

The Implicit Standard of Exercising Judicial Economy and Its Possible Applications

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Abstract: The implicit standard of judicial economy indicates that a panel or the Appellate Body tends to exercise judicial economy regarding knotty issues, or exercise judicial economy to narrow the scope of verdicts for knotty cases. Currently, the main method of identifying knotty issues is to refer to the submissions or opinions of "mixed third parties". Another method is to refer to the consensus among dispute participants. Sometimes, a panel combines these two methods to identify knotty issues. Generally speaking, non-violation, agriculture, sanitary and phytosanitary (SPS) cases, as well as those involving national security issues are usually more politically sensitive and thus more likely to gain recognition as knotty cases, which may trigger the application of judicial economy. The implicit standard of judicial economy may be applied to *US — Steel and Aluminium Products*. In this case, the panel can examine the procedural issues under Article XXI of GATT 1994, and exercise judicial economy regarding its substantive issues.

Keywords: Judicial Economy, Implicit Standard, Sino-US Trade War, Section 232 Measures, Security Exceptions

I. INTRODUCTION

Judicial economy is a principle or doctrine that has been broadly used in international dispute settlement. The practical application of this principle by the panels and Appellate Body of the World Trade Organization (WTO) is its most frequent and typical example. Generally speaking, judicial economy represents the proposition that to save judicial resources and increase the efficiency of dispute settlement, WTO panels and the Appellate Body¹ do not need to rule on

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1 During the early years of the WTO, some experts, including former members of the Appellate Body, did not consider the Appellate Body authorized to exercise judicial economy. See e.g., James Bacchus, Appellators: The Quest for the Meaning of And/Or, *World Trade Review*, Vol. 4, No. 3, 2005, p. 507. This paper argues that the Appellate Body is entitled to exercise judicial economy. For more discussions on the Appellate Body's authority to exercise judicial economy, see Alberto Alvarez-Jimenez, The WTO Appellate Body's Exercise of Judicial Economy, *Journal of International Economic Law*, Vol. 12, No. 2, 2009, p. 395; Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press, 2013, p. 241.

every claim and issue raised. Instead, they should rule only on the claims and issues necessary to settle a dispute and leave the remaining claims or issues unexamined.²

The lack of specific stipulation in the covered agreements means that the application of judicial economy in WTO dispute settlement is uncertain. On one hand, it is easy to make the panels and/or the Appellate Body³ falsely exercise judicial economy and thus prevent a positive solution to disputes.⁴ On the other hand, it will also cause the panels and/or the Appellate Body to ignore the application of judicial economy, meaning that the dispute is not optimally settled because of “excessive adjudication”, and it further influences enforcement of adjudication. The question of whether judicial economy is properly exercised has an important impact on the efficacy of dispute settlement.

The proper application of judicial economy is inseparable from the guidance of its application standards. However, few scholars have currently studied these standards. The application standards of judicial economy that some researchers have proposed are insufficiently systematic to effectively guide the panels and the Appellate Body (if recovered in the future) to exercise judicial economy.⁵ This has somewhat affected the mature development of the jurisprudence of judicial economy.

It should be noted that this influence is broad and profound since WTO dispute settlement frequently applies judicial economy. According to statistics that scholars have calculated, panels exercised judicial economy in 41 percent

2 There is “judicial economy” in a broad and narrow sense. This definition of “judicial economy” is in a narrow sense. Unless otherwise specified, “judicial economy” discussed in this paper is in a narrow sense. For the definition of “judicial economy”, see also Liang Yi, The Exercise of Judicial Economy by the WTO Appellate Body, *Journal of WTO and China*, Vol. 8, No. 1, 2018, pp. 35-36; William J. Davey, Has the WTO Dispute Settlement Exceeded Its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and Its Use of Issue-avoidance Technique, In John H. Jackson et al. (Eds.), *Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transnational Economic Relations*, West Publishing, 2013, p. 352; *Supra* n. 1, Alberto Alvarez-Jimenez (2009), p. 393.

3 The Appellate Body is now paralyzed and thus unable to review appeals given its ongoing vacancies. See Appellate Body, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (Last Visited on January 20, 2022).

4 For cases not positively settled due to false judicial economy, see e.g., Report of the Appellate Body, *Australia — Measures Affecting Importation of Salmon (Australia — Salmon)*, WT/DS/18/AB/R, October 20, 1998, para. 223.

5 Jin Enhuang, On Principle of Judicial Economy in WTO Dispute Settlement Mechanism, Master's Thesis of Southwest University of Political Science and Law, March 2010, pp. 14-18; Guo Jiaxin, Judicial Economy in WTO Dispute Settlement Mechanism, Master's Thesis of East China University of Political Science and Law, April 2010, pp. 23-27.

of WTO cases between 1995 and 2009.⁶ As of October 31, 2019, at least 149 panel reports involved the application of judicial economy.⁷ Considering judicial economy's importance and extensive impact on WTO dispute settlement, it is necessary to pay attention to its appropriate application, i.e., it is necessary to study its application standards.

Some scholars may argue that the WTO dispute settlement mechanism has entered a "period of dormancy" due to the Appellate Body's paralysis, so it is unnecessary to study the application standards of judicial economy in this mechanism. However, this view is one-sided and untenable. First, although this mechanism's operations are not as active as before, WTO members still continue to resort to it to settle disputes, even after this paralysis occurred on December 11, 2019. When the Appellate Body was paralyzed between December 11, 2019 and December 1, 2021, the WTO dispute settlement mechanism accepted a total of 14 cases.⁸ Second, the WTO crisis has also triggered heated discussions on its reform (including the reform of this mechanism), and many reform proposals involve judicial economy. Third, it is necessary to prepare for resuming this mechanism. Fourth, even if this mechanism cannot resume its operations in the foreseeable future, judicial economy is still a principle with widespread applications in international dispute settlement, indicating that its study will also provide important insights for the operations of other international

6 Marc L. Busch and Krzysztof J. Pelc, *The Politics of Judicial Economy at the World Trade Organization*, *International Organization*, Vol. 64, Spring 2010, p. 257.

7 This data was calculated by the author according to information on the WTO website. It should be noted that there might be some slight deviations in this data due to the divergent understanding of the connotations and extensions of this principle. See also Liang Yi, *On the Principle of Judicial Economy in the Dispute Settlement of the WTO*, University of International Business and Economics Press, 2021, p. 7.

8 The 14 cases are as follows: (1) DS594: Korea (Republic of Korea) — *Measures Affecting Trade in Commercial Vessels (Second Complaint) (Japan)*; (2) DS595: European Union — *Safeguard Measures on Certain Steel Products*; (3) DS596: Brazil — *Measures Concerning the Importation of PET Film from Peru and Imported Products in General*; (4) DS597: United States — *Origin Marking Requirement*; (5) DS598: China — *Anti-dumping and Countervailing Duty Measures on Barley from Australia*; (6) DS599: Panama — *Measures Concerning the Importation of Certain Products from Costa Rica*; (7) DS600: European Union and Certain Member States — *Certain Measures Concerning Palm Oil and Oil Palm Crop-based Biofuels*; (8) DS601: China — *Anti-dumping Measures on Stainless Steel Products from Japan*; (9) DS602: China — *Anti-dumping and Countervailing Duty Measures on Wine from Australia*; (10) DS603: Australia — *Anti-Dumping and Countervailing Duty Measures on Certain Products from China*; (11) DS604: Russian Federation — *Certain Measures Concerning Domestic and Foreign Products and Services*; (12) DS605: Dominican Republic — *Antidumping Measures on Corrugated Steel Bars*; (13) DS606: European Union — *Provisional Anti-Dumping Duty on Mono-Ethylene Glycol from Saudi Arabia*; (14) DS607: European Union — *Measures Concerning the Importation of Certain Poultry Meat Preparations from Brazil*. See https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (Last Visited on January 20, 2022).

dispute settlement mechanisms. Therefore, even though the WTO dispute settlement mechanism is facing a crisis, it is still necessary to study judicial economy, especially its application standards.

Based on observations of WTO dispute settlement practice, this paper argues that the application standards of judicial economy can be roughly divided into the explicit application standard (the explicit standard) and the implicit application standard (the implicit standard) according to the measure of whether a panel or the Appellate Body has explicitly expressed the reason for exercising judicial economy. In other words, the implicit standard is in opposition to the explicit standard. The understanding of the implicit standard is inseparable from that of the explicit standard.

The explicit standard of exercising judicial economy is a measure that a panel or the Appellate Body uses and explicitly expresses to determine when to exercise judicial economy. For instance, the standard of purpose is an explicit standard requiring that the application of judicial economy shall not contravene the dispute settlement mechanism's aim of securing "a positive solution to a dispute" provided by Article 3.7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).⁹ In addition, according to the standard of purpose, when a panel or the Appellate Body exercises judicial economy, it usually expresses that the purpose for doing so is to settle a dispute.¹⁰ In this sense, the explicit standard of exercising judicial economy can be compared to human skin. Moreover, the "necessity" standard is also an explicit standard indicating that a panel or the Appellate Body only needs to examine the claims or issues necessary to settle disputes.¹¹ Under the "necessity" standard, a GATT panel, WTO panel, and the Appellate Body usually state that they do not consider it necessary to examine a claim/issue when exercising judicial economy. In short, clues can indicate whether a panel or the Appellate Body is applying the explicit standard in specific cases. When they apply the

⁹ Article 3.7 of the DSU provides: "... The aim of the dispute settlement mechanism is to secure a positive solution to a dispute..."

¹⁰ The standard of purpose is a standard adopted by WTO panels and the Appellate Body. GATT panels did not establish this standard. When a GATT panel exercised judicial economy with respect to a specific issue, it did not provide the reason for doing so; it simply referred to a decision it had previously made (i.e., the measures at issue were inconsistent with other GATT provisions) and deemed it unnecessary to examine this specific issue. See GATT Panel Report, *United States — Imports of Sugar from Nicaragua*, L/5607 – 31S/67, adopted March 13, 1984, para. 4.5.

¹¹ This is also the core meaning of judicial economy.

explicit standard, a panel and the Appellate Body often clearly state the specific explicit standard they are adopting.

Unlike the explicit standard, the implicit standard of exercising judicial economy is a measure that a panel or the Appellate Body uses but does not explicitly state to determine when to exercise judicial economy. A panel or the Appellate Body usually applies the implicit standard in the name of the explicit standard (e.g., the standard of purpose). In this sense, the implicit standard of exercising judicial economy can be compared to muscles beneath human skin. When adopting this standard, a panel or the Appellate Body tends to exercise judicial economy regarding knotty issues (including but not limited to political issues), or narrow the scope of verdicts for disputes involving an extensive amount of knotty issues (e.g., sanitary and phytosanitary (SPS), i.e., health and safety cases). Therefore, according to the implicit standard, judicial economy becomes a tool for avoiding sensitive or knotty issues,¹² reflecting the political savvy of a panel and the Appellate Body. Reflecting the name of this standard, when a panel or the Appellate Body applies the implicit standard of exercising judicial economy, it does not say that this decision's true intention is to avoid examining knotty issues. Instead, it usually provides a more normal-sounding reason, i.e., stating that there is no need to examine a certain issue to settle the dispute.

As mentioned earlier, judicial economy is an important principle that has been frequently applied during WTO dispute settlement. However, the lack of thorough academic research on this principle does not match its status. For instance, few studies have currently been conducted on the application standards of judicial economy,¹³ let alone its implicit standard.

In fact, there is a wide range of applications for the implicit standard of judicial economy.¹⁴ In the context of anti-globalization and the prevalence of

12 For convenience of discussion, "sensitive issues" and "knotty issues" are collectively referred to as "knotty issues" hereinafter. This is mainly because "knotty issues" are broader than "sensitive issues" in terms of connotation. Usually, "knotty issues" include "sensitive issues". For example, political issues are usually very sensitive and thus difficult to address in the WTO. By contrast, issues relating to technological development are not definitely sensitive, but they are also too knotty to address because it is difficult to strike a balance between protecting trade liberalization and encouraging technological development.

13 Some research does mention the application standards of judicial economy. See *supra* n. 5, Guo Jiaxin (2010), pp. 23-27; Jin Enhuang (2010), pp. 14-18. However, the application standards of judicial economy proposed by these research are unsystematic to effectively guide the panels and the Appellate Body (if it recovers in the future) to exercise judicial economy.

14 Due to space limitations, and considering that the implicit standard is more beneficial to the settlement of current and future disputes in the WTO, this paper only discusses the implicit standard and its possible application.

trade protectionism, international economic and trade disputes involve many complex and knotty issues (such as national security). The Sino-US economic and trade disputes occurring since the outbreak of the Sino-US trade war involves many of these issues. As an important judicial skill for avoiding knotty issues, judicial economy can be applied to these cases, and the implicit standard largely determines this principle's applicability. This paper also argues that panels¹⁵ may refer to the implicit standard to exercise judicial economy to address knotty issues or disputes to narrow the scope of verdicts and further improve their compliance rate.

To prove these arguments, this paper is divided into three sections that follow this introduction. Section II illustrates the implicit standard of exercising judicial economy based on WTO jurisprudence. Section III focuses on the example of *US — Steel and Aluminium Products* to discuss how the implicit standard may be applied to WTO dispute settlement. Section IV concludes this paper and offers suggestions to WTO Members on how they should address the issue of security exception as complainants.

II. THE IMPLICIT STANDARD OF EXERCISING JUDICIAL ECONOMY

As an application standard of judicial economy, the implicit standard will help a panel and the Appellate Body to determine when they should exercise judicial economy. As previously illustrated, the implicit standard indicates that a panel or the Appellate Body tends to exercise judicial economy regarding knotty issues, or tends to exercise judicial economy to narrow the scope of verdicts for disputes involving an extensive amount of knotty issues (knotty cases or disputes). Therefore, under the implicit standard, it is critical to identify the knotty issues or cases. Identifying these issues or cases is the only way to understand the theory of the implicit standard as well as to further estimate whether

15 In consideration of the paralysis of the Appellate Body, and the United States does not participate in Multi-party Interim Appeal Arbitration Arrangement (MPIA) reached by China, the EU and some other WTO members, this paper will not study the application of the implicit standard of judicial economy by the Appellate Body or the Appeal Arbitral Tribunal. Instead, this paper will focus on studying the application of this standard by WTO panels.

and how a panel should refer to this standard to exercise judicial economy. The following parts will analyze the implicit standard of judicial economy while focusing on the identification of knotty issues and cases.

A. The Identification of Knotty Issues

Before further discussion, it is essential to realize that international disputes are full of knotty problems, and it can even be said that all issues in international disputes are knotty. If an issue only has a certain level of complexity, it is not a knotty problem that will be discussed in this paper. The knotty issues discussed in this paper refer to issues whose complexity reaches a certain degree to which it is unsuitable for the WTO panels to examine and make decisions on them. Presently, the main method to identify knotty issues is to refer to the submissions or opinions of “mixed third parties”.¹⁶ Another method is to refer to the consensus among dispute participants.

1. Referring to the Submissions of the Mixed Third Parties

The main method that has been frequently used to identify knotty issues is to refer to “mixed submissions”¹⁷ made by third parties siding with both the complainant(s) and respondent. In WTO dispute settlements, most third parties side with the complainant, while some side with the respondent. In addition to these two kinds of third parties, some “impartial” third parties offer mixed submissions. They express support for both parties on the same issue or claim, express curiosity about how a panel or the Appellate Body rules on an issue, or request proper interpretation of WTO rules from a panel or the Appellate Body.¹⁸ A third party that offers mixed submissions can be referred to as a “mixed third party”.

Regarding an issue or a claim in a WTO dispute settlement case, if third parties deliver mixed submissions siding with both the complainant(s) and the respondent, a panel tends to stop reviewing the issue (i.e., exercises judicial economy with respect to it) on the premise of ensuring a positive solution to

16 Marc L. Busch and Krzysztof J. Pelc, Ruling Not to Rule: WTO Panels and the Use of Judicial Economy, In Tomer Broude et al. (Eds.), *The Politics of International Economic Law*, Cambridge University Press, 2011, pp. 263-264.

17 *Ibid.*

18 *Supra* n. 6, pp. 258-259.

the dispute. The reason for the panel's decision may be that these mixed submissions indicate Members' ambivalence on this issue.¹⁹ According to Busch and Pelc, "an increase in the number of third parties offering mixed submissions increases the odds that the panel invokes judicial economy by as much as 67%, in contrast to partisan submissions, which have no effect".²⁰ This data also partly verifies the existence of the implicit standard of exercising judicial economy in WTO dispute settlement practice.

In WTO dispute settlement, the panels' different ways of addressing the same issue in *Canada — Dairy* and *EC — Sugar* further verify the existence of the implicit standard of exercising judicial economy. In *Canada — Dairy*, the panel had to confront the question of whether the measure at issue was consistent with Articles 9.1 and 10.1 of the Agreement on Agriculture (AA). These two articles focus on different subsidy elements. The panel did not exercise judicial economy regarding issues under these two articles and examined them with the consideration that doing so could establish a sound foundation for appellate review (if there was one).²¹ Later, another case, i.e., *EC — Sugar*, also involved Articles 9.1 and 10.1 of the AA. Unlike the panel's decision in *Canada — Dairy*, the panel in *EC — Sugar* merely ruled on Article 9.1 and exercised judicial economy regarding Article 10.1.²² Comparing these two similar cases, the former lacked mixed submissions, whereas the latter case involved three third parties offering mixed submissions.²³ Therefore, mixed submissions by third parties may influence a panel's exercise of judicial economy.

Likewise, the panels' different ways of addressing the same issue in *Turkey — Textiles* and *Brazil — Tyres* also verified the existence of the implicit standard of exercising judicial economy. In both cases, the respondents invoked Article XXIV of GATT 1994 (Territorial Application - Frontier Traffic - Customs Unions and Free-trade Areas) to defend themselves. In *Turkey — Textiles*, the

¹⁹ *Ibid.*, p. 265.

²⁰ *Ibid.*, p. 272.

²¹ Reports of the Panel, *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R, May 17, 1999, para. 7.119.

²² Reports of the Panel, *European Communities — Export Subsidies on Sugar*, WT/DS265, WT/DS266, WT/DS283, October 15, 2004, para. 7.17.

²³ *Supra* n. 16, p. 263.

panel examined the respondent's defence under Article XXIV without exercising judicial economy regarding this defence. In contrast, the panel in *Brazil — Tyres* exercised judicial economy regarding the respondent's defence under Article XXIV. A comparison of these two cases found that the former case lacked mixed submissions, whereas the latter case involved three third parties, i.e., Australia, China, and Mexico, offering mixed submissions.²⁴ In *Brazil — Tyres*, Australia noted that there was limited Appellate Body jurisprudence on Article XXIV and thus the panel may be required to traverse new ground in dealing with the Parties' arguments on this article.²⁵ China only believed that the finding on Article XXIV that this panel would render would definitely have systematic implications on further disputes.²⁶ Mexico did not side with any party to the dispute on this issue.²⁷

As shown by the above data and dispute settlement practice, referring to the mixed submissions that the third parties offered is an important method for identifying knotty problems.

2. Referring to the Consensus of the Dispute Participants

The second method to identify knotty issues is to observe whether all of the dispute participants (including the complainants, respondents, and third parties) reach a consensus on an issue's sensitivity or knotty nature. If the dispute participants reach this consensus, this issue is likely a knotty one covered by the implicit standard, which will trigger a panel to exercise judicial economy

24 Some scholars may consider that the reason why the panels exercise judicial economy on the same issue differently in these two cases is not influenced by the implicit standard, but because the respondent of *Turkey — Textiles* only invoked Article XXIV of GATT 1994 for defence. In such circumstances, if the panel of *Turkey — Textiles* does not examine this defence (i.e., the panel exercises judicial economy with respect to this defence), it will not succeed in positively resolve the dispute due to false judicial economy. The author believes that this view is partial and does not reflect the full picture of the problem. Indeed, unlike the respondent of *Turkey — Textiles*, the respondent of *Brazil — Tyres* invoke not only Article XXIV but also Article XX (General Exceptions) of GATT 1994 for defence. Therefore, it seems reasonable that the panel does not need to examine the defence under Article XXIV if the findings and the decision on the defence under Article XX are enough to settle the dispute. However, it should be noted that it is also probably that the panel reverses the sequence of analysis of matters under these two provisions so that it can exercise judicial economy with regard to defence under Article XXIV because this defence is too knotty to examine.

25 Report of the Panel, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, June 12, 2007, paras. 5.20-5.21.

26 *Ibid.*, para. 5.32.

27 *Ibid.*, paras. 5.117-5.118.

regarding this issue or use other techniques to avoid reviewing it. A case in point is the issue on essential security interests under Article XXI (Security Exceptions) of GATT 1994.

Article XXI of GATT 1994 provides:

Nothing in this Agreement shall be construed

(a) to require any [Member] to furnish any information the disclosure of which it considers contrary to its **essential security interests**,²⁸ or

(b) to prevent any [Member] from taking any action which it considers necessary for the protection of its **essential security interests**²⁹

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any [Member] from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

In *Russia — Measures Concerning Traffic in Transit (Russia — Traffic in Transit)*, The complainant, respondent, and third Parties reached a consensus on the sensitivity of “essential security interests”, and the panel did not define “essential security interests”.

Among the participants to this dispute, Brazil, Canada, and the EU all directly pointed out in their submissions that issues related to “essential security interests” under Article XXI are sensitive. Brazil considered that a Member was not required to delineate its “essential security interests”, since this could be sensitive information in the sense of Article XXI(a).³⁰ Canada considered that the subject matter of Article XXI was of a particularly sensitive nature.³¹

²⁸ Emphasis added.

²⁹ *Ibid.*

³⁰ Report of the Panel, *Russia — Measures Concerning Traffic in Transit (Russia — Traffic in Transit)*, WT/DS512/R/Add.1, April 5, 2019, Annex D-2 Executive Summary of the Arguments of Brazil, para. 14.

³¹ *Ibid.*, Annex D-3 Executive Summary of the Arguments of Canada, para. 5.

The EU considered that information related to “essential security interests” was of a highly sensitive nature.³²

In this case, the panel did not define what constitutes “essential security interests”. Instead, it ruled that “it is left, in general, to every [WTO] Member to define what it considers to be its essential security interests”.³³ Some may argue that the panel refrained from defining “essential security interests” in Article XXI of GATT since the wording “it considers” indicates that the WTO Member that takes the measures at issue should determine these interests. However, this paper found that this opinion does not fully reflect this issue. For instance, in Article XXI(b), the term “it considers” vests some discretion in WTO Members. This discretion can be interpreted in three ways: 1) The term “it considers” qualifies only the word “necessary”, indicating that a WTO Member is free only to determine what measures are “necessary” to protect their essential security interests. In other words, a WTO Member only has the discretion to define these measures’ “necessity”.³⁴ 2) The term “it considers” vests in a WTO Member not only the discretion to determine the necessity of the measures at issue but also the discretion to determine what constitutes “essential security interests”.³⁵ 3) The term “it considers” shows that a WTO Member has the discretion to determine “necessity”, “essential security interests”, and the matters described in the three sub-paragraphs of Article XXI (b).^{36,37} In *Russia — Traffic in Transit*, the panel adopted the second interpretation and decided not to define “essential security interests”, which may be partly due to this issue’s sensitive nature. On the surface, this is the panel’s judgment based on the rules of treaty interpretation, but it may also be that the panel believes that the matter of “essential security interests” is a knotty issue that is inappropriate for it to investigate or make a decision.

If the third parties to a dispute clearly point out an issue’s sensitivity, the panel may not make a decision on it. In other words, the panel may exercise

32 *Ibid.*, Annex D-5 Executive Summary of the Arguments of the European Union, para. 13.

33 Report of the Panel, *Russia — Traffic in Transit*, WT/DS512/R, April 5, 2019, para. 7.131.

34 For example, the EU holds this view. See *supra* n. 33, para. 7.43.

35 Australia holds this view. See *supra* n. 33, paras. 7.36 & 7.49.

36 For example, Canada holds this view. See *supra* n. 33, para. 7.40.

37 See *supra* n. 33, para. 7.63.

judicial economy or judicial restraint regarding this issue.³⁸ However, panels do not often use this method of identifying knotty issues because the third parties seldom directly point out an issue's sensitivity.

B. The Identification of Knotty Cases

The implicit standard indicates that a panel tends to exercise judicial economy to narrow the scope of a verdict of a knotty dispute involving an extensive amount of knotty issues. The true reason why a panel exercises judicial economy in these circumstances is usually to reduce controversy regarding the verdict and further improve this verdict's implementation rate, rather than to save judicial resources.

Similar to the knotty issues discussed in this paper, if a case only has a certain level of complexity, it is not a knotty case that will be discussed. The knotty cases discussed refer to those whose complexity reaches the degree at which the panels consider it is inappropriate for them to examine and make decisions.

As some scholars have observed, non-violation, SPS, and agriculture cases are usually more politically sensitive and more likely regarded as knotty cases, resulting in panels' exercise of judicial economy.³⁹ In addition, cases involving national security issues are much more politically sensitive than the above-mentioned categories, and are usually identified as knotty cases.

For instance, *EC — Biotech* is a case involving issues of health and safety standards. In this case, the United States and Canada, later joined by Argentina, brought suit against Europe's *de facto* moratorium on approving applications to sell genetically modified foods. The case attracted seventeen third parties, many of whom offered both written and oral submissions. *EC — Biotech* was said to raise an "extraordinarily wide range of factual, scientific and legal issues",⁴⁰ many of which had few existing case laws to draw on for a ruling. Moreover, these cases are regarded as especially prone to controversy, since

38 In WTO dispute settlement, panels and the Appellate Body sometimes use judicial economy as a tool of judicial restraint. See *supra* n. 2, Liang Yi (2018), pp. 52-60.

39 *Supra* n. 6, p. 269.

40 Reports of the Panel, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 5.15.

these measures are, by definition, contingent on constantly changing scientific findings and evolving risk assessment. Given this situation, the panel considered this as a knotty case, and it exercised judicial economy regarding a large number of Canada and Argentina's claims.⁴¹ Similarly, *EC — Hormones* was also a case involving issues of health and safety standards. This case's panel exercised judicial economy with respect to many of its claims.⁴²

C. Summary

In the illustration above, a panel indeed referred to the implicit standard to exercise judicial economy in WTO dispute settlement. This standard indicates that a panel tends to exercise judicial economy regarding knotty issues, or exercises judicial economy to narrow the scope of verdicts for these cases. At present, the main method of identifying knotty issues is to refer to submissions or opinions of "mixed third parties".⁴³ Another method is to refer to the consensus among dispute participants. A panel sometimes combines these two methods to identify knotty issues. Generally speaking, non-violation, agriculture, SPS cases as well as cases involving national security issues are usually more politically sensitive, and it is more likely that they will be regarded as knotty cases, which may trigger the application of judicial economy. In these cases, a panel may identify the knotty issues to decide which issues or claims that merit applications of judicial economy.

III. POSSIBLE APPLICATIONS OF THE IMPLICIT STANDARD OF EXERCISING JUDICIAL ECONOMY

In recent years, anti-globalization has been spreading rapidly, and trade protectionism is continuing to increase. Sino-US economic and trade frictions have persisted, especially since the outbreak of the Sino-US trade war, and many of its disputes have been referred to the WTO for settlement. Is it possible to apply the implicit standard of judicial economy in these cases? The paper has a positive answer. *US — Steel and Aluminium Products (China)* is a case that can apply the implicit standard of judicial economy. The next section will use

41 *Ibid.*, paras. 7.3377, 7.3384, 7.3394, 7.3405, 7.3422 & 7.3429.

42 Reports of the Panel, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R, WT/DS48/R, August 18, 1997, para. 8.271.

43 *Supra* n. 16, pp. 263-264.

this case as an example to analyze the possible applications of this standard.

A. An Overview of *US — Steel and Aluminium Products*

In April 2017, the US Department of Commerce conducted an investigation under Section 232 of the Trade Expansion Act of 1962 (TEA 1962). This led to an increase in tariffs on steel and aluminum products imported from China and other WTO Members because the US considered that these products threatened its national security.⁴⁴ This unilateral action was condemned for violating WTO rules (e.g., Most Favoured Nation Treatment). However, the US argued that its tariff measures were justified according to the Security Exceptions (Article XXI of GATT 1994). Later, on April 5, 2018, China requested consultations with the US concerning duties that it had imposed on imported steel and aluminum products.⁴⁵ Upon China's request, several other WTO Members also filed consultation requests with the US concerning these measures.⁴⁶ A panel was established in the WTO to review these cases, i.e., *US — Steel and Aluminium Products*.⁴⁷ The question is whether the US could justify its measures

44 US Department of Commerce, Presidential Memorandum Prioritizes Commerce Steel Investigation, <https://www.commerce.gov/news/press-releases/2017/04/presidential-memorandum-prioritizes-commerce-steel-investigation> (Last Visited on May 28, 2019).

45 Request for Consultations by China, *United States — Certain Measures on Steel and Aluminum Products*, WT/DS544/1, April 9, 2018, p. 1.

46 The US also increased tariffs on steel and aluminum products from other WTO Members except for Canada, Mexico, the European Union, Australia, Korea (Republic of Korea), Argentina and Brazil. See *supra* n. 45, Request for Consultations by China (2018), p. 1. Turkey (DS564), Switzerland (DS556), Russia (DS554), Norway (DS552), Mexico (DS551), Canada (DS550), the European Union (DS548) and India (DS547) also requested consultations with the US. Later, the US reached solutions with Canada and Mexico on May 23 and 28, 2019, respectively, to eliminate the duties on steel and aluminium products from the two WTO Members. See Notification of a Mutually Agreed Solution – Addendum, *United States — Certain Measures on Steel and Aluminium Products*, WT/DS550/13, May 27, 2019; Notification of a mutually agreed solution – Addendum, *United States — Certain Measures on Steel and Aluminium Products*, WT/DS551/13, June 3, 2019.

47 See Constitution of the Panel established at the request of China – Note by the Secretariat, *United States — Certain Measures on Steel and Aluminium Products*, WT/DS544/9, January 28, 2019; Constitution of the Panel established at the request of the European Union – Note by the Secretariat, *United States — Certain Measures on Steel and Aluminium Products*, WT/DS548/15, January 28, 2019; Constitution of the Panel established at the request of Norway – Note by the Secretariat, *United States — Certain Measures on Steel and Aluminium Products*, WT/DS552/11, January 28, 2019; Constitution of the Panel established at the request of the Russian Federation – Note by the Secretariat, *United States — Certain Measures on Steel and Aluminium Products*, WT/DS554/18, January 28, 2019; Constitution of the Panel established at the request of Switzerland – Note by the Secretariat, *United States — Certain Measures on Steel and Aluminium Products*, WT/DS556/16, January 28, 2019; Constitution of the Panel Established at the request of Turkey – Note by the Secretariat, *United States — Certain Measures on Steel and Aluminium Products*, WT/DS564/16, January 28, 2019.

regarding Article XXI of GATT.⁴⁸ This issue attracted widespread attention from other WTO Members.

Later, upon the complainants' requests, the WTO established and composed a panel to examine these cases. However, as of January 1, 2022, the COVID-19 pandemic and crisis of the WTO dispute settlement mechanism due to the Appellate Body's paralysis have resulted in this panel not yet issuing a panel report.⁴⁹

This paper is not intended to analyze the panel report for *US — Steel and Aluminium Products*. Instead, by analyzing the legal issues of this case, this paper hopes to argue that the implicit standard of judicial economy can be applied in these knotty cases or issues to improve the efficiency of WTO dispute settlement and maximize the implementation of verdicts on the premise of justice.

B. The Possible Applications of the Implicit Standard of Judicial Economy to *US — Steel and Aluminium Products*

To answer the question of whether the implicit standard of judicial economy can be applied to *US — Steel and Aluminium Products*, it is necessary to first find out whether *US — Steel and Aluminium Products* is a knotty case, and whether this case has knotty issues.

Is *US — Steel and Aluminium Products* a knotty case? In this case, the US invokes Article XXI of GATT 1994 to justify the measures at issue by saying that the tariffs imposed pursuant to Section 232 are national security issues not susceptible to review or capable of resolution by WTO dispute settlement.⁵⁰ As demonstrated above, cases involving national security issues are usually more politically sensitive, and more likely deemed as knotty cases. Accordingly, *US — Steel and Aluminium Products* is likely regarded as a knotty case that will trigger the application of the implicit standard of judicial economy since it involves national security issues. Given this situation, the panel may consider exercising judicial economy to narrow the scope of this case's verdict.

48 Peng Yue, Security Exceptions in Sino-US Trade War, *Wuhan University Journal (Philosophy & Social Sciences)*, Vol. 72, No. 1 2019, pp. 154-167.

49 DS544: *United States — Certain Measures on Steel and Aluminium Products*, https://www.wto.org/english/trade_disputes/dispu_e/cases_e/ds544_e.htm (Last Visited on January 20, 2022).

50 See Communication from the United States, *United States — Certain Measures on Steel and Aluminium Products*, WT/DS544/2, April 17, 2018.

As for the specific issues on which the panel can apply the implicit standard to determine the application of judicial economy, it is necessary to conduct a detailed analysis of *US — Steel and Aluminium Products*.

Regarding the defence of the US, i.e., the respondent, under Article XXI of GATT 1994, assuming, *arguendo*, that the panel rules that the tariff measures the US took under Section 232 of TEA 1962 are safeguard measures, the panel must proceed to examine the US defence under Article XXI. This review will determine whether the measures at issue are justified. Otherwise, the panel may falsely exercise judicial economy by refraining from reviewing the US defence under Article XXI since it fails to achieve the aim of “secur[ing] a positive solution to dispute”.

Supposing that the panel rules that the tariff measures the US took under Section 232 of TEA 1962 are not safeguard measures, is it still necessary for the panel to examine the issues under Article XXI of GATT? Some may consider that the panel may exercise judicial economy in terms of the US defence under Article XXI of GATT because the complainant(s) lose(s) in the panel proceeding, and the panel will not change this result regardless of whether it reviews the US defence. However, this approach is very risky because it may threaten a positive solution to the dispute. When the Appellate Body operates normally, if the complainant appeals, and the Appellate Body reverses the panel’s legal findings and conclusions on safeguard measures, and further finds that the measures at issue constitute safeguard measures, the Appellate Body will have to examine the US defence under Article XXI of GATT. In these circumstances, however, the Appellate Body, which is entitled neither to conduct factual findings⁵¹ nor to remand⁵² the case to the panel, cannot review the issues under Article XXI of GATT because of the lack of relevant factual and legal findings in the panel report. The Appellate Body is paralyzed, so it currently cannot create a situation where it reverses the panel’s legal findings and conclusions. However, the Appellate Body is paralyzed but not dead, so it may

51 Article 17.6 of the DSU: “An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel”. According to this Article, the Appellate Body is authorized to review only legal issues and not factual issues.

52 Article 17.13 of the DSU: “The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel”. This Article does not authorize the Appellate Body to remand the case to the panel.

eventually recover. Therefore, the panel should not decline to perform its duties in the name of judicial economy. On the contrary, the Appellate Body's paralysis means that the panel cannot rely on it to review the issues that the panel has no time to review. In this circumstance, the panel should exercise judicial economy more prudently and thoroughly examine the respondent's defence.

Therefore, to avoid the above dilemma, the panel may still examine the US defence under Article XXI of GATT or at least examine the factual issues of the US defence thereunder even if it has ruled that the measures at issue are not safeguard measures.⁵³

The analysis above indicates that in any circumstance, it may be inevitable for the panel in *US — Steel and Aluminium Products* to examine the US defence under Article XXI of GATT 1994. Then, to what extent should the panel examine the US defence under Article XXI of GATT 1994? Specifically, it is unclear whether the panel needs to examine the following two issues: 1) Are the issues under Article XXI of GATT 1994 justifiable? 2) If the answer to the previous question is positive, are the measures at issue justified under Article XXI of GATT?

In *Russia — Traffic in Transit*, the panel acknowledged the justifiability of Article XXI. Unless something unexpected happens, the panel in *US — Steel and Aluminium Products* will follow the decision made by the panel in *Russia — Traffic in Transit*.⁵⁴ Then, the key issue faced by the panel in *US — Steel and Aluminium Products* is the second question, i.e., whether the measures at issue are justified under Article XXI of GATT. This question undoubtedly involves many issues that are so knotty that a panel will be reluctant to review them, and parties to the dispute do not actually hope the panel or the Appellate Body will review them. In fact, the panel can still settle the dispute without examining these issues under Article XXI of GATT.

In fact, these issues under Article XXI of GATT can be further classified into substantive issues and procedural issues. Both substantive requirements

⁵³ This is considered a kind of "judicial cooperation". See *supra* n. 6, p. 261.

⁵⁴ In WTO dispute settlement, panels are not obliged to *stare decisis*. However, a panel seldom deviates from the decisions of former cases, which is considered *de facto stare decisis*. See Raj Bhala, The Precedent Setters: *De Facto Stare Decisis* in WTO Adjudication (Part Two of a Trilogy), *Journal of Transnational Law & Policy*, Vol. 9, No. 1, 1999-2000, p. 48.

and procedural requirements should be met to successfully justify the measures at issue in accordance with Article XXI of GATT 1994. Substantive issues may include what “other emergency in international relations” refers to, what “essential security interests” are, and other aspects. In *Russia — Traffic in Transit*, several third parties explicitly pointed out the sensitive nature of the “essential security interests” issue, and thus, the panel ruled that this issue was considered as self-judging by WTO Members.⁵⁵ The panel in *US — Steel and Aluminium Products* could follow the example of this finding. Then, the key substantive issue that this panel would face is to determine what constitutes an “other emergency in international relations” or whether it exists between the complainants and respondent.

This substantive issue may be too sensitive for the panel to review. The author notes that the panel in *Russia — Traffic in Transit* did rule on the “other emergency in international relations” under Article XXI(b) (iii), recognizing the existence of this emergency between Russia and Ukraine.⁵⁶ It should also be noted that there is an important difference between *Russia — Traffic in Transit* and *US — Steel and Aluminium Products*: The UN General Assembly confirmed the emergency in the former case,⁵⁷ while no authoritative international organization confirmed the declared emergency in the latter case, and it lacked support from any other reliable evidence. This difference indicates that it is easier to determine the existence of an “other emergency in international relations” in *Russia — Traffic in Transit*, whereas this emergency in *US — Steel and Aluminium Products* is too knotty to undergo a review. In *Russia — Traffic in Transit*, the panel can rely on the evidence at hand to determine the existence of an “other emergency in international relations”. Unlike this case, it is inappropriate for the panel in *US — Steel and Aluminium Products* to determine whether there is an “other emergency in international relations” between the complainants and respondent. If third parties to the disputes provide mixed submissions on the issue of an “other emergency in international relations”, this may increase the odds that the panel will exercise judicial economy on this issue.

⁵⁵ *Supra* n. 33, para. 7.131.

⁵⁶ *Supra* n. 33, para. 7.126.

⁵⁷ UN General Assembly Resolution No. 71/205, December 19, 2016, Exhibit UKR-91.

Nevertheless, whether or not the panel examines and decides on an “other emergency in international relations”, it can still examine the procedural issues under Article XXI. In other words, the panel can make a decision on whether the respondent met the procedural requirement of Article XXI when it invokes this Article to justify the measures at issue. Compared with the substantive issues under Article XXI, procedural issues are less knotty to address. Both substantive requirements and procedural requirements of Article XXI should be met to successfully justify the measures at issue in accordance with this Article.

A procedural requirement to invoke Article XXI of GATT is the duty to inform. According to the Decision Concerning Article XXI of the General Agreement (1982 Decision) adopted by the GATT Contracting Parties in 1982, “[s]ubject to the exception in Article XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI”.⁵⁸ When invoking other exceptions under Article XXI, it appears that based on the intent of the drafters of the 1982 Decision, this case also involves the duty to inform.⁵⁹ However, the US did not perform its duty to notify other WTO Members about its measures.

In addition to the duty to inform, the duty to justify is another procedural requirement for invoking Article XXI. This obligates the acting WTO Member to “supply sufficient facts to exclude improper motivation (i.e., economic reasons) and to show that the objective standards under (i) – (iii) [of Article XXI (b)] are met”.⁶⁰ Except for insisting on excluding panels from examining security issues,⁶¹ the US does not seem to have provided any fact to exclude improper motivation or show that it has met the objective standards under (i) – (iii) of Article XXI(b).

These two procedural duties are not only requirements for invoking Article XXI of GATT but also for the principle of good faith.⁶² This is a general principle

58 See Decision Concerning Article XXI of the General Agreement, L/5426, 1982, p. 1. The full text of this document is available at the official website of the WTO, <https://docs.wto.org/gattdocs/q/GG/L5599/5426.PDF> (Last Visited on March 30, 2019).

59 Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, *Michigan Journal of International Law*, Vol. 12, No. 3, 1991, pp. 604-605.

60 *Ibid.*, p. 605.

61 *Supra* n. 50, p. 1.

62 *Supra* n. 59.

of law and a principle of general international law that is codified in the Vienna Convention on the Law of Treaties (VCLT). According to the VCLT, contracting parties to a treaty shall interpret and perform this treaty in good faith.⁶³ WTO panel reports have confirmed this view. In particular, in *Russia — Traffic in Transit*, the panel emphasized that Article XXI(b)(iii) shall be interpreted and applied in good faith.⁶⁴ Additionally, a panel and the Appellate Body are authorized to review whether a WTO Member exercises its right in good faith.⁶⁵

In *US — Steel and Aluminium Products*, the panel may restrict its scope of examination to the procedural issues under Article XXI of GATT. If the panel finds that the US does not meet the procedural requirement to invoke Article XXI, which proves that the US action is WTO-inconsistent, the panel can exercise judicial economy regarding substantive issues concerning Article XXI of GATT. Examining substantive issues will not contribute to finding a positive solution for the dispute. The panel can exercise judicial economy to tactfully avoid sensitive security issues without obstructing efforts to find this solution. Therefore, when the examination of procedural issues is sufficient to settle a dispute, the panel should exercise judicial economy when dealing with substantive issues under Article XXI of GATT.

IV. CONCLUSION

Judicial economy is a principle frequently applied in WTO dispute settlement.⁶⁶ WTO panels and the Appellate Body often exercise it to save judicial resources, avoid making decisions on knotty issues, and avoid making broad decisions on knotty cases. When exercising judicial economy on knotty issues, panels usually explain that decisions on other issues are sufficient to settle the dispute

⁶³ See Articles 31 & 26 of the VCLT.

⁶⁴ *Supra* n. 33, para. 7.132.

⁶⁵ Han Liyu, The Application of the Principle of Good Faith in the WTO Dispute Settlement, *Jurists Review*, No. 6, 2005, pp. 156-157; Reports of the Appellate Body, *United States — Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217AB/R, WT/DS234/AB/R, January 16, 2003, paras. 296-298. For more discussions on good faith in the WTO dispute settlement, see e.g., Andrew D. Mitchell, Good Faith in WTO Dispute Settlement, *Melbourne Journal of International Law*, Vol. 7, No. 2, 2006.

⁶⁶ According to some scholars, until 2009, 41% of panel reports involve the exercise of judicial economy. See *supra* n. 6, p. 257. As calculated by the author, until October 31, 2019, at least 149 circulated panel reports involve the exercise of judicial economy.

and that it is unnecessary to examine knotty issues for this purpose.⁶⁷ Judicial economy is usually exercised to save judicial resources and improve dispute settlement efficiency. However, the implicit reason for exercising judicial economy is related to political aspects. Therefore, panels and the Appellate Body have an implicit standard to exercise judicial economy. This standard indicates that a panel or the Appellate Body tends to exercise judicial economy when dealing with knotty issues, or to narrow the scope of verdicts of knotty cases. At present, the main method to identify knotty issues is to refer to the submissions or opinions of mixed third parties. Another method is to refer to a consensus among dispute participants. In other words, if the third parties deliver mixed submissions on an issue, directly point out its sensitivity, or the dispute participants reached a consensus on the sensitivity or knotty nature of a specific issue, this issue is typically a knotty one covered by this standard. Generally speaking, non-violation, agriculture, SPS cases as well as cases involving national security issues are usually more politically sensitive and more likely regarded as knotty, which may trigger applications of judicial economy. For these knotty cases, a panel may identify knotty issues to decide which issues or claims require applying judicial economy.

Article XXI of GATT, entitled “Security Exceptions”, involves many knotty issues covered by the implicit standard of exercising judicial economy. These include an “other emergency in international relations” and “essential security interests”. When a WTO Member invokes Article XXI of GATT to justify the measures at issue, the panel of that dispute should exercise judicial economy while considering these knotty issues (mainly substantive issues under Article XXI) on the premise of securing a positive solution to the dispute. In cases triggered by the Sino-US trade war, especially *US — Steel and Aluminium Products*, the panel must face issues on security exceptions covered by Article XXI of GATT. In fact, the dispute can be settled positively, even without examining substantive issues (e.g., whether an “other emergency in international relations” exists) under Article XXI. As a result, the panel can merely examine the procedural issues under Article XXI (if necessary) and exercise judicial

⁶⁷ See e.g., Report of the Panel, *Turkey — Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, May 31, 1999, paras. 9.55 & 10.1.

economy regarding substantive issues under Article XXI. The complainants in *US — Steel and Aluminium Products* can make diplomatic efforts to persuade or imply that third parties to the dispute should submit mixed submissions on the substantive issues under Article XXI or directly point out these issues' sensitivity. In response, the panel might exercise judicial economy to avoid these knotty issues.

Undoubtedly, panels, the Appellate Body, and Appeal Arbitrators should settle disputes independently and impartially. However, amidst a complex international situation, they must maximize their political wisdom to achieve a balance between a fair trial and improving their verdicts' implementation rate, and exercising judicial economy is an effective tool to help them with achieving this purpose.