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The Application of Article XXI of the GATT and the Violation of the Non-Discrimination Principle in Tariff Policy under Executive Order 14323

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ABSTRACT

The DS640 dispute between Brazil and the United States raises important questions in international trade law concerning the limits of WTO members' authority to impose tariff measures on national-security grounds under Article XXI of the GATT 1994. The United States imposed additional tariffs on Brazilian steel products through the Section 232 mechanism, claiming that the measures protected national-security interests, whereas Brazil argued that they violated the principle of non-discrimination and the United States' bound-tariff commitments. This article examines the legality of the tariff measures through three principal GATT disciplines: most-favoured-nation treatment under Article I, national treatment under Article III, and bound-tariff obligations under Article II. The study concludes that the tariffs are discriminatory because selective exemptions were granted to certain countries without an objective basis related to product differences, thereby contravening Article I. The measures also reflect protection of the United States' domestic steel industry, which is inconsistent with Article III. In addition, the additional tariffs exceed the bound rates recorded in the United States Schedule of Concessions and therefore violate Article II. The national-security justification under Article XXI is considered inapplicable because the measures do not satisfy the "emergency in international relations" standard articulated in Russia – Traffic in Transit. Accordingly, the article argues that the United States' measures in DS640 are inconsistent with its multilateral obligations and underscores the role of the WTO Dispute Settlement Body in preventing the national-security exception from being used as an instrument of protectionism.

Kata Kunci:
GATT, Pelanggaran Prinsip Non-Diskriminasi, Kebijakan Tarif, Perintah Eksekutif Nomor 14323

ABSTRAK

Sengketa DS640 antara Brasil dan Amerika Serikat menimbulkan persoalan penting dalam hukum perdagangan internasional mengenai batas kewenangan anggota WTO untuk mengenakan tindakan tarif dengan alasan keamanan nasional berdasarkan Pasal XXI GATT 1994. Amerika Serikat mengenakan tarif tambahan terhadap produk baja Brasil melalui mekanisme Section 232 dengan alasan bahwa tindakan tersebut diperlukan untuk melindungi kepentingan keamanan nasional. Sebaliknya, Brasil berpendapat bahwa tindakan tersebut melanggar prinsip nondiskriminasi dan komitmen tarif terikat Amerika Serikat. Artikel ini mengkaji keabsahan tindakan tarif tersebut berdasarkan tiga disiplin utama GATT, yaitu perlakuan negara yang paling diuntungkan berdasarkan Pasal I, perlakuan nasional berdasarkan Pasal III, dan kewajiban tarif terikat berdasarkan Pasal II. Penelitian ini menyimpulkan bahwa tarif tersebut bersifat diskriminatif karena Amerika Serikat memberikan pengecualian secara selektif kepada negara-negara tertentu tanpa dasar objektif yang berkaitan dengan perbedaan karakteristik produk, sehingga bertentangan dengan Pasal I. Tindakan tersebut juga mencerminkan perlindungan terhadap industri baja domestik Amerika Serikat, yang tidak sejalan dengan Pasal III. Selain itu, tarif tambahan tersebut melampaui tingkat tarif terikat yang tercantum dalam Daftar Konsesi Amerika Serikat dan oleh karena itu melanggar Pasal II. Pembenaran berdasarkan keamanan nasional dalam Pasal XXI dinilai tidak dapat diterapkan karena tindakan tersebut tidak memenuhi standar "keadaan darurat dalam hubungan internasional" sebagaimana dirumuskan dalam perkara Russia – Traffic in Transit. Oleh karena itu, artikel ini berpendapat bahwa tindakan Amerika Serikat dalam DS640 tidak sesuai dengan kewajiban multilateralnya dan menegaskan pentingnya peran Badan Penyelesaian Sengketa WTO dalam mencegah penggunaan pengecualian keamanan nasional sebagai instrumen proteksionisme.

1. INTRODUCTION

International trade constitutes not merely an economic activity involving the cross-border movement of goods and services, but also a legal relationship structured by reciprocal rights, binding commitments, and institutional mechanisms for dispute settlement. The stability of international trade therefore depends on the extent to which states are willing to restrain unilateral economic power through generally applicable legal rules. (Bossche, 2026) identifies four principal reasons for the existence of international trade law. First, it limits governmental measures designed to protect domestic markets and exclude competing foreign products. Second, it provides economic operators and investors with legal certainty and predictability. Third, it accommodates legitimate national interests that may be affected by trade liberalization. Fourth, it secures equal opportunities for states to obtain the benefits of international trade. These functions demonstrate that international trade law is intended to reconcile two potentially competing considerations: the sovereign authority of states to regulate their economies and the need to prevent that authority from being exercised arbitrarily, discriminatorily, or contrary to previously negotiated commitments.

The establishment of the World Trade Organization (WTO) in 1995 transformed this objective into a rules-based multilateral trading system. Under that system, market access is not dependent solely on temporary diplomatic concessions but is governed by enforceable treaty obligations contained in the WTO covered agreements, including the General Agreement on Tariffs and Trade 1994 (Bhala, 2005). The WTO dispute-settlement system preserves the rights and obligations of members and requires the covered agreements to be interpreted in accordance with the customary rules of treaty interpretation recognized in public international law (WTO, 1994). Accordingly, the interpretation of the GATT must be based on the ordinary meaning of its provisions, their context, and the object and purpose of the agreement, rather than solely on the unilateral interpretation adopted by the member imposing a trade measure.

Within this legal architecture, non-discrimination and tariff predictability constitute distinct but interrelated obligations. The principle of most-favoured-nation treatment in Article I:1 of the GATT requires any advantage, favour, privilege, or immunity granted to a product originating in or destined for one country to be extended immediately and unconditionally to like products originating in or destined for all other WTO members. Article II, by contrast, protects the value of negotiated tariff concessions by prohibiting members from according imported products treatment less favourable than that specified in their Schedules of Concessions and from imposing ordinary customs duties exceeding their bound tariff rates. The two provisions perform different normative functions. Article I prevents discrimination among foreign trading partners, whereas Article II prevents the unilateral withdrawal of negotiated market-access commitments. A single country-specific tariff measure may therefore simultaneously violate Article I because it differentiates between countries and Article II because it exceeds the tariff ceiling recorded in the imposing member's Schedule.

National treatment under Article III also forms part of the broader principle of non-discrimination. However, a normative legal analysis must distinguish its scope from that of Articles I and II. Article III principally regulates internal taxes and domestic laws, regulations, and requirements affecting imported products after they have entered the domestic market. It is intended to prevent internal measures from being applied so as to protect domestic production. By contrast, an additional customs tariff imposed at the border is ordinarily assessed under Articles I and II rather than Article III. Consequently, although national treatment remains relevant to explaining the general architecture of non-discrimination under the GATT, it is not the primary legal basis for assessing the country-specific additional duties challenged by Brazil in DS640. Treating every protectionist border tariff as an Article III violation would obscure the doctrinal division between customs duties regulated by Article II and internal taxation or regulation governed by Article III.

The effectiveness of Articles I and II would nevertheless be undermined if a member could escape these obligations merely by characterizing a tariff as a national-security measure. Article XXI of the GATT therefore occupies a sensitive position within the treaty structure. It preserves a member's authority to protect its essential security interests, including through measures relating to fissionable materials, traffic in arms and military supplies, and measures taken in time of war or another emergency in international relations (WTO, 1994). The provision recognizes that the multilateral trading system cannot require a state to disregard genuinely fundamental security interests. At the same time, Article XXI cannot be interpreted as an unlimited authorization to suspend WTO obligations whenever a government invokes the language of security. Such an interpretation would allow members to transform ordinary economic, political, or diplomatic disagreements into security emergencies and would thereby render tariff bindings and non-discrimination obligations legally ineffective.

The principal interpretive difficulty arises from the phrase "which it considers necessary" in Article XXI(b). A purely subjective interpretation would permit the invoking member to determine conclusively both the existence of a security emergency and the legality of the measures adopted in response to it. Under that interpretation, a WTO panel would lack authority to scrutinize any measure once national security had been invoked. Such an approach is difficult to reconcile with Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which assigns the dispute-settlement system the function of preserving members' rights and obligations and clarifying the provisions of the covered agreements. It is also incompatible with the principle of effectiveness in treaty interpretation because it would allow one party's unilateral characterization of a measure to displace the substantive obligations accepted by all WTO members.

This interpretive controversy was addressed directly in Russia—Measures Concerning Traffic in Transit. The panel rejected the proposition that Article XXI(b)(iii) is entirely self-judging. Although a member retains substantial discretion to identify its essential security interests and determine the measures it considers necessary to protect them, the existence of "war or other emergency in international relations" constitutes an objective condition that may be reviewed by a WTO panel (WTO, 2019). The words "which it considers" qualify the member's assessment of necessity and essential security interests, but they do not eliminate the panel's authority to determine whether the circumstances expressly stipulated in Article XXI(b)(i)–(iii) exist.

Russia—Traffic in Transit consequently establishes a hybrid standard of review. Certain elements of Article XXI are subject to objective judicial assessment, whereas other elements preserve a degree of governmental discretion. First, a panel may determine whether the situation invoked by the respondent objectively amounts to war or another emergency in international relations. The concept refers to circumstances of exceptional gravity in relations between states, such as armed conflict, latent armed conflict, severe international tension, or a crisis producing general instability. It is not synonymous with every political disagreement, economic dispute, or diplomatic controversy. Second, the phrase "taken in time of" requires a temporal relationship between the measure and the relevant emergency. Third, the invoking member must articulate the essential security interests allegedly threatened. Fourth, the principle of good faith permits an assessment of whether the measure is at least plausibly connected to the protection of the security interests identified by the member. This standard does not authorize a panel to substitute its preferred security policy for that of the respondent, but it prevents Article XXI from becoming a device for arbitrary protectionism.

The distinction between a domestic declaration of emergency and an "emergency in international relations" under Article XXI is particularly significant. A declaration made pursuant to a state's domestic legislation may authorize its executive branch to impose economic restrictions as a matter of internal law. Nevertheless, domestic legality does not automatically establish conformity with international law. The legal characterization used in domestic legislation or an executive order cannot determine the autonomous meaning of the terms contained in the GATT. A measure may therefore be valid under domestic emergency legislation while remaining inconsistent with Articles I and II of the GATT and incapable of satisfying Article XXI(b)(iii). Conversely, the existence of a qualifying international emergency must be established by reference to the treaty standard, not merely by reference to the terminology selected by the government adopting the measure.

The 2022 panel reports concerning the United States' Section 232 steel and aluminium measures further illustrate this distinction. The panels considered the relationship between economic concerns, domestic industrial capacity, and the concept of an emergency in international relations. They concluded that the circumstances invoked by the United States did not satisfy the objective requirements of Article XXI(b)(iii) and that the challenged measures were inconsistent with relevant GATT obligations (WTO, 2022). However, these reports must be used cautiously. The United States appealed the reports while the WTO Appellate Body was unable to hear appeals. Consequently, the reports were not adopted by the Dispute Settlement Body and do not possess the same legal status as the adopted report in Russia—Traffic in Transit. They remain relevant as persuasive interpretive materials, particularly because they apply the Russia—Traffic in Transit framework to tariff measures adopted under a national-security rationale, but they should not be described as final or binding precedents.

Against this doctrinal background, United States—Tariff Measures on Certain Products from Brazil (DS640) raises a materially different legal controversy from the earlier Section 232 disputes. On 5 August 2025, Brazil requested consultations regarding a 10% additional ad valorem duty imposed on goods originating in Brazil and an additional 40% duty imposed on certain Brazilian products (WTO, 2025). The measures included duties introduced through Executive Order 14323, which declared that certain policies and actions of the Government of Brazil constituted an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States (Bureau of Industry and Security, 2018).

Executive Order 14323 did not primarily identify excessive Brazilian steel imports or the deterioration of a particular United States defence industry as the relevant threat. Instead, it referred to matters including decisions of Brazilian governmental and judicial authorities, the regulation of online platforms, alleged restrictions on speech, the treatment of United States persons and companies, and the prosecution of former Brazilian President Jair Bolsonaro. The order relied on the International Emergency Economic Powers Act and other provisions of United States law to impose an additional 40% tariff on specified Brazilian products. Its product- and country-specific design therefore presents a direct question regarding whether a tariff may be used as an instrument of diplomatic or political coercion without violating the multilateral trade obligations of the United States.

Brazil's consultation request identifies three principal groups of claims. First, Brazil alleges that the country-specific duties are inconsistent with Article I:1 of the GATT because products originating in Brazil are subjected to less favourable tariff treatment than like products originating in other WTO members. Under Article I:1, the decisive issue is not whether the United States expressly intended to discriminate against Brazilian producers, but whether an advantage accorded to like products from other countries was withheld from Brazilian products. A tariff imposed specifically because of Brazilian origin constitutes prima facie origin-based differentiation. Unless that differentiation falls within a valid exception, it undermines the unconditional character of the MFN obligation (WTO, 2025).

Second, Brazil invokes Articles II:1(a) and II:1(b) of the GATT. Article II:1(a) requires the United States to accord Brazilian products treatment no less favourable than that provided in its Schedule of Concessions. Article II:1(b) prohibits the imposition of ordinary customs duties exceeding the bound rates specified in that Schedule and regulates additional duties or charges imposed in connection with importation. The central inquiry is therefore whether the combined additional duties caused the applicable tariff burden to exceed the United States' bound rates. If the duties exceeded those bindings, a prima facie violation would arise independently of whether the measure produced quantifiable trade injury or was adopted with a protectionist intention. The legal function of Article II is to protect the negotiated tariff ceiling itself.

Third, Brazil invokes Articles 23.1 and 23.2(a) of the DSU. These provisions protect the exclusive and compulsory character of WTO dispute settlement by restricting members from making unilateral determinations that another member has violated WTO obligations and from seeking redress outside the procedures prescribed by the DSU. This claim introduces an institutional dimension that extends beyond tariff discrimination. It raises the question of whether a member may use unilateral tariff measures to compel changes in another member's governmental conduct instead of pursuing available international dispute-settlement procedures. The relevance of Article 23 is especially pronounced when tariffs operate not merely as instruments of market regulation but as sanctions intended to obtain compliance with unilateral demands.

Because DS640 was initiated through a request for consultations, no WTO panel has yet determined that the United States violated the GATT or that Article XXI is applicable. It would therefore be legally inaccurate to present Brazil's allegations as established judicial findings. The appropriate normative method is sequential. Brazil must first establish prima facie inconsistencies with Articles I:1 and II:1(a)–(b), as well as the relevant elements of its DSU Article 23 claims. If the United States invokes Article XXI(b)(iii), the analysis must then determine whether the objective conditions of that exception are satisfied. Only after those conditions are established does the respondent retain discretion, subject to good faith, to identify its essential security interests and determine the measures it considers necessary to protect them.

Applied to Executive Order 14323, the decisive question is not whether the United States used the expressions "national security" or "national emergency" in its domestic instrument. The decisive question is whether the circumstances between the United States and Brazil reached the level of war or another emergency in international relations within the autonomous meaning of Article XXI(b)(iii). Disagreement concerning judicial decisions, regulation of digital platforms, freedom of expression, or the prosecution of a former political leader may generate substantial diplomatic tension. Nevertheless, diplomatic disagreement alone does not necessarily constitute an international emergency of the gravity contemplated by Article XXI. The United States would have to demonstrate both the existence of qualifying circumstances and a credible relationship between those circumstances, the essential security interests identified, and the selection of additional tariffs on Brazilian goods.

The structure of the tariff measure is also relevant to the good-faith assessment. The breadth of the products covered, the existence of exemptions, the selection of a 40% rate, the relationship between the targeted goods and the alleged security threat, and the possibility of increasing tariffs in response to Brazilian retaliation may indicate whether the measure was designed to protect an articulated security interest or to create economic leverage. Article XXI does not necessarily require the strict least-restrictive-means analysis used under certain other WTO exceptions. However, an absence of any plausible relationship between the goods subjected to tariffs and the interests purportedly protected may support the conclusion that the security exception is being used as a pretext for coercive or protectionist action.

Subsequent developments must also be distinguished from the legality of the measure during the period in which it operated. In February 2026, the United States terminated the additional ad valorem duties imposed under several executive orders relying on the International Emergency Economic Powers Act, including Executive Order 14323, while leaving the underlying declarations of national emergency otherwise unaffected (Bureau of Industry and Security, 2018). The termination of the tariffs may affect the practical continuation of the dispute and the nature of any remedy sought. It does not, however, automatically determine whether the duties were consistent with WTO law while they remained in force. The normative assessment must therefore focus on the legal character of the measures at the time they were imposed, while acknowledging their subsequent termination.

The central legal issue in this research should consequently be formulated more precisely as follows: to what extent were the country-specific additional tariffs imposed by the United States on products originating in Brazil inconsistent with Articles I:1 and II:1(a)–(b) of the GATT 1994 and Articles 23.1 and 23.2(a) of the DSU, and, if such inconsistencies are established, could they be justified under Article XXI(b)(iii) in light of the objective threshold, temporal nexus, and good-faith requirements developed in Russia—Traffic in Transit?

This formulation avoids treating Article XXI as an independent source of tariff authority and instead positions it correctly as a potential justification for conduct that would otherwise be inconsistent with the GATT. It also distinguishes MFN discrimination from the violation of bound tariff commitments, separates border tariffs from the national-treatment disciplines governing internal measures, and recognizes the institutional prohibition against unilateral redress. Normatively, the dispute tests whether the WTO legal order can preserve an appropriate balance between sovereign security autonomy and the integrity of reciprocal trade commitments. An interpretation that is excessively deferential would allow national-security language to become a mechanism for avoiding multilateral obligations. Conversely, an interpretation that disregards genuine security interests would intrude upon an area in which states retain legitimate sovereign discretion. The function of Article XXI is therefore not to eliminate legal scrutiny but to structure that scrutiny through objective treaty conditions and a controlled margin of discretion exercised in good faith.

2. RESEARCH METHODS

This study employs normative legal research, understood as a process of identifying legal rules, principles, and doctrines in order to address the legal issues under examination (Marzuki, 2019). It applies the statute and conceptual approaches. Legal materials were collected through library research and comprise primary legal materials, including legislation, international agreements, and WTO panel and Appellate Body reports, as well as secondary legal materials, such as classical and contemporary books, journal articles, and previous studies. The materials were analyzed qualitatively using descriptive-analytical techniques, statutory and treaty interpretation, doctrinal analysis, and an examination of relevant WTO jurisprudence. The analysis was conducted to determine the applicable legal framework, interpret the rights and obligations of the parties, and evaluate the legal reasoning applied in resolving the dispute.

3. RESULTS AND DISCUSSION

3.1 Violation of the Most-Favoured-Nation Principle under Article I of the GATT

The MFN principle in Article I of the GATT requires any advantage, favour, privilege, immunity, or tariff reduction granted to the product of one country to be extended immediately and unconditionally to the like products of all WTO members (Bossche & Prévost, 2016). MFN treatment is a core component of non-discrimination and is intended to prevent protectionist distinctions based on particular political or economic relationships. In DS640, Brazil contended that the United States treated Brazilian steel less favourably than steel from other countries, including United States allies that received complete exemptions or special tariff quotas through country-specific arrangements.

A violation of Article I:1 may be assessed th9rough three cumulative elements developed in WTO jurisprudence and academic literature (Priyono, 2013). First, there must be an "advantage," "favour," or "privilege." Such an advantage may consist of a tariff exemption, a reduction in customs duties, or preferential import procedures. In the dispute as described in this article, the United States granted country exemptions to South Korea, Argentina, and Australia. The panels in US – Steel and Aluminium Products treated comparable exemptions as trade advantages relevant to Article I. (Voon, 2019) likewise argues that selective exemptions under the United States Section 232 policy constitute a clear advantage granted to particular countries within the meaning of Article I.

Second, the advantage must not be withheld from other WTO members or made conditional upon additional requirements. The jurisprudence in Canada – Autos indicates that conditions restricting the extension of an advantage to other members are inconsistent with the MFN obligation. Because the exemptions in DS640 were allegedly based on strategic and geopolitical considerations rather than product characteristics, they did not satisfy the requirement of immediate and unconditional extension. (Bartels, 2002) similarly explains that preferences founded on political relationships cannot be characterized as unconditional extensions of trade benefits.

Third, the measure must result in less favourable treatment for countries that do not receive the advantage. In EC – Seal Products, the Appellate Body understood less favourable treatment in terms of a measure that adversely modifies the competitive opportunities of imported products relative to like products (WTO, 2014). Brazilian steel subject to the full 25 per cent tariff was therefore placed in a less favourable competitive position than steel from countries receiving exemptions. Such differential tariff treatment is sufficient to establish an MFN concern without requiring separate proof of additional economic harm. On this reasoning, the existence of an advantage, its non-extension on an unconditional basis, and the resulting less favourable treatment together support the conclusion that the United States measure constituted a prima facie violation of Article I:1 of the GATT 1994.

The WTO panels in US – Steel and Aluminium Products identified a comparable pattern. The United States imposed a general tariff of 25 per cent on steel while providing exemptions, suspensions, or alternative arrangements for selected trading partners, including South Korea, Australia, Argentina, and the European Union (WTO, 2022). The panels found that selective exemptions could result in less favourable treatment and thus raise a prima facie inconsistency with Article I:1. The policy pattern described in DS640 is similar: Brazil was subject to the full tariff, whereas selected countries received preferential treatment based on political and strategic relationships rather than product characteristics or neutral technical trade criteria (Bown, 2025).

International trade scholarship further emphasizes that geopolitical discrimination is inconsistent with the central purpose of MFN treatment, which is to eliminate arbitrary preferential treatment (Pinchis-Paulsen et al., 2024). If the United States granted tariff exemptions to allies solely because of political relations, the measure would undermine the core of Article I. Although the United States might invoke Article XXI as a justification, the panel in DS512 explained that a security exception cannot displace the legal requirement of good-faith consistency unless the measure is genuinely connected to an emergency in international relations.

3.2 Bound-Tariff Commitments under Article II of the GATT and the Alleged Breach of United States Tariff Commitments

The national-treatment principle requires a WTO member not to accord imported products treatment less favourable than that accorded to like domestic products (WTO, 1994). Although the dispute described in DS640 primarily concerns import duties under Articles I and II, it also raises a related question under national treatment: whether the United States tariff policy protected domestic steel production in a manner inconsistent with the anti-protectionist purpose of Article III (Howse & Langille, 2023).

National treatment is not confined to formally discriminatory domestic regulations; it is also concerned with measures that protect domestic production in substance (Howse & Langille, 2023). In the steel context, the United States tariffs were expressly presented as a means of increasing domestic production capacity and reducing reliance on imported steel. United States Department of Commerce policy documents stated that the measures were intended to revive a domestic steel industry considered strategically important to the national economy (Bureau of Industry and Security, 2018).

An assessment under Article III normally requires a structured inquiry into whether imported and domestic products are “like,” whether a relevant internal measure applies to imported goods, and whether that measure accords imported products less favourable treatment (WTO, 1996). Determining likeness is a fact-intensive comparison of physical characteristics, end uses, consumer preferences, and market relationships. Only after imported and domestic goods are found to be comparable can their regulatory treatment be meaningfully assessed (Bossche & Prévost, 2016). A measure that is facially neutral may still violate Article III where its application alters competitive conditions in favour of domestic products, including through de facto discrimination. WTO jurisprudence therefore focuses not only on the stated intention of a policy but also on its actual effects on the competitive opportunities of imported and domestic products (Mavroidis, 2016). In the context of the argument developed in this article, Brazilian and United States steel would first have to be shown to be like products. If so, a measure designed to strengthen domestic production, combined with selective exemptions for allied countries, could indicate a pattern of treatment that benefits domestic steel even if the measure appears formally neutral.

Methodologically, an allegation of national-treatment inconsistency may be supported by three categories of evidence: the relevant legal instruments and tariff schedules; empirical data showing differences in market access or changes in market share; and domestic policy documents revealing a protective purpose or effect, such as the Section 232 report and public statements by policymakers. Government defences based on security, health, or environmental objectives do not eliminate the need to assess the measure's protective effect. Such defences can prevail only where the requirements of the relevant exception are satisfied and are subject to appropriate review by the WTO Dispute Settlement Body.

Where a measure is applied so as to improve the competitive position of domestic products while disadvantaging imports, it may be understood as protecting domestic production contrary to the general purpose expressed in Article III:1. In Japan – Alcoholic Beverages II, the Appellate Body emphasized that Article III is directed at preventing the protective application of internal measures (WTO, 1996). Accordingly, although tariffs are technically governed by Article II as border measures, the protective design and effects alleged in the present article may also be discussed in relation to the broader national-treatment principle and its prohibition of protectionism.

3.3 National Treatment under Article III of the GATT and the Alleged Inconsistency of United States Tariff Policy

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Where a measure is applied so as to improve the competitive position of domestic products while disadvantaging imports, it may be understood as protecting domestic production contrary to the general purpose expressed in Article III:1. In Japan – Alcoholic Beverages II, the Appellate Body emphasized that Article III is directed at preventing the protective application of internal measures (WTO, 1996). Accordingly, although tariffs are technically governed by Article II as border measures, the protective design and effects alleged in the present article may also be discussed in relation to the broader national-treatment principle and its prohibition of protectionism

4. CONCLUSION

The DS640 dispute between Brazil and the United States presents an important issue in international trade law concerning the limits of WTO members' authority to impose tariff policies on national-security grounds under Article XXI of the GATT 1994. The United States imposed additional tariffs on Brazilian steel products through the Section 232 mechanism in order to protect asserted national-security interests, while Brazil maintained that the measures violated non-discrimination and bound-tariff commitments. This study concludes that the tariffs were discriminatory because selective exemptions were granted to certain countries without an objective basis related to product differences, thereby contravening Article I. The policy also reflected protection of the United States domestic steel industry, which the article regards as inconsistent with Article III. Moreover, the additional tariffs exceeded the limits stated in the United States Schedule of Concessions and therefore breached Article II. The national-security justification under Article XXI was considered unavailable because the measures did not satisfy the "emergency in international relations" standard articulated in Russia – Traffic in Transit. The article therefore concludes that the United States measures in DS640 were inconsistent with its multilateral obligations and emphasizes the role of the WTO Dispute Settlement Body in preventing the national-security exception from being used as an instrument of protectionism.

REFERENCES

Bartels, L. (2002). Article XX of GATT and the Problem of Extraterritorial Jurisdiction (The Case of Trade Measures for the Protection of Human Rights). *Journal of World Trade*, *36*(2), 353–403.

Bhala, R. (2005). Modern GATT law: a treatise on the General Agreement on Tariffs and Trade. *Common Market Law Review*, *44*(2), 545–547.

Bossche, P. Van den. (2026). *From Afterthought to Centerpiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System*.

Bossche, P. Van Den, & Prévost, D. (2016). *Essentials of WTO Law*. Cambridge University Press.

Bown, C. P. (2025). *US-China Trade War Tariffs: An Up-to-Date Chart*. Www.Piie.Com. http://piie.com/research/piie-charts/2019/us-china-trade-war-tariffs-date-chart

Bureau of Industry and Security. (2018). *The Effect of Imports of Steel on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended*.

Howse, R., & Langille, J. (2023). Continuity and Change in the World Trade Organization: Pluralism Past, Present, and Future. *American Journal of International Law*, *117*(1), 1–47. https://doi.org/10.1017/ajil.2022.82

Marzuki, P. M. (2019). Penelitian Hukum. *Jakarta: Kencana Prenada Media Group*.

Mavroidis, P. C. (2016). *The Regulation of International Trade: The WTO Agreements on Trade in Goods*. MIT Press.

Pinchis-Paulsen, M., Saggi, K., & Mavroidis, P. C. (2024). The National Security Exception at the WTO : Should It Just Be a Matter of When Members Can Avail of It? What About How? *World Trade Review*, *23*, 271–295. https://doi.org/10.1017/S1474745624000065

Priyono, F. J. (2013). Prinsip Most Favoured Nations dan Pengecualiannya dalam World Trade Organization (WTO). *Masalah-Masalah Hukum*, (2), 593–

600.

Voon, T. (2019). The Security Exception in WTO Law: Entering a New Era. *AJIL Unbound*, (ii), 45–50. https://doi.org/10.1017/aju.2019.3

WTO. (1994). *General Agreement on Tariffs and Trade 1994*. www.wto.org.

WTO. (1996). *Appellate Body report, Japan—Taxes on alcoholic beverages*. www.wto.org. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds8_e.htm

WTO. (2014). *Appellate Body reports, European Communities—Measures prohibiting the importation and marketing of seal products*. www.wto.org. https://www.wto.org/english/tratop_e/dispu_e/400_401abr_e.pdf

WTO. (2019). *Panel report, Russia—Measures concerning traffic in transit*. www.wto.org. https://www.wto.org/english/tratop_e/dispu_e/512r_e.pdf

WTO. (2022). *Panel reports, United States—Certain measures on steel and aluminium products*. www.wto.org.

WTO. (2025). *Dispute Settlement - DS640: US – Tariff Measures (Brazil)*. www.wto.org. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds640_e.htm