AP NEWS (Dec. 3, 2024), https://perma.cc/68FW-2MDQ. China recently eased some of these controls, but not uniformly. Keith Bradsher, *China Suspends Export Controls on More Critical Minerals*, N.Y. TIMES (Nov. 9, 2025), https://perma.cc/AR5W-Y3WR.

195. Kurtenbach, *supra* note 194.

196. Ian Tang, *Trump's Tech Wall: Intensifying "Tough on China" Policy Approach to Pose Global Risks*, CAPSTONE DC (Jan. 2, 2025), https://perma.cc/M6X5-PVCA.

197. *Expansion of End-User Controls to Cover Affiliates of Certain Listed Entities*, 90 Fed. Reg. 47201 (Sep. 30, 2025); *Fact Sheet: President Donald J. Trump Strikes Deal on Economic and Trade Relations with China*, WHITE HOUSE (Nov. 1, 2025), https://perma.cc/ZWS4-3SS4.

198. Ryo Makioka & Hongyong Zhang, *The Impact of Export Controls on International Trade: Evidence from the Japan–Korea Trade Dispute in the Semiconductor Industry*, CTR. FOR ECON. & POL'Y RSCH (Apr. 27, 2023), https://perma.cc/7WNG-X6XQ.

199. *Id.*

As the global trade of semiconductors and related technology is increasingly important for the supply of military establishments and high-tech industries, so is the salience of restrictions on their movement for international relations. As Jackson's book pointed out in 2021, "The potential for future disputes over export controls should not be underemphasized. They figured prominently in the relationships between nations prior to World War II and arguably were one of the causes, or at least a trigger, of the outbreak of that war in the Pacific."[200] While the WTO has yet to provide much, if any, guidance on how nations can resolve in the multilateral legal forum the inevitable disputes that these policies raise, decades of caselaw give us a clue as to what the "right" answer looks like. If the evolution of Article XXI jurisprudence is any indication, it will most likely be one that both protects the settled expectations of traders in a liberalized global economy while also ensuring each nation has latitude to implement those policies that best protect its legitimate domestic policy interests. Unsettled questions as to the interaction between international export control regimes like the Wassenaar Agreement, the scope of the GATT's bar on export restrictions, and the correct application of essential security exceptions to trade obligations outside of international relations emergencies will have to be answered by the WTO or whatever multilateral trade adjudication body is eventually tasked with hearing the export control dispute that eventually goes the distance in multinational litigation. For the time being, uncertainty as to the legality of export controls in the twenty-first century will continue to hamper international economic relations. This article plays a small role in gathering the jurisprudence that will be critical to the analysis of such questions, but it could not draw definitive conclusions regarding the dispositive issues that may one day be submitted to future GATT Panels.

Furthermore, a plethora of issues that this article could not begin to address await adjudicators, including whether the United States has promulgated and applied export control policies in contravention of its obligations under GATT Article X (a heavily fact-specific allegation that would require further briefing by affected parties) and whether U.S. export controls amount to *prima facie* violations of the country's obligations under TRIPS and GATS. Additionally, further inquiry should be made as to the legality of export control policies with extraterritorial regulatory effects. Lastly, this issue has the potential to yield interesting analyses into what one might consider international administrative law, in which order of analysis decisions by international arbitration bodies are interrogated and, potentially, standardized. What are the consequences of delaying – or skipping entirely – the adjudication of a complainant's assertions when a derogation is raised by the respondent? It also raises important questions as to whether domestic laws governing the procedures by which the United States promulgates its trade regulations, like the Administrative Procedure Act, are sufficient to meet its commitments under GATT Article X, GATS Article VI, and other international obligations to promulgate, publish, and adjudicate rules and licensure decisions with notice, opportunity to respond, objectivity, and other procedural rights.

200. JACKSON ET AL., *supra* note 87, at 363.