An Expensive Price to Pay: How Article XXI(b) Protects International Hegemony at the Cost of Good Governance

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ABSTRACT

In 2020, the Trump Administration's decision to impose 25% tariffs on aluminum and 10% tariffs on steel derivatives took effect. Despite widespread outrage from the international community, which is evidenced by the multitude of retaliatory measures and complaints against the U.S. before the World Trade Organisation, it is certainly not the first time that the International Hegemon U.S. has subverted international trading regulations. Presently, the U.S. has invoked the security exception under Article XXI of the General Agreement on Tariffs and Trade of 1994. These tariffs were defended by the Trump Administration as a measure to protect the viability of their domestic industries to meet the state's national defence requirements. The security exception, which as the name suggests, is an exception carved out for states that allows them to take any action it considers necessary for the protection of its essential security interests. It has, thus, largely been a self-judged provision used by states to justify trade decisions that protect their national interest. Two questions arise in this context: whether the existence of this exception serves to perpetuate international hegemony due to the sensitive aspect of state sovereignty it covers in its self-judging character, and whether this then transforms it into a tool to challenge good governance. The WTO as a governing body is founded on the ideals of good governance, however, it has been ineffective in regulating the exploitation of its provisions by powerful and developed states due to non-recognition of such principles explicitly. If status quo remains, where states misuse the provisions of GATT increasingly and repeatedly and the WTO remains unable to discharge good governance and hold such states accountable, it may result in monumental changes in the world order including the eventual collapse of the multilateral international trade regime. This paper explores the relationship between good governance and the WTO and how the security exception functions within this context. It examines the nature and usage of said exception by the U.S. and how this has created a pressing issue for the multilateral trade regime. It proposes an exception to the exception as a reinforcement to ensure that there is a check and balance of measures imposed under Article XXI as a possible solution. The proposed exception is of a qualifying nature that lays down international standards that must be met to retain the self-judging character of the national security exception, failing which measures would be open to judicial scrutiny.

Keywords: *International trade, good governance, International hegemony, National security exception, State sovereignty, Tariffs, WTO.*

1.0 Introduction

By the end of the Cold War era, consensus was that international organizations lacked institutional depth and existed to serve the interests of the rich and powerful instead (Kentikelenis & Voeten, 2020; Mearsheimer, 1995). In this background of global dissatisfaction and the failure of the International Trade Organization, the World Trade Organization was institutionalised as a product of one of the most successful trade negotiations of the time, the Uruguay Round, on the ideals of liberal trade and economy, international cooperation and global good governance.

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The term 'good governance' was first used while discussing the need for institutional reform and efficiency in the public sector within Sub-Saharan African countries (Kaufmann et al., 1999). It can be traced back to the development of the normative concept of 'governance' by the World Bank, which was defined as "*the manner in which power is exercised in the management of a country's economic and social resources for development*" (World Bank, 1992). This concept has evolved over the years, and today when viewed from the perspective of international economic relations, good governance is understood as having three dimensions (Christie et al., 2013):

i) The usage of rules, resources and power in the functioning of institutions;
ii) participation in terms of equal representation and equal access to decision making and inclusion; and
iii) factors ensuring transparency, accountability and fair administration.

Time and time again, the World Trade Organization has reiterated its commitment to the twin ideals of good governance and sustainable development. Notably, however, when it comes to acting on such commitments the WTO seems to favour one twin over the other (Weiss & Steiner, 2007) – while sustainable development is explicitly provided for as an objective in the preambulatory paragraphs of the Marrakesh Agreement, 1994 and regularly invoked by the Appellate Body (US – Import Prohibition of Certain Shrimp and Shrimp Products), the principles of good governance are merely alluded to and decidedly more obscure.

It may be argued that while the concept of good governance is hardly visible in the WTO's broader framework, the organization itself is a rules-based system (Mayer, 1981; Keohane, 1984; Jackson, 1989) rooted in the elements of participation, transparency and accountability. The origin of the consensus rule that WTO negotiations are based on lies within the principle of participation, and the effort to reduce the economic hierarchy between the developed and developing nations alike is aimed at ensuring accountability and effectiveness in the regime (Woods, 1999, p. 52). The establishment of the Dispute Settlement Body with the objective of delivering unbiased decisions on trade issues, as well as its model of functioning, is based on the principle of accountability, framed on the idea that the world economic order is accountable not to powerful nations, but to the international trading regime instead (Woods, 1999, p. 44). The requirement that tariff measures be reasonable, internally consistent, transparent and non-discretionary points to procedural element of principle of fairness seen within the regulations of the WTO, while the demand for equal distribution of power to ensure equitable outcomes of WTO measures points to the substantive element of the principle (Woods, 1999, p. 46). Essentially, the broad idea of good governance, intrinsic within the WTO, entails equal representation and powers amongst the world with no one country being able to act as an unaccountable hegemon (Botchway, 2001, p. 177). It stands to reason then, that the WTO stands against the notion of international hegemony.

Unfortunately, it would seem that the lack of explicit recognition of good governance principles in the WTO's legal framework, and particularly within the General Agreement on Tariffs and Trade, 1994, has fostered a consequent lack of any semblance of good governance in the multilateral trade system. In fact, it may very well be true that there exist certain provisions in GATT itself that have been used in an attempt to subvert the principles of participation, transparency, accountability and fair administration.

The multilateral trading regime has experienced several devastating setbacks in 2020, however in reality, the regime was already in shambles due the paradigm shift from multilateralism to multipolarity. This shift can be attributed to the growing flavour of 'economic nationalism' over the past decade and the United States of America, particularly under the Trump Administration, has been the most recent country to embrace the phenomenon with its short-sighted foreign policy, pronounced trade wars and abuse of power to suit the country's own interest that all served to spell severe ramifications for the rest of the world. This policy orientation is not a consequence of Trump's

presidency, and can be seen within the moderate democrat administrations of Obama and Biden as well. In fact, the Appellate Body crisis started to build up in 2011 when the reappointment of Jennifer Hillman was blocked, followed by the unilateral decision to block the appointment of Seung Wha Chang in 2016 (United States Blocks Reappointment of WTO Appellate Body Member, 2016). Economic nationalism is on the rise with protectionist measures increasing rapidly, threatening liberalised trade. This is also a direct consequence of two issues: the rise in regional trade or, Mega-Regionalism, and the abuse and misuse of the WTO regulations and provisions, such as Article XXI(b), by powerful nations and trade giants.

Article XXI(b), or popularly referred to as the national security exception (hereinafter referred to as NSE) is an example of this. Not only has it been used with increasing frequency in recent years, resulting in an arguable absence of transparency and accountability by virtue of the nature of this provision, its invocation has been accompanied by a host of unsavoury suspicions and hostile retaliation. While this is worrisome, what is even more unsettling is how the NSE itself is being used with impunity by powerful Member States to serve their own hegemonic ends, thereby actively undermining WTO's claim of good governance. It is, perhaps, obvious at this juncture that the discussion around NSE cannot be continued without the study of the one country which has invoked it multiple times in the past decade. In other words, the United States of America has once again assumed centre stage.

In 2017, the Trump Administration directed the initiation of an investigation into steel imports and their effect on U.S. national security (U.S. Department of Commerce, 2017).

In 2018, the Trump Administration imposed 25 per cent tariffs on steel products and 10 per cent tariffs on aluminium products ("Adjusting Imports of Steel into the United States," 2018).

In 2020, the Trump Administration imposed 25 per cent tariffs on steel derivatives and 10 per cent tariffs on aluminium derivatives ("Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States," 2020).

Section 232 of the Trade Expansion Act, 1962, empowers the President to regulate imports on the grounds of national security, beginning with an investigation by the Department of Commerce and ending with a recommendation, based upon which the President may issue proclamations adjusting imports. So far, only imports of steel and aluminium products and derivatives have been adjusted under this law, however, it is speculated that restrictions on automobiles and their parts ("Adjusting Imports of Automobiles and Automobile Parts Into the United States", 2019) and well as on uranium and titanium sponges follow closely ("Notice of Request for Public Comments on Section 232 National Security Investigation of Imports of Titanium Sponge," 2019). This move of the then Administration invited harsh criticism, both domestically and internationally.

On the domestic front, the very constitutionality of Section 232 (American Institution for International Steel, Inc. v United States, 2019) is being challenged in federal court along with the tariffs themselves (Severstal Export GMBH v. United States, 2018), and Congress is deliberating measures to limit the President's powers in this respect, in the aftermath of Trump's affinity for tariffs (Fefer et al., 2018). More importantly, this situation draws attention to the complications arising on the international front: although the U.S. imposed such tariffs under Section 232, it also invoked Article XXI(b) to justify the imposition.

These tariffs were defended by the Trump Administration as a measure to protect the viability of domestic industries to meet national defence requirements which is linked to protecting U.S. national security interest. Nevertheless, this move has been the cause of outrage and retaliatory measures including from the European Union, China and India (Fefer et al., 2018, p. 28). It has also resulted in numerous complaints against the U.S. before the WTO (Fefer et al., 2018, pp. 39-41), as it is seen not only as yet another violative act by the U.S. but also as a threat to the multilateral trading regime – a threat that still holds under the Biden Administration.

This article, while briefly touching upon these tariffs and their legitimacy under NSE, aims to answer this question: whether the very existence of the NSE serves to perpetuate international hegemony due to the sensitive aspect of state sovereignty it covers in its self-judging character,

thus, not simply becoming the perfect clause to exploit, but also the tool to challenge good governance and what this ultimately means for the WTO as well as the continued existence of liberalised multilateral trade.

For the purpose of this article, the researchers will be restricting their study of the exploitation of this exception to this particular instance of steel and aluminium tariffs levied by the U.S.

2.0 An Analysis of Article XXI(b) of GATT

The NSE can be invoked to justify violations of member obligations assumed under GATT, creating a caveat in the system. Article XXI(b) allows for countries to take any trade-related measures that it considers necessary for the protection of its essential security interests related to *fissionable materials, traffic of arms or ammunition, any material directly or indirectly involved in supply for the military establishment, measures taken during any emergency in international relations or during the time of war*. The essential keywords that warrant deliberation are "it considers necessary" and "essential security interests", "supply for the military establishment" and "emergency in international relations".

By and large dormant for decades, this clause, predominantly an affirmation of the recognition of the sovereignty of members (Federer, 2018; Alexandroff & Sharma, 2005), has become the centre to many disputes and virtually the ideal provision to exploit the WTO multilateral trade system. The NSE was created to ensure the sovereignty of states over their national security, as is reflected by the text. It has a clear discretionary nature, conferring upon states the absolute power in matters of determining essential security interests, and it is this nature that lends the provision of a self-judging character. This can further be substantiated by drawing a comparison with the exception clause under Article XX, where the subjective term "considers necessary" is absent, and whose invocation has been examined objectively by the DSB, creating a general rule that the absence of unjustified discrimination is to be established by the invoking member state (EC – Measures Affecting Asbestos and Products Containing Asbestos, 2001).

Due to lack of WTO judicial precedent on the NSE clause until 2019, the primary tool of interpretation has been state practice, a *lex specialis* of GATT treaty interpretation (Alford, 2011, p. 708). Individual interpretation of member states can be broadly classified into two competing interpretations, the *ultra vires* and the *intra vires* perspective (Federer, 2018). The *ultra vires* perspective argues that the sole judge of the NSE invocation is the invoking member and that DSB has no right to adjudicate on the security interests of a sovereign WTO member which, it is contended, is substantiated by the intention behind the clause: to ensure sovereign liberty over their essential security interests (Federer, 2018; U.N. Conference on Trade and Employment, 1947). The *intra vires* interpretation, further divided into two sub-classes, argues that the NSE falls within the jurisdiction of WTO Dispute Settlement Body. Where the first sub-class argues that the review power of the DSB is limited to whether the good faith requirement attached to invocation has been met with, the second sub-class argues that the invocation in its entirety is open to judicial scrutiny (Alford, 2011). This view is supported by the language used by the drafters of the text and the accepted rule that no member state can unilaterally justify violation of longstanding GATT principles (Federer, 2018, p. 230). Viewed from the lens of good governance, this *intra vires* interpretation is reflective of the principles of transparency, accountability and fairness. Unfortunately, the majority view and reigning state practice is that NSE is a self-judging clause, however, a strong minority argues that the invocation can be objectively reviewed based on whether the measure was taken in good faith and has

any objective nexus to essential security interests (Akande & Williams, 2003).

This also happens to be the view taken by the DSB in the very recent, and first of its kind, ruling on the NSE in 2019 (Russia – Measures Concerning Traffic in Transit, 2019). Ascertaining the DSB's jurisdiction over disputes on the invocation of the NSE, the body defined certain key terms of the article and chalked out the limits of the Article. Despite upholding the historic, and currently protested, self-judging character of the NSE, the DSB stated that such discretion is limited to what the state deems are its security interests and the WTO cannot scrutinise what interests pertain to the quintessential functions of the state. However, in rejecting Russia's claim that the NSE is non-justiciable altogether, the DSB held that the invocation can be reviewed where there is evidence of absence of good faith and where the nexus between the measure and the security interest is implausible. The same stance was mirrored in the Saudi Arabia dispute regarding the invocation of the security exception (Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights, 2020) under the TRIPS agreement.

The researchers submit that the majoritarian *ultra vires* interpretation is exactly what is creating a fissure in the framework of GATT, as it has allowed the NSE to morph into an anti-transparency, anti-accountability and anti-fairness weapon that can be wielded at will. This is evidenced by the way U.S. has been employing the NSE to further its agenda at the expense of others, and thus requiring urgent attention. The multilateral trading system appears to be crumbling from within, a gradual destruction brought on by the very international hegemony it sought to counter and yet seemingly perpetuates.

3.0 The U.S. and the National Security Exception – A Close Friendship

Much of Trump's electoral campaign consisted of assuring people he would "make America great again" (Simoes, 2017). It was evident since then that should he assume office, his America First policy would bring about dramatic changes in the way America dealt with the rest of the world. His attempts to "put American steel and aluminum back into the backbone of the country" (Whitehouse, 2017) were what we began to see shortly after his inauguration in the form of extreme tariffs. It was the promise of a politician being honoured. It is for this reason, among others, that it appears that the reason behind these measures was political, and not exactly pertaining to national economic security interests. In fact, economists are contending that these tariffs hurt American economic interest, particularly those of the manufacturing sector quite severely (Fajgelbaum et al., 2020).

What may have begun as a promise to voters, and arguably retained that character as does any promise made by a politician hoping to be re-elected, quickly turned into an irrational display of power by someone who thinks trade wars are "good and easy" (Griswold, 2019). Although the Administration defended the imposition of tariffs saying its domestic industries need to be self-sufficient in the interest of its national security, i.e., in case a war breaks out the U.S. must be able to manufacture enough weaponry on its own and currently it is dependent on imports to do so – these tariffs have been applied selectively. The application against U.S. allies including the EU does not bode well for international relations, but that fact that Argentina, Australia, Brazil, Canada, Mexico and South Korea are exempt from the tariffs on derivative steel products, and Argentina, Australia, Canada and Mexico are exempt from the tariffs on derivative aluminium products (Fefer et al., 2018, p. 9), has led to many states regarding this act as *malafide*. Indeed, the EU and other members have filed complaints against the U.S. in the WTO (Fefer et al., 2018, p. 43). However, the one who is suffering the brunt of these restrictions is growing superpower China – a state Trump often accused of employing "unfair trade practices" (Whitehouse, 2018). Trump's acts were presumably in an attempt to pressure China into revising its policies on intellectual property protection, technology transfers, industrial subsidies and market access (Guohua, 2019a) – something he has been consistently

criticising.

China has not taken these restrictions lying down – the U.S. is now staring at retaliatory tariffs in return (Guohua, 2019a), and Chinese complaints before the WTO (Fefer et al., 2018, p. 39). This has the potential to turn into a full-blown trade war quickly, if not already presenting as one. There appears to exist a political vendetta against China, originating well before Trump, which has resulted in several U.S.-China clashes before having reached this point where the U.S. is formulating policies that have a strong undercurrent of 'beggar thy neighbour.' Often credited to Adam Smith, the beggar thy neighbour policy refers to a policy that is enacted by one state in an attempt to resolve its economic issues but also worsens another state's economic issues (Smith, 2007). Protectionist policies such as trade barriers including tariffs, quotas and sanctions are examples of this. 25 per cent tariffs on aluminium and steel are *certainly* examples of this. Such policies were sought to be prevented by the institution of GATT, an agreement that embodies principles of free trade.

The crux of the problem, however, is not that one does not recognise what the U.S. did under the Trump Administration specifically, although that in itself is extremely concerning. Retaliatory beggar thy neighbour policies that result in in a trade war will affect developing countries the most, destroying multilateral trade and world economies. The problem is that International Hegemon United States of America has always been doing this – flouting norms of international trade with impunity to further its interests, economic or otherwise, regardless of the detriment to others (Jordan, 2019). Over and over it has bent rules to suit its purpose, always hidden behind the farce of "the greater good," parading as environmental concerns (US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, 2018; US – Import Prohibition of Certain Shrimp and Shrimp Products, 2001) or moral duties and no amount of world pressure or WTO rulings have resulted in changed behaviour. Thus, in a sense, Trump merely furthered the legacy of a superpower interested in preserving power, and Biden seems in no particular hurry to undo said legacy.

4.0 A System in Need of Changing

It is apparent that a global trade war rooted in preserving power and establishing supremacy is beneficial to none – especially developing states. The implications for the multilateral trading regime should the U.S. continue indulging in such behaviour, made not only possible but also convenient by the NSE, are dire.

Today, once again, the legitimacy of the multilateral trade system is being contested by developing nations who feel inadequately consulted within international organisations which are catering to the interests of the powerful (Woods, 1999, p.41). A classic example of this is how China is still eligible for the Special and Differential Treatment despite being the world's third largest economy (Cimino-Isaacs et al., 2021). One of the consequences of this dissatisfaction is, harkening back to the 90s, the rise in the number of Regional and Free Trade Agreements over the years, that has led to a sense of multipolarity within the sphere of global trade, weakening the WTO (Garzon, 2017, p. 102). It is becoming increasingly common for states to develop bilateral and plurilateral RTAs such as the EU-Singapore Free Trade Agreements, or the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. There are currently 342 RTAs in force, 7 of which entered into in 2021 (WTO Database, 2021). This positive trend in the creation of RTAs suggests that there may come a time where the WTO becomes defunct, indeed it is already viewed as obsolete by some (Creamer, 2019), what with the flagrant abuse of its provisions and its inherent inability to counter wilful misuse. This may exacerbate brewing discontent further and lead to the ultimate collapse of the system.

The WTO is already plagued by a plethora of issues including the debacle of the Doha Development Agenda (Araujo, 2018, p. 245) and the crippling of the appellate body by the U.S.

resulting in its stagnation since December 2019 (Cimino-Isaacs et al., 2021). U.S.' continued blocking of the appointment of judges to the appellate body has created a situation where there is, effectively, no grievance redressal mechanism left to members. This is not to say that the U.S. would abide by unfavourable rulings of the appellate body, in all likelihood as evidenced by history, it will not. While a change in the U.S. Administration may seem like a ray of hope for numerous issues like immigration, on the trade front, Biden's approach and goals appear to be much the same as his predecessor. Granted, Biden provides a more diplomatic and civilized approach to negotiations, but the economic nationalistic perspective still colours his core policy (Sloan, 2020). Even if Biden decides to extend cooperation to the WTO in an effort to salvage the situation, he has no plans to do so until the current global pandemic has been tackled by the nation whose timeline, based on the statistics, cannot be predicted at this point. Further, with more and more states beginning to prioritise their interests and protect and promote regional trading regimes – it means the end of an era that was built on the principles of free trade. This has been aggravated by the COVID-19 pandemic, which has shifted focus to domestic interests and slowed own the ministerial negotiations (Cimino-Isaacs et al., 2021), ultimately pointing towards the question of the continued relevance of the body itself. The NSE, compounding these issues, is a polarising provision that is sabotaging the WTO's very existence.

However, as much as a systemic change seems warranted, any radical change must be approached with caution. Propounded by Sir Charles Kindleberger, the Hegemonic Stability Theory contends that for the world to remain stabilized, there is a need for one stabiliser – a hegemon, if you will – committed to the ideals of a liberal trade regime including free trade and peace (Brawley, 2004). Arguing in favour, Robert Gilpin cites hegemony, liberal ideology and common interests as the key factors essential for the formation and expansion of a liberal trade regime and market. The theory predicts the decline of the hegemony eventually, where the hegemon gets weary of 'free-rider nations' and begrudges its economic partners who enjoy similar benefits with lesser input from their side, so to speak (Schubert, 2003 as citing Gilpin, 1987).

This precisely resembles the current scenario with the U.S. Although the framing of the 1994 GATT is mostly credited to the U.S., it no longer holds the same values of the liberal economy as it did back then and its policies now are nationalistic. The Trump Administration made its discontent with the regime clear, threatening to withdraw from the WTO if "they don't shape up" and going as far as to call the treaty "the worst trade deal ever made." (Jordan, 2019, p. 177). The WTO system, U.S. claims, has enabled the rise of countries like China at the cost of millions of manufacturing jobs in the U.S (Johnson, 2020). Therefore, any radical change to reform the system and the NSE clause particularly, might have very well been the straw that breaks the camel's back. While the Biden Administration has now replaced Trump in office, it is evident that his position on the WTO is not dissimilar, although perhaps not as extreme (Sloan, 2020). It has been categorically stated that the U.S. would be less willing to cooperate if its interests are not prioritised (Guohua, 2019b). Thus, it may lead to the withdrawal of the U.S. from the WTO regime and although such withdrawal may not lead to the abolishment of the WTO directly, it will significantly weaken the already crumbling system, maybe fatally.

Given the current state of affairs, there is no one clear successor to the seat of International Hegemon. The baton may pass to China, which has slowly begun its hegemonic journey, with increased contribution to the global economy and quantitatively ahead of the U.S. since 2013 (Lisewski, 2020) or to the EU, the current trade giants of the world alongside the U.S. However, it is also true that international trade and economy is not a relay race – such major transitions, more accurately the vicious battle for hegemonic dominance, disrupt the world order and create a flux. If the WTO were to collapse, and with-it GATT, there will exist a vacuum in the sphere of international trade where there would be no global trade facilitating and regulating body. In the long term, this

implies that smaller developing states would be left to defend themselves, with no institution to champion their cause and protect them from exploitation from developed states in unbalanced negotiations. The descent into multipolarity would become more rapid and intensive, attributed to numerous conflicting trade blocs with zero cooperation amongst them. A glimpse of this future is already visible, with an increasing number of states opting for Mega-Regionals, such as the Trans Pacific Partnership (TPP), and the Regional Comprehensive Economic Partnership (RCEP). RCEP alone accounts for 30 per cent of global GDP (McDonald, 2020) and TPP over 40 per cent (McBride et al., 2021). The numbers are so high and so many trade partners have entered into RTAs that even if the WTO shattered, their trade lines would remain intact, albeit presenting as cut-throat warring wolf-pack model of global trade with incredibly high stakes. Moreover, should trade wars break out, which is neither a foreign nor a far-fetched notion, there would be no impartial body to help end the trade crisis before it disrupts the world economy drastically. This also means that states would have to resort to their measures of dispute settlement that are fraught with diplomatic tension, politically motivated agendas and selfish interests. Ultimately, the cumulative effect of all these contributing factors would then trigger economic crises and threaten the ideals of sovereignty.

However, it is not merely in the interest of the world for world order to remain as is with a functional WTO with U.S. backing. U.S.' withdrawal might hurt the U.S. more than the WTO. The U.S. has only 20 FTAs in force with relatively smaller nations, and the recent withdrawal from the TPP (Office of the U.S. Trade Representative, 2017) and the abandonment of Transatlantic Trade and Investment Partnership (TTIP) negotiations, coupled with unregulated trade relations without GATT principles might be counter-productive for the U.S. as 60 per cent of the U.S. trade is outside the purview of its FTAs (Costa & Cimino-Isaacs, 2016). It would also lose its Most Favoured Nation status with 163 members and the country would become a less attractive base for manufacturing, thus increasing cost of U.S. production and diminishing its competitiveness which essentially comes down to an increased price burden on the consumers (Brown & Irwin, 2018).

The U.S. has lost too many lives, jobs and opportunities to the COVID-19 pandemic, and like several other states, now faces a disrupted supply chain and high unemployment rate (Weinstock, 2020). Although backing out of the WTO may seem beneficial to its economic nationalism and in dealing with its economic crisis, it would further cripple the U.S. economy and expose it to the danger of tariff hikes and more stringent restrictions from Member States, who are no longer bound by MFN obligations and other protections that the WTO offers. This would also then contribute to a faster hegemonic decline which may spell unimaginable and unmitigable disaster for the rest of the world.

5.0 The Road Ahead

As established, the need for a systemic change is imminent and extremely necessary, beginning with the self-judged national security exception that has turned into a dangerous tool foretelling ruin. However, a delicate balance must be struck between creating real change while also not disturbing the current system too severely lest we run the risk of unleashing trade instability and the breakdown of the multilateral trade system.

The researchers believe that what is required is a regulatory character to the framework of the NSE that will ensure transparency in application and clarity in interpretation. Such character would be falling in line with the *intra vires* interpretation of the NSE, thereby strengthening the WTO's supposed commitment to good governance as well, without interfering with state sovereignty enforced through the provision. This can be done by way of modification of the clause itself that involves laying down a set of qualifications that test the veracity of the invocation for members states to be eligible to claim the NSE for their proposed trade measures.

The researchers propose carving out an exception within the exception as a means of

reinforcement within the Article XXI(b) to ensure equilibrium between sovereign security concerns and independence and prevent the possible misuse of GATT.

Article XXI(b)

"Nothing in this Agreement shall be construed

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or…"

Provided that, the self-judging character shall be extinguished where one or all of the qualifications for the invocation have not been met in the interest of transparency, accountability and fairness.

Explanation 1. – In Clause b, "**qualifications**" include:

(a) The measure imposed under this exception

(i) must be uniformly applied to all nations in consonance with Article I. Where certain member states are exempted, a statement of reason for such exclusion must be provided by the invoking member to all contracting parties, subject to judicial scrutiny upon institution of complaint by the aggrieved member;

(i) Should the statement of reason provided by the invoking member relate to exceptions available under Articles XXIV and XX, then such measure imposed must satisfy the requirements of such articles.

(ii) must aim to impart a higher degree of benefit upon the invoking member than the degree of disadvantage created to another member;

(iii) must be in consonance with the standard and principles of good faith;

(iv) must be proportionate to the threat to national security of the invoking member. Where tariff measures are being sanctioned, they must be in quantitative proportion to the security interest aimed to secure;

(v) must have a prima facie plausible nexus with the security interest aimed to secure.

The researchers are aware of the difficulty that accompanies modifying a treaty, especially one as complex as GATT. However, it is necessary that GATT, being an extremely important instrument in international trade falling under the ambit of the WTO, explicitly recognises the principles of good governance. It is desirable that this loophole in the current system is reformed appropriately, particularly to combat international hegemony. Considering the recent trend of judicial pronouncements by the WTO in regards of the NSE, it is hoped that Member State acceptance and willingness to formulate a remedy – this specific remedy, would be strengthened through precedent.

Article XXI(b) is enabling powerful states to violate free trade norms and introduce policies best suited to their interests and in the process, exploit developing states that are bound by GATT norms. The cumulative effect of this is the ever-widening gap between the developed and developing member states. If remain unchecked, the consequence will be the inevitable decline of the WTO as well as its standing as a paragon of good governance, with members repudiating obligations. They may resort to protectionist policies, or devise an alternate trade regime rather than remain part of a

pseudo system that panders to superpower interests and where the authority of members to twist existing provisions to their advantage is not curtailed – such a development might trigger recession eventually and liberal economic principles may be at stake. Global cooperation is not enough, the need of the hour is good governance – what meets the eye today is an appalling lack of governance at all from the WTO, made possible by the simultaneous lack and presence of certain provisions in GATT used by Member States to their advantage and the WTO's ultimate disadvantage. If such practice of twisting provisions to undermine good governance continues to go unaddressed and remains non-remedied, the future for multilateral international trade and economies looks inarguably bleak.

The WTO must take concrete steps to save the world from a polarised trade regime and must push for more decisive negotiations and consequential reforms. This, it is submitted, begins with introducing a well-balanced reform to the NSE framework to combat the impunity with which superpowers navigate international trade and its hegemonic set up, while still respecting state sovereignty.

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