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Divergent Strategies: A Legal History of the WTO's National Security Exception in the Context of a Globalized Economy, 1983-2019

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**DIVERGENT STRATEGIES: A LEGAL HISTORY OF THE
WTO'S NATIONAL SECURITY EXCEPTION IN THE
CONTEXT OF A GLOBALIZED ECONOMY, 1983-2019**

*By: William J. Gardner, Jr.**

ABSTRACT

This student note provides a legal history of the World Trade Organization's (WTO) adjudication of "national security" disputes under Article XXI of the General Agreement on Tariffs and Trade (GATT). The skeptical German historian Oswald Spengler noted, "History is direction – but Nature is extension – ergo everyone gets eaten by a bear." Tracing the history of landmark GATT and WTO decisions from the 1983 US – Trade Measures Affecting Nicaragua case, this note weaves through the WTO's relatively consistent reluctance to engage in domestic policy, detailing the WTO's massive deviation from that policy in the 2019 Russia – Measures Concerning Traffic in Transit case. In doing so, this note presents a comprehensive history of the GATT and the WTO, while describing the fundamental themes of conflict presented throughout the WTO's relatively short history, especially in the context of the national security exception. Those themes, namely the so-called "shock of the global" and globalization, and the WTO's struggle to reconcile domestic and international interests, permeate throughout the history of the GATT and the WTO. In effect, this paper details the WTO's challenges with national security and domestic affairs, which some speculate might lead to a self-cannibalization of the WTO, especially should the United States elect to leave the organization within the next year.

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“History is direction – but Nature is extension – ergo everyone gets
eaten by a bear.”
-Oswald Spengler

“The nation will continue to be a central pole of identification, even if
more and more nations come to share common economic and
political forms of organization.”
-Francis Fukayama

I. INTRODUCTION

In 2019, thirty-six years of the World Trade Organization (“WTO”) Appellate Body’s jurisprudence evaporated with the stroke of a pen. From 1983-2019, the WTO Appellate Body recognized national sovereignty as a principal beyond its reach; Wilsonian self-determination guided Appellate Body decisions such that nationalistic security considerations counter-balanced—and arguably outweighed—standard tariff considerations.¹ The lingering specter of the 1947 General Agreement on Tariffs and Trade (“GATT”) provided, in Article XXI, an “exception” to the WTO’s otherwise globalized interest. The following provision, Article XXI, embodied the essence of early twentieth century views on self-determination; by 2019, it became clear that Wilsonian self-determination seemed incompatible with larger, globalized marketplaces, which require free trade—with few to no nationalistic tariffs—in order to operate properly.²

Article XXI

Security Exceptions

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

¹ See Woodrow Wilson, An Address to a Joint Session of Congress (Fourteen Points Address) (1918), in 45 THE PAPERS OF WOODROW WILSON 534, 539 (Arthur S. Link ed., 1984). For the sake of simplicity, the references to Wilsonian self-determination serve as a guiding instrument to explain the GATT 1947’s interests: ensuring that supranational trade not interfere with otherwise strictly national interests. “Wilsonian self-determination” refers to the President’s plea for nationalistic autocracy in the international system, highlighted in the Fourteen Points speech. *Id.*; see also Report by the Panel, *United States—Trade Measures Affecting Nicaragua*, ¶¶ 5.1-17, L/6053 (Oct. 13, 1986), http://www.wto.org/gatt_docs/English/SULPDF/91240197.pdf [hereinafter Nicaragua Panel Report].

² See Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697 (2011). Though Alford’s work focuses more on the self-judging nature of the national security exception, he contextualizes the conflict between supra-national and national intentions—a key theme in the comparison of the national security exception to Wilsonian self-determination drawn by this paper. It is also logical to attribute the national security exception to Wilsonian idealisms, being that early trade views were formed by post-World War I era international skepticism.

- (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
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.³

Of note—and quite unique to Article XXI—is that the national security exception applies to situations wherein the contracting party has the right to judge its own essential security interests.⁴ Noting the vague definition of “security interests,” it is important to again contextualize this exemption as quite contrary to international comity.⁵ Though the national security exception is a clear attempt to balance international trade with domestic considerations, many fear the ambiguity surrounding Article XXI’s language allows countries to essentially “opt-out” of international free trade agreements for the sake of national security.⁶

³ General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

⁴ *Id.*

⁵ *Id.*

⁶ Peter Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 DUKE L. J. 1277, 1278 (2003).

II. THE ORIGINS OF THE WTO NATIONAL SECURITY EXCEPTION, ITS PROBLEMS, AND THE CRISIS OF THE PRESENT DAY

Article XXI ensured each nation certain “national security” rights, wherein the WTO could not act “to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests.”⁷ In effect, GATT 1947 limited the WTO’s global mission from the outset – in theory, nations could circumvent Most Favored Nation (“MFN”) trade principles by claiming breach of their national security interests, thereby placing tariffs as they pleased and not necessarily to the benefit of the international community.

However, the WTO’s history seems to suggest such a fatal flaw ought not otherwise exist. In 1944, the Allied powers, meeting at the Bretton Woods Conference, crafted the World Bank, International Monetary Fund, and GATT 1947.⁸ Spearheaded by the United States, which moved away from its historically isolationist policies because it could now afford freer trade, GATT 1947 culminated in eight rounds, each of which attempted to reduce tariff levels and increase trade between nations.⁹ GATT 1947 and its architects recognized a strikingly modern trade theory – Less Developed Countries (“LDCs”) required trade, and the United States’ goal of “communist containment” would only be furthered if democracy, industrialization, and prosperity took hold in these countries.¹⁰

After eight successful rounds, in 1994, the Uruguay Round culminated in the creation of the WTO under the guise of GATT 1994.¹¹ Importantly, GATT 1994 incorporates the entirety of GATT 1947, but provisions the creation of the WTO under these former Bretton Woods

⁷ GATT, *supra* note 3, art. XXI(b).

⁸ WILLIAM A. LOVETT ET AL., *US TRADE POLICY: HISTORY, THEORY, AND THE WTO* 4 (2d ed. 2004).

⁹ *Id.*

¹⁰ See generally X, *The Sources of Soviet Conduct*, 25 *FOREIGN AFF.* 566-582 (1947); see also Lovett, *supra* note 8, at 4.

¹¹ Lovett, *supra* note 8, at 10.

principles.¹² The GATT Secretariat expanded from a rounds-based regime to a continuing multinational organization.¹³ Voting in the WTO shifted toward simple majority, with each country receiving one vote, as in the United Nations General Assembly.¹⁴ In addition, GATT 1994 created the WTO dispute settlement panel system, whereby countries that feel disfavored can counter tariff processes they feel are contrary to their interests by convening a panel to challenge the tariffs.¹⁵ Importantly, however, decisions upheld by the WTO's Appellate Body—a seven-member “court”—cannot be overturned except by a negative consensus; that is, all countries that win would have to support their victory being overturned in such a system.¹⁶ Therefore, as no rational actor would support the reversal of a decision in their favor, WTO panel decisions are all but impossible to overturn.

Having dispensed with the relevant background, this Note traces the legal history of the WTO national security exception, beginning with the 1983 *United States—Trade Measures Affecting Nicaragua* case and ending with the *Russia—Measures Concerning Traffic in Transit* case, noting the massive impacts on the disparate results between these two cases on pending dispute settlements. It will elucidate on four main themes: (1) the “shock of the global” and reconciling national interests with the globalized system of trade; (2) the recurrence of the idea that the WTO is full of incongruous goals, most importantly, reconciling national security exceptions with comity in international trade; (3) the WTO's failure to determine whether the national security exception is “self-judging”; and (4) the drastic shift from 1983 to now as part of a larger history of globalization, focusing on this context as shaping the development of international trade law.

This Note is an intellectual history. It will consider the now uncertain future created by the four aforementioned thematic undertones in the broader context of WTO dispute settlement issues promulgated by the national security exception to GATT 1947.

¹² General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

¹³ Lovett, *supra* note 8, at 10.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 10-11.

Importantly, one such example of looming uncertainty in WTO jurisprudence exists in the Qatar and UAE dispute over “measures taken in the context of coercive attempts at economic isolation” allegedly imposed by the UAE upon Qatar.¹⁷ Most drastic, however, are the implications for Section 232 tariffs imposed by the United States. Section 232 of the Trade Expansion Act of 1962 enables U.S. Presidents to unilaterally install tariffs under the guise of a domestic national security exception, mirroring Article XXI of GATT 1947.¹⁸ Though Section 232 and the Trade Expansion Act of 1962 were created for the Kennedy Round, wherein the United States slashed tariffs by roughly fifty percent, the legislation cuts both ways, allowing drastic restrictions of trade with little oversight. Due to President Trump installing tariffs on steel, aluminum, and automobiles under Section 232, eight countries, as well as the European Union, have initiated WTO dispute resolution panels against the United States: China, India, Canada, Mexico, Norway, Russia, Switzerland, and Turkey.¹⁹ As a result, now, more than ever, the clouded and muddled jurisprudence of the WTO regarding GATT’s Article XXI and the national security exception is vital to the interests of the global community.

Much of the existing scholarship on the legal history of the *United States – Trade Measures Affecting Nicaragua* case and the *Russia – Measures Concerning Traffic in Transit* case eschews notions of a continuing legal history in favor of discrete analyses. Simon Lester and Huan Zhu’s *A Proposal for “Rebalancing” to Deal with “National Security” Trade Restrictions* notes the *US-Nicaragua* case and its place in a broader history, but does not describe that history, instead focusing on an

¹⁷ See Tania Voon, *The Security Exception in WTO Law: Entering into a New Era*, 113 *AJIL UNBOUND* 45, 46 (2019), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/CF8C3DCDF2CD924CAEEDD147840668F9/S2398772319000035a.pdf/security_exception_in_wto_law_entering_a_new_era.pdf; WTO, *Qatar Seeks WTO Panel Review of UAE Measures on Goods, Services, IP Rights*, (Oct. 23, 2017), https://www.wto.org/english/news_e/news17_e/dsb_23oct17_e.htm.

¹⁸ Caitlain Devereaux Lewis, CONG. RSCH. SERV., R44707, *PRESIDENTIAL AUTHORITY OVER TRADE: IMPOSING TARIFFS AND DUTIES 1* (2016).

¹⁹ See Voon, *supra* note 17, at 47. For further information regarding the domestic implications of President Trump’s actions, which will not be the focus of this note, see Joshua Jamerson, *Congress Mulls Curbing Presidential Trade Authority*, *WALL STREET JOURNAL* (Feb. 14, 2019), <https://www.wsj.com/articles/congress-mulls-curbing-presidential-trade-authority-11550152801>.

active proposal for the re-shaping of US domestic policy in light of the 2019 *Russia – Measures Concerning Traffic in Transit* decision.²⁰ Roger P. Alford provided perhaps the most comprehensive legal history of the WTO's national security exception, however, his article *The Self-Judging WTO National Security Exception* is now dated, originating in 2011; yet, it remains one of the most complete and impressive legal histories on the pre-2019 *status quo ante* of the WTO and GATT Article XXI decisions.²¹ In *Petrificus Totalus: The Spell of National Security!*, R. V. Anuradha provides a complete list of the historical and contemporary national security dispute cases facing the WTO.²² Interestingly, Anuradha's documentation of these cases eschews historical analysis for a broader study of the national security exception itself; instead of explaining the contemporary issues regarding the ongoing trade wars, it contextualizes the GATT's development over time.²³ In *National Security and Economic Globalization: Toward Collision or Reconciliation?*, J. Benton Heath, provides a thematic account of the collision between international and national trade policies, particularly in the history of GATT Article XXI.²⁴ Yet, Heath's paper is not a history like this note; it is a thematic overview, describing the tensions between the national and the international, but not discussing and detailing the mechanisms and context in play throughout the thirty-six year history of GATT Article XXI.²⁵ The literature on the legal history of the WTO's decisions from the 1983 *US-Nicaragua* dispute to the 2019 *Russia-Ukraine* dispute insufficiently describes these events, claiming them to be separate and distinct, rather than, as this student note argues, part of a larger continuum.

The final—and integral—theme of this paper is the cyclical nature of the underlying legal history, such that the WTO seems to be moving away from the toleration of “isolationist” policies such as the Article XXI national security exception and toward a global,

²⁰ Simon Lester and Huan Zhu, *A Proposal for “Rebalancing” to Deal with “National Security” Trade Restrictions*, 42 FORDHAM INT'L L.J. 1451 (2019).

²¹ Alford, *supra* note 2.

²² R. V. Anuradha, *Petrificus Totalus: The Spell of National Security!*, 13 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 311 (2018).

²³ *Id.*

²⁴ J. Benton Heath, *National Security and Economic Globalization: Toward Collision or Reconciliation?*, 42 FORDHAM INT'L L.J. 1431 (2019).

²⁵ *Id.*

internationalized, and modern system of free trade based on international comity. Interestingly, this system seemed present at the time of the GATT's inception, yet yielded to international skepticism, an operational guideline for most trading countries during the pre-World War I era.²⁶

III. GATT – FOUNDING A NEW WORLD, 1947

As GATT grew out of the Bretton Woods framework and evolved into a mature international organization, its members met in a series of “rounds,” each designed to further international comity in commerce and trade. GATT concluded a series of eight rounds, not counting the initial round in Geneva: Annecy, Torquay, Geneva II, Dillon, Kennedy, Tokyo, Uruguay, and Doha. Though some of the early rounds—namely the Annecy and Torquay rounds—proceeded with the intention of establishing GATT as an international governing body, as well as developing GATT's institutional framework, each of the eight rounds shared one commonality: tariff reduction.²⁷

Importantly, GATT's designers intended its use for trade liberalization and freedom, not protectionism and isolation. Though provisions such as the aforementioned Article XXI national security exception existed at the time of GATT's adoption, the main intention of GATT was the systematic lowering—and eventual erasure—of international tariffs.²⁸ In its preamble, GATT recognized that reforms post-war had to favor market liberalization; GATT operated under the presumption that higher living standards would ensue internationally if market access increased while trade costs contemporaneously decreased.²⁹

Market liberalization starkly contrasted with pre-World War I attitudes, which favored nationalistic market independence and heavy tariffs in order to support domestic economies and production. Two

²⁶ SIDNEY BRADSHAW FAY, *THE ORIGINS OF THE WORLD WAR 4* (photo. reprt. 1948) (2nd ed.).

²⁷ See *Timeline: World Trade Organization*, BBC NEWS (Feb. 15, 2012), http://news.bbc.co.uk/2/hi/europe/country_profiles/2430089.stm.

²⁸ ANTHONY M. ENDRES & GRANT A. FLEMING, *INTERNATIONAL ORGANIZATIONS AND THE ANALYSIS OF ECONOMIC POLICY, 1919-1950* 131 (2002).

²⁹ GATT, *supra* note 3, art. VII.

economists' ideas stand pronounced in early GATT liberalization principles: the Swedish economist Folke Hilgerdt and the British economist John Maynard Keynes.

Hilgerdt's early work suggested freer trade in the 1930s would have reduced the depth of the worldwide impact of the Great Depression because it would have dampened inflation pressures in the larger, relatively closed economies.³⁰ In other words, liberal trade would have stymied the spread of the Great Depression's disastrous downturn because closed national markets would not have faced such heavy inflation, due to the countervailing force of global, liberal trade.³¹ Modeling the aforementioned then-experimental liberal trade network, in 1938, Hilgerdt demonstrated considerable trade integration despite the rise of protectionism in the 1930s; also, his models indicated the potential for greater multilateral trade, but only if trade were substantially liberalized and tariffs accordingly reduced.³²

Keynes' famous works, including the *General Theory*, did not hold sway in the early Geneva round of GATT.³³ Though neither the early GATT rounds cited the *General Theory*, nor did they attribute their ideas to Keynes in any official regard, a general "Keynesian" idea that aggregate demand could be managed by monetary and fiscal policy seemed to predominate.³⁴ By promoting microeconomic liberalization—that is, liberalization of trade at the national scale—through freer trade, GATT seemingly relied upon and employed the ideas of Keynes' work.³⁵ The Geneva round's initial research program derived much of its ideals from Scandinavian-style international economics, which ultimately proved pivotal in the installment of this Keynesian-esque system.³⁶ Clearly, the then-liberal ideas of free trade pronounced by Hilgerdt, Keynes, and their contemporaries

³⁰ Endres & Fleming, *supra* note 28, at 131.

³¹ *Id.*

³² *Id.*

³³ *Id.*; see also JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY*, 1936.

³⁴ Endres & Fleming, *supra* note 28, at 132.

³⁵ *Id.*

³⁶ *Id.*

manifested in the GATT, whether or not the 1947 agreement explicitly attributed its ideals to their works.

A. The Subcutaneous Emergence of the WTO, 1994

After nearly fifty years of successful trade liberalization measures, GATT folded into a permanent international body—the WTO. By “the early 1980s, the United States suggested a broader GATT round to include services and agriculture, and to open more NIC [‘Newly Industrialized Country’] and LDC [‘Less Developed Country’] markets.”³⁷ Countervailing forces—namely in the form of rising protectionist interests—threatened international comity in trade; a “consensus” of sorts soon emerged—a broad Uruguay GATT round was necessary to combat a potential bifurcation in the fragile international system established in 1947.³⁸ However, another threat to the international system emerged, placing the Uruguay round’s ambitions in doubt. The Soviet Union, under Mikhail Gorbachev, sought *perestroika* and *glasnost*, effectively reforming the country, and opening its manufacturing capacities to widespread international trade. The EU, in the meanwhile, resisted international liberalization of agricultural trade.³⁹ Finally, Americans felt—likely due to the aforementioned pressures on the GATT system—a “more level playing field was essential.”⁴⁰

These potentially bifurcating tensions resolved with the creation of the WTO. An international body providing equal votes and a dispute resolutions process based on the same goals as GATT 1947, the WTO seemed poised to cure the ailing GATT system.⁴¹ The United States viewed these aforementioned features, particularly the equitable voting system, as highly controversial.⁴² Like the United Nations, each member country of the WTO would receive one vote, with all votes weighed equally among the member states.⁴³ In effect,

³⁷ Lovett, *supra* note 8, at 8-11.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Lovett, *supra* note 8, at 8-11.

⁴³ *Id.*

developing countries possess some three-quarters of the votes in the WTO. Compared with the International Monetary Fund, which has weighted voting according to financial quotas and economic strength, the WTO provided an arguably less-than-ideal voting system for satisfying the GATT's purposes of a level playing field.⁴⁴

Most controversial to the United States and other founding members, however, was the WTO's Appellate Body system.⁴⁵ Panel decisions are appealable to the Appellate Body, a seven-member court, for the purposes of review.⁴⁶ However, Appellate Body decisions cannot be overturned except by the unanimous vote of all WTO member states.⁴⁷ From a matter of practicality, any nation that has won an appeal in their favor after appearing before the Appellate Body has no logical reason to then cast a vote to overturn the favorable decision. Effectively, the negative consensus requirement means that WTO Appellate Body decisions are nearly *de facto* and cannot be overturned.⁴⁸

Importantly, though the WTO provides access to dispute resolution panels, its appeals process is relatively limited. As such, decisions of the WTO Appellate Body can reshape interpretations of GATT 1947, without room for further appeal. The powerful precedential-overriding power of the Appellate Body ensures decisions once understood as the final manifestation of GATT's national security exception, for example the holding in the *US – Nicaragua* dispute, can be summarily overturned years later, as was the case in the *Russia – Ukraine* decision.

IV. US – NICARAGUA: THE PRECARIOUS ORIGINS OF A “SELF-JUDGING” ARTICLE XXI NATIONAL SECURITY EXCEPTION

On May 1, 1985, then-President Ronald Reagan issued Executive Order 12513 prohibiting the majority of trade with Nicaragua and restricting all transactions related to certain forms of air

⁴⁴ *Id.* at 10.

⁴⁵ *Id.* at 10-11.

⁴⁶ *Id.* at 11.

⁴⁷ Lovett, *supra* note 8, at 11.

⁴⁸ *See id.*

and sea transportation between Nicaragua and the United States.⁴⁹ Nicaragua, dissatisfied with President Reagan's actions, called for panel review by the GATT with the intent of examining the measures imposed by the United States in light of Article XXI.⁵⁰ The United States subsequently rejected the establishment of a panel, citing GATT Article XXI as justification for the sanctions. The United States' national security interests, according to the United States representative, fell within the domain of domestic governance, not the GATT's Council.⁵¹ "A panel could [] not address the validity of, nor the motivation for, the United States' invocation of Article XXI."⁵² The United States additionally noted the futility of Nicaragua's qualm, noting any panel recommendation made would inherently rely upon a limited frame of reference—United States and Nicaragua-centric domestic law—and therefore could not apply on a broader scale.⁵³

The Nicaraguan theory of Article XXI's application relied on two distinct conditions: (1) the measures taken by the United States—or any other Article XXI action taken by another power—had to be necessary for the protection of an essential security interest; and (2) the measure had to be taken in a time of war or other emergency in international relations.⁵⁴ In effect, Nicaragua advocated that Article XXI should be interpreted as a self-defense law; that is, in order for one power to effectuate national security tariffs, they would have to be attacked or otherwise somehow have their national security impacted by some other nation.

Interestingly, the Panel had little discussion regarding the purposes of the United States and its counter-arguments; contextual analysis provides that the United States perhaps was arguing Article XXI's national security was an assurance of a sovereign right, outside the realm of any international body. Historian Geoffrey Blainey, in *The Causes of War*, notes that international prosperity is not always an effective deterrent to war.⁵⁵ Using World War I as a case study, Blainey

⁴⁹ Exec. Order No. 12513, 3 C.F.R. 342 (1985).

⁵⁰ Nicaragua Panel Report, *supra* note 1, at 1.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 8.

⁵⁵ See generally GEOFFREY BLAINNEY, *THE CAUSES OF WAR* (1973).

describes the failure of peace despite increasing trade, tourism, and growing global multiculturalism.⁵⁶ In a similar vein, the United States responded to the aforementioned Nicaraguan assertion regarding Article XXI with a dismissive indifference, stating that “Article XXI applied to any action which the contracting party taking it considered necessary for the protection of its essential security interest.”⁵⁷ Similarly to the thesis in Blainey’s work, the United States argued Article XXI inherently could not be for war deterrent purposes. Though the Nicaraguan government claimed that war could be deterred through the functioning of the GATT—by increasing trade and trade access—the United States supposed through its argument that the GATT functioned less for the purposes of peace and more for the purposes of financial growth.

Despite American protestations, in a separate review of the issues at bar, the International Court of Justice found that embargoing Nicaragua was one of a series of economic and military actions taken against Nicaragua in violation of international law.⁵⁸ The GATT Council noted the International Court of Justice’s holding that the embargoes were not necessary for the protection of any essential security interest of the United States.⁵⁹ The United States replied to the International Court of Justice and the panel with a simple argument—Article XXI applied to “any action which the contracting party taking it considered necessary for the protection of its essential security interest.”⁶⁰ Using direct language from the GATT 1947, the United States highlighted an inherently self-interested application of the law: the national security exception applied in situations where a country was acting in order to protect its own national security. In other words, the best judge of a nation’s national security, then, was that nation itself.

Adjudicating this dispute, the GATT Council relied upon the following limited terms of reference:

⁵⁶ *Id.*

⁵⁷ Nicaragua Panel Report, *supra* note 1, at 7.

⁵⁸ *Id.* at 1.

⁵⁹ *Id.* at 8.

⁶⁰ GATT, *supra* note 3.

To examine, in the light of the relevant GATT provisions, of the understanding reached at the Council on 10 October 1985 that the Panel cannot examine or judge the validity of or motivation for the invocation of Article XXI:(b)(iii)[sic] by the United States, of the relevant provisions of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/211-218), and of the agreed Dispute Settlement Procedures contained in the 1982 Ministerial Declaration (BISD29S/13-16), the measures taken by the United States on 7 May 1985 and their trade effects in order to establish to what extent benefits accruing to Nicaragua under the General Agreement have been nullified or impaired, and to make such findings as will assist the CONTRACTING PARTIES in further action in this matter.⁶¹

The Panel report made clear that “the Panel could not examine the validity of, nor the motivation for, the United States’ invocation of Article XXI.”⁶² The aforementioned terms of reference explicitly state the Panel “cannot examine or judge the validity of or motivation for the invocation of Article XXI:(b)(iii)[sic].”⁶³ Prematurely having its legs swept from below, the Panel therefore could not actually reach a ruling on the Article XXI invocation. As some measure of guidance, in dicta, the Panel “concluded that embargoes such as the one imposed by the United States, independent of whether or not they were justified under Article XXI, ran counter to basic aims of the GATT”⁶⁴ However, the Panel’s ultimate conclusion seemingly left Article XXI matters in the hands of sovereign nations for them to articulate and manage, whether or not such actions were actually valid under Article XXI.

⁶¹ Nicaragua Panel Report, *supra* note 1, at 2.

⁶² *Id.* at 9.

⁶³ *Id.* at 2.

⁶⁴ *Id.* at 18.

A. "Freedom is Under Siege" – Contextualization and Explanation of the United States' Argument Before the GATT Council Under President Reagan

President Reagan, in his 1985 State of the Union address, laid the ground for the aforementioned executive order that the Nicaraguan government protested before the GATT Council and, in doing so, created the so-called "Reagan Doctrine."⁶⁵ President Reagan stated "[w]e cannot play innocents abroad in a world that's not innocent; nor can we be passive when freedom is under siege . . . Support for freedom fighters is self-defense . . . It is essential that the Congress continue all facets of our assistance to Central America."⁶⁶ Later that May, the President signed the fateful and above-mentioned Executive Order 12513; an estimated \$169 million in bilateral trade evaporated with the stroke of a pen, justified by supposed threats to the United States' national security.⁶⁷

At discussion before the GATT Council, nineteen of the forty-three nations present argued that Article XXI was self-judging; nine argued that it was not; and fifteen expressed no opinion.⁶⁸ A clear majority of the Member states felt, then, that national security interests lay in the hands of each nation individually; that the GATT could not intervene in the domestic affairs of foreign powers; and that, with regards to maintaining international comity in trade, GATT's powers should be strictly limited to the supra-national. Nicaragua poignantly argued strongly against a self-judging Article XXI, suggesting the absurdity of claiming that "Nicaragua, a small and undeveloped country, could pose a threat to the national security of one of the most powerful countries in the world."⁶⁹ India, agreeing, suggested need for proving a "genuine nexus" between security interests and "trade action taken."⁷⁰ Cuba added "it was a mockery . . . for such a powerful country to cite Article XXI as a basis for imposing economic sanctions

⁶⁵ Alford, *supra* note 2, at 713.

⁶⁶ President Ronald Reagan, Address Before a Joint Session of the Congress on the State of the Union (Feb. 6, 1985).

⁶⁷ Alford, *supra* note 2, at 713.

⁶⁸ *Id.*

⁶⁹ *Id.* at 714.

⁷⁰ *Id.* at 715.

on a small, poor country that could not possibly threaten U.S. security.”⁷¹ Poland and Czechoslovakia joined the Nicaraguan side, addressing fears over power imbalances and pointing out that Article XXI could easily be invoked by stronger powers to essentially impose upon smaller countries “discriminatory, unilateral and arbitrary actions.”⁷² In other words, a self-judging national security interest is structured such that justifications are not required. The actions of the United States—a major hegemon—in claiming that a significantly smaller and weaker Nicaragua posed a threat to American national security demonstrated to Nicaragua, India, Cuba, and their other six fellow Member states a clear hypocrisy lying dormant in the GATT system.

By the end of Nicaragua’s plea for review, the GATT Council found for the United States, affirming the idea that Article XXI was, in effect, self-judging. Harkening back to Wilson’s Fourteen Points, the GATT Council recognized national sovereignty and the right to self-governance, but at a cost. The only extant international body of trade failed to plug a major hole in its system. Until 2019, the *United States – Nicaragua* conflict remained binding, such that even after the formation of the WTO, Article XXI actions proceeded with an emphasis on domestic non-intervention.⁷³

V. THE PRESENT DAY: RUSSIA-MEASURES CONCERNING TRAFFIC IN TRANSIT

A. The Russia-Ukraine Dispute in Context

Much of the world has been watching the Russian military intervention in Ukraine with a keen eye. Since February 2014, Russian military forces have occupied—and effectively annexed—parts of the Ukrainian peninsula, including Crimea.⁷⁴ In what has effectively been

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 713-14.

⁷⁴ Steven Pifer, *Five years after Crimea’s illegal annexation, the issue is no closer to resolution*, BROOKINGS (Mar. 18, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/03/18/five-years-after-crimeas-illegal-annexation-the-issue-is-no-closer-to-resolution/>.

a localized and miniaturized war, the Ukrainian government has attempted to reclaim the Crimea; throughout the Spring of 2014, Russian troops invaded the region, seizing key facilities, attempting to reclaim the Crimea as part of Russia.⁷⁵ The Russian government—under the direction of Vladimir Putin—initially denied that the soldiers wearing Russian combat fatigues, utilizing Russian weaponry, and equipped with Russian tactical equipment were at all committing actions sanctioned by the Russian government.⁷⁶ That is until April of 2014, when President Putin confirmed the troops were indeed Russian, committing actions sanctioned by the Russian government.⁷⁷ In a highly controversial election, the Crimean government—essentially a puppet controlled by the Russian regime—voted “Soviet-style” to join Russia; a 97% “yes” vote with 83% turnout forever changed Ukraine’s governance in the twenty-first century.⁷⁸

Reasons for the Russian annexation of Crimea and subsequent military occupation of eastern Ukraine are historical and myriad. Catherine the Great annexed the region in 1783, where it remained under Russian—and subsequently Soviet—control until 1954, when it was transferred to the Soviet Bloc-run Ukrainian government.⁷⁹ Even still, Russian motives for intervening and interfering with the autonomous post-Soviet Ukraine seem to echo the Brezhnev Doctrine. Espoused in 1968, Soviet party chief Leonid Brezhnev declared the need for the then-Soviet Union to intervene in the then-Soviet Bloc states, in order to maintain a Marxist-Leninist *status quo*.⁸⁰ Effectively, then, the Soviet government announced its right to intervene militarily in any Eastern Bloc nation it felt necessary. In the twenty-first century, Vladimir Putin has espoused much the same, justifying his actions as necessary to protect “ethnic Russians and Russian speakers in the region.”⁸¹

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Crimea Profile*, BBC NEWS (Jan. 17, 2018), <https://www.bbc.com/news/world-europe-18287223>.

⁸⁰ Steven G. Glazer, *The Brezhnev Doctrine*, 5 INT’L. LAW. 169, 170-71 (1971).

⁸¹ Joshua Stowell, *Russia’s Justification for the Annexation of Crimea*, GLOBAL SECURITY REV. (Apr. 7, 2017), <https://globalsecurityreview.com/russias-legal-plausible-justification-for-the-annexation-of-crimea/>.

B. Russia—Ukraine: The Economic Crisis and the Entrance of the WTO

At a surface level, in contrast to the United States and Nicaragua, the Russia—Ukraine dispute hinges more-so on hard military power than economic sanctions. While the United States was actively engaged in the Falklands War, as well as the Iran-Contra affair, its hard power presence in the contested region pales in comparison to the literal boots-on-the-ground insurgency serving as the background to the Russia—Ukraine dispute.

Russia imposed transit restrictions on Ukrainian territory in January 2016, cutting off access to Central Asian and Caucasian markets.⁸² Under normal circumstances, access to these markets are provided by means of Russian roadways and rail systems.⁸³ Ukraine, economically impacted by these actions (for clear reasons, given that major markets evaporated overnight due to the ongoing Russian insurgency), petitioned the WTO, stating that “the Russian Federation . . . adopted and applied various [damaging] measures concerning traffic in transit from the territory of Ukraine . . . through the territory of the Russian Federation to third countries by means of road and rail transportation.”⁸⁴ Russia’s answer and defense to the complaint was simple: Article XXI(b)(iii) of the GATT 1947 states economic restrictions “taken in time of war or other emergency in international relations” justified their implementation of constraints on Ukrainian exports.⁸⁵ Again, the WTO faced a potential calamity. The age-old question of national sovereignty and the WTO’s level of review of such matters stood before the WTO—a specter of the past, haunting the present, and threatening to disrupt order.

Before proceeding further in the discussion of the Russia—Ukraine crisis, it is important to digress and mention that Russia and Ukraine are, as aforementioned, technically at war. Historians, policy strategists, and scholars alike have interchangeably used the term “Russo—Ukrainian War” to describe Russo—Ukrainian relations

⁸² Anuradha, *supra* note 22, at 321.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*; *see also* GATT, *supra* note 3.

since 2014.⁸⁶ Therefore, by all measures of technical accuracy and precision, it is not incorrect for the Russian Federation to state that it is at war with Ukraine and, because of that war, subsection (b)(iii) of Article XXI of the GATT 1947 ensures Russia the right to unilaterally cease trade and implement restrictions on the basis of national security.⁸⁷ The United States, acting as a third-party, submitted a letter addressed to the Panel.⁸⁸ In that letter, the United States agreed with Russia, arguing that the WTO Panel ought to limit its frame of reference to the strict verbiage of the GATT and recognize—from a textualist standard—that Article XXI has been invoked.⁸⁹ The European Union submitted a letter itself, also acting as a third-party.⁹⁰ In contrast to the United States, the European Union argued that Article XXI invocations are justiciable; that is, Article XXI's scope can be determined—and therefore limited or expanded—by the WTO Panel.⁹¹

As to the United States' position in its letter, there is one major factor driving the United States' continued defense of Article XXI. Aside from the United States' history with the 1983 Nicaragua decision, the United States currently faces numerous disputes—each

⁸⁶ Joshua P. Mulford, *Non-State Actors in the Russo-Ukrainian War*, 15 CONNECTIONS 89 (2016). See also Nick Thompson, *Ukraine: Everything you need to know about how we got here*, CNN (Feb. 3, 2017), <https://www.cnn.com/2015/02/10/europe/ukraine-war-how-we-got-here/index.html>; TIMOTHY SNYDER, *THE ROAD TO UNFREEDOM: RUSSIA, EUROPE, AMERICA* 197 (2018).

⁸⁷ By all means, this comment is merely reflective of the literal language in the GATT. Suggesting that Russia has a legitimate interest is not my aim; I merely am attempting to demonstrate that, by the superficial verbiage of the GATT 1947, Russia can effectuate tariffs and other such restrictions on trade. Article XXI of the GATT provides extremely wide—essentially unlimited—discretion to a nation to protect its own economic interests in the name of national security. For more reading on the broad, nearly unlimited powers that GATT grants member states, see Anuradha, *supra* note 22, at 1-7; Alford, *supra* note 2. See also GATT, *supra* note 3, for the language in question, noting subsection 3, which states the GATT Council—now WTO, as incorporated by GATT 1994—shall undertake any action “to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests.”

⁸⁸ Anuradha, *supra* note 22, at 7.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

brought before the WTO, and all in reference to Section 232 of the Trade Expansion Act of 1962. Section 232 Tariffs function as a domestic counterpart to Article XXI, in that they allow the President of the United States to impose “national security” tariffs in times where the security of the nation is threatened.⁹² Rather unsurprisingly, the vagueness of Section 232—just like the vagueness of Article XXI—has proven problematic, providing myriad issues to the United States government and the world economy.⁹³ Section 232 tariffs have not been used by any president after the 1995 creation of the WTO and prior to President Trump. President Trump, however, has utilized them liberally in his escalating trade war with China; the United States has put Section 232 tariffs on aluminum, steel, and uranium, in return, China, Russia, Turkey, and other nations impacted by the tariffs brought their grievances to the WTO.⁹⁴ As such, the United States has maintained its historical position that invoking Article XXI is a “self-judging” action—as it set forth in the 1983 Nicaragua dispute—and thus the United States forwarded the aforementioned letter to the WTO, siding with Russia and suggesting the self-judging nature of Article XXI actions.⁹⁵

C. Zero Hour: The WTO Panel’s Decision

In a drastic shift from the preceding seventy-two years of international economic decision-making under the GATT 1947, the WTO Panel found that the WTO “has jurisdiction to determine whether the requirements of Article XXI(b)(iii) of the GATT 1994 are satisfied,” upon any invocation of Article XXI(b)(iii).⁹⁶ The panel

⁹² Joshua Jamerson, *Congress Mulls Curbing Presidential Trade Authority*, WALL STREET JOURNAL (Feb. 14, 2019), <https://www.wsj.com/articles/congress-mulls-curbing-presidential-trade-authority-11550152801>.

⁹³ *Id.*

⁹⁴ For more about the situation at the time of enactment and the then-potential for retaliation against the Section 232 tariffs before the WTO (which has since turned into actual retaliation), see CONG. RSCH. SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS (2019).

⁹⁵ Paul Bettencourt, “*Essentially Limitless*”: *Restraining Administrative Overreach Under Section 232*, 17 GEO. J. L. & PUB. POL’Y 711, 723-27 (2019).

⁹⁶ Panel Report, *Russia—Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019) [hereinafter Russia Panel Report].

operated under terms of reference far different from those of the 1983 GATT Council for the United States – Nicaragua dispute:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Ukraine in document WT/DS512/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁹⁷

These terms are far broader than the aforementioned limited terms used in the 1983 Nicaragua dispute.⁹⁸ By a simple, superficial comparison, it is clear that the panel here intended to act broadly, as it decided to “make such findings as will assist the DSB”⁹⁹ However, in the United States – Nicaragua case, the panel intended to act with restraint, as its references explicitly omitted any discussion regarding Article XXI, stating, “that the Panel cannot examine or judge the validity of or motivation for the invocation of Article XXI:(b)(iii) by the United States.”¹⁰⁰

Regarding the requirements for invoking Article XXI, the Panel found “Russia has met the requirements for invoking Article XXI(b)(iii) in relation to the measures at issue.”¹⁰¹ However, the Panel’s conclusion is not the end-all, be-all for this case, nor for international relations and trade writ large. The Panel felt justified in upholding Russia’s Article XXI invocation because the “relations between Ukraine and Russia had deteriorated to such a degree that they were a matter of concern to the international community.”¹⁰² The Panel’s decision yields speculation that the United States might attack the strict definition of “war” and “emergency in international relations” under the GATT; it is important to stress that in this Russia case the WTO reached a conclusion antithetical to its extant history (including

⁹⁷ *Id.* at 19.

⁹⁸ See Nicaragua Panel Report, *supra* note 1, for comparison.

⁹⁹ Russia Panel Report, *supra* note 96, at 19.

¹⁰⁰ Nicaragua Panel Report, *supra* note 1.

¹⁰¹ Russia Panel Report, *supra* note 96, at 52-59.

¹⁰² *Id.* at 54.

history of Article XXI actions under the GATT).¹⁰³ Speculation is abound that the United States might now contest the panel's finding, "[w]ar refers to armed conflict."¹⁰⁴ Reasons for such an attack rely mostly upon the Nicaragua case, again, as the United States there was able to take Article XXI actions in a time when the United States deemed its national security was at risk. By defining the term "war," the WTO has further limited the scope of Article XXI to legitimate armed conflict; any attempt to bring Article XXI actions would therefore require something like the Russia – Ukraine conflict, wherein there are legitimate boots on the ground and an armed annexation has occurred. Recalling the United States' justification in the United States – Nicaragua conflict, wherein the United States stated that Nicaragua posed a threat to its national security with no further explanation, such an explanation could not pass muster today, given the Russia – Ukraine ruling's constraints on Article XXI's scope to wartime actions.

Perhaps most confounding is that the WTO Panel's decision categorically excludes economically costly trade wars.¹⁰⁵ Given the current state of international trade – with the aforementioned Section 232 tariffs causing much a stir – it is likely that this decision is reactive to the global *status quo*. Note, however, that this decision by the Panel will likely be appealed by Ukraine to the Appellate Body. Once there, the Appellate Body will have the ability to review all restrictive trade actions and state which ones it feels are justifiable under Article XXI and which it feels are not justifiable.¹⁰⁶ As aforementioned, however, no decision by the Appellate Body has ever been overturned, due to the negative consensus requirement. That is not to say that the Appellate Body will not overturn the Panel's decision – it is currently unknown at the time as to what the Appellate Body will do – but the Appellate Body's final review will likely not itself be overturned.

If the Appellate Body upholds the Panel's findings, then it is clear that Article XXI has effectively been amended, and that any

¹⁰³ Bettencourt, *supra* note 95.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

amendment requires only one vote.¹⁰⁷ While perhaps hyperbolic, the true issue is the continuing disagreements over national sovereignty that have plagued GATT and the WTO since their inception. Speculators and spectators alike believe that the United States is liable to withdraw from the WTO given an Appellate Body decision upholding the *Russia – Measures Concerning Traffic in Transit* decision that is then likely to be upheld by one Ukrainian vote (at the least).¹⁰⁸ The United States has historically demonstrated concern regarding what it views as Appellate Body overreach; an aggressive stance by the Trump Administration on foreign trade, coupled with long-brewing discontent between the United States and the WTO means such a withdrawal is very possible in the near future.¹⁰⁹

Fears of United States voters turning against the WTO as a threat to national sovereignty and security have led to the theorization that a United States withdrawal from the WTO could mean permanent, immense tariff increases.¹¹⁰ Ironically, the very system designed to preserve and hierarchically manage international trade seems to have created such immense backlash that the twentieth-century free trade system is now in jeopardy. Any willingness of the WTO Appellate Body “to rule on such a controversial topic risks destabilizing the entire rules-based system of international trade,” as one scholar has stated.¹¹¹ Surely, such an opinion is not an

¹⁰⁷ *See id.* As aforementioned, the WTO has a negative consensus requirement for Appellate Body review. Such a requirement therefore means that the Appellate Body’s decision will likely not be overturned, as Ukraine would not logically vote against its own interest after the Appellate Body’s decision is rendered. Therefore, while it is an exaggeration to state that the amendment process for GATT requires only one vote, there is a case to be had that amendments are not really a general consensus decision; if the Appellate Body “amends” Article XXI and their decision is upheld—even by one Ukrainian vote—then the GATT truly only does need one vote (plus Appellate Body review) to amend the GATT. What problems such action could raise are unknowable, but it is likely that great resentment is to be had whereby unilateral action by one member-state can modify some thirty-two years of international trade law precedent before the WTO.

¹⁰⁸ Christine Wang, *Trump threatens to withdraw from World Trade Organization*, CNBC (Aug. 30, 2018), <https://www.cnbc.com/2018/08/30/trump-threatens-to-withdraw-from-world-trade-organization.html>.

¹⁰⁹ Bettencourt, *supra* note 95, at 725.

¹¹⁰ *Id.*

¹¹¹ *Id.*

understatement given the magnitude of the Russia – Ukraine decision: on one hand lies national sovereignty, the right to self-realization, and Wilsonian self-determination of a sorts. On the other lies a system inherently tied together by the WTO in order to promote international comity, peace, and stability in trade and global economics.

D. The Qatar – United Arab Emirates Conflict, and the Future of International Trade Conflicts Arising Under Article XXI

The aforementioned Section 232 disputes are myriad. China, the European Union, Canada, Mexico, Norway, Turkey, Russia, India, and Switzerland have thus far taken a number and entered the line of complainants filing against the United States at the WTO.¹¹² These are not the only claimants, but some of the larger countries airing their grievances against the United States. An escalating trade war with China, geopolitical posturing against Russia, uncertainty regarding Turkey, and tenuous relations with Western Europe seem to have escalated such that the WTO will have to review the United States' Section 232 trade powers. As mentioned, these powers have existed – and been used on-and-off – since the Trade Expansion Act of 1962 was passed; an even longer precedent of some fifty-eight years is in question now.

Akin to the *Russia – Measures Concerning Traffic in Transit* decision, another Panel review has been initiated regarding a conflict between the United Arab Emirates and Qatar.¹¹³ The dispute, similar to Russia – Ukraine, centralizes around claims that Qatar has restricted imports from the United Arab Emirates.¹¹⁴ Since 2017, the United Arab Emirates has boycotted Qatar over allegations of institutional and governmental support for terrorism.¹¹⁵ Qatar has denied the charge, and the United Arab Emirates has claimed that Qatar's response to the

¹¹² *United States – Certain Measures on Steel and Aluminium Products*, WTO (Jan. 25, 2019), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds544_e.htm.

¹¹³ Eric Knecht and Alison Williams, *Qatar denies banning UAE goods after WTO dispute panel formed*, REUTERS (May 29, 2019), <https://www.reuters.com/article/us-qatar-emirates-wto/qatar-denies-banning-uae-goods-after-wto-dispute-panel-formed-idUSKCN1SZ26T>.

¹¹⁴ *Id.*

¹¹⁵ *See id.*

boycott has been a ban on trade from the United Arab Emirates.¹¹⁶ Qatar's response has been to cite Article XXI of the GATT, suggesting that threats to national security have justified its trade restrictions on the United Arab Emirates.¹¹⁷

The Qatar—United Arab Emirates situation is all too similar to the Russia—Ukraine problem: tensions are brewing over trade, with one larger country imposing trade restrictions on a smaller nation, with justification for their actions coming from Article XXI of GATT. As of August 2019, the United Arab Emirates agreed to drop its case against Qatar, in response to Qatar's easing of trade measures enacted against the United Arab Emirates.¹¹⁸ Importantly, this news comes after—and likely as a result of—the Russia decision by the WTO. Qatar's reasons for easing tensions are unknown officially, but it is not implausible to suggest that the changing tide of Article XXI decisions has raised caution among WTO member states seeking to enact trade restrictions. In the case of Qatar, it is again probable—but not known—that the government, recognizing Russia's pyrrhic victory in *Russia—Measures Concerning Traffic in Transit* acknowledged the polemic written by the WTO against a broad Article XXI. Therefore, understanding that its trade actions were likely no longer justifiable under the WTO's new regime, Qatar likely dropped its restrictions, allowing the United Arab Emirates to thereafter drop its case.

VI. CONCLUDING THOUGHTS

Writing in the early twentieth century, Oswald Spengler stood alone as a cynic among the optimistic attitude his compatriots shared entering the new century. Perhaps only Jan Gotlib Bloch—whose now-famous treatises on the harms of mechanized warfare and the decline of international relations prior to the First World War—joins Spengler in sharing such an attitude. Spengler, however, crafted a theory of international relations and history characterized by an unnatural cyclical-ism. Noting the tendency of humans to repeat their follies,

¹¹⁶ *See id.*

¹¹⁷ *Id.*

¹¹⁸ Kaitlyn Burton, *UAE Agrees To Drop WTO Dispute With Qatar*, LAW 360 (Aug. 8, 2019), <https://www.law360.com/articles/1186623/uae-agrees-to-drop-wto-dispute-with-qatar>.

Spengler assured his readers that the West was doomed and that the new, ever-globalizing order he saw slowly growing out of the Enlightenment was both dangerous and short-lived.¹¹⁹

Others, including later historian Francis Fukayama, saw the Enlightenment and the latter twentieth century – which Spengler did not live to see – as instrumental in cementing the development of liberal democracy and free market globalism as the *de facto* world system, especially after the failures of Communism and Fascism.¹²⁰ Fukayama wrote famously that history had “ended” with the 1991 collapse of the Soviet Union and Eastern Bloc; free trade, he felt, would bring an era of prosperous, internationalized growth, while liberal democracies would replace totalitarian regimes and autocratic governance.¹²¹

The truth lies somewhere in between the minds and ideas of these writers. On one hand, the international system has developed rapidly, with GATT evolving from a post-war solution to the rebuilding of Europe and the rest of the war-ravaged world to something of a permanent mainstay under the purview of the WTO. On the other, Spengler’s perhaps overly reactionary stance was not totally incorrect. The GATT’s 1947 recognition of national security as an inherently domestic and self-judging standard meant that future conflict would forever ensnare the GATT and its successors unless such a conflict were to be resolved. An international system built on hegemonized trade under the WTO cannot coexist with a domestically oriented system, catering to the whims of each WTO member state’s respective government.

The future, while uncertain, seems to be suggestive of a move in two directions simultaneously – of an international body trying to appease Spengler by focusing on the national and Fukayama by focusing on the international. Such a situation is untenable. The *Russia – Measures Concerning Traffic in Transit* case is representative of the culmination of thirty-six years of economic uncertainty; of a reunion between the supra-national and the national. At best, the future holds something of a middle ground – of a continued liberal

¹¹⁹ OSWALD SPENGLER, *THE DECLINE OF THE WEST* (GEORGE ALLEN TRANS., FIRST VINTAGE BOOKS ED. 2006) (1922).

¹²⁰ FRANCIS FUKAYAMA, *THE END OF HISTORY AND THE LAST MAN* (2006).

¹²¹ *Id.*

trade network held together by the WTO, promoting comity in international trade. At worst, the future presents a series of challenges to the international order, and a heavy shift towards internalized, domesticized governance and economics.