

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

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ABSTRACT

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

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

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