



A podcast about the economics of trade & policy
with Chad P. Bown

Episode 175. The dreaded WTO ruling on Trump's national security tariffs

[Episode webpage](#)

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Transcript

(lightly edited)



Chad Bown: In December, the World Trade Organization released the dispute settlement ruling that a lot of people were dreading. The case involved former American President Donald Trump's steel and aluminum tariffs. Almost everyone who cares even a little bit about the rules-based trading system had wanted this issue to go away.

And that is because the WTO was being forced to weigh in on the extremely sensitive topic of US national security. The WTO almost avoided having to rule on the issue – but not quite.

In this episode, we are going to tell the story of Trump's tariffs, the dispute, and why it was clear – even from the beginning – that forcing the WTO to rule on national security was going to be a problem.

Now that the legal decision is out, we will also discuss lessons for a World Trade Organization wrestling with member countries' newfound concerns over national security.

To do all of that, I will be joined by two very special guests.

Jennifer Hillman: I'm Jennifer Hillman, I'm a professor at the Georgetown University Law Center.



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Chad Bown: In the 1990s, Jennifer Hillman was an official at the Office of the US Trade Representative. From 2007 to 2011, Jennifer was an appeals court judge as a member of the WTO's Appellate Body.

Mona Paulsen: I'm Mona Paulsen. I am an assistant professor at the LSE Law School.

Chad Bown: Mona Paulsen has a PhD in international economic law. Mona is one of the world's great experts on the history of national security and trade, and she'll talk us through some of the implications of national security for the world trading system today.

You are listening to an episode of *Trade Talks*, a podcast about the economics of trade and policy. I'm your host, Chad Bown, the Reginald Jones Senior Fellow, at the Peterson Institute for International Economics in Washington.

PART I: THE NATIONAL SECURITY TARIFFS (02:10)

Chad Bown: This story begins in the second half of the Obama administration. By then, it had become clear that the United States and other countries faced a serious problem – China and its non-market economy.

China was suddenly producing over 50 percent of global steel and aluminum. This was up from less than a third of global capacity a decade earlier. China's expanding production also had no end in sight.

The problem was that China's domestic demand for metals was slowing. It was doing less construction and infrastructure investment at home. With all of that steel and aluminum production capacity already built, China was exporting more and more to the rest of the world. Massive Chinese exports drove down world prices, hurting steel and aluminum companies in the United States and other countries.

By the time of the Obama administration, the United States had mostly stopped direct imports from China of steel and aluminum. This was done through its use of anti-dumping and countervailing duties. But that hadn't solved the underlying problem taking place in China.

Steel and aluminum are commodities. Even if the United States doesn't buy Chinese steel, China still can sell its cheap steel to countries in Europe or Canada or Korea. Europe or Canada or Korea can then use the Chinese steel at home and then sell their steel into the US market,



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since their steel was not hit with US tariffs. This result was still lower steel prices in America – good for consuming industries, bad for steel companies and their workers.

As one last attempt to tackle the China steel production problem at its source, the US helped kickstart an OECD process in 2016. And for aluminum, in the waning days of the Obama administration, the US filed a formal WTO dispute against China's subsidies. Unfortunately, both of those efforts arrived too late.

In November of 2016, Donald Trump was elected president of the United States. On the campaign trail, candidate Trump had given fiery speeches about what he intended to do on trade and China, including this one, at a shuttered steel mill in Pennsylvania

Candidate Donald Trump: If China does not stop its illegal activities, including its theft of American trade secrets, I will use every lawful presidential power to remedy trade disputes including the application of tariffs consistent with Section 201 and 301 of the Trade Act of 1974 and Section 232 of the Trade Expansion Act of 1962.

And when they say trade expansion, they're talking about other countries. They're not talking about us, because there is no expansion. They get the expansion. We get the joblessness. That's the way it works.

Chad Bown: As President, Trump promised to take a different approach from his predecessors.

In early 2017, less than 100 days into office, the Trump administration began with something very unusual. Here's Jennifer Hillman.

Jennifer Hillman: In April of 2017, the Trump administration began two investigations, one on steel and one on aluminum. In each, the administration looked at the question of whether or not imports of those products were a threat to America's national security, and all of this was done under what is known as Section 232 of the Trade Expansion Act of 1962.

Chad Bown: This was weird. The law under which they were doing these investigations was an old law, but it had rarely been used.

Jennifer Hillman: We don't know for certain why the Trump administration chose to go down this particular road of a national security case. What we do know is that it was begun at a time in which the United States Trade Representative, Bob Lighthizer, had not yet been confirmed. And we know also that this is a statute that is run through the Department of Commerce and at the time, the Commerce Department Secretary, Wilbur Ross, had been confirmed.



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If the real goal was to keep tariffs on steel and aluminum, they had other options that would've arguably been less damaging to the trading system overall than this fight over national security.

Chad Bown: This Trump decision was one of many that has turned out quite damaging to the trading system.

For steel and aluminum, there were other, less damaging options than national security tariffs that the president could have chosen. Those included more traditional trade remedies of antidumping, safeguards, and countervailing duties.

Separately though, the Trump administration was also quite fed up with a different part of the WTO system – its dispute settlement procedures. The WTO had been criticizing the way the United States was using those more traditional trade remedies for more than twenty years, ruling against the United States in dozens and dozens of cases.

With these new Section 232 investigations, it was almost as if President Trump was saying to the WTO – “hey, if you thought those trade remedy import restrictions were bad, just wait until you see my national security tariffs.”

The point is, even in April 2017, the warning signs were already there. In early 2018, things started to heat up

Jennifer Hillman: In February of 2018, the Trump administration released the final results of this Section 232 investigation, and it found that imports of both steel and aluminum threatened the national security of the United States.

Now, it's important to note that its finding was based on a definition of national security that's within that 232 statute that very much focuses on the economic impact of the imports and the impact on commerce. In fact, it led Commerce Secretary Wilbur Ross to say that economic security is national security.

And the reports recommended that the president impose measures that would reduce imports.

Chad Bown: In March of 2018, President Trump agreed that imports of steel and aluminum threatened America's national security. He also began to impose measures to reduce imports.

But the way he did so was also weird. Yes, countries like China and Russia were hit with tariffs immediately. But Trump gave other, special trading partners, a choice. They could try to make him an offer and negotiate their way out of his tariffs. For example, a country might be able to



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avoid the US tariffs if it accepted quotas. So if the trading partner agreed to a strict volume limit on how much steel and aluminum it would sell to the United States, for them, there would be no US tariff.

Countries like Argentina, Brazil, and South Korea accepted Trump's deal. The European Union, Canada, and Mexico did not. They refused the quotas.

So in June of 2018, Trump hit those three with tariffs as well. Europe and Canada were especially upset because under NATO – the North Atlantic Treaty Organization – they were America's longtime military allies. The NATO allies didn't understand how their exports could be a threat to American national Security.

Jennifer Hillman: In response, many countries did two things. First, a number of them filed cases at the World Trade Organization complaining that these tariffs violated the United States' basic WTO obligations. In addition, some countries also retaliated immediately by imposing tariffs of their own on US exports going into their markets. That includes China, Canada, Mexico, and the European Union.

Chad Bown: We now had two problems.

By my count, countries would ultimately bring nearly 10 different WTO disputes against these Trump tariffs. But second, and importantly, even American military allies like Canada and countries in the European Union were now suddenly retaliating with their own tariffs against US exports.

Jennifer Hillman: Almost certainly these other countries, were now breaking the rules as well. You cannot impose measures of your own on your own without going through the WTO or without having conducted your own investigations. And they had done neither of those.

These trading partners claimed that Trump's tariffs were not really national security tariffs, that instead they were in fact safeguards, which gave them the right to use this little loophole in the safeguards agreement that allowed them to retaliate immediately as a way of rebalancing the trade concessions that had made between the United States when it agreed on what its tariffs would be, and these other countries that agreed on what their tariffs would be.

Chad Bown: Rebalancing trade concessions is a critical part of this story and something we will come back to later.



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For now, what is important was this new problem. What had begun as a concern with China's excessive production of steel and aluminum had suddenly turned into a fistfight between the United States and its military allies.

Trump put national security tariffs on Europe and Canada, Europe and Canada immediately retaliated against US exports, and both sides of this military alliance were now probably breaking WTO rules.

For the WTO, things were going from bad to worse.

Over the next three years, some of those problems did slowly dissipate.

To get Congress to pass his renegotiated trade deal with Canada and Mexico, Trump agreed to convert their tariffs into voluntary export restraints. Canada and Mexico stopped retaliating and pulled their WTO disputes.

Then, in November 2020, Joe Biden was elected President. With Trump now out, Biden was promising to work with allies on trade. Many were hopeful.

One problem though was that the clock was still ticking on all of those remaining WTO disputes against Trump's national security tariffs. The Biden administration would need to do something to make that problem go away.

It did make progress. With the European Union, the Biden team negotiated a similar deal to what Trump had done with Canada and Mexico. Europe agreed to volume limits on its exports, and Biden removed the US tariffs. Here is European Commission President, Ursula von der Leyen, in October 2021

European Commission President Ursula von der Leyen: I am also very pleased to announce we have today agreed to suspend the tariffs on steel and aluminum and to start the work on a new and sustainable steel arrangement. And this marks a milestone in the EU-US partnership.

With this deal with Europe, one more WTO dispute had now gone away. The Biden administration then announced a similar agreement with Japan. And then one more with the United Kingdom.



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But unfortunately, that is where the deals end. The remaining exporting countries did not get deals. Without a settlement, those other trading partners kept pushing their WTO disputes, until finally, in December of 2022, the WTO could not put off its decision any longer.

More than four and a half years after Trump had first imposed the protection, the WTO was forced to issue a ruling on his national security tariffs.

PART II: THE WTO'S LEGAL RULING ON THE US NATIONAL SECURITY TARIFFS (14:35)

Chad Bown: Understanding the WTO decision requires coming to grips with two critical parts of this dispute: the underlying legal text and the American argument. On the American argument, I asked Jennifer to explain which US administration was defending the case as well as the basics of the underlying American legal defense.

Jennifer Hillman: The vast majority of the arguments which would occur both in written form and in lawyers from USTR appearing before this three member panel that was hearing the case, almost all of that occurred under the Trump administration.

The major claims of all of the other parties was that the United States was violating two of the most basic principles of the GATT. The first allegation was that the United States was violating so-called most favored nation, which says that you have to treat all of the members of the WTO equally. The second major claim is that the United States had agreed and had bound its tariffs at a specific level. For instance, with respect to steel, the United States had bound its tariff at a 0 percent duty, and therefore the imposition of a 25 percent tariff is violating that obligation.

What the United States was basically saying is, we agree that we've done all of these things, but we are justified in doing that under an exception to the rules, which is known as the national security defense found in Article XXI of this General Agreement on Tariffs and Trade.

Chad Bown: This takes us to the legal text of Article XXI – the national security defense – which is the second thing that we need to understand.

Under Article XXI, the US could have gone with any of three potential justifications for the national security defense. It could have said the tariffs were needed

- (i) Because they relate to nuclear material



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- (ii) Because they relate to trafficking in arms or supplying a military establishment, or
- (iii) Because it was during a time of war or other emergency in international relations.

Chad Bown: Of those three boxes for national security justifications – nuclear, military establishment, or an emergency in international relations – which did the US say was its defense for its tariffs?

Jennifer Hillman: None! What the United States basically said was, we don't have to tell you which one of the three it is. The United States throughout this entire litigation said over and over again that, in the United States' view, this provision was entirely self-judging, that it was up to the United States to determine what was in its essential security interest, it was up to the United States to impose measures, and it did not owe any obligation to the panel or anyone else to explain which of these three boxes its measures fell into.

So throughout the litigation, the panel really did keep pushing the United States to say, we understand that you're invoking this national security defense, but the panel kept saying, we want to understand *where* in this national security defense does your measures fall.

And while the United States kept saying again and again, this is self-judging, this is not justiciable, it finally did say that the publicly available information could be understood to relate most naturally to the circumstances described as an 'other emergency in international relations.'

Chad Bown: OK. Not only were the US tariffs a problem, but another worry was now with the American defense of its national security tariffs. The new concern was that this US argument – that its Article XXI defense was self-judging, and so it therefore did not need to explain itself – could lead to other problems for the trading system. Here's Mona Paulsen.

Mona Paulsen: All WTO members, when they sign up to be WTO members, they all agree that they're not going to decide for themselves what happens in disputes and how to resolve them. They all agree that WTO panels will figure out what to do when there's a dispute between two members.

If all the WTO rules are self-judging, then that initial agreement – that all governments come together and commit to – that falls away.



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Jennifer Hillman: I think the biggest concern is whether or not other countries will follow in the United States' footsteps. What the United States was effectively saying is if I say it's national security, you have to take my word for it, and you can't ask me any questions, and you can't ask me to tell you which part of this national security exception do I fit in. I don't have to say anything.

And the concern is what happens if everybody else does the same thing. What happens if every country decides to impose any measures and simply allege that they also contend that they are national security, and that they will not provide any more information or answers to anyone about them.

Chad Bown: Let's recap where we are. A lot of the potential WTO disputes had gone away. The US had managed to settle them without requiring the WTO to rule.

The countries hurt by the US tariffs, and that were still complaining in this WTO dispute, were Norway, Switzerland, Turkey and China.

Their argument was that the US broke the rules. The US was not allowed to just increase its tariffs. And the US was also not allowed to structure its steel and aluminum protection in a discriminatory way, that would benefit some WTO members, but not others.

The US defense was – maybe we did those things – but if we did, we justify having done so under the national security exception, this thing called Article XXI.

That is our, the US, defense. Furthermore, no one is allowed to ask why we did it. That is for us to decide. Once we have flashed this national security card, we do not need to also explain ourselves to the either complaining countries or to the WTO.

Mona, how did the WTO panel rule in the case?

Mona Paulsen: The panel in this dispute finds that the United States did not identify that there was an emergency in international relations, and therefore it didn't meet the circumstances by which to invoke Article XXI.

Chad Bown: The WTO panel did not agree with the US argument that this was self-judging and non-justiciable. To explain, the panel appealed to the language in that third paragraph of Article XXI.



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Back in 2017-18, during this investigation, the United States was not involved in any wars. So in order to determine whether there was an “emergency in international relations” – these are the terms in Article XXI – how does the panel even define what these terms mean?

Mona Paulsen: The way the panel determines the meaning of those terms is it looks at dictionary meanings. And in that sense, they look at this idea of the fact that an emergency in international relations must be grave or severe and at least comparable – this is their language – to the gravity of severity of war, in terms of how it impacts international relations.

In the context of this dispute, sticking to dictionary definitions is a really good way of staying as apolitical as possible.

Chad Bown: Jennifer, how did the WTO panel ultimately get boxed into looking at dictionary meanings to figure out whether the US was in an “emergency in international relations,” and how did this ultimately affect the panel’s ruling?

Jennifer Hillman: The panel got to this result largely because the United States chose not to defend any of the particulars of whether or not this fell in which box, and if it was in a particular box, why did it fit within that box? Because the United States stuck with its basic argument that this particular provision is self-judging and non-justiciable, which means the United States fundamentally did not put up any arguments under this aspect of the national security defense.

So instead, the panel keyed off of this one phrase that the United States submitted, saying that these measures relate most naturally to the circumstances of an other international emergency. The panel then looked at what was on the public record that the United States had put forward, which was the 232 reports and the underlying documents related to those reports, and all of those pointed to a concern over over-capacity to produce steel and aluminum, particularly coming out of China. The panel on its own looked at all of the data and the information that was in those underlying 232 reports and ultimately came to the conclusion that they did not rise to the level of showing that there was in fact an other emergency in international relations just because there was over capacity to produce steel and aluminum.

Chad Bown: When the report was released publicly, legal scholars responded with some pretty heavy complaints with what the WTO panel had done.

Jennifer Hillman: There has been a fair amount of criticism of this panel report because these arguments about why there was or was not an ‘other emergency in international relations’ come off as fairly weak and as the panel reaching and, in essence, making arguments arguably on behalf of the United States that the United States never made.



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So they make up, to some degree, a weak case on why these measures might or might not fall within this taken in the time of 'other emergency and international relations,' and then shoot down their own argument as not being a compelling argument.

Chad Bown: The WTO was put in this impossible position of having to adjudicate a case about a member's national security, one of the most sensitive topics in the trading system. Without much to go on, the panel was forced to rely on dictionary definitions and, in a sense, it had to make the US defense for it.

While legal scholars found fault with the WTO panel's approach, one of the sharpest critics of the WTO ruling, was, of course, the United States itself.

Here is the Biden Administration's US Trade Representative, Katherine Tai, at the Council on Foreign Relations, shortly after the WTO ruling was announced

USTR Katherine Tai: Our position has long been that, if you just look at the text of the agreement, national security decisions that are made by governments are a source of incredible responsibility. They should not be made willy-nilly. But for the integrity of a multilateral institution like the WTO, that it should not get into the business of second guessing the national security decisions that are made by sovereign governments.

I think that the WTO is getting itself on very, very thin ice, and I think that that really challenges the integrity of the system. It is the responsibility of governments to bring integrity to their decisions on national security. But it is a very challenging place to be to have unelected, not really accountable, decision-makers in Geneva second guess processes that are run through a government like ours, which is democratic, and also for a country like ours that many others look to, to defend on national security, not just for ourselves, but for others.

Chad Bown: The United States was clearly unhappy with the WTO decision. A USTR spokesperson also said that the United States will not comply with the panel report, meaning the steel and aluminum tariffs that remain are going to stay.

Nevertheless, there is one potentially important thing that the United States has not yet said. That, may be a silver lining.

Mona Paulsen: At the time of us talking, we don't know whether or not the United States will appeal the panel report. Of course, that would be appealing 'into the void' because there's no operable Appellate Body at the moment.



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That means that once the time limit for them to appeal ends, it's possible that some of the complainants – Norway and Switzerland in particular – could then proceed to the next phase, to arbitration, to try to focus on rebalancing of concessions or to retaliate.

Chad Bown: This could turn out to be the silver lining. If the United States does not appeal this report into the void, Norway and Switzerland could seek rebalancing. That means they would be allowed some retaliation, legally, based on how much exports they lost due to the original US tariffs.

A US decision not to appeal the report might be the United States quietly supporting the role of international law. The United States would be saying that while we are not going to remove our tariffs, it is fine for Norway and Switzerland to go ahead with the rebalancing that the WTO allows.

This could be a positive sign, albeit small one, that the US is OK with at least some of these key WTO rules. We'll see what happens.

PART III: THE WTO'S NATIONAL SECURITY RULING IN HISTORICAL CONTEXT (28:40)

Chad Bown: Someday, historians may remember this December WTO legal decision as a pretty big deal. To see why, it's useful to begin with a separate Biden administration statement made after the WTO ruling.

Maria Pagán, the US Ambassador to the World Trade Organization in Geneva, said to the WTO membership that, "I wish to remind Members: the negotiating history of Article XXI(b) confirms the drafters intended this provision to be self-judging, and that the available remedy for such measures is a non-violation claim."

We'll turn to that last part, the non-violation claim part, momentarily.

But first, Mona. You are a legal historian. According to your research, did the drafters of the legal text in the 1940s intend for Article XXI to be entirely self-judging?

Mona Paulsen: The drafters never intended for Article XXI to be entirely self-judging. What's really important to understand here is that context is everything.

Throughout the discussions, and in particular through the internal deliberations of the United States, the key architect of the security exceptions, it's clear that that was a really complicated



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question. There were debates within the US, particularly between the Defense Departments and the State Department that was responsible for negotiating these trade rules.

Ultimately, US internal documents do confirm that while the necessity of the actions taken was something that a government would decide for itself, understanding the relationship between the actions taken and the situation at issue, like an emergency in international relations, would be subject to review.

Chad Bown: At the time, the part of the US government that ultimately drafted the international rules was not fully on board with this self-judging, non-justiciable argument.

The big question is why? In the 1940s, why did even the United States want to allow some form of international dispute settlement to be able to review actions taken during an emergency in international relations.

Mona Paulsen: The US was really concerned about other governments using the security exceptions for political interests. And that's what you see, you see India arguing, what if there's a political crisis at home?

And so that's why they keep emphasizing this idea of legitimate, real security interests to be an issue. Because at the time, and I think this is really important, they're worried about checking economic warfare. They're worried about checking future economic retaliation.

Chad Bown: Mona's research here is incredibly important. The United States and the international trading system was coming off the disaster of the 1930s. There was the US Smoot-Hawley Tariffs and trading partner retaliation; there was the Great Depression and the Second World War.

When the State Department was drafting rules for the new system in the late 1940s the United States was worried the world might repeat those same mistakes. Countries might impose new trade barriers for political reasons, and then try to get out of the consequences by justifying the barriers on the grounds of national security.

Fear of imitation was one worry, but Mona is pointing to a separate concern. If there was no international review, the retaliatory response by trading partners – and we know that there would be one – might itself then go unchecked. This goes back to the rebalancing argument we mentioned briefly before.



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A hugely underappreciated part of the ultimate dispute settlement system is not only that it allows for retaliation, or rebalancing, but that same system also serves to provide a check, a limit, on the size of that retaliation.

The drafters in the 1940s hoped that an authorized, but limited retaliation, that allowed for rebalancing would prevent the sort of tit-for-tat behavior, escalation, and spiraling trade tensions that ultimately resulted in the economic warfare of the previous decade.

They wanted to stop history from repeating itself.

How would the drafters' new rules work in practice? Well, in the decades since the 1940s, there were just not a lot of cases where countries invoked this Article XXI defense.

National security concerns did come up – in the 1980s during disputes between Britain and Argentina over the Falklands War, or when the United States in Nicaragua were fighting in Central America, and then also in the 1990s when the United States and Europe had a disagreement over the Americans's treatment of Cuba. But even then, the disputes were withdrawn or settled diplomatically before the WTO was forced to rule on whether national security was a legitimate defense for any given country's trade barriers.

For nearly 70 years, countries did an amazing job of protecting the multilateral trading system from this no-win issue.

Then in 2014, Russia invaded Ukraine. Russia imposed trade restrictions. Ukraine brought a WTO dispute, and Russia defended its trade policy under the Article XXI, national security exception. Finally, in May of 2019, the WTO could avoid the issue no longer. A panel was forced to provide the WTO's first ever dispute settlement ruling on national security.

From today's perspective, it was the US legal position in that Russian dispute that is super interesting.

Mona Paulsen: It's not until 2019 that we have an official WTO panel report with respect to the interpretation of Article XXI of the GATT. So that's a really long time, and that rises out of the Russian invasion and subsequent annexation of Crimea.

What we then begin to see from this dispute between Russia and Ukraine, and the report, is that the United States now is consistent in maintaining that Article XXI is entirely self-judging. And that's a different position than some of the other third parties like the EU, Canada, other governments that are taking the position that Article XXI is not wholly self-judging.



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Chad Bown: Now, the United States was definitely not siding with Russia in its 2014 invasion of Ukraine and annexation of Crimea. Back then, the United States did impose a ton of sanctions on Russia in response. That's not at issue.

Where the US is aligned with Russia is on this 2019 WTO dispute. There, the Americans argued that when a country like Russia invokes the Article XXI defense, the WTO litigation should then stop.

And that is essentially the US defense and argument today. So in recent times, across the Trump and Biden administrations, on this national security issue, the United States is at least being consistent.

PART IV: NONVIOLATION COMPLAINTS AND A DIFFERENT APPROACH TO NATIONAL SECURITY AND WTO DISPUTE SETTLEMENT (36:16)

Chad Bown: Today we are at a crossroads. The steel and aluminum dispute shows there is a fundamental disagreement between WTO member countries and WTO panels about the meaning of Article XXI and national security.

Even aside from that, consider how the world has changed in the four short years since those WTO disputes were first launched.

Russia has once again invaded Ukraine, and there has already been nearly a year of brutal and ongoing war in Europe. China has developed an increasingly aggressive and hostile foreign policy. China implemented its national security law curtailing Hong Kong's democracy. China has ramped military exercises around Taiwan and toward its other neighbors. There are increasing concerns about a Chinese invasion. The WTO has received even more formal disputes involving national security.

This issue of national security is clearly not going away.

To help, we wanted to investigate this idea of a non-violation complaint, the one that US Ambassador, Maria Pagán, referred to earlier. Though countries have rarely made non-violation complaints in formal dispute settlement, the idea that they could has been there since the GATT's beginnings.



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I asked Jennifer to explain what a non-violation complaint is in theory and how it might be put to work here in response to an Article XXI, national security type of dispute.

Jennifer Hillman: So the concept here, and the way that this would work would be that there would be an understanding that when a member invokes this national security exception, Article XXI, the WTO system, in essence, does what the United States has basically been arguing for, which is to stop having any more litigation and instead, you would immediately assume a non-violation has occurred. And you would immediately begin the process of rebalancing without actually asking a panel to rule one way or another on whether the national security defense was effectively invoked. You would not have any rulings to that effect. You would just have an automatic understanding that whenever Article XXI is invoked, the next step is to simply rebalance the concessions.

Chad Bown: Again, suppose this non-violation claim had been used in the US national security tariffs, WTO dispute. The idea is that even if there were no explicit WTO rules being broken, the United States did take away some legitimate economic benefits that other countries, like Norway or Switzerland, were expecting under the agreement. Even if there was no wrongdoing, those countries deserve rebalancing as compensation.

Chad Bown: Let's run through some of the pros and cons of such a non-violation complaint approach, starting with the benefits.

Jennifer Hillman: So first and foremost, the benefit for the WTO as a system is it doesn't have to make these very difficult rulings on national security, which always will put it between a rock and a hard place. Because if it rules as it did in this instance, in favor of those complaining about the US's national security tariffs, the United States responds the way it did, "I'm not going to comply. You can't judge my national security." And if on the other hand, it rules in favor of the national security defense, it invites many other trading partners to consistently impose measures and claim that they are in the name of national security.

The second thing it really does is that it can be done very quickly. It won't take the two or three or four years of litigation before a WTO panel, that it would take to go through a full defense.

It does mean that you will not just in Katherine Tai's words, "willy-nilly," start invoking national security all the time because you know that you will have to pay for it in the form of this rebalancing. And so invoking the national security defense is not free. It's available. You don't have to go through litigation, but it's not free. And therefore, in theory, that is a deterrent on using it unless and until you really need to.



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Chad Bown: Another benefit involves something Mona said earlier about what the drafters in the 1940s wanted for the system. The focus on rebalancing also creates a check, a limit, on the retaliation that the complaining government will be allowed.

If adopted today, this sort of approach would keep the issue within the WTO and its basic rules. There would be retaliation, but it would be limited. And it would solve the problem of this dispute once and for all. No further escalation.

And that is arguably better than the alternative, which is that the complaining government retaliates unchecked, and unilaterally. That leads to escalation, further retaliation, economic warfare, and a more serious breakdown of international relations.

Chad Bown: As we try to help the trading system dispose of potential national security cases, what are some of the costs, or downsides, of using this non-violation approach?

Jennifer Hillman: The downside of not going through the process is that there is no international scrutiny. There's no one judging whether or not this really did fall on the national security side of the line, or whether it really was just blatant protectionism.

You also will clearly still have the problem of “how much” is this rebalancing? How much was it worth to a country, uh, to engage in trade and steel and aluminum with the United States? How much did these tariffs harm that trade? Therefore, how much should the rebalancing be?

That is a process that the WTO does normally through an arbitration. Oftentimes we've seen in past cases where the parties are wildly different in terms of their sense of the value of a case.

Chad Bown: Finally, not only is the technical process of calculating rebalancing sometimes hard – and why you can get these wildly different estimates between the two parties – but often times the result means tariff retaliation. That too is not free. In the retaliating country, the result is new costs on consumers in consuming industries, even if there are some benefits to newly protected producers. This is also not a particularly useful remedy when the complainant is a small country that might not have a lot of imports over which to retaliate.

Overall, this alternative of a non-violation approach does have a lot of upside. It may be a considerable improvement over the status quo. Nevertheless, it is still imperfect.



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PART V: WHAT DID WE LEARN (43:44)

Chad Bown: As we wrap up this episode, I want to take a step back and look at the bigger picture. Mona, let's start with you.

What have we learned? Why is this national security issue turning out so hard for today's World Trade Organization and its dispute settlement system?

Mona Paulsen: You have to separate those specific circumstances like the Russia invasion of Ukraine. Those are clear circumstances. One country invaded another country. The system can probably withstand a dispute about that because it's a very clear time of war.

The other problem, and what we're seeing, is that there is a lot of discussion about the US invocation of security because it is inevitably putting security on the table as part of its climate policy, as part of its economic policy. The US position right now is, "I'm sorry, if this is paper-rock-scissors, security covers trade." And to that extent, everyone keeps saying, "No, no, US, you are wrong, you can't do that, that's a way to deviate from the rules."

We can't just say, "The WTO rules are meaningless because security is on the table." But what can the US do if all there is is a security exception?

Chad Bown: Jennifer, as my last question for you, I wanted to ask why you think the world is so upset with what has happened with this December WTO ruling. In some sense, the experts have been warning us from the very beginning, way back in 2017, that if the dispute ever got to a WTO ruling like today, this was going to be really bad news for the multilateral trading system.

Here we are, and they were right. Why are people surprised by this?

Jennifer Hillman: To me, there's two basic reasons why I think many in the world are very upset with the Biden administration's response to this decision.

First is I think a lot of the world was really hoping, fingers crossed, that when the Biden administration came in that they were going to change the US position with, particularly with respect to the issue of the dispute settlement system at the WTO, and that they were going to be very engaged in thinking about how to reform the WTO Appellate Body so that it met a lot of the concerns that have been raised for many years, and at the same time would engage in a process to get it back, in a reformed way, but nonetheless back on track.



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And the moment the United States came out and said, “we will not comply with this decision,” for many in the world, those hopes were very much dashed.

The other is, I think the rest of the world is hearing the Biden administration say in so many other contexts that the Biden administration wants to promote the rule of law. Particularly when you think about it in the context of what it's doing vis-a-vis China and absolutely with respect to what's happening with Russia's invasion of Ukraine. The United States is consistently among those saying we need to hold Russia to account for the atrocities and the war crimes and the repeated violations of international norms that are occurring throughout the world.

And yet, here is the United States, in this instance, violating international norms itself. It is saying to the WTO, we don't care what you say, we don't care that you found that we're in violation, we're not going to comply, even though we have obligations that we recognize.

Chad Bown: How do you think the Biden administration might respond to that?

Jennifer Hillman: I think this decision, in part, needs to be put in context because of the national security nature of it. I think there are many in the world that do understand, and especially the Biden administration, that when it comes to national security, there has to be some safe space to say all bets are off.

And we've obviously seen a sea change, even in the last three or four years, of how we think about national security, and how we think about what is a legitimate response to national security concerns.

Part of that, I think, is a clear understanding by the Biden administration, rightfully so, that the WTO rules are simply no longer fit for purpose. It's not just in the national security area, but that's one of them. You have a WTO that hasn't figured out how to take on board what are the 21st century problems. How do the trading rules contribute affirmatively to solving climate change, to dealing with global health problems, to addressing the incredible amounts of inequality? On and on.

So, at some level, the Biden Administration's basic message is the WTO and its rules are not working. So why should we comply with the ruling in this case? Why should we continue to engage in this dispute settlement system that is designed to enforce rules that are themselves outdated.

At the same time, it is very difficult to change the rules of the WTO. It requires a consensus, which means unanimity, and it is proving incredibly difficult when among those countries are



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countries that are as different as the United States and China, in their approach to all things economic and national security, to come up with any kind of new rules that would be acceptable to 164 countries.

So some of this response is a clear expression of frustration on the part of the Biden administration with failures of the WTO to modernize both its rules and its dispute settlement system.

Chad Bown: My last question for you, Mona, also ties into that. What's your big takeaway from all the reaction around these recent national security disputes, and what can policymakers try to do about it?

Mona Paulsen: My big concern, of thinking through some of these recent disputes with the United States and the panel reports with respect to the tariffs on steel and aluminum, is that we're going to have the US just completely lose faith in WTO dispute settlement. And we're seeing that increasingly in many ways, not just with the way that the panel interpreted essential security interests in Article XXI, but it builds on that. And whatever solutions we try to come up with isn't going to take that away.

What we can do is try to think about how to deal with this system in crisis. Now that we know all that we know, in looking through the system, what can we do to make it better?

We've seen the US, in some of its press releases, talk about an interest in reform. And so I really would love to bring in some of the United States concerns to address some of these realities that we're dealing with in the globalized economy that clearly are not working within the way the rules work.

We need to think of a way to bring the US back to the table and deal with that because clearly going through the dispute settlement mechanism, this is a problem, and it's only going to get worse if we don't address it.

Chad Bown: Jennifer, Mona, thank you very much.

Jennifer Hillman: Thanks for having me.

Mona Paulsen: It's always good to talk to you.



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Chad Bown: To conclude this episode, let me make two other points.

First, another thing that's been gnawing at me is that the 2018 steel tariffs were just a bad test case for national security. Steel has a terrible reputation in the United States as being a complainer, a swing-state anomaly, a protection recidivist, a sensitive industry in trade-speak.

For US policy makers, an important reminder is that, aside from all the other legal options for protection that we talked about today – safeguards, anti-dumping, countervailing duties – the United States always has one other thing it could do if it needs to protect its steel industry, legally, under the WTO's own rules.

That is called Article XXVIII: Modification of Schedules. At any time and for any reason, the United States can tell the WTO membership that it is going to increase its tariffs and not have to explain why.

All the United States needs to do is to negotiate compensation with affected trading partners seeking to then rebalance trade concessions under Article XXVIII. The legal provision is there. It too has rarely been used, but maybe it should be used more.

If the Trump administration had used Article XXVIII back in 2017, this particular drama over national security could have been avoided.

The second point though is that the world has seriously changed since 2017. National security today is suddenly a much bigger deal. There will now be times when there are no other options aside from that defense.

In those instances, maybe the non-violation complaint approach that we described earlier can help.

But what I also take away from some of Mona's new research is that the system would benefit from countries coming to the table and talking about some new rules. They need to start somewhere, and in the words of one of Mona's new papers, even if, as a starting point, that means they agree to disagree.



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GOODBYE FOR NOW

Chad Bown: And that is all for *Trade Talks*. A huge thanks to Jennifer Hillman at Georgetown University Law Center and Mona Paulsen at LSE Law School. I am going to post on the episode web page a link to a bunch of their research on this topic of national security and the WTO.

Thanks to Melina Kolb, our supervising producer. As always, thanks to Collin Warren, our audio guy. Do follow us on Twitter or Mastodon, we are on @Trade__Talks. That's not one but two underscores @Trade__Talks.

<insert super funny double underscore joke here> . ■

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