Subsidizing the Microchip Race: The Expanding Use of National Security Arguments in International Trade

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SUBSIDIZING THE MICROCHIP RACE: THE EXPANDING USE OF NATIONAL SECURITY ARGUMENTS IN INTERNATIONAL TRADE

Victoria G. Walker*

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INTRODUCTION

In 2018, China, India, the European Union, Canada, Mexico, Norway, Russia, Switzerland, and Turkey lodged complaints with the World Trade Organization’s (WTO) Dispute Settlement Body (DSB) in the case of Certain Measures on Steel and Aluminium Products. Each State alleged that the United States had violated international trade law by imposing a series of aggressive tariffs on steel and aluminum imports. President Donald Trump’s administration responded to these allegations by claiming that its actions were permissible under Article XXI of the General Agreement on Tariffs and Trade (GATT); a long-standing exception built into the international trade law framework that allows States to restrict trade when doing so is vital to their national security. According to the

1. Request for Consultations by China – Certain Measures on Steel and Aluminium Products, WTO Doc. DS544/1 (April 5, 2018); Request for Consultations by India – Certain Measures on Steel and Aluminium Products, WTO Doc. DS547/1 (May 23, 2018); Request for Consultations by the European Union – Certain Measures on Steel and Aluminium Products, WTO Doc. DS548/1 (June 1, 2018); Request for Consultations by Mexico – Certain Measures on Steel and Aluminium Products, WTO Doc. DS550/1 (June 1, 2018); Request for Consultations by Canada – Certain Measures on Steel and Aluminium Products, WTO Doc. DS551/1 (June 5, 2018); Request for Consultations by Norway – Certain Measures on Steel and Aluminium Products, WTO Doc. DS552/1 (June 5, 2018); Request for Consultations by Russia – Certain Measures on Steel and Aluminium Products, WTO Doc. DS554/1 (June 29, 2018); Request for Consultations by Switzerland – Certain Measures on Steel and Aluminium Products, WTO Doc. DS556/1 (Aug. 15, 2018); Request for Consultations by Turkey – Certain Measures on Steel and Aluminium Products, WTO Doc. DS564/1 (June 1, 2018); Report of the Panel, United States – Certain Measures on Steel and Aluminium Products, WTO Doc. DS544, P6.15 (Dec. 9, 2022).

2. Id.

3. Communication from the United States – Certain Measures on Steel and Aluminium Products, WTO Doc. DS48 (June 7, 2018).
United States, Article XXI granted it and other States near-total discretion when it came to defining their own security interests. The DSB Panel rejected this argument. Instead, the Panel asserted its own power to determine whether a State could claim the protection of Article XXI. When it came to American tariffs on imported metals, the Panel found that Article XXI was not appropriately implicated.

This decision was significant because it marked the first time that a DSB Panel directly considered a State’s invocation of Article XXI and determined that the security exception did not excuse the State’s behavior. During the drafting of the GATT and for seventy years after, the security exception had been critiqued for its broad scope and vague language. In Steel and Aluminium Products, the Panel finally indicated an inclination to adopt a more narrow, workable interpretation of the text. This interpretation would outline the limits to the exception, such that States could not raise it in defense of just any trade practices. In narrowing the exception, the Panel carved out a role for the international community in determining when a trade barrier is truly tied to a State’s national security interests.

Backlash from the United States was immediate. When President Joe Biden learned of the decision ruling against his predecessor’s steel tariffs, he did not attempt to distance himself from the trade barriers, as one familiar with modern-day U.S. politics might expect. Instead, the White House doubled down on its original stance, rejecting the binding decision from Steel and Aluminium Products and refusing to accept any result that might limit the United States’ ability to freely define its own national security interests. In so ardently rejecting the results of the WTO dispute resolution process, the United States established itself as somewhat of an outlier in contemporary international trade law. While the DSB Panel and many States said that the steel and aluminum tariffs did not fit within the Article XXI meaning of national security, the United States continued to insist that they did and that its Article XXI decisions were not up for discussion.

4. Id.
6. Id.
7. Id. at 84.
10. Id.
11. Id.
12. Communication from the United States – Certain Measures on Steel and Aluminium Products, WTO Doc. DS548 (June 7, 2018).
Just a few years later, the United States has once again turned to national security arguments to justify its use of trade restrictions.\(^{13}\) This time, though, the State is in good company. In August 2022, Biden signed the bipartisan CHIPS and Science Act (U.S. CHIPS Act) into law.\(^{14}\) This legislation allocates $52.7 billion U.S. dollars\(^{15}\) to semiconductor\(^{16}\) research, development, and manufacturing taking place within U.S. borders, aiming to keep American companies at home and to attract local manufacturing business by foreign competitors.\(^{17}\) The day the U.S. CHIPS Act was signed into law, the White House issued a press release indicating that the legislation would serve as a safeguard of American national security by lessening reliance on foreign nations for access to critical technologies.\(^{18}\) While drawing parallels to the innovation of the 1960s Space Race, the White House expressed a desire to gain an edge over global competitors and position the United States as a leader in the semiconductor industry.\(^{19}\) The U.S. CHIPS Act itself stated that “a secure supply of semiconductors [is] necessary for the national security, manufacturing, critical infrastructure, and technology leadership of the United States,”\(^{20}\) and the U.S. Code called it “counter to the national security interest [for the United States] to be heavily dependent upon foreign sources for this technology.”\(^{21}\) All of this language suggests that


\(^{14}\) Id.; CHIPS ACT OF 2022, PUB. L. NO. 117-167, 136 STAT. 1362.

\(^{15}\) Id.

\(^{16}\) For the purposes of this Note, the terms “semiconductor” and “microchip” are used synonymously to refer to the same piece of technology. At a technical level, “microchip” is the general term for chips on which conductive semiconductor materials operate. In industry and legal discourse surrounding the microchip race, however, the terms are often used interchangeably, along with words like “chip,” “semiconductor chip,” “microcircuit,” and “integrated circuit.” The Semiconductor Industry Association refers to semiconductors as “the tiny chips powering modern electronics.” Semiconductor Industry Association (SIA), 2022 State of the U.S. Semiconductor Industry 2 (2022).

\(^{17}\) $2 billion of this funding was placed into a CHIPS for America Defense Fund that largely focused on promoting university research and development, with an emphasis on creating technologies beneficial to the Department of Defense. CHIPS ACT OF 2022, CHIPS FOR AMERICA DEFENSE FUND, PUB. L. NO. 117-167, § 102(b)(1), 136 STAT. 1374. The lion’s share of the money was allocated to a much larger CHIPS for America Fund, which aimed to develop domestic manufacturing capability by offering onshore manufacturers “semiconductor incentives” through the Department of Commerce. CHIPS ACT OF 2022, CHIPS FOR AMERICA FUND, PUB. L. NO. 117-167, § 102(a), 136 STAT. 1372; CHIPS ACT OF 2022, SEMICONDUCTOR INCENTIVES, PUB. L. NO. 117-167, § 103, 136 STAT. 1379.

\(^{18}\) White House, supra note 13.

\(^{19}\) Id.


the promotion of American national security was not a byproduct of the U.S. CHIPS Act, but rather a key goal.22

The United States’ view that steel and aluminum tariffs were related to its national security was not met with support from other States. When it comes to highlighting the security significance of semiconductors, though, the United States is far from alone. Rather, the State is just one participant in a global economic contest colloquially referred to as the “microchip race,”23 in which many States have used national security as a key justification for the implementation of trade barriers.24 So what makes these scenarios different? If a dispute on microchip subsidies was presented to a DSB panel today, would the panel follow the approach of Steel and Aluminium Tariffs and continue narrowing Article XXI, or would it recognize the broad way that the term “national security” has been applied throughout the microchip race and take a different approach? Is it feasible for the DSB to limit the legal meaning of security under Article XXI when the term is being applied so liberally by States engaging in economic contests like the microchip race?

This Note contends that the widespread use of national security language by States involved in the microchip race raises a point of difficulty for future DSB panels faced with interpreting Article XXI. While backlash against the security arguments of major economic powers like the United States, Russia, and China has allowed recent panels to begin narrowing the parameters of the security exception, the widespread use of national security rhetoric to justify microchip subsidies suggests a broadening of the term that is likely to have implications for future reform. If a microchip subsidies dispute reaches the DSB, the panel will face the difficult task of trying to reconcile the narrowing legal meaning of Article XXI and the broadening political use of “national security,” all while trying not to further alienate skeptical parties like the United States. Before such a thorny situation arises, the WTO should work to increase the flexibility and predictability of Article XXI by establishing a Committee on National Security

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22. To offer a comparison for the $52 billion that the CHIPS Act allocated to semiconductor research, development, and manufacturing through the CHIPS Act: in FY 2022, the U.S. government spent $767 billion total on National Defense, $755 billion on Medicare for all eligible Americans, and $132 billion on Transportation. U.S. Treasury, How much has the U.S. government spent this year? (March 28, 2023), https://www.cbo.gov/publication/58888 [https://perma.cc/NT3F-JTZB].


that can more actively assess the meaning of national security and apply it in the context of novel trade situations.

In exploring these developments, Part I of this Note will discuss the Article XXI security exception and the textual ambiguities that DSB panels have recently attempted to resolve. Part II will explore the microchip race and the subsidies programs that States have justified using broad national security arguments. Part III will consider the likelihood that a DSB dispute on semiconductor subsidies will arise. Finally, Part IV will discuss a possible path to reforming the WTO’s approach to national security under the GATT before such a difficult case reaches its dispute process.

I. NATIONAL SECURITY UNDER INTERNATIONAL TRADE LAW

Protection and peace have long been upheld as primary goals of government.25 Prominent political philosophers Thomas Hobbes and John Locke both considered the human desire for security to be one of the key drivers behind the early formation of society.26 Three hundred years after their deaths, most States maintain either a formal or de facto military.27 While many State leaders promote the development of international law, they often remain tied to the idea that defense is a more significant interest than free trade28 and hesitate to limit their own abilities to act quickly and drastically in times of crisis.29 Thus, international trade agreements often include explicit exceptions that allow States to suspend their trade obligations in the name of security.30

Such an exception was carved into the GATT – the primary treaty overseeing international trade matters – in the form of Article XXI.31 The inclusion of this security exception served its purpose by gaining requisite support for the GATT’s formation.32 At the same time, the provision plagued international trade law with a point of ambiguity that continues

26. Id.
to haunt it today. This Section will discuss the long-standing debate surrounding Article XXI, which has preserved a security exception broad enough to be invoked in novel situations like *Steel and Aluminium Products* and the microchip race.

**A. The Role of International Law in Regulating State Economic Behavior**

The past fifty years have been marked by an ever-increasing volume of global trade, which is largely governed by international treaties overseen by the WTO. These mechanisms arose as part of the modern structure of trade law, which was born in the wake of World War II. In 1944, forty-four States met at the United Nations Monetary and Financial Conference in Bretton Woods, New Hampshire, with the intention of reopening the post-war economy. They hoped to address many of the economic conditions that had negatively impacted trade in the 1930s, including the rapid increase in tariff and nontariff barriers which States had used to shield their local economies from forces like the Great Depression.

In doing so, Bretton Woods completely reimagined international trade. Attendees rejected the protectionist tendencies of the interwar period in favor of complex legal systems that sought to simultaneously increase global trade volume and acknowledge State priorities like increasing domestic employment and ensuring economic stability. To meet these ambitious goals, Bretton Woods established a new international monetary system based around two international governmental organizations (IGOs): 1) an International Monetary Fund (IMF) designed to promote international financial stability and cooperation, and 2) a

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38. Morgenthau, supra note 36, at 182.
41. Articles of Agreement of the International Monetary Fund, Art. 1; U.S. TREASURY, BRETTON WOODS DOCUMENTS: TREASURY REPORT ON BRETTON WOODS PROPOSALS 2 (Feb. 15, 1945).
World Bank that focused on State financial assistance.\textsuperscript{42} A proposed third treaty would have established an International Trade Organization (ITO) to promote fair trade, but this effort stalled when the United States Senate failed to ratify the agreement.\textsuperscript{43} The Senate’s rejection of the ITO was motivated by a variety of factors, including rising apprehension about emerging threats like the Cold War and Korean War, a shift of private sector opinion, and disagreement between different agencies on how to approach trade on a global scale.\textsuperscript{44} The failure of the ITO shows an early hesitance to fully commit to international trade at the expense of domestic power.

Nevertheless, the idea of an international legal structure for cross-border trade found new life in 1947, when the United States and twenty-two other States met in Geneva to establish the GATT.\textsuperscript{45} GATT 1947 is an international treaty designed to promote the exchange of goods.\textsuperscript{46} It aims to reduce the use of trade barriers,\textsuperscript{47} which are regulations and policies that States use to restrict trade in order to shield or manipulate their local economies.\textsuperscript{48} Common examples include tariffs, which charge a tax on imports and exports; quotas, which limit the amounts of goods moving across borders; and anti-dumping duties, which penalize States for dropping large quantities of cheap goods into others’ markets.\textsuperscript{49}

Because GATT 1947 is a treaty, rather than a true IGO like the ITO would have been, it was initially overseen by a group of Contracting Parties with relatively weak enforcement power.\textsuperscript{50} This lack of teeth was one of the factors that led to a strong renewed view that international trade would be best served by an IGO.\textsuperscript{51} In 1995, this vision came to fruition

\textsuperscript{42} International Bank for Reconstruction and Development Articles of Agreement, Art. 1; U.S. TREASURY, BRETON WOODS DOCUMENTS: TREASURY REPORT ON BRETON WOODS PROPOSALS 8 (Feb. 15, 1945).


\textsuperscript{44} Id. at 339.

\textsuperscript{45} Id. at 336.


\textsuperscript{47} Id.


\textsuperscript{49} Id.

\textsuperscript{50} Reitz, supra note 46, at 556.

with the establishment of the WTO.\textsuperscript{52} In preparation for this new forum, the Uruguay Round agreements established a more expansive 1994 version of the GATT, which incorporated GATT 1947 by reference\textsuperscript{53} and created a formal process for dispute resolution.\textsuperscript{54} GATT 1994 was adopted as the WTO’s core treaty governing the general trade of goods and services.\textsuperscript{55} The WTO also took on the role of overseeing a long list of other treaties, most of which cover either a distinct industry area like agriculture or a distinct trade barrier like dumping.\textsuperscript{56} One of these barrier-specific measures is the 1995 Agreement on Subsidies and Countervailing Measures (SCM Agreement), which governs the use of subsidies.\textsuperscript{57}

Today, the WTO is composed of 164 Member States, including powerful economic players like the United States, the European Union, and China.\textsuperscript{58} In overseeing its complex arrangement of trade agreements,\textsuperscript{59} the WTO makes heavy use of its standing dispute mechanism, the DSB.\textsuperscript{60} The DSB was established through the Understanding on Rules and Procedures Governing the Settlement of Disputes, in Annex 2 of the WTO Agreement,\textsuperscript{61} and its process follows three steps:\textsuperscript{62} 1) the parties consult in hopes of finding an agreeable resolution to their dispute;\textsuperscript{63} 2) if no agreement is reached, then the dispute is adjudicated by a DSB panel, which produces a report on its ruling;\textsuperscript{64} and 3) the report is either formally adopted within twenty and sixty days of circulation\textsuperscript{65} or is sent to

\begin{footnotesize}
\begin{enumerate}
\item Agreement Establishing the World Trade Organization, Article II.
\item General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 1(a) [hereinafter GATT 1994]; WTO, The Uruguay Round, WORLD TRADE ORG. (Apr. 23, 2023, 10:11 PM), http://www.wto.org/english/thewto_e/whatis_e/tif_e/facts_e.htm; note that GATT 1947 was referred to as “the GATT” before the passage of GATT 1994, and that GATT 1994 (incorporating GATT 1947) is now often referred to simply as “the GATT.”
\item Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 1; Reitz, supra note 46, at 580.
\item Marrakesh Declaration of 15 April 1994, 6.
\item Agreement on Subsidies and Countervailing Measures, Jan. 1, 1995 [hereinafter SCM Agreement].
\item Legal Texts: The WTO Agreements, supra note 56.
\item Id.
\item Id. at Art. 4.
\item Id. at Art. 12.
\item Id. at Art. 16.
\end{enumerate}
\end{footnotesize}
the Appellate Body for review.66 A report that is challenged by the losing party can only be adopted after such review.67

All WTO Member States fall under DSB jurisdiction, which Members consent to during accession to the organization.68 Furthermore, compliance with panel rulings is mandatory and often enforced by approved countermeasures that would otherwise violate the WTO Agreement.69 While panel reports do “not [set] binding precedents for other disputes between the same parties on other matters or different parties on the same matter,” in practice these reports create expectations among WTO Member States and provide persuasive guidance for future panels.70 Therefore, it is important to seriously consider past DSB panel reports when discussing future disputes, even though the reports are not technically binding on non-parties.

While the DSB has received some fairness critiques,71 it has overall been regarded as a very successful and effective system; a “crown jewel” of the international trade framework.72 The DSB has traditionally seen a “relatively high rate of compliance [which] has increased confidence in the dispute settlement mechanism and encouraged its use by a significant number of WTO Members including developing countries.”73 This near-perfect record has set the WTO’s dispute resolution system apart from other international tribunals like the International Court of Justice.74

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66. Id. at Art. 17; The WTO Appellate Body is designed to have seven sitting members. As of May 2024, however, it has zero. WTO, Appellate Body, WORLD TRADE ORG. (2023) (last visited Mar. 31, 2024, 4:58 PM), https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm.
67. Id.
70. WTO, Legal effect of panel and appellate body reports and DSB recommendations and rulings: 7.2 Legal status of adopted/unadopted reports in other disputes, WORLD TRADE Organization (Apr. 23, 2023, 10:53 PM), https://www.wto.org/english/tratop_e/dispu_e/dispsettlementcbte/c7s2p1e.htm.
72. This term has been used by many scholars to describe the WTO’s dispute settlement mechanism. See, e.g., William J. Davey, WTO Dispute Settlement: Crown Jewel or Costume Jewelry?, 21 WORLD TRADE REV. 291, 291 (2022); Daniel J. Ikenson & Robert E. Lighthizer, Is the WTO Dispute Settlement Mechanism Fair?, COUNCIL ON FOREIGN RELAT. (Feb. 27, 2007), https://www.cfr.org/article/wto-dispute-settlement-system-fair.
However, in recent years, the WTO’s dispute system has received criticism from the likes of the United States, the European Union, and Japan. The United States has been particularly pointed in expressing its dissatisfaction, focusing on the WTO’s perceived ambivalence towards Chinese trade violations and the alleged overreach of the DSB’s Appellate Body. The United States has accused the Appellate Body of treating its own reports as precedential, leaning into litigation rather than dispute settlement, and retaining members after their four-year terms have expired. Such grievances have resulted in an ongoing rift between the United States and WTO, which has in turn led to criticism of the United States. In 2016, President Barack Obama blocked the reappointment-by-consensus of one of the Appellate Body’s seven standing members. Trump and Biden have continued to prevent new appointments as member terms have expired and, in 2018, Trump threatened to pull out of the organization entirely. This has left the Appellate Body paralyzed, with zero members and no ability to fill the open seats. As a result, any panel reports sent for review are currently sitting in limbo, unable to be formally adopted.

Despite this ongoing setback, the WTO’s dispute process must still be treated as a central part of the international trade system. States continue to submit disputes to the DSB, with thirty-one new cases initiated since the start of 2020, including three in 2024. A number of Member States have also committed to working around the Appellate Body problem by

75. David A. Wemer, What is wrong with the WTO?, Atlantic Council (June 14, 2019), https://www.atlanticcouncil.org/blogs/new-atlanticist/what-is-wrong-with-the-wto/#:text=Cr
76. Markus Wagner, The Impending Demise of the WTO Appellate Body: from Centrepiece to Historical Relic?, Faculty of Law, Humanities, and the Arts Papers U. WOLLONGONG 1, 14 (June 7, 2019).
77. Id.
B. The Article XXI Security Exception

1. Uncertainty in the Text of Article XXI

In order to garner support for a structured system of international trade, the architects of the WTO embedded various treaties with exceptions that allow States to deviate from general trade rules when doing so is necessary to protect their security interests. Such security exceptions function like affirmative defenses, allowing States accused of violating international trade laws to argue that their actions were justified by valid concerns. Although this type of exception exists within WTO treaties like the Agreement on Technical Barriers to Trade, the General Agreement on Trade in Services, and the TRIPS Agreement on intellectual property, the earliest and most notable instance is Article XXI of the GATT.

The text of Article XXI is relatively short and rife with ambiguity. The exception allows States with serious security concerns to avoid disclosing confidential information and taking actions that might jeopardize their interests, but it does so using broad, undefined terms that leave room for interpretation by States and DSB panels. Two significant points of ambiguity are the terms “essential security interests” and “time of war or other emergency in international relations.”

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84. WTO, Legal issues arising in WTO dispute settlement proceedings: 10.3 Necessary for the respondent to invoke exceptions, WORLD TRADE ORGANIZATION (last visited Apr. 23, 2023, 10:56 PM), https://www.wto.org/english/tratop_e/dispu_e/dispsettlement_cbt_e/c10s3p1_e.htm.
85. Bacchus, supra note 32.
87. GATT 1947, Article XXI(b).
88. GATT 1947, Article XXI(b)(iii).
The text of the Article XXI is as follows:

**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

(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 fissile 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.89

This text has been subject to a great deal of debate over the years. During initial GATT drafting conversations, delegates such as Dr. A.B. Speekenbrink of the Netherlands expressed worry that Article XXI was “possibly a very big loophole in the whole Charter.”90 U.S. Delegate John M. Leddy similarly noted this issue, saying “We recognized that there was a great danger of having too wide an exception” that “would permit anything under the sun.”91 However, Leddy called Article XXI “a question of balance”92 that was intended to offer States “some latitude” in their security decisions, while also being narrow enough “so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance.”93 Overall, he expressed a belief that “no one would question the need of a Member, or the right of a Member, to take action

89. GATT 1947, Article XXI.
91. Id. at 20.
92. Id.
93. Id. at 21.
relating to its security interests and to determine for itself – which I think we cannot deny – what its security interests are.” In this instance, the Dutch delegate responded with a statement that reflects much of the subsequent conversation around Article XXI: “Well, Mr. Chairman, I certainly could not improve the text myself. I only wanted to point out certain dangers. Otherwise I agree with it.”

Over the years, two core issues have moved to the forefront of debate, both of them concerning the heart of the exception in Article XXI(b). First, it is unclear whether States may judge for themselves what measures are necessary to safeguard their “essential security interests;” a concept referred to as the “self-judging” nature of the exception. One interpretation holds that the phrase, “which it [the State] considers necessary,” means that States are at full liberty to decide their security interests for themselves. Another interpretation is that States play a role in determining their interests, but that they must act within outer limits set by the international community.

Second, there is a lack of clarity as to the meaning of the phrase, “time of war or other emergencies in international relations.” While the other sub-sections of Article XXI refer specifically to nuclear weapons and military goods, Article XXI(b)(iii) is far less specific. The fact that it is listed separately from “war” suggests room for non-military situations to fall under Article XXI, but the text fails to provide further guidance.

These broad phrases position Article XXI as a Pandora’s box of international trade law. Without clear limits, the security exception has the potential to swallow the underlying rules of international trade by allowing States to completely evade the GATT. Thus, in the past decade, there has been an effort to limit the expansive nature of Article XXI.

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94. Id. at 20.
95. Id. at 21.
96. GATT 1947, Article XXI(b).
97. Id.
98. Alford, supra note 28.
101. GATT 1947, Article XXI(b)(ii).
102. GATT 1947, Article XXI(b)(i).
103. GATT 1947, Article XXI(b)(ii).
2. Interpreting Article XXI

Interpretations of Article XXI can be viewed in three chronological stages: 1) the period before the birth of the WTO, during which the GATT Contracting Parties made little effort to interpret Article XXI; 2) the period between the formation of the WTO and 2019, during which DSB panels were presented with Article XXI questions but offered little feedback about the text; and 3) the years since 2019, which have produced actual written guidance on the security exception.

Between the passage of the GATT and the formation of the WTO, Article XXI was invoked fewer than ten times. In 1975, for example, Sweden raised the exception in defense of an import quota on footwear, notifying the Contracting Parties that this industry was integral to the State’s economy and that a recent decrease in production threatened its security policy. However, none of these early invocations led to significant interpretations of Article XXI, on which the Contracting Parties generally avoided commenting. In a barebones Decision Concerning Article XXI of the General Agreement, the Parties noted the security exception’s flaws, but did not address them. Instead, the States merely reaffirmed their general commitments to international trade law and recognized that they “may be requested to give further consideration to this matter in due course.” The security exception was widely viewed as self-judging at the time, with little room for input from the greater world community, and there was no mechanism in place to subject States to dispute resolution on topics they did not wish to discuss. For example, when the United States embargo against Nicaragua was raised before the Contracting Parties in 1985, the United States ended the discussion before it could take off. The United States agreed to engage in dispute resolution only if the self-judging question of Article XXI was not
discussed.\textsuperscript{113} Due to the toothless nature of trade dispute resolution at the time, States were able to push conversation about Article XXI further and further down the road.

The establishment of the WTO and the mandatory jurisdiction of the DSB provided more opportunity for Article XXI interpretation. Nonetheless, between 1995 and 2019, invocation of the security exception remained uncommon.\textsuperscript{114} Even as the DSB developed its reputation as a strong, binding option for dispute resolution, it intentionally avoided ruling on the scope of Article XXI, instead favoring bilateral and multilateral discussions.\textsuperscript{115}

It was not until 2019 that a DSB panel finally sought to define the parameters of Article XXI in the case of \textit{Measures Concerning Traffic in Transit}.\textsuperscript{116} In September 2016, after a contentious situation in which Russia blocked Ukrainian exports using trade restrictions, Ukraine and eighteen third-party States (including the United States) accused Russia of violating the GATT, the Agreement Establishing the World Trade Organization, and the Protocol of Access.\textsuperscript{117} In response, Russia invoked Article XXI(b)(iii), which said that “Nothing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations.”\textsuperscript{118}

The Panel made a few key findings. After confirming that the DSB had jurisdiction to review Article XXI(b)(iii) claims,\textsuperscript{119} the Panel first held that a State may not completely self-judge whether the use of a specific trade barrier advances its “essential security interests.”\textsuperscript{120} Instead the Panel agreed with Ukraine’s argument that Member States do not enjoy “total discretion” in making this decision, since this would make the inclusion of various descriptive paragraphs within Article XXI redundant.\textsuperscript{121} Rather, there should be a role for the international community in

\begin{footnotes}
\footnotetext[114]{Peter Van den Bossche & Sarah Akpofure, \textit{The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994}, WORLD TRADE INST. WORKING PAPER NO. 03/2020, footnote 12 (2019).}
\footnotetext[115]{Id.}
\footnotetext[116]{Panel Report, Russia – \textit{Measures Concerning Traffic in Transit}, WT/DS512/7 (Apr. 26, 2019); U.S. Tariffs on Steel and Aluminium Imports Go into Effect, Leading to Trade Disputes, \textit{112 AM. J. INT’L L.} 499, 499 (2018).}
\footnotetext[117]{WTO, Russia – \textit{Measures Concerning Traffic in Transit}, WORLD TRADE ORG. (May 1, 2023, 10:23 PM), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm.}
\footnotetext[118]{GATT 1947, Article XXI(b)(iii).}
\footnotetext[119]{Panel Report, Russia – \textit{Measures Concerning Traffic in Transit}, WT/DS512/100, ¶ 7.5.1.2 (Apr. 26, 2019).}
\footnotetext[120]{Id.}
\footnotetext[121]{Id. at 7.5.1.}
determining whether Article XXI was properly invoked.\textsuperscript{122} The Panel provided guidance on the meaning of “essential security interest,” calling these “interests relating to the quintessential functions of the [S]tate,” which would “depend on the particular situation and perceptions of the [S]tate in question and can be expected to vary with changing circumstances.”\textsuperscript{123} This both provided clarity and raised new questions, such as what was meant by “quintessential functions” and how much leeway would be provided by the case-by-case approach of “changing circumstances.” The Panel also indicated that its “objective assessment” of an Article XXI invocation should include “an examination of whether a Member invoking the exception has done so in good faith,” as required by the Vienna Convention on the Law of Treaties (VCLT).\textsuperscript{124} The Panel determined that Russia had fulfilled this requirement.\textsuperscript{125}

Second, the Panel analyzed what constitutes an “emergency in international relations,”\textsuperscript{126} describing it as a “situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.”\textsuperscript{127} Russia claimed that such an emergency situation had begun in 2014, when its annexation of the Crimean Peninsula led to strained relations between Russia and Ukraine.\textsuperscript{128} The Panel found that relations “had deteriorated to such a degree that they were a matter of concern to the international community,” demonstrated by the fact that Ukraine and other States had imposed sanctions on Russia, and that the UN General Assembly had recognized the existence of armed conflict in the region.\textsuperscript{129} As a result, the Panel indicated that the Russia-Ukraine trade situation did in fact count as an emergency in international relations, as “it [was] not relevant to this determination which actor or actors bear international responsibility” for the situation at hand.\textsuperscript{130}

\textit{Traffic in Transit} finally brought Article XXI to the forefront of trade conversation. Although this initial dispute left room for further clarity as to the limits of Article XXI, the Panel took the major step of

\textsuperscript{122} Id.
\textsuperscript{123} Id. at 7.5.6.
\textsuperscript{125} Id. at 7.123.
\textsuperscript{126} GATT 1947, Article XXI(b)(iii).
\textsuperscript{128} Notably, these events occurred well before the February 2022 Russian invasion of Ukraine.
\textsuperscript{129} Panel Report, Russia – Measures Concerning Traffic in Transit, WT/DS512/100, ¶ 7, 7.121 (Apr. 26, 2019).
\textsuperscript{130} Id. at 7.123.
demonstrating that DSB panels could and would tackle the open questions surrounding the security exception. Two years later, another panel report was released which further suggested this by dubbing down on the holdings in Traffic in Transit.\textsuperscript{31} In 2022, the United States invoked Article XXI(b)(iii) in the aforementioned case of Steel and Aluminium Products.\textsuperscript{32} As in Traffic in Transit, the Panel in Steel and Aluminium Products addressed the ambiguities surrounding the terms “essential security measures”\textsuperscript{133} and “emergency in international relations.”\textsuperscript{134} First, the Panel responded to the United States’ historically-based textual argument that “customary rules of interpretation” supported the notion that the security exception was entirely self-judging.\textsuperscript{135} The United States maintained that the phrase “which it considers necessary” allows a State to make a “subjective determination” of its own interests “that involves consideration of numerous factors that will vary from Member to Member,” and which must be determined by the State without restriction by other WTO Member States.\textsuperscript{136} As in Traffic in Transit, the Panel in Steel and Aluminium Products rejected the notion that Article XXI was entirely self-judging.\textsuperscript{137} Second, the Panel provided further clarity on the term “emergency in international relations,” stating that the reference to “war” in Article XXI(b) “informs the meaning of ‘emergency in international relations,’” insofar as an emergency situation must be, “if not equally grave or severe, at least comparable in its gravity or severity” to war.\textsuperscript{138} A State could meet this requirement by offering sufficient evidence to prove – through an objective assessment, rather than merely its own perspective – that the relevant situation was “of a critical or serious nature in terms of [its] impact on the conduct of international relations.”\textsuperscript{139}

\textsuperscript{131} Report of the Panel, United States – Certain Measures on Steel and Aluminium Products, WTO Doc. DS544, 38 (Dec. 9, 2022).
\textsuperscript{132} Communication from the U.S., United States – Certain Measures on Steel and Aluminium Products, WTO Doc. DS544 (Apr. 13, 2018).
\textsuperscript{133} GATT 1947, Article XXI(b).
\textsuperscript{134} GATT 1947, Article XXI(b)(iii).
\textsuperscript{136} Comments of the United States of America on the Complainant’s Comment on U.S. Statements at the Panel’s Videoconference with the Parties, United States – Certain Measures on Steel and Aluminium Products, WTO Doc. DS544 (March 11, 2021).
\textsuperscript{137} Report of the Panel, United States – Certain Measures on Steel and Aluminium Products, WTO Doc. DS544, 6.15 (Dec. 9, 2022).
\textsuperscript{138} Id. at 7.139.
\textsuperscript{139} Id. at 82.
The Panel determined that, unlike Russia, the United States had not offered sufficient evidence to establish an emergency of this type.  

3. The Aftermath of Traffic in Transit and Steel and Aluminium Products

Concerns about the broad nature of Article XXI were raised during the GATT’s drafting, but it took seventy years for a DSB panel to address those concerns head-on. The recent cases of Traffic in Transit and Steel and Aluminium Products are significant in that they demonstrate an effort to reign in Article XXI(b)(iii) using the WTO’s dispute resolution mechanism.  

As previously discussed, the most significant backlash has come from the United States, which has remained steadfast in its rejection of the Panels’ “flawed interpretation” of Article XXI, even after the shift from a Republican to a Democratic administration. In January 2023, the United States appealed Steel and Aluminium Products, which currently remains in limbo due to the paralyzed state of the Appellate Body. Even if a decision were to come through in the near future, the United States has expressed an unwillingness to accept any result that denies the self-judging nature of the security exception. The State’s devotion to maintaining utmost flexibility in Article XXI reflects a long trend of it simultaneously supporting the WTO’s development and hesitating to commit fully to the legal trade framework. The United States played a major role in the design and implementation of the international trade system, providing the leadership of individuals like Treasury Secretary Henry

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140. Id; For example, the United States pointed to the G20’s Global Forum on Steel Excess Capacity Report to support the existence of an international emergency in the steel industry. The Panel, in contrast, took the very existence of this report to be evidence that the G20 was taking active steps to control any such emergency by increasing global cooperation.

141. Another Article XXI case arose in Measures Related to the Exportation of Products and Technology to Korea in 2019, but it did not result in any further clarifications. This case arose when Japan restricted exports of chemicals crucial to its neighbor’s electronics industry and South Korea accused it of violating various treaty commitments, including six separate articles of the 1994 GATT. While Japan raised a national security exception – this time pointing to Article XXI(b)(ii) on issues of military relevance –, the dispute was ultimately withdrawn by South Korea in favor of bilateral trade discussions. Japan – Measures Related to the Exportation of Products and Technology to Korea, WTO Doc. DS590/5 (Mar. 24, 2023).


Morgenthau Jr. and economist Harry Dexter White at Bretton Woods.  

The States has long characterizing trade as “critical to America’s prosperity.” At the same time, though, American enthusiasm for a strong cooperative trade regime has always been qualified by internal disagreement between agencies and an unwillingness to restrict foreign policy options too severely. When it came to drafting the GATT, the Article XXI security exception was largely included as a compromise required to secure United States buy-in. Today, assertions that the WTO is stepping beyond the parameters of its mandate have continued to fuel internal debate about the extent to which the United States should honor its WTO commitments, especially now that a DSB panel has directly sought to limit the State’s economic activities.

However, the United States’ view must be considered alongside the views of others who have interpreted the Article XXI developments more positively. The Traffic in Transit panel report was received by many scholars as a “landmark decision” that is “likely to guide future Panels.” Dr. Viktoria Lapa said the “panelists should be acclaimed for drafting a carefully worded report which was able to find a balance between trade and security” while leaving both Ukraine and Russia somewhat satisfied. Similarly, lecturer Omer Faruk Direk said that the Panel “introduced some very crucial and novel criteria for qualifying the authority vested in the contracting parties,” although it did not extend as far as to provide a “coherent methodology” for ensuring that invocations of Article XXI were genuine. After the subsequent case of Steel and Aluminium Products, Professor Tania Voon said the “panels have been unafraid to undertake an ‘objective assessment’ of the security exception.” Shailja Singh of the Indian Institute of Foreign Trade applauded both decisions for doing


147. James Bacchus, supra note 32.


150. Id.


“an excellent job of adopting a balanced approach toward the interpretation of the self-judging security exception,” while leaving space for more specific interpretations in different industries such as cybersecurity and energy.153

In addressing the ambiguity of Article XXI, the DSU panels in Traffic in Transit and Steel and Aluminium Products certainly took a positive step forward. Article XXI was not a workable tool of international trade law as it existed before these two disputes. For much of the GATT’s lifespan, WTO Member States steered clear of both using and interpreting the security exception due to the difficulties of doing either. Between its broad barebones text and traditional self-judging views of the exception, Article XXI provided a blank check for deviations from international trade law that made it valuable to States in a respondent position and dangerous to everyone else.154 While States like the United States and Russia called upon the exception themselves in some instances, they also criticized its use in others, shrouding Article XXI in a cloud of illegitimacy even when it was invoked under honest fear for national security. The drafters GATT 1947 found it necessary to include the security exception in order to encourage early participation in the new trade order, but it is long past time that the ambiguities of Article XXI to be discussed openly so that the text can be invoked without stirring controversy.

Concerns about limiting the scope of Article XXI certainly have merit. Transcripts from GATT drafting discussions reflect the importance of leaving complex security matters somewhat up to States, and a degree of flexibility is needed in the international trade regime in order to allow national leaders to address complex and context-specific security concerns.155 However, early conversations and the text of Article XXI also seem to indicate that the exception is not meant to be the type of blank check that a fully self-judging exception allows. Article XXI(b) specifically lists three scenarios in which the exception applies: 1) those relating to nuclear materials, 2) those relating to war and weaponry, and 3) those taking place in “time of war or other emergency in international relations.”156 Under the principle of expressio unius, “the expression of one thing is the exclusion of the other,” this list suggests that State decisions on Article XXI must be made within a set of

155. See discussion in Part I(b)(i).
156. GATT 1947, Article XXI.
constraints. Viewed as a whole, the negotiators of the GATT seem to have committed to both flexibility and restraint without a clear vision of how these two goals would coexist in the future. The Panels in Traffic and Transit and Steel and Aluminium Tariffs made strong first attempts to provide guidance, while preserving the utility of Article XXI for States facing serious security concerns.

Although States hesitated for years to place clear limits on the power of WTO Members to define their own security interests, recent DSB panel reports have set the WTO on a path towards a narrower interpretation of Article XXI. This is an overdue development, but it also poses a major issue: the narrowing of Article XXI is out of line with the way that national security rhetoric is currently being used by State leaders around the globe. As the WTO has been working to narrow legal terms such as “essential security interests,” States seeking to justify trade barriers in defense of their vital industries – including those related to critical technologies – have increasingly turned to “national security” as a political justification for their actions. In 2023 and thus far in 2024, the discrepancy between the narrowing meaning of security under trade law’s Article XXI and the broadening political messaging about security coming from State leaders is nowhere more obvious than in the microchip race. Before semiconductor subsidy issues inevitably make their way to the DSB, the WTO should consider how to continue tackling the ambiguities of Article XXI while also seriously accounting for the evolving political rhetoric that reflects the way States discuss national security in practice.

In order to determine the best path forward for the WTO, it is first helpful to explore State security discussions through the case study of the microchip race.

II. THE RACE TO SUBSIDIZE MICROCHIP PRODUCTION

Over the same period in which the WTO ramped up its efforts to reign in the legal meaning of security under Article XXI, Member States have sought to protect their security interests by subsidizing domestic microchip production. Given the popularity and high value of these subsidies, there is a serious possibility that a microchip subsidies dispute will appear before the WTO. Based on the sheer amount of national security rhetoric present in the microchip race, it is likely that the

respondent State in such a dispute will invoke Article XXI to justify its actions. At that point, the WTO will be caught in the difficult position of having to reconcile its narrowing view of the Article XXI security exception with the efforts of global leaders to stretch the national security conversation further than ever before.

There are three reasons why this widespread discussion of national security in the semiconductor subsidies context is significant. First, Article XXI has not previously been applied to the broad area of subsidies, but security arguments are being used to justify subsidies in the microchip race.158 Second, Article XXI has not yet been raised in a dispute concerning the massive military and civilian area of semiconductor technology.159 Third, the expansion of “national security” language in popular usage demonstrates the importance of the WTO finding a way to address the topic of security that acknowledges the way that States actually discuss their security interests in practice.

A. A Perfect Storm of Microchip Shortages

In the early months of 2020, rapidly-rising numbers of COVID-19 cases spurred a wave of public lockdowns around the world.160 As office buildings closed and billions of people took refuge in their homes, the global community witnessed a fusing of residence and workplace that created an immediate demand for reliable access to personal technologies like smartphones, computers, and televisions.161 Throughout the course of the pandemic, high sales of these products, as well as other critical devices like at-home medical equipment and cars, ultimately led to overwhelming global demand for one common production component: semiconductors.162

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158. See discussion in Part II(C)(1).
159. China recently challenged U.S. trade barriers related to semiconductors in Measures on Certain Semiconductor and Other Products, and Related Services and Technologies, but the United States agreed to appear before the DSB only if Article XXI was not discussed. Request for consultations by China, United States – Measures on Certain Semiconductor and Other Products, and Related Services and Technologies, WT/DS615 (Dec. 15, 2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/615-1.pdf&Open=True. See discussion in Part III(B).
Semiconductors are pieces of technology that function as the “brains of modern electronics.” Their economic importance has exploded in recent years, raising the industry from a $51 billion market in 1990, to a $298 billion market in 2010, to a $557 billion market in 2023. Semiconductors are a vital component of many at-home and at-work technologies and are regularly in demand by individual consumers, corporations, and militaries. In 2020, manufacturers that were already operating at high levels of production to meet demand encountered new supply chain issues. The COVID-19 pandemic’s stay-at-home mandates increased online sales of microchip-reliant products, while also making in-person production more difficult and creating supply chain bottlenecks. The Russia-Ukraine War has put further stress on the microchip industry by cutting off manufacturers’ access to natural materials that are vital to the chip-making process. Between these major international

163. Semiconductors are also commonly referred to as microchips and are produced using tiny quantities of pure elements. Semiconductors are the Brains of Modern Electronics, Semiconductor Ind. Assoc. (SIA) (2022), https://www.semiconductors.org/semiconductors-101/what-is-a-semiconductor/. They range from basic devices like memory chips to more complex systems like high-performance processors. King, supra note 161. They were invented in the late 1950s by Jack Kilby of Texas Instruments and Robert Noyce of Fairchild Semiconductor. BBC, History: Kilby and Noyce (1923-2005), BBC (2014), https://www.bbc.co.uk/history/historic_figures/kilby_and_noyce.shtml.


167. J.P. MORGAN, supra note 160.

168. Max A. Cherney, The Russia-Ukraine conflict could disrupt chip-making materials supply, PROTOCOL (Feb. 11, 2022), https://www.protocol.com/bulletins/russia-ukraine-chips. For example, Ukrainian companies Ingas and Cryoin produce 45-54% of semiconductor-grade neon, which is used to make the lasers that cut microchips. Trotta, supra note 166. In early 2022, both firms closed their doors, forcing manufacturers down the supply chain to reach into their precious-element stockpiles
Subsidizing the Microchip Race

events, the semiconductor industry experienced a perfect storm of disruptions, leading to an unprecedented microchip shortage that impacted customers around the globe. This consumer crisis highlighted the already-pressing need for States to increase their supply chain resilience in the semiconductor industry. It caused a wide-spread desire for self-reliance to morph into an international race by State governments hoping to lock in microchip production capabilities close to home.

Since 2022, States involved in the microchip race have subsidized local private-sector semiconductor production in order to increase their shares of the global industry and thereby achieve technological sovereignty. Subsidies were not the only measure that national governments could have implemented in response to market-wide microchip shortages. On the technical side, temporary solutions were possible, including turning to older chip technologies and leaning into software updates rather than hardware changes. From a trade angle, there was room for more active coordination by the WTO to facilitate the smoother trade of microchips between States. The main issue was a distinct lack of faith by States that they would be able to continue acquiring chips from abroad. In particular, the ongoing technology war between the United States and China has led to heightened protection of trade development information and a stockpiling of physical technological products like microchip manufacturing equipment. Domestic production subsidies provided States a path towards guaranteeing continued access to semiconductor technology whether global trade tensions eased or worsened over time.

in order to continue meeting some of the heightened industry demand. Alexandra Alper, Exclusive: Russia’s attack on Ukraine halts half the world’s neon output for chips, Reuters (Mar. 11, 2022), https://www.reuters.com/technology/exclusive-ukraine-halts-half-worlds-neon-output-chips-clouding-outlook-2022-03-11/.


173. ABL Circuits, How to overcome the global semiconductor shortage (Oct. 3, 2022), https://www.ablcircuits.co.uk/blog/how-to-overcome-the-global-semiconductor-shortage/.


While various States have sought to develop microchip production capabilities, the race has primarily been between the United States, the European Union, and China, with Taiwan and South Korea working hard to hold onto their historic dominance of the market. On the private industry side, the key player is the Taiwan Semiconductor Manufacturing Company Limited (TSMC), an industry giant and the ninth largest company in the world by market capitalization.\(^{176}\) TSMC produces 92% of the microchips found in phones, laptops and ballistic missiles across the global market.\(^{177}\) Other key players include South Korea’s Samsung\(^ {178}\) and U.S.-based Intel.\(^ {179}\)

While it is not clear that any one State can resolutely “win” the microchip race, political leaders are likely to consider their efforts successful if they can increase their supply chain resilience – including securing access to crucial production parts like pure elements\(^ {180}\) – enough to achieve a perception of technological sovereignty in the semiconductor area.\(^ {181}\) One way to try and limit dependence on international trade pathways for access to chips is to pump money into local manufacturing, research, and development in order to build up domestic semiconductor companies and attract manufacturing business from foreign players like TSMC. In plain terms, States hope to produce more semiconductors locally so that their access to the technology cannot be cut off by events outside of their control. Over the last couple of years, subsidies paid by governments to private manufacturers have become the economic tool of choice to achieve these national goals.


biden-manufacturing (Many smaller corporations like United Microelectronics Corporation ("UMC") (Taiwan), GlobalFoundries (United States), and Tower Semiconductor (Israel) also produce chips, often focusing on more specialized varieties); see Govind Bhutada, *The Top 10 Semiconductor Companies by Market Share*, VISUAL CAPITALIST (Dec. 14, 2021), https://www.visualcapitalist.com/top-
10-semiconductor-companies-by-market-share/.

\(^{180}\) See footnote 169 on Ukrainian neon.

\(^{181}\) Paul Timmers, *How Europe aims to achieve strategic autonomy for semiconductors*, BROOKINGS (Aug. 9, 2022), https://www.brookings.edu/techstream/how-europe-aims-to-achieve-strategic-
autonomy-for-semiconductors/.
B. Subsidizing the Microchip Race

Subsidies, generally considered, are grants of money made by governments to private industry. They pose a particularly ambiguous and contentious topic in international trade law because they are wide-ranging and ill-defined. However, this is not due to a lack of governing law. Subsidies are the subject of their own treaty, called the SCM Agreement. This is one of the treaties overseen by the WTO and covers regulations applicable to subsidies, as well as the use of countervailing measures to offset the negative effects that importing subsidized goods can have on local industries.

While there is no single meaning of the word “subsidy,” the SCM Agreement broadly defines one as “a financial contribution by a government or public body within the territory of a Member,” through which a benefit is conferred. Examples include direct grants and tax breaks. Subsidies are often classified into categories with different characteristics and user goals, such as consumption subsidies, which encourage consumer spending by deliberately keeping prices low, and production subsidies, which aim to attract private manufacturers through the promise of rewarding economic conditions. In the latter category, governments often grant tax credits or issue reimbursements in order to cover part of the costs that a consumer would otherwise pay for a good or service. This shifts production costs away from private industry players, which can act as an incentive to lure corporations into the local market, or at the very least keep home-grown companies from leaving. States involved in the microchip race have focused on domestic production subsidies, which are especially effective at attracting local business growth.

Although semiconductors were first produced in the United States, the country saw declining production capacity over much of the past thirty years. In recent history, East Asia has been the hub of microchip production, led by Taiwan and South Korea. While these States hold smaller market shares than the United States, they have positioned themselves at the heart of the industry. Taiwan, in particular, plays a

183. SCM Agreement.
184. Legal Texts: The WTO Agreements, supra note 56.
185. Id. at Art. 1.
major role in the global semiconductors supply chain, which became very apparent in light of COVID-19 shortages and is largely rooted in the unmatched technological successes of TSMC.

Over the past three years, all of the leading public players in the microchip race have sought to position themselves at the head of the semiconductor industry. These States have bolstered their capabilities in this space by implementing subsidy programs to secure greater local control over microchip production, resulting in a scramble to advertise public policies favorable to private companies. Some of the most prominent efforts are summarized in the following chart and described below.

<table>
<thead>
<tr>
<th>State</th>
<th>Chips Program</th>
<th>2022 Market Share</th>
<th>2023 Market Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>U.S. CHIPS Act ($52 billion)</td>
<td>48.0%</td>
<td>50.2%</td>
</tr>
<tr>
<td>European Union</td>
<td>European Chips Act ($47 billion)</td>
<td>9.0%</td>
<td>12.7%</td>
</tr>
<tr>
<td>China</td>
<td>Estimated $143 billion package</td>
<td>7.0%</td>
<td>7.2%</td>
</tr>
<tr>
<td>Taiwan</td>
<td>Amendment to Statute for Industrial Innovation</td>
<td>8.0%</td>
<td>7.0%</td>
</tr>
<tr>
<td>South Korea</td>
<td>K-Chips Act</td>
<td>19.0%</td>
<td>13.8%</td>
</tr>
</tbody>
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190. Id; Yen Nee Lee, 2 charts show how much the world depends on Taiwan for semiconductors, CNBC (Mar. 15, 2021), https://www.cnbc.com/2021/03/16/2-charts-show-how-much-the-world-depends-on-taiwan-for-semiconductors.html.


In the United States, the U.S. CHIPS Act constitutes an unprecedented public investment in semiconductor development, with funding offered to domestic and international companies willing to expand production or build new manufacturing facilities on U.S. land. This legislation has already seen success, bolstering local players like Intel while also drawing attention from foreign companies like TSMC.

The U.S. CHIPS Act has served as a model for similar legislation drafted by other States. In September 2023, the European Council's European Chips Act entered into force, modeled on the U.S. legislation and designed to meet similar ends. The Act focuses on “reinforcing Europe’s technological leadership” through a focus on research and innovation. It also hopes to ensure “security of supply,” including by doubling Europe’s share of global production capacity by 2030.

The third rising giant in the microchip race, and perhaps the biggest wildcard, is China. President Xi Jinping has repeatedly indicated that China intends to take significant steps to become self-reliant in technological production. While the blurred lines between the Chinese Communist Party and private industry have made it difficult to identify

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200. TSMC committed to setting up two microchip plants in the U.S. state of Arizona; a move that constituted the largest ever foreign investment in Arizona, as well as one of the largest in the nation's history.


202. Id.

203. Id.

204. European Chips Act, supra note 194.

exactly how much China has spent on microchip manufacturing.\textsuperscript{206} Politico and Reuters have estimated that the State will invest close to $143 billion in its semiconductor industry.\textsuperscript{207} An investment of this size would raise the global competition to unprecedented financial levels that only the United States could hope to match and would run the risk of turning the microchip race into what reporters have called a “phantom technology cold war.”\textsuperscript{208}

Some reports have suggested that China’s microchip race strategy may be shifting and becoming slightly less aggressive in the wake of COVID-19, the Russian invasion of Ukraine, and a series of late 2022 export regulations by the United States targeting Chinese artificial intelligence and semiconductors.\textsuperscript{209} Whichever direction China ultimately ends up moving, however, the threat of a U.S. or China chip takeover has continued to fuel the ongoing microchip race.\textsuperscript{210}

Various other States have also been working to attract and retain microchip production capabilities. Under strain on their historic leadership in the area, Taiwan and South Korea have been focused on keeping business at home. In Taiwan, the effort to maintain local production by TSMC has sociopolitical significance that goes beyond economic considerations. Taiwan’s key role in the microchip industry has acted as a “silicon shield,” helping to prevent attacks by China and warranting continued support from the United States.\textsuperscript{211} Taiwan’s government faces a critical turning point at which it must either ardently defend its chip industry or watch local producers chase enticing subsidy packages abroad.\textsuperscript{212} To that end, the government passed its own equivalent chips

\textsuperscript{213} Mark Tyson, Taiwan Expected to Reveal Its Own CHIPS Act on Thursday, TOM’S HARDWARE (Nov. 16, 2022), https://www.tomshardware.com/news/taiwan-expected-to-reveal-its-own-chips-act-on-thursday; Ben Blanchard & Sarah Wu, Chip giant Taiwan eyes bigger tax breaks for tech R&D to
act via amendments to its Statute for Industrial Innovation, focusing its attention on TSMC and a number of other major producers.\textsuperscript{214}

Similarly, South Korea has passed its own K-Chips Act, which came in the form of an amendment to the Restriction of Special Taxation Act.\textsuperscript{215} The K-Chips Act responds to worries that domestic chip companies will take their business to the United States and elsewhere, pulled away by the promise of large subsidies and tax incentives.\textsuperscript{216} South Korea has also committed to a “K-Semiconductor Belt” strategy that will involve building “the world’s largest semiconductor supply chain by 2030” and which includes its own subsidies for research and development.\textsuperscript{217}

Other States have targeted subsidies at their local semiconductor industries with varying degrees of success. Japan – which was once the dominant semiconductor producer, accounting for over 50% of global supply\textsuperscript{218} – announced a $6.8 billion subsidy\textsuperscript{219} that aims to double domestic chip revenue.\textsuperscript{220} In India, technology-focused Prime Minister Narendra Modi acted early on microchips, implementing a $10 billion incentive package at the end of 2021\textsuperscript{221} in a push to attract companies like Taiwan’s Foxconn.\textsuperscript{222} On the other side of the world, Canada announced

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\textsuperscript{214} Monica Chen & Rodney Chan, Taiwan ‘Chips Act’ to benefit only a few companies, DIGITIMES ASIA (Mar. 29, 2023), https://www.digitimes.com/news/a20230328PD213/chips-act-ic-design-ic-manufacturing-taiwan-tsmc.html.


\textsuperscript{217} Semiconductor Industry Association 2023 Factbook, supra note 191, at 12; KBS, ‘K-Semiconductor Belt Strategy’ to establish the world’s largest supply network by 2030, KBS WORLD (May 17, 2021).


\textsuperscript{221} Ibid.

an investment of $240 million.\textsuperscript{223} Even some States that have hitherto not been active in the industry, such as Australia, are facing internal pressure to join the microchip race before it is too late.\textsuperscript{224} Other new players have already found themselves crowded out. In Spain, EU-aided subsidies are available, but have not been keenly pursued by companies who can find better deals in the United States and China.\textsuperscript{225}

While many of these programs involve aggressive government investment in local industry, they are not all being pursued in a manner hostile to other States. For example, in March 2023, U.S. President Biden and Canadian Prime Minister Justin Trudeau announced that the two countries would work in tandem to “promote secure and resilient semiconductor supply chains, creating jobs for both countries” through a “cross-border packaging corridor” established in partnership with private company IBM.\textsuperscript{226} Likewise, Japan and the United States have collaborated on a program\textsuperscript{227} and there have been early meetings of a “Chip 4” discussion forum between the United States, South Korea, Japan, and Taiwan.\textsuperscript{228}

However, these unfolding microchip race collaborations exist alongside very tense inter-State relationships. In the same joint statement in which the United States and Canada announced their combined semiconductor plans, the States lamented a “serious long-term challenge to the international order posed by the People’s Republic of China.”\textsuperscript{229} This statement recognizes an ongoing chasm permeating international trade law: a widely-recognized “trade war” between the United States and China that began during the Trump administration and which has only


\textsuperscript{224} Alex Capri & Robert Clark, Australia’s semiconductor moonshot, \textit{Aus. Strategic Pol. Inst.} (Sept. 21, 2022), https://www.aspi-strategist.org.au/australias-semiconductor-moonshot/.


\textsuperscript{227} Ibid; Semiconductor Industry Association 2023 Factbook, supra note 191, at 12.


\textsuperscript{229} White House, supra note 226.
been amplified under Biden. The microchip race kicked off in the midst of COVID-19 and the War in Ukraine, but one would be remiss not to recognize the influence of the ongoing trade war on States’ desires to achieve technological sovereignty. Over the past five years, the United States has accused China of “unfair trade practices” in technological areas like artificial intelligence, while China has complained that the United States is targeting it unfairly in response to fabricated economic attacks. These ongoing tensions between the world’s two largest economies have placed great strain on the international trade system and resulted in increased dispute resolution before the WTO’s DSB. As the microchip race continues and further developments in semiconductor subsidies legislation unfold, it is likely that the semiconductor industry will serve as a proxy for the larger U.S-China trade war.

C. State National Security Rhetoric

The rise in semiconductor subsidies programs has been accompanied by a trend of State leaders justifying their actions by pointing to national security. This has stretched the term “national security” to cover both semiconductors and subsidies, which are categories that have not previously been involved in Article XXI discussions. The microchip race threatens to continue pulling Article XXI in new directions, even as the WTO seeks to limit the exception’s application.

1. The Use of “National Security” Arguments in the Microchip Race

Powerful economies seem to have coalesced around the practice of subsidizing local semiconductor development and production. National security concerns have been the overarching justification for these actions. Some governments have used this term explicitly and repeatedly, while others merely imply similar messaging through their actions and public statements.

As might be anticipated from its history with Article XXI, the United States provides one particularly outspoken example of a State that has stressed the importance of semiconductor subsidies to its security. President Biden said that the U.S. CHIPS Act “will mean […] we are never so
reliant on foreign countries for the critical technologies that we need for American consumers and national security” [emphasis added].

Likewise, the Secretary of Defense indicated that “the investments [...] are critical to our national security” [emphasis added]. The Secretary of Commerce said that the Act “will ensure continued U.S. leadership in the industries that underpin our national security,” and the Senate Majority Leader indicated that having “Chinese chips in our federal supply chain is a direct threat to our national security” because “it exposes our military and other critical infrastructure...” [emphasis added]. Private sector leaders in the industry have repeated these same sentiments, including the President of Intel, who said that “semiconductors enable technologies critical to U.S. national security.”

National security arguments have also proven to resonate with U.S. lawmakers. At first, many politicians who were against subsidizing private companies opposed the U.S. CHIPS Act. However, after U.S. Senators were briefed on the imminent military risks of relying on Chinese and Taiwanese microchips, Congress passed the legislation with bipartisan majorities in both the House and the Senate.


238. Id. For example, how U.S. military jets would become inaccessible if access to new chips was suddenly cut off.

239. Originally introduced in July 2021 by Representative Tim Ryan (D-OH), the bill was ultimately approved in its final form by a House vote of 243-187 and a Senate vote of 64-33 [https://perma.cc/R1Z3-4SKJ].
Other States have expressed similar sentiments regarding their own security when it comes to semiconductors. In Taiwan, Minister of Economic Affairs Wang Mei-hua called the microchip industry “deeply intertwined with the island’s future,” saying that the government’s effort to maintain business through subsidies “isn’t just about our economic safety,” but “appears to be connected to our national security, too.”\footnote{240} In South Korea, Minister of Science and ICT Lee Jong-ho highlighted the national security implications of microchips during his confirmation speech,\footnote{241} listing semiconductors as one of the core technologies essential to national survival.\footnote{242} The Canadian government has indicated that chips “are critical to Canada’s national security, economy and technological interests,” such that “the government is committed to collaborating with Canadian researchers and businesses to strengthen Canada’s position in the industry.”\footnote{243} Others like China\footnote{244} and the EU have expressed parallel concerns without referring specifically to their “national security” goals; instead merely highlighting the importance of technological sovereignty and supply chain security.\footnote{245}

The frequency with which microchip subsidies programs are described in terms of national security is significant because it suggests a certain baseline agreement among economically powerful States that security interests can extend to new areas. National security concerns have arisen in industries as expansive as microchips, as well as in situations involving more locally-focused trade barriers like subsidies. Unlike in the case of American steel, in which the United States found itself an outlier facing general backlash,\footnote{246} microchip subsidies have been met with apparent consensus that these critical technologies are essential to national security.

2. Expansion of the “Security” Label to New Areas

Over many years, the “national security” label has been broadened to include many additional types of goods and trade barriers.

\footnote{240} Yimou Lee, supra note 212.  
\footnote{243} Gov. of Canada, supra note 223.  
\footnote{244} Josh Banks, Computer chip ban signals new era as Biden and Xi meet, AP (Nov. 12, 2022), https://apnews.com/article/biden-technology-china-asia-xi-jinping-cdf6b9f04cc7ea47665ee6f0438f3b57.  
\footnote{245} Timmers, supra note 181; European Commission, supra note 194; Alex Capri & Robert Clark, Australia’s semiconductor national moonshot, AUSTRL. STRAT. POL. INST. REPORT NO. 63/2022 1, 4 (2022).  
\footnote{246} See discussion in Introduction.
Semiconductors and subsidies are both areas that have recently been pulled into political security rhetoric, which is relevant because it suggests that microchip subsidies might also be categorized as security measures befitting Article XXI.

When the GATT was ratified in 1947, “national security” was generally used to describe the defense space.\(^{247}\) The area of study arose in reaction to the mass military mobilization of the World Wars and first focused on “the relationship between the use of force and policy,” as well as on “finding ways to better coordinate military, diplomatic and industrial processes.”\(^{248}\) Relevant manufactured goods included things like conventional and nuclear weapons.\(^{249}\) The very text of Article XXI recognizes this, with two-thirds of XXI(b) limited in application to (i) “fissionable materials” and (ii) goods “for the purpose of supplying a military establishment.”\(^{250}\) While the term “national security” was interpreted somewhat differently depending on the diverse histories, regional placements, and geopolitical considerations of States,\(^{251}\) it was generally considered a less sweeping label that did not include the type of non-military technologies that are often counted today.\(^{252}\) This shifted during post-Cold War détente, when there was new emphasis on the economic challenges integral to security.\(^{253}\) It evolved again in the early 2000s with debates about whether public transnational challenges like environmental degradation and international terrorism should qualify as issues of national security.\(^{254}\)

There have been attempts to expand the term “national security” into areas of consumer goods. In the 1975 footwear case, Sweden argued that its shoe industry was relevant to its national security, although this did not result in a panel report.\(^{255}\) Similarly, the 2019 dispute of Measures Related to the Exportation of Products and Technology to Korea (concerning restrictions on chemical exports) and the dispute of Steel and Aluminium Products both attempted apply national security arguments to industries


\(^{248}\) Id. at 3.

\(^{249}\) Id. at 5.

\(^{250}\) GATT 1947, Article XXI(b).


\(^{252}\) Id. at 485.

\(^{253}\) Taylor, supra note 247, at 7.

\(^{254}\) Id. at 12.

that have popular applications outside of their military uses. While footwear, chemicals, and steel are all utilized by militaries, the trade barriers that States use to protect these goods often apply not only to products that will ultimately end up with soldiers, but also to products that will be used by other government entities and civilian consumers. In this zone between clearly military and predominantly commercial, the line between “national security” and “not national security” becomes a slippery slope.

Microchips fall into this area between purely military and purely commercial products. On the one hand, “semiconductors constitute essential parts of all modern weapons.” Accordingly, the U.S. CHIPS Act contains a CHIPS for America Defense Fund that emphasizes Department of Defense policy objectives. On the other hand, this fund only receives $2 billion of the $52.7 billion available, with the rest going to the more general CHIPS for America Fund. There is an argument to be made that products like microchips are so integral to everyday life and well-functioning society that their civilian consumer use is independently relevant to State security. Semiconductor-based products like iPhones are widely relied upon in many States for purposes of communication, navigation, and shopping. Nonetheless, this same argument can be made for products such as oil, agricultural produce, and cars. Today, the U.S. Cybersecurity & Infrastructure Security Agency identifies sixteen “critical infrastructure sectors” that “are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof.” This list mentions chemicals, defense industries, and energy, but also references healthcare

258. CHIPS ACT OF 2022, CHIPS FOR AMERICA DEFENSE FUND, PUBL. L. NO. 117-167, § 102(b), 136 STAT. 1374.
259. Id. at 136.
If semiconductor access is an issue of national security, then it is likely that these other topics will eventually be discussed in the same way.

In the context of the microchip race, the term “national security” has also been broadened to encapsulate subsidies, which are a trade barrier not typically discussed using this language. Security discourse applies more naturally to trade barriers that prevent the cross-border movement of goods because products entering a State have the potential to pose a physical threat. For example, State A might use an embargo to block products from State B that may have been tampered with or otherwise pose a direct risk to buyers. Alternatively, State A might apply tariffs to goods moving to or from State B in an attempt to influence State B’s behavior in other areas. In contrast, subsidies primarily involve the relationship between a State government and private companies operating within its borders, so clear physical security concerns are not implicated. Nevertheless, the fact that so many States have recently highlighted microchip subsidies as an area of security concern in their public discourse suggests that the term “national security” has been politically broadened to include this type of trade barrier. While there are past examples of security arguments being used to justify subsidies for agricultural products and oil drilling, these have primarily been made by outlier States. In the microchip race, there is consensus among many world leaders that “chips act” subsidies program falls within the national security conversation.

By offering national security justifications for their microchip subsidies programs, State leaders have expanded the political discourse around international trade and security in a way that conflicts with the WTO’s efforts to narrow the scope of the Article XXI security exception. This makes it more pressing now than in the past to reign in Article XXI, since the exception seems closer than ever to applying to “every conceivable circumstance.”

264. Id.
267. UN Economic and Social Council, supra note 90.
III. Facing the Potential of a WTO Microchip Subsidies Dispute

As demonstrated above, there is an increasing rift between the broad use of national security justifications on the global political stage and the efforts within the WTO dispute process to limit the legal meaning of security under Article XXI. If a dispute on microchip subsidies was brought to the DSB, the panel would be placed in the difficult position of either having to disregard global opinion to find that programs such as the U.S. CHIPS Act, European Chips Act, and K-Chips Act do not implement serious security concerns, or else having to reconsider the recent push to limit Article XXI.

In considering such a scenario, it is first necessary to recognize that a DSB dispute on semiconductor subsidies is both possible and likely to arise in the near future.

A. The Potential of More Article XXI Cases

As discussed in Part I, Article XXI has been increasingly used and discussed in recent years. Still, it is possible that States might be hesitant to invoke Article XXI due to the old stigma around the provision and the political backlash that may ensue. Traffic in Transit and Steel and Aluminium Products demonstrate that Article XXI is very much available as a defense in DSB disputes, but in each of those cases, the invoking State was a political powerhouse that many believe was using the security exception to skirt around its obligations under international law. The idea that national security is a legitimate excuse for implementing trade barriers had long been established in Article XXI, but the exception’s use by the United States and Russia did not necessarily poise it as a viable, politically-acceptable option for States hoping to maintain the international community’s good favor.

Nevertheless, given the expansion of security conversation outside of the WTO, along with the new panel guidance on Article XXI, it is likely that the national security exception will continue to be used more frequently. The DSB has put out an increased number of panel reports addressing security questions over the past five years, concerning both

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GATT and non-GATT issues. Although Article XXI remains controversial, there also seems to be an eagerness by the international community to both make use of and further explore the longstanding security exceptions built into the trade system.

B. The Potential of an Article XXI Case on Microchips

The DSB has proved capable of handling disputes on semiconductors, although never in the subsidy context. In 1997 and 2003, respectively, panels addressed cases on random access memory semiconductors. More recently, on December 12, 2022, the dispute mechanism received a request for consultations from China, in the case of Measures on Certain Semiconductor and other Products, and Related Services and Technologies. China’s complaint concerned a U.S. export control regime that restricted the sale of microchips to China, which the impacted State characterized as “discriminatory and disguised trade restrictions.”

These three disputes show that semiconductor issues are ripe for discussion by the DSB. However, they do not present the same Article XXI conundrum that a microchip subsidies dispute would, since they all involve trade barriers of more traditional security concern. While the earlier disputes focused on anti-dumping duties and countervailing duties, respectively, Semiconductors (China) focuses on export controls,


271. This complaint was revised on February 9, 2023; Taiwan and Russia have both requested to join the original consultations, although this idea has been rejected by the United States. United States – Measures on Certain Semiconductor and other Products, and Related Services and Technologies, DS615 (May 11, 2023), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds615_e.htm.

272. The U.S. CHIPS Act, for example, includes a requirement that companies end certain relationships with China in order to receive funding of up to $3 billion. U.S. Chips Act; White House, supra note 13.


274. United States Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, WTO Doc. DS99 (Aug. 14, 1997); United States – Countervailing Duty
alleging violations of multiple articles of GATT 1994, as well as violations of the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Investment Measures (TRIMS), and the TRIPS Agreement on intellectual property.  A DSB panel addressing a complaint against targeted export restrictions would have more leeway to get around difficult questions about the contemporary meaning of “national security,” since that type of trade barrier falls more easily into traditional security discourse. The WTO would not be faced with the same reckoning between its recent efforts to limit Article XXI and the general political agreement that the microchip race is an issue of utmost security importance, despite involving a product and a trade barrier that fall outside of the traditional walls of “national security.” Ultimately, the Panel in Semiconductors (China) was not given the chance to provide any analysis of Article XXI, since the United States entered consultations on the condition that questions of national security not be reviewed.

C. The Potential of an Article XXI Case on Microchip Subsidies

The DSB is likely to face an eventual case on microchip subsidies for two reasons: 1) a State impacted by one of the recently passed chips acts could legitimately argue that microchip subsidies are illegal under international trade law, and 2) subsidies are already subject to some criticism, both in general and in the context of the microchip race.

1. Making the Argument that Microchip Subsidies Are Illegal Under International Trade Law

A State before the DSB could argue that a particular semiconductor subsidies program is illegal under international trade law. This argument would depend, in large part, on the specific chips act being considered, since the various State programs all involve different grants and benefits. In general, though, there is certainly an argument to be made that these extensive subsidies schemes break international trade law by violating the SCM Agreement.

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Parts II and III of the SCM Agreement categorize subsidies into two legal groups: “prohibited subsidies,” which are never permissible, and “actionable subsidies,” which are sometimes permissible, depending on the circumstances and their negative effect on impacted States. Originally, there was a third category of permitted “non-actionable subsidies” that applied to widely-approved endeavors like regional aid, but this has been replaced by a binary system in which subsidies either fit the narrow definition of “prohibited subsidies” or else fall into the general category of “actionable subsidies.” Prohibited subsidies are those designed to directly impact international trade and competition. The classification applies in two areas: 1) export subsidies (which specifically target trade), and 2) local content subsidies (which require the use of domestic goods). Because prohibited subsidies are more limited in scope and serious in effect, States alleging their use are not required to prove any adverse effects on their own economies. However, the label of prohibited subsidies is applied sparingly.

A DSB panel is unlikely to find that State semiconductor subsidies fit into this relatively narrow category. Therefore, such funding can be placed into the broader pool of actionable subsidies. Actionable subsidies are not automatically prohibited, but can be challenged before a multilateral dispute body like the DSB. To bring such a dispute, the complainant State must first seek consultations with the offending State and be unsuccessful in reaching peaceful resolution. It must also prove that

277. The SCM Agreement’s rules on both prohibited and actionable subsidies include exceptions for the provisions of the Agreement on Agriculture. SCM Agreement, Agreement on Agriculture; WTO, Agreement on Subsidies and Countervailing Measures (“SCM Agreement”), WORLD TRADE ORG. (last visited on May 1, 2023 at 10:31 PM), https://www.wto.org/english/tratop_e/scm_e/subs_e.htm.
280. Hoekman, supra note 278.
281. Id.
282. SCM Agreement, Art. 3.2.
284. For example, in the case of Measures Affecting Trade in Large Civil Aircraft (The Airbus-Boeing Dispute), a DSB panel found that government launch aid subsidies made by the EU to Airbus were prohibited subsidies. However, this decision was reversed by the Appellate Body, which found that the subsidies were merely actionable. United States – Measures Affecting Trade in Large Civil Aircraft, DS553 (2019).
286. Id.
287. Id.
it has suffered an adverse effect, which is akin to the injury-in-fact standing requirement in U.S. courts.\textsuperscript{288} Such negative effects on local industry come in three forms:\textsuperscript{289} 1) “injury to the domestic industry of another Member,”\textsuperscript{290} 2) “nullification or impairment” of their benefits under the GATT 1994,\textsuperscript{291} or 3) “serious prejudice to [their] interests.”\textsuperscript{292} In short, a State would need to show that it was harmed by the subsidy.

Once a subsidy has been established as actionable, the panel assessing it may decide either that it is permissible in context or that it caused too great an “injury to the domestic industry of another Member” to be sustained.\textsuperscript{293} If the latter is found, then the subsidizing State will be required to either “take appropriate steps to remove the adverse effects” or may “withdraw the subsidy” entirely.\textsuperscript{294} When it comes to the various chips acts and public funding schemes discussed in Part II, adverse effects can likely be found in the negative economic impact that such subsidies have on the domestic production and market shares of other States.\textsuperscript{295} One State (ex. Taiwan) might argue that another State (ex. the United States or China) harmed it by luring its top semiconductor producers (ex. TSMC) across international borders with the promise of attractive subsidy packages.\textsuperscript{296}

If a State can establish that it was adversely impacted by an actionable microchip subsidy, then it will able to launch a dispute before the DSB. This would give the respondent State an opportunity to raise Article XXI in its defense, if it so wished.\textsuperscript{297} The next question then becomes whether any State would actually bring such a case, given that so many States are actively subsidizing their own industries. This requires a consideration of

\textsuperscript{289} U.S. International Trade Administration, supra note 283.
\textsuperscript{290} SCM Agreement, Article 5(a).
\textsuperscript{291} SCM Agreement, Article 5(b).
\textsuperscript{292} SCM Agreement, Article 5(c).
\textsuperscript{293} SCM Agreement.
\textsuperscript{295} Part II, Article 6 dives into a detailed breakdown of “serious prejudice” which is not necessary to explore for the purposes of this Note. SCM Agreement, Art. 6.
\textsuperscript{296} Taiwan has been a Member of the WTO since 2002, listed as Chinese Taipei. WTO, Members and Observers, WORLD TRADE ORG. (last visited May 20, 2024 at 4:05 PM), https://www.wto.org/english/tbewto_e/whatis_e/tif_e/org_e.htm.
\textsuperscript{297} GATT 1947, Article XXI(b)(ii). Whether this defense is ultimately necessary will depend whether the panel finds the subsidy to be permissible or not, which must be discussed on a case-by-case basis. If a panel were to find that the subsidy was not harmful, then the respondent State would win the dispute without needing to rely on Article XXI.
why States would object to others’ subsidies and whether they would object to microchip race programs in particular.

2. Criticism of Subsidies Clashing with WTO Values

As the initial frenzy of the microchip race passes, at least some WTO Member States are likely to return to the WTO’s underlying values of cooperative “trade that flows as smoothly, predictably, and freely as possible.”\(^{298}\) Subsidies run directly counter to these goals. The SCM Agreement itself suggests that subsidies are bad for global competition and should be discouraged and gradually lessened over time.\(^{299}\) Likewise, the WTO Trade Guide states that subsidized trade can lead to “harmful commercial effects”\(^{300}\) and the Organization for Economic Co-operation and Development says subsidies can create a “race to the bottom” by fostering long-term complacency and “stifling [...] innovation.”\(^{301}\) A couple other negative impacts are examined below.

First, subsidies create risks of overproduction, which could lead to illegal dumping in foreign markets. This occurs when “a company exports a product at a price lower than the price it normally charges on its own home market,” harming the importer’s local industries.\(^{302}\) As traditional chip-producing States like Taiwan, new high-investors like the United States, and interested States around the world all compete in the microchip race, the market is likely to become oversaturated, leading to a domino effect of other trade practices illegal under international law.

Second, subsidies raise international issues of fairness in trade, such as making market entry more difficult for developing States.\(^{303}\) Subsidies do this by crowding newer players out of markets and stealing air from budding industries. For example, Kenya has been making an active effort to enter the semiconductor market, including by launching major production units.\(^{304}\) Since so much microchip production has become


\(^{301}\) Sauvage, supra note 299.


\(^{303}\) Id.

localized, Kenya has had a difficult time attracting the necessary investment to develop its technology, resulting in factories equipped to produce older chip designs, which are less profitable. Subsidies – and especially direct production grants – are most heavily employed by economically powerful States, with the ten wealthiest States in the world granting over 50% of them. Regardless of national security interests, some argue that the use of domestic subsidies by affluent countries creates an unfair situation for other States.

While domestically-focused production subsidies may be considered a less abrasive trade barrier than others like quotas and embargoes, the above points show that subsidies still warrant governance under international trade law. In addition to these general issues with subsidies, critiques focused on microchip race programs have begun to pop up. As criticisms continue to unfold, it becomes more likely that a dispute will arise in the DSB.

3. Early Critiques of the Microchip Race

At the start of the microchip race, State criticism of other States’ semiconductor subsidies was notably light. Many countries – including both economic powerhouses and smaller contenders – were engaged in an early frenzy to support their domestic chip industries and increase their global market shares. It seemed unlikely that political leaders would risk drawing negative attention to their own use of trade barriers by reminding other States of their mutual obligations to promote fair and unfettered trade. More recently, however, this seems to be changing.

Semiconductors (China) presents just one example of the rising contention surrounding microchip race subsidies programs. Another example occurred in March 2023, when the South Korean Trade Ministry indicated dissatisfaction with the U.S. CHIPS Act, saying that it “could deepen business uncertainties” and “make the United States less attractive as an investment option.” Still another came in April 2023, when China expressed concern about Japan’s practices of restricting chip

production equipment. While States initially seemed hesitant to question each other’s semiconductor subsidies, the tone has shifted as the microchip race approaches its final sprint. The more money that is pumped into chip manufacturing, the more likely the microchip contest is to transform into a proxy for the trade war between the United States and China. This runs the risk of pushing other States out of the market and making semiconductor subsidies seem like a protectionist tool of powerful outlier States; akin to the way that U.S. steel tariffs and Russian limits on Ukrainian rail travel were viewed by the international community. If semiconductor subsidies cease to serve the self-proclaimed security interests of most States involved in the microchip race, then those States will likely become more inclined to raise violations of international trade law before the DSB.

Given the legal potential of raising an SCM Agreement violation and the point that States are beginning to view each other’s chips acts more critically, it is likely that a microchip race subsidies case will soon come before the DSB. If such a dispute is brought, the discrepancy between the WTO’s narrowing of Article XXI and the global community’s broadening of “national security” in the microchip subsidies context will force the WTO into the difficult role of having to reconcile these positions.

IV. A RECOMMENDED APPROACH FOR HANDLING ARTICLE XXI

If a DSB panel is faced with an Article XXI argument about semiconductor subsidies, it will need to reconcile its efforts to reign in Article XXI with the notion circulating in global political discussion that States are able to take major economic steps to secure their technological sovereignty when it comes to protecting their national security interests. There are multiple paths that a panel could take. On one end of the spectrum, the panel could completely backtrack from the progress made in Traffic in Transit and Steel and Aluminium Products and instead fully embrace the perspective that Article XXI is a completely self-judging instrument. On the opposite end, the panel could double down on the idea that the international community has a role to play in defining security and, fitting with that viewpoint, could continue to significantly narrow the security exception using its interpretive powers. The most prudent path falls between these two extremes.

A. A Panel Should Reaffirm the Position That Article XXI is Not Entirely Self-Judging

Before any reform can be made to Article XXI, it is important to answer the threshold question of whether the WTO has any ability to determine the scope of the security exception, or whether this must be left entirely up to States. The next panel considering this issue should reaffirm the position that there is a role for the international community in determining what counts as legitimate “security interests.”

Because Article XXI does not explicitly say that it is “self-judging,” there are various other interpretations that can be used. All of these interpretations recognize a role for outside limitations, including judicial review. For example, one perspective recognizes that States’ interpretations are limited by a “good faith standard that is subject to judicial review.” Another acknowledges the ability of the WTO to play a more active role in deciding whether the specific goods and trade barriers under review are closely enough related to the States’ security interests. Scholars have written at length on the question of whether the security exception is self-judging, resulting in a great deal of space for the WTO to continue moving away from the traditional view.

The WTO should not backtrack and adopt the entirely self-judging view. For years, the self-judging perspective existed alongside a series of mitigating factors that often prevented States from abusing Article XXI. Roger Alford highlighted four such factors, including: 1) WTO Article XIII, which allows States to opt out of the normal set of trade rules with a particular political adversary when one of them becomes a member; 2) the option to implement preferential trade agreements, which allow States to establish stronger trading relationships with political allies in lieu of general most favored nation rules; 3) WTO-authorized sanctions; 4) and compensation for impaired trade benefits. While this list is non-exclusive, it helps explain why Article XXI cases were not raised a great deal before the late 2010s. While the general view was that States could unanimously declare security concerns, their likelihood of doing so was lessened by the favorable options that were built into their WTO membership. These original conditions still exist today, but they seem to

309. Id. at 704.
310. Id.
313. Barry, supra note 306.
be placating States less in light of growing economic tensions and ques-
tions about the behaviors of the WTO, leaving States leaders less inclined
to avoid making brash security claims.

The retreat to a reliance on security as a justification for trade behav-
ior is just one symptom of the rising economic tensions that have been
brewing over the past decade. Recent events like the United Kingdom’s
withdrawal from the European Union,314 the United States-China trade
war (including U.S. tariffs and Chinese retaliatory measures), COVID-19,
and the Russia-Ukraine War have all led to a rise in trade tensions and
economic uncertainty that the UN315 and the Organization for Economic
Cooperation and Development have recognized. These tensions are not
entirely new. In fact, the United States has expressed dissatisfaction
with China’s involvement in the WTO ever since its 2001 entry into the
Organization.316 Still, the heightened lack of trust that many economic
powers currently have in their neighbors has driven States to implement
trade barriers like semiconductor subsidies in an attempt to secure their
supply chains against unexpected activity from abroad.

Thus, while the mitigating factors that originally stymied abuse of
Article XXI are still in place, they no longer pose a high enough barrier
against the threats that drive States towards raising trade barriers to
protect their national security interests. The traditional solution of
allowing a self-judging security exception and trusting States not to
abuse it is not sufficient in a time when areas as broad as microchip sub-
sidies are viewed as implicating State security. Rather than reconsider-
ing a broader interpretation of Article XXI, the next panel tackling the
text should more clearly carve out a role for the international community
in defining contemporary security concerns.

B. A Panel Should Require Good Faith by the State Interpreting Article XXI

If Article XXI is not entirely self-judging, then States invoking it
should adhere to the good faith interpretation requirement. This was
mentioned by the panels in both Traffic in Transit and Steel and Aluminium
Products and should be reaffirmed in an upcoming dispute.

314. Pinelopi K. Goldberg & Tristan Reed, Growing Threats to Global Trade (June 2023),
https://www.imf.org/en/Publications/fandd/issues/2023/06/growing-threats-to-global-trade-gold-
berg-reed.
315. UN, UN Report finds high trade tensions and policy uncertainty continue to damage prospects
tensions-and-policy-uncertainty-continue_damage.
316. Jennifer A Hillman, China’s Entry into the WTO – A Mistake by the United States?, GEORGETOWN
The requirement that treaties be interpreted in good faith is one of the customary rules of interpretation of public international law and is codified in the VCLT. Article 31(1) of the VCLT provides that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” In *Traffic in Transit*, the Panel indicated that “the discretion of a Member to designate particular concerns as ‘essential security interests’ is limited by its obligation to interpret and apply Article XXI(b)(iii) of GATT 1994 in good faith.” Further, this means that States should “not use the exceptions in Article XXI as a means to circumvent their obligations” such as by “simply … re-leveling trade interests it had agreed to protect and promote within the system, as ‘essential security interest,’ falling outside the reach of that system.” In order to present in good faith, a State must provide requisite evidence in support of its claims.

The requirement that States interpret Article XXI in good faith is important, but cannot be relied upon to fully reign in States using Article XXI. The requirement essentially just ensures that States are not using the security exception to completely mask ulterior motives and that there is some sort of link between the challenged trade barriers and the security interests that they are designed to defend. States must merely show that the measures taken “are not implausible as measures protective of these interests.” Unlike many other treaty provisions, Article XXI has never been found to have been invoked in bad faith, including when Russia and the United States recently raised it. While the good faith requirement is necessary, more work is needed from the WTO in order to continue making Article XXI a workable exception to the GATT which can provide helpful guidance in scenarios like the microchip race.

### C. The Role of the International Community in Interpreting Article XXI

Once it is made clear that the international community has a role to play in determining whether matters fall within the scope of Article

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318. *Id.*
320. *Id.*
322. The WTO Security Exception and Limits of the Rules-Based System by Stephan G. Schneider, 197 (UNDERGRADUATE LAW JOURNAL).
XXI(b)(iii) and that the exception must be invoked in good faith, a panel would reach the point of defining the actual limits of the text. This includes further exploring the phrases “essential security interests” and “emergency in international relations,” as discussed in Part I.

A panel approaching these questions could continue to follow recent practice by producing a panel report that narrows the scope of Article XXI in a piecemeal, case-by-case manner. DSB panels are composed of between three and five individuals nominated by the Secretariat. Nominees are often trade delegates from WTO Member States or retired government officials and academics, and generally serve on a limited part-time basis. They are often well-qualified area specialists prepared to produce detailed and thoughtful guidance on disputes.

However, while DSB panel reports on Article XXI have provided greater clarity on the scope of the exception in recent years, they have also resulted in backlash; particularly from the United States. This has placed the WTO in a difficult position. For as long as the Organization finds itself at odds with the United States, which is one of its founding Members and largest supporters, any action that it takes on national security runs the risk of delegitimizing its strong dispute mechanism. The United States has been clear – as recently as in its response to Semiconductors (China) – that it will not accept an unfavorable Article XXI decision in which it had no input. The State also continues to cripple the system as a whole by blocking appointments of members to the Appellate Body. While the opinion of one State should not drive the entire direction of international trade law, the WTO would be well-advised to alleviate tension with the United States and other Members by rethinking its current approach to the topic of national security in a way that recognizes the great priority that States place on their perceived security interest.

The WTO should not simply wait for a difficult DSB dispute on microchip subsidies to arise and raise complex questions on the scope of national security. What it should do is tackle this question early, to the extent possible. If the WTO can provide more detailed guidance on the meaning of security and address global economic situations like the microchip race in a more fluid, conversational setting that seeks the input of States, then it will be better positioned to alleviate tensions and
appear in-touch with changing global perspectives. At the very least, creating another avenue for national security discussions will allow the Organization to work through the complexities of real security scenarios like the microchip race even if Member States reject its dispute resolution system in the way that the United States has done. This is especially important right now, as panel reports continue to be lost in the limbo of the broken Appellate Body.

Two paths seem most helpful in allowing the WTO to supplement its dispute resolution process to better handle trade disputes that implicate national security concerns. First, the WTO Member States could dive back into the actual text of Article XXI and begin open discussions of how to improve it. Second, as recommended by this Note, the WTO could establish a Committee on National Security.

Direct reforms to the text of Article XXI are possible, but unlikely and therefore not the optimal solution. Such edits would be very powerful in curing the security exception’s ambiguities, since fuller definitions of “essential security concerns” and “times of international emergency” could be written directly into the text. This approach would be most effective in preventing Article XXI from becoming an unchecked escape route from trade obligations. In spite of this, a direct amendment is not the ideal solution for two reasons. First, there is nothing to indicate that States will be more likely to agree on different text today than they were when the GATT was first written. The early problems that plagued the GATT’s drafters – including the challenge of weighing flexibility and sovereignty against a strong international trade framework – continue to pose difficulties today. The security exception has never once been amended.327 Even when GATT 1947 was incorporated into GATT 1994, the text remained unchanged.328 Any amendments to the treaty would require approval by two-thirds of WTO Members. Consensus of this degree may be possible for a very minor edit, such as adding the “in good faith” requirement that is already incorporated via the VCLT, but agreement on any new definitions is much less likely. The terms “essential security interests” and “emergency in international relations” remain murky because they are difficult concepts to define in light of the ever-changing nature of international relations. While the ambiguity of Article XXI needs to be addressed, a certain degree of leeway is still required to protect the original spirit of the exception. Rather than seeking to amend Article XXI itself, the WTO should focus on facilitating more

328. Id.
active and proactive conversation about major security issues that calls for regular input from Member States.

This Note recommends doing this by forming a Committee on National Security. This solution was proposed by Simon Lester and Inu Manak, who recommended that the Committee meet at least once a year to consult on questions relevant to security topics. Such a solution falls within the standard practice of the WTO, which already maintains a series of committees that meet regularly and serve as oversight for the implementation of various WTO agreements. A Committee on National Security would provide a standing forum where Article XXI reforms could be discussed in real time and in much greater detail than such topics currently receive during DSB disputes. Although Article XXI has come back into the limelight in the past five years, security issues are still only addressed when one State begins a dispute against another. Currently, panel reports are either final and binding, or appealed into limbo. A Committee would allow for more fluid, ad hoc conversation about economic security issues, giving Member States the chance to explain their positions in more detail. This would provide the international community with an opportunity to work through scenarios that may implicate security concerns in a less adversarial environment and before disputes arise.

A body such as a Committee on National Security is the best avenue for tackling Article XXI because it provides flexibility for the WTO to adjust to changing economic and technological conditions. This is ideal for handling a complex situation like the microchip race, in which global political rhetoric regarding the meaning of security seems to extend much further than the meaning of security under prior interpretations of Article XXI. A Committee would be able to track situations like the microchip race as they unfold, following them closely in order to discuss ways in which Article XXI can be reconciled with actual global practice. Such a Committee could then make non-binding recommendations on State practice, to be implemented by States voluntarily or taken into consideration by later DSB panels. It could also build out resources to help States determine when they can readily call upon the Article XXI defense and discuss policies in national security terms. For example, the Committee could maintain a list of essential goods and establish a process by which States could propose to add new products over time as their national economies and priorities evolve.

330. Id. at 271.
331. Id. at 278.
In today’s world of rapidly developing technology and increasingly interconnected society, it is vital that an instrument as broad as Article XXI be able to keep pace with the contemporary security interests of States without becoming so broad that it completely overcomes rules against trade barriers. The significant implementation of trade barriers by States across the globe engaging in the microchip race highlights the need for a WTO that is capable of carrying out ongoing discussions about the ways in which shifting trade tensions and major advancements in technology come together to impact the security priorities of States. The role that recent DSB panels have carved out for the international community in determining the meaning and application of Article XXI should be approached by implementing a proactive and flexible system that helps to keep the security exception workable and to prevent the WTO from falling too far out of touch with global sentiments on national security.

D. Aligning the WTO’s Views on Security with the Views of the Global Trade Community

A Committee on National Security would be best able to align the WTO’s views on “essential security interests” and “emergency in international relations” with the perspectives of the global community, while being careful not to disregard all limits of the security exception.

1. Limiting “Essential Security Interests”

A permanent Committee would have greater flexibility than would one-off panels when it comes to tracking changes in the international trade landscape and acknowledging rising threats that States perceive to their security. The panel in Traffic in Transit described “essential security interest” as “interests relating to the quintessential functions of the [S]tate,” noting that these “depend on the particular situation and perceptions of the [S]tate in question and can be expected to vary with changing circumstances.”332 While trade conflicts between particular States are rooted in many localized factors and may sometimes receive the most in-depth legal analysis by DSB panels, a Committee on National Security could be quite helpful in providing more generally-applicable and up-to-date guidance on “changing circumstances” within international trade.

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Furthermore, a Committee could preempt various DSB complaints by discussing up-front whether certain major programs concern the “quintessential functions” of the State. If, as in the case of semiconductor subsidies, many States agreed in their political rhetoric that security concerns were implicated, then a Committee could acknowledge right off the bat that the area was likely to fall within the purview of Article XXI. If a new technology was introduced, such as an eventual replacement for the modern smartphone which was just as integral to everyday communication and transportation, then the Committee could discuss whether the product qualified as essential. On the other hand, if it were clear – as in the case of American steel – that one State was a significant outlier in its trade opinions, then the Committee could either more closely scrutinize the issue or leave a DSB panel to consider the good faith and specific evidence presented by the State.

A Committee discussing the limits of the national security exception should consider breaking down the broad new categories of goods and trade barriers that are being discussed in security terms. Traditionally, “national security” meant military-related, and the outer scope of Article XXI was relatively well-defined. Today, the application of security arguments to industries like agriculture, oil, and semiconductors demonstrates a view of security that encompasses many things that are integral to the function of society. Accordingly, it is important to approach new areas in a careful fashion. If considering Article XXI in the context of semiconductor subsidies, for example, a Committee might consider drawing a distinction between government/military and consumer subsidies. This would grant States leeway in subsidizing chips that go into government technology, while preventing them from subsidizing consumer products. This approach would align with political rhetoric on semiconductor security concerns, which has not focused on consumer uses. Rather than indicating whether all chips act programs qualify for the Article XXI defense, the WTO should carve microchip subsidies into the security exception only to the extent needed to recognize and account for global views on the matter.

2. Limiting “Emergency in International Relations”

The Committee on National Security should also officially incorporate economic crises into the meaning of “emergency in international

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relations.” The *Steel and Aluminium Products* Panel defined this term as “situations of a certain gravity or severity and international tensions that are of a critical or serious nature in terms of their impact on the conduct of international relations.”334 This definition should be expanded to either specifically include or deny situations of purely economic character, such as the U.S. steel tariffs and various subsidies programs implemented in response to shortages and perceived supply-chain risks. Based on the views expressed throughout the microchip race, economic situations should be included.

However, there is room for nuance to prevent Article XXI from becoming too expansive. Nadia Garcia-Santaolalla proposed differentiating levels of emergencies through a framework that distinguishes between “international emergencies” (regional threats) and “global emergencies” (larger multi-State situations).335 This approach seeks to increase cooperation in larger emergencies, thereby avoiding cases that result in invocations of Article XXI.336 Under such a classification system, a situation like the microchip race would qualify as a global emergency and might be more easily categorized as fitted to the exception. Meanwhile, a situation that was more localized would face closer scrutiny before being labeled an “emergency in international relations.”

Overall, the WTO must directly and explicitly recognize that States now view access to microchips and the use of microchip subsidies as essential to their technological sovereignty and national security. It is unrealistic for WTO panels to continue narrowing the meaning of security under Article XXI without also recognizing the political expansion of security conversations. While DSB panels have made it clear that there is always a case-by-case, context-specific element to the application of Article XXI, a Committee on National Security could provide more detailed guidance as to the meaning of “national security” and prevent disgruntled responses to unwelcome DSB panel reports that run the risk of being rejected by respondent States. By creating a body in which Member States can have an active voice, the WTO can continue maintaining and expanding Article XXI without allowing the security exception to cover “anything under the sun.”337

336. Id. at 20.
337. UN Economic and Social Council, *supra* note 90.
V. CONCLUSION

As of spring 2024, the microchip race continues to rage on. States continue to respond to perceived threats to their national security and technological sovereignty by ramping up domestic production subsidies programs and building national security arguments into their political rhetoric and national legislation. In doing so, world leaders engaged in the microchip race have presented a view of “national security” that is much more expansive than DSB panel efforts to narrow Article XXI would suggest. In order to tackle this discrepancy before it results in another DSB panel decision that runs the risk of being rejected by States, the WTO should proactively adopt a more flexible approach to Article XXI, including facilitating ongoing discussion on the meaning of national security by establishing a Committee on National Security.