The US essential security tariffs on steel and aluminium and the Chinese retaliation

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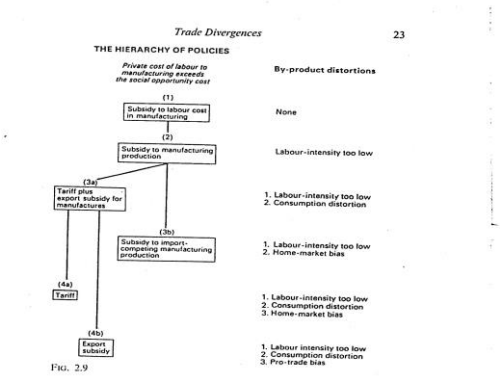
Corden, *Trade and Welfare*, p23



Trade Divergences 23

THE HIERARCHY OF POLICIES

	By-product distortions
Private cost of labour to manufacturing exceeds the social opportunity cost	
(1) Subsidy to labour cost in manufacturing	None
(2) Subsidy to manufacturing production	Labour-intensity too low
(3a) Tariff plus export subsidy for manufactures	1. Labour-intensity too low 2. Consumption distortion
(3b) Subsidy to import-competing manufacturing production	1. Labour-intensity too low 2. Home-market bias
(4a) Tariff	1. Labour-intensity too low 2. Consumption distortion 3. Home-market bias
(4b) Export subsidy	1. Labour intensity too low 2. Consumption distortion 3. Pro-trade bias

FIG. 2.9

graded as third-best, alongside the tariff-*cum*-export subsidy. Similarly, an export subsidy on manufactures on its own parallels a tariff on its own, both being fourth-best: the subsidy creates *pro-trade* bias and the tariff *home-market bias*.

When two policies are third-best in the hierarchy we are simply saying that they both add one more by-product distortion to the second-best policy. One of the 'third-best' policies may lead to a higher welfare level than the other, so that one would have to renumber the policies if one wished to order them strictly on the basis of welfare levels attainable, and not just on the basis of the numbers of by-product distortions imposed.

2.9 Trade Divergences

So far we have assumed that all divergences are *domestic* divergences (and we shall maintain this assumption in the next three chapters). Thus in our various

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The s232 tariffs and the Chinese retaliation

- 11 Jan 2018 US Secretary of Commerce completed an investigation report finding imports of steel and aluminium were threatening to impair the national security
- March 2018 - US President imposed 25% additional tariffs on steel and 10% additional tariffs on imports from China – and some other countries
- China (and some other WTO Member countries) said that the US investigation about injury to the US steel and aluminium industries and the consequence decision to impose additional tariffs was really the imposition of a safeguard measure under the WTO Agreement on Safeguards which permitted affected Members to suspend the application substantially equivalent obligations to trade from the US.
- 2 April 2018 – China imposed additional tariffs of 15% on 108 products and 10% on 20 products from the US (8 other Members also imposed retaliation)
- 5 April 2018 China initiated a WTO complaint DS544 against the US's tariffs and the US invoked GATT Article XXI exception
- 16 July 2018 - US initiated a WTO complaint DS558 against China's tariffs (also complaints against 6 others) and China invoked Article 8(2) of the Agreement on Safeguards
- 9 Dec 2022 – Panel report in DS544 finds US tariffs not justified under GATT security exception in Art XXI.
- 16 August 2022 - Panel report in DS558 finds that China's tariffs not justified under Art 8 of the Agreement on Safeguards
- 26 January 2023 - US notified WTO of appeal of panel report in DS544
- 18 September 2023 - China notified it would appeal panel report in DS558
- US wants the WTO Ministerial to adopt an authoritative interpretation of Art XXI saying it is entirely self-judging

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Section 232 of the *Trade Expansion Act 1962* as amended. (codified as 19 U.S.C. §1862

- Section 232 authorises the Secretary of the Department of Commerce to conduct an investigation so as to submit a report to the President advising the President if any article "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security".
- If the report does find imports are threatening national security, the President must
- "if the President concurs, determine the nature and duration of the action that , in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security."

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US Secretary of Commerce initiates investigation under s232 of Trade Act-

- 19 April 2017 US Sec of Commerce initiated an investigation under s232 of *Trade Act* to assess effect of imported steel on national security (later also on aluminium)
- 11 Jan 2018 US DOC issued report
- 8 March 2018 US President issued proclamation imposing additional tariff of 25% on steel and 10% on aluminium

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Public Hearings and Public Comments

- Held a public hearing on 24 May 2017 – 37 witnesses giving testimony
- 21 April 2017 Invited public comments by 31 May 2017 – received 201 written submissions
- Including some submissions opposed to applying tariffs

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Findings in the Secretary of Commerce s232 report

- Steel is needed for defense (but observes that Department of Defense requirements currently require about 3% of US steel production)
- But that national security is broader than defence needs.
- It also involves the ability to project military capability and the general economic health of critical industries, those needed for minimum operations of the economy and government.
- And the maintenance of domestic capacity to produce articles as needed for national security
- Adopts a view that steel mills need to operate at 80% of capacity in order to operate efficiently and profitably
- The Secretary concluded that three factors – "displacement of domestic steel by excessive imports and the consequent adverse impact on the economic welfare of the domestic steel industry, along with global excess capacity in steel" … "create a persistent threat of persistent plant closures that could leave the United States unable in a national emergency to produce sufficient steel to meet national defense and critical industry needs".
- That as the number of steel production facilities decreases, the ability to increase steel production during a national emergency diminishes. [p50]
- Discusses whether the existing steel capacity would be able to increase steel production to an adequate level in a conflict on the scale of the Vietnam war or adequate in a conflict on the scale of the Second World War. Discusses how long it would take to add capacity.
- That it is vital to national security, "especially in an unexpected or extended conflict or national emergency" to have the "surge capacity" to "quickly shift production capacity used for commercial products to defense and critical infrastructure production" [55-56]
- Recommends tariffs to reduce imports to a level that would leave the domestic industry producing a quantity equal to 80% of productive capacity.

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The retaliation

- Six countries responded to the US tariffs on steel and aluminium with their own additional import duties on imports on some chosen products from the United States:
- 29 June 2018, Canada imposed additional duties
- 2 April 2018, China imposed additional duties
- 17 May 2018, the EU imposed additional duties, and on 21 June 2018 more additional duties

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Were the US tariffs on steel and aluminium really safeguard measures? Could affected exporting Member suspend substantially equivalent concessions of obligations?

- GATT Article XIX permits safeguard measures in response to increased imports which cause or threaten serios injury to a domestic industry
- Agreement on Safeguards
- Article 2, 3 require that to impose a safeguard measure, a Member must conduct an investigation and make a determination that increased imports are causing or threatening serios injury to the domestic industry
- Article 12(1) requires a Member to give a notification to the WTO Committee on Safeguards when it (a) initiates an investigation relating to serious injury; and also when it (b) making a finding of serious injury or threat caused by increased imports; and (c) takes a decision to apply a safeguard measure.

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Could the US tariffs be regarded as a Safeguard measure?

- Art 12:3 requires a Member proposing to apply a safeguard measure to provide adequate opportunity for consultations with Members having an interest as exporters of the relevant product so as to achieve the objective set out in art 8(1).
- Art 8:1 obliges the Member imposing a safeguard measure to maintain a substantially equivalent level of concessions between it and exporting members.
- To achieve that objective, Members may agree on trade compensation (that is, reductions on bound tariff rates on other products)

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Suspension of substantially equivalent obligations under Article 8(2) of the Agreement on Safeguards?

- If no agreement reached on compensation within 30 days,
- The affected exporting Member may suspend application of substantially equivalent concessions or other obligations (that is, increase tariffs so as to reduce trade by an equivalent value) to the trade of the Member applying the safeguard measure.
- The affected exporting member must first give written notice to the Council for Trade in Goods and wait for 30 days.
- If the affected exporting member wants to raise tariffs in retaliation, it must do so within 90 days of the safeguard measure being applied
- The affected exporting member can proceed with the retaliation if the Council for Trade in Goods "does not disapprove" of the suspension of the substantially equivalent concessions or other obligations.
- Art 8(3) The right to suspend under 8(2) shall not be exercised for the first 3 years after a safeguard measure is in effect, provided the safeguard measure is a response to an absolute increase in imports and is otherwise consistent with the Agreement on Safeguards.

But Article 11:1(c) excludes the application of the Agreement on Safeguards to measures maintained under other GATT Articles

- Article 11:1(c) of the Agreement on Safeguards:
  - "This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994."
- Two panels had to rule on Article 11:1(c)
- *US – Certain Measures on Steel and Aluminium Products – Complaint by China* WT/DS544, panel report circulated 9 December 2022.
- *China – Additional Duties on Certain products from the United States* WT/DS558, panel report circulated 16 August 2023.

US – Certain Measures on Steel and Aluminium Products – Complaint by China WT/DS544, panel report circulated 9 December 2022

- China argued that the US national security tariffs imposed under s232 violated some provisions of the Agreement on Safeguards.
- The panel interpreted Article 11:1(c) to mean that if measures were maintained under another GATT provision then the Agreement on Safeguards could not apply:
  - Irrespective of whether the measures were in conformity with the other GATT provision; and
  - Irrespective of whether the measures had any of the characteristics of safeguard measures.
- The panel found that the tariffs were maintained under GATT Article XI so Article 11:1(c) excluded the application of the Agreement on Safeguards,
- So the US national security tariffs could not be in breach of the *Agreement on Safeguards*.

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China – Additional Duties on Certain products from the United States WT/DS558, panel report circulated 16 August 2023

- The US alleged that the Chinese tariffs breached tariff bindings under Article II.
- China claimed that the tariffs were authorised by Article 8.2 of the Agreement on Safeguards.
- Panel: tariffs could not be justified under Article 8.2 unless they were in response to safeguard measures taken under the Agreement on Safeguards
- Just as in *US – s232*, the panel interpreted Article 11:1(c) to mean that if measure were maintained under another GATT provision then the Agreement on Safeguards could not apply:
  - Irrespective of whether the measures were in conformity with the other GATT provision; and
  - Irrespective of whether the measures had any of the characteristics of safeguard measures.
- Panel: The panel found that the tariffs were maintained under GATT Article XI so Article 11:1(c) excluded the application of the Agreement on Safeguards
- So the s232 tariffs were not safeguard measures; and
- The tariffs in response to the s 232 tariffs could not be justified under Article 8.2 of the Agreement on Safeguards
- Effectively ruling that the only WTO consistent way for China to retaliate against the s232 tariffs is to wait for the appeal in *US – Certain measures on Steel and Aluminium* DS544 to be completed, for the WTO Dispute Settlement Body to adopt the panel and AB reports and to obtain authorisation from the DSB to retaliate.

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WTO Complaints against US measures on steel and aluminium

- Between April and August 2018, China, India, EU, Canada, Mexico, Norway, Russia, Switzerland and Turkey initiated WTO complaints by requesting consultations.
- May 2019, US reached agreements with Canada and Mexico to withdraw the duties and Canada and Mexico withdrew their WTO complaints.
- January 2020, the EU withdrew complaint.
- the other 6 complaints went to panels.
- The US invoked GATT article XXI and said it was an entirely self-judging provision and a panel could not rule on whether a members invocation of art XXI complied with Art XXI

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GATT Article XXI
Essential security interests

- Nothing in this Agreement shall be construed
- (a)
- (b) to prevent any contracting party from taking any action **which it considers** necessary to the protection of its essential security interests
- (i) relating to fissionable materials …
- (ii) relating to traffic in arms ….
- (iii) taken in time or war or other emergency in international relations , or
- (c) prevent [actions under UN Charter].

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The US has always maintained that Article XXI is entirely self-judging and that panel cannot rule on invocation of GATT Article XXI

- Between 1948 and 1994, some countries have asserted that Art XXI is self-judging and others have asserted that Panels must be able to rule on invocation of art XXI
- there was only one panel report on GATT Article XXI United States – measures on Nicaragua but not adopted because blocked by the US.
- During Falkland Islands war, US statement to General Council 7 May 1984
- "… no country could participate in GATT if in doing so it gave up the possibility of using any measures, other than military, to protect its security interests …"

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1st WTO case on art XXI was *Russia –Traffic in Transit* case, WT/DS512/R, panel report circulated 5 April 2019, adopted 26 April 2019

- In 2014 there was a change of government in Ukraine, and since then there had been a war between the government of Ukraine and some forces in eastern Ukraine which wanted some of the eastern territories to separate from Ukraine.
- Russia imposed certain requirements limiting the permissible ways in which cargo and road and rail cargo transit from Ukraine could enter and pass through Russia to Kazakhstan or Kyrgys Republic.
- Russia invoked Article XXI(b)(iii) stating that the measures were "actions which [Russia] considers necessary for protection of its essential security interests…
- (iii) taken in time of war or other emergency in international relations."
- Russia argued Art XXI is entirely self-judging
- US third party submission also argued art XXI is entirely self-judging

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Russia –Traffic in Transit case, WT/DS512/R, panel report circulated 5 April 2019, adopted 26 April 2019

- Panel notes 3 possible interpretations of the words "which it considers"
- It could relate only to the word "necessary" so that the question of necessity is self-judging but the both the questions of what constitutes an essential security and the questions as to whether a situation falls within paragraphs (i), (ii) are not self–judging and require an objective determination.
- It could relate to the words "necessary for the protection of its essential security interests" – so that a Member can self-judge what is an essential security interest and what is necessary for the protection of that essential security interests, but the questions as to whether a situation falls within paragraphs (i), (ii) or (iii) is not self-judging and requires an objective determination
- It could relate to the whole of Article XXI(b) including the 3 sub-paragraphs – so that the invocation of Article XXI(b) is entirely self-judging.

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Russia –Traffic in Transit case, WT/DS512/R, panel report circulated 5 April 2019, adopted 26 April 2019

- The existence of the situations in paragraphs (i), (ii), and (iii) are objective facts which need to be determined objectively.
- The words "which it considers" do not apply to the questions of whether there is a situation falling within one of the paragraphs (i), (ii) and (iii).
- Article XXI(b) does not give the Member a right to self-judge whether there is a situation falling within one of the paragraphs (i), (ii) and (iii).
- A Panel does have jurisdiction to decide whether there is a situation which falls within one of either para (i), (ii) or (iii).
- In this case, the Panel did have jurisdiction to decide whether the requirements of Article XXI(b)(iii) are satisfied, that is, whether Russia's action was "taken in time of war or other emergency in international relations."
- (Is the existence of an emergency in international relations really objectively determinable? Whether a situation could become an armed conflict is difficult to predict; It involves assessment of risks and likelihood of contingencies.)

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Russia – Traffic in Transit case, 2019
Was there an action "taken in time of war or other emergency in international relations"

- What is an emergency in international relations?
- Panel: an "emergency in international relations" means something short of war but a situation of armed conflict or of latent armed conflict or heightened tension or crisis, or of general instability engulfing or surrounding a state.
- Panel: the situation between Ukraine and Russia since 2014 did involve armed conflict and did constitute an emergency in international relations
- Panel: Russia's actions were taken in time of an emergency in international relations

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Russia – Traffic in Transit case, 2019
"any action which it considers necessary for the protection of its essential security interests"

- To some extent the designation of what is an "essential security interest" is left to each Member State to decide.
- But the requirement to apply Article XXI(b)(iii) in good faith means Members should not use the exception to circumvent obligations, so
- Members must articulate the essential security interest said to arise from the emergency in international relations [7.134]
- The further the emergency in international relations is from a situation of armed conflict, the more specific the articulation of the essential security interest should be [7.135]
- And the requirement to apply Article XXI(b)(iii) in good faith also means the Member should act in good faith in choosing actions for the protection of the essential security interest said to arise from the emergency in international relations [7.138]
- So while the designation of the "essential security interest" is partly self-judging, the panel can determine whether the Member has articulated sufficiently the essential security interest;
- And
- Whether the measures meet a minimum standard of it being plausible that the measures were adopted to protect the essential security interest.
- Russia had adequately articulated the essential security interest arising from the armed conflict in eastern Ukraine
- The measures adopted by Russia met a minimum standard of being plausible measures for protecting Russia's designated essential security interests.
- The Panel, after having accepted that there is a plausible connection between the measures and the protection of the security interest, left it to Russia to self-judge whether the measures were necessary for the protection of Russia's essential security interests.

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a 2nd WTO case on Art XXI *: Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights (Saudi Arabia – IPRs')* WT/DS567/R, circulated 16 June 2000, appealed but appeal suspended January 2022, dispute terminated April 2022

- Facts: Saudi Arabia, accusing Qatar of promoting terrorism and extremism, severed all diplomatic, consular and economic relations with Qatar.
- A company called BeoutQ had streamed and broadcasted in Saudi Arabia content belonging to a Qatar based media company, BeIN.
- BeIN sought to enforce its IP rights in Saudi Arabia.
- The Saudi Arabian government (i) prevented BeIN from engaging a Saudi lawyer; (ii) prevented BeoutQ from being subject to any criminal procedure or penalty.
- Qatar brought a WTO complaint alleging Saudi Arabia was breaching provisions of TRIPS.
- Saudi Arabia invoked TRIPS Article 73 which has exactly the same text as GATT Article XXI.

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Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights (Saudi Arabia – IPRs') WT/DS567/R, circulated 16 June 2000, appealed but appeal suspended January 2022, dispute terminated April 2022

- Panel was not adopted, because the parties terminated the dispute.
- The Panel followed the same analytical approach as the Panel in Russia Transit case. (though whether that is correct could still be an open question)
- Accepted that the situation in which they were accusing each other of terrorism amounted to a situation of heightened tension involving defense or military interests or maintenance of public order
- Possibly contention that they correctly decided there was an emergency in international relations
- Panel accepted that Saudia Arabia had met a minimal standard of articulating its essential security interest
- Panel accepted that the denial of access to a lawyer was plausibly connected to protecting the security interest but that the refusal to apply criminal penalties was not.

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Summary of approach in *Russia – Transit* and *Saudi Arabia - IPRs*

- Whether there is an emergency in international relations is an objectively determinable fact which is not self-judging
- Whether an action is taken in time of an emergency in international relations is an objectively determinable fact which is not self-judging
- Whether the action is taken to protect its essential security interest – is self-judging; the Member can decide what constitutes "essential security interest" but must decide in good faith, which requires articulation of the interest, and demonstration of a plausible connection between the measures and the purported essential security interest;
- Whether the member considers the measures "necessary" – is self-judging.

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United States – Certain Measures on Steel and Aluminium products – Complaint by China WT/DS544, panel report circulated 9 December 2022.

- Considers US argument that invocation of Art XXI is entirely self-judging
- Careful analysis of the grammar of Article XXI
- Finds that the panel must determine question of whether the measures is taken in time of an emergency in international relations and should not treat that issue as self-judging.
- That the term "emergency in international relations" means something that is comparable in its gravity and severity to a war in terms of its impact on international relations
- On the factual question of whether there was an emergency in international relations:
- the US argument appears to have been limited to saying that the content of the US Secretary of Commerce s232 report is ample evidence of why the US considered there was an emergency in international relations
- And the panel's analysis is limited to assessing whether what was stated in the US Secretary of Commerce report establishes the existence of an emergency in international relations
- Panel observes that the s232 report referred to (1) displacement of domestic steel/aluminium by imports; (2) the impact of that displacement on the economic health of the domestic steel / aluminium industry; and (3) the global excess capacity in the steel and aluminium.
- Panel found that the international tensions relating to the steel and aluminium industries did not rise to the level of gravity or severity as to constitute an emergency in international relations within paragraph XXI(b)(iii).
- So was not justified under art XXI
- Panel did not need to assess conformity with other elements of Art XXI(b).

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One more WTO case on art XXI since the *US – s232* case: *United States – Origin marking Requirement* case, panel report circulated 21 December 2022, appealed 26 January 2023

- Panel report has not been adopted yet. May be adopted if the Appeal is eventually resolved,
- Found that the situation in Hong Kong did not meet the standard of gravity to be an emergency in international relations
- So it was not justified under Article XXI
- Panel did not need to assess conformity with other elements of Article XXI(b).

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The outcome: continuing US tariffs and Chinese tariffs

- If the appeals could be completed, it is likely that both panel reports would be adopted, that the WTO DSB would authorize China to retaliate and the outcome would be the same as the current situation (subject to possible arbitration of the level of retaliation but note that China has already tried to make its retaliation meet the substantial equivalence standard under AS art 8.2, so it is likely not far from compliance with DSU Art 22.6 standard of equivalent to the level of nullification or impairment).
- The WTO dispute settlement system would have done its primary job: determined whether one member can retaliate in response to actions of another Member. The WTO dispute settlement system could not do anything more.
- Whether the appeals are resolved or not, the US is not going to change its view that resort to Art XXI is completely self-judging; and China is not going to remove the retaliation.
- In an informal way, the US and China have agreed on a "mutually agreed solution".
- It is possible that the parties could unwind their tariffs on each other in tandem. If one party reduced a tariff or excluded products, it is quite plausible that the other would reciprocate.
- But with US so insistent that art XXI is self-judging, is it likely the US will move first?

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Is there a way for China and the US to have a 3rd party to help them mutually reduce their tariffs?

- Good offices of the WTO DG, conciliation, mediation, arbitration?
- What about a non-binding independent report which does not question the stated essential security objective of the US and only considered the necessity of the US tariffs for achieving the US security objective. Could it suggest less trade restrictive measures? Which the US could implement without the risk of loss of political support that might follow backing down on its self-judging argument.
- What about a non-binding independent report examining the ways that the steel industry and its employees could adjust to being losers from trade liberalization? Could it suggest governmental measures other than import restrictions? (which could reduce political pressure from the steel industry to find some legal cover for import tariffs)
- Note that these are both processes involving identification of objectives, identifying a range of possible policy instruments and choosing the best policy instrument. (the Corden, *Trade and Welfare* approach)

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This is the general approach thoroughly embedded in WTO law

- Let the Member choose their objective
- Let the member choose the desired level of achievement of their objective
- But apply disciplined to encourage the Member to choose the most efficient instrument / least trade restrictive
- Eg in the areas of quarantine restrictions, technical regulations, disciplines on professional qualifications and licensing
- The approach to GATT Article XXI in the 4 panel reports is out of line with the general approach in WTO law.

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The approach to GATT Article XXI in the 4 panel reports is out of line with the general approach in WTO law because:

- It does not allow the member to choose its objective – the panel determines whether there is an emergency in international relations that can justify the member having an objective of protecting an essential security interest. If the panel says there is no emergency in international relations then the member is not allowed to have an objective of addressing what the member perceives to be an emergency in international relations;
- If the panel decides there is an objective emergency in international relations and permits the Member to protect its interests arising form that emergency, then the panels apply hardly any discipline at all to the invoking Member's consideration that actions are necessary to protect that security interest. The test is a minimal threshold of whether it is plausible that the action was taken to protect the designated security interest and accompanied by an obligation to articulate the security interest only to the extent necessary to apply that plausibility test. The panel's approach does not require consideration of the range of measures available to achieve the objective, their trade restrictiveness nor whether the chosen policy instrument is necessary.

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The panel has the standards of review the wrong way around

- The standards of review are the wrong way around.
- The security exception should give:
- More deference to whatever the member considers is its appropriate objective in the face of its perception of situations in international relations (who is in a better position to judge whether a situation involves "latent armed conflict": the member country which is worried that it might have to engage in armed conflict or the WTO Panel?)
- Less deference to what the Member considers is an action that is necessary for its objective of protecting its essential security interest. The test of the panel sets the bar too low: requiring only that it is plausible that the Member considers it is protecting an essential security interest and allowing the Member to self-judge if its actions are necessary . Members should have to articulate their essential security interest and the desired extent to which they are aiming to achieve that designated security interest, demonstrate they have considered all available options other than import barriers, and to give a reasoned and adequate explanation why they considered other measures not to be adequate.

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Can the text of Article XXI be interpreted in the way suggested?

- Yes the words "which it considers" can mean that
- A Member can self-judge whether there is an emergency in international relations, and a panel can objectively determine if a measure is taken in time of that emergency;
- A Member can self-judge the content of its essential security objectives but must be required to identify exactly what its security interest is in a way that is sufficiently detailed to enable examination of what is necessary to achieve that objective;
- A Member cannot be held to have breached the necessity requirement merely because a panel would not have reached the same conclusion as the Member which considers the actions are necessary for the protection of its essential security interest;
- But a Member could be held to have breached the necessity requirement if the Member fails to give a reasoned and adequate explanation of how it determined that the action is necessary which would need to include identifying possible ways of achieving its stated objective regarding its self-designated essential security interest and explaining how it has evaluated that the action adopted is necessary.

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How should members react to the US proposal for the Ministerial Council to adopt an authoritative interpretation of GATT Article XXI?

- They should not accept an interpretation that resort to Article XXI is entirely self-judging and outside the jurisdiction of panels.
- But they need not completely dismiss the suggestion of the merit of having an authoritative interpretation.
- They could negotiate on text that would recognize that some parts but not all of article XXI can be self-judging and would articulate the extent to which a Panel should objectively assess how the Member made a decision arriving at a position in which it considered that actions are necessary to protect an essential security interest.

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