

# THE GATT SECURITY EXCEPTION: SYSTEMIC SAFEGUARDS AGAINST ITS MISUSE

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*Distinct from the heavily litigated General Exceptions enshrined in Article XX of the General Agreement on Tariffs and Trade, 1947, the Security Exception under Article XXI presents a unique challenge to the WTO Dispute Settlement Mechanism. As this provision governs a sensitive aspect of State sovereignty, namely, the preservation of national security, there is little consensus on the form or extent of scrutiny that the WTO can place on a member invoking Article XXI. At the outset, arguments can be made to exclude any determination of the invocation of Article XXI from the WTO Panel review altogether. Even if the Panel's jurisdiction is accepted, Member States would have impenetrable discretion to invoke the exception, if the ambiguously drafted provision is stretched to its widest ambit. This leads to the opening up of dangerous avenues of misuse of the provision, threatening the integrity of the multilateral trading system. In this paper, I will seek to argue that the risk of misuse of this provision is overstated, because of, rather than in spite of, its ambiguity and political complexity, and will establish that the modern WTO regime provides strong systemic safeguards, both direct and indirect, against its misuse.*

## I. INTRODUCTION

The multilateral trading system, created by the enactment of the General Agreement on Tariffs and Trade, 1947 ('GATT') and the establishment of the World Trade Organization ('WTO') in 1994, has significantly contributed to the global pursuit of trade liberalisation and economic efficiency. In acceding to these international agreements, States have relinquished some of their sovereign rights in exchange for the benefits of trade liberalisation, owing to the operation of basic principles such as the Most-Favoured-Nation principle and the National Treatment principle, et al. However, the WTO Member States have enacted several exceptions to their obligations under the WTO covered agreements with respect to core areas of their sovereignty. Among the most sensitive

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and controversial of these exceptions is the Security Exception under Article XXI of the GATT,<sup>1</sup> which reads:

“Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
  - (i) relating to 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 contracting party from taking any action in pursuance of its obligations under the United Nations.”

Key aspects of national sovereignty are guarded closely by treaty negotiators, and Article XXI is an expression of the intent to keep national security matters as far away from multilateral scrutiny as possible. However, in an era when economic pressures form a potent tool for pursuing national security agendas, this aspect of national sovereignty is inextricably linked to the WTO framework. The question that follows is that to what extent or degree can a country render itself unaccountable, whilst derogating from its WTO obligations in the name of ‘national security’? Due to the open-ended wording of this provision, various nations and academics have debated the limits of this exception, with some even arguing that this provision is limitless.<sup>2</sup> This naturally leads to concerns that there exists a large scope for misuse of this provision, if States extend the open-ended exception to its widest ambit.<sup>3</sup> This paper will

<sup>1</sup> The General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S.194 (‘GATT’).

<sup>2</sup> Raj Bhala, *National Security and International Trade Law: What The GATT Says and What the United States Does*, 2 U. Pa. J. Int’l L. 263 (1997-98).

<sup>3</sup> GATT Analytical Index: Guide to GATT Law and Practice 603 (1995) (‘Analytical Index’).

attempt to engage with the provision beyond its wording alone, and will seek to assess the threat of misuse of the provision.

First, I will briefly discuss the background of the use of economic sanctions, as a political foreign policy tool, in Part II. In Part III, I will explore the arguments favouring and disfavouring the review by a GATT or WTO adjudicatory body, and will assess the viability of these interpretations. Further, in Part IV of the paper, I will explore how past and existing disputes involving Article XXI have been dealt with by the GATT/WTO, and subsequently resolved, with particular emphasis on the crucial role played by diplomacy and political pressure. In Part V, I analyse why diplomacy, and not WTO litigation, is the ideal route for resolving trade disputes stemming from national security disputes. Despite litigation not being a viable or efficacious method of dispute resolution in this context, I demonstrate in Part VI that there exist sufficient internal safeguards within the modern WTO regime which prevent abuse of this provision and, at the same time, afford Member States sufficient space to exercise their core sovereign rights. Part VII presents my concluding remarks.

## II. THE POWER AND RELEVANCE OF ECONOMIC SANCTIONS

Economic and trade sanctions are recognised as one of the most powerful and effective methods of exerting pressure in international relations.<sup>4</sup> Particularly, the use of trade embargo and economic boycott can effectively coerce the target country into capitulating to the demands of the enforcing country.<sup>5</sup> From the perspective of trade liberalisation, a sanction can affect the quantum of goods imported into, and exported from a country, and hence, sanctions are far more trade-distorting than the imposition of the customs duty.<sup>6</sup> Furthermore, in the case of a customs duty or tariff-based trade restriction, the effect of the measure falls on the price of the good, and it is the consumer who finally decides how effective the regulation would be in affecting the target State's economy.<sup>7</sup> On the other hand, in case of an embargo or a boycott, and any other non-price based instrument, there is an undesirable certainty in the manner in which the measure will affect the economy, as the producers of the target country are allowed to export fewer or no goods and thus, face immediate losses in sales due to this restriction.<sup>8</sup>

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<sup>4</sup> Marten Smeets, *Conflicting Goals: Economic Sanctions and the WTO*, 2 Global Dialogue 3 (2000).

<sup>5</sup> Sven Kuhn von Burgsdorff, *The Effectiveness of Economic Sanctions: The Case of Cuba*, 4 Intercultural Hum. Rts. L. Rev. 52 (2009).

<sup>6</sup> Smeets, *supra* note 4.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

It is clear that economic sanctions are the antitheses of the ultimate aims of the WTO and the GATT, i.e. furtherance of trade liberalisation, non-discrimination, predictability and multilateralism in international trade decision-making. Yet, in order to balance the pursuit of trade liberalisation and State sovereignty, Article XXI of the GATT allows for the imposition of sanctions by a Member State against any other Member State(s) in the name of national security. Such sanctions constitute clear and obvious barriers to trade liberalisation, and they nullify the non-discrimination principle by permitting selective imposition of barriers; destabilise predictability, as measures can be imposed with no prescribed period of notice or even without publication of such notice; and seemingly allow unilateral action without the need for consent among the WTO Member States.<sup>9</sup> This contradicts the four key objects of the WTO outlined above.

For these reasons, the drafting parties of the GATT recognised that the Security Exception under Article XXI must be invoked as selectively as possible, so as to minimise the possibility of abuse, while at the same time according enough scope for countries to deal with their legitimate security interests.<sup>10</sup> While drafting the original GATT Charter, one of the key negotiators from Netherlands stated:

“We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognised that there was a great danger [in] having too wide an exception [...] because that would permit anything under the sun. Therefore we thought it well to draft provisions which would take care of real security interests and, at the same time [...] to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance. [...] It is really a question of balance.”<sup>11</sup>

This intent of the negotiators should inform the interpretation of the Security Exception, and in deciding whether, and to what extent, a WTO Panel can adjudicate over a decision of a Member State to invoke Article XXI. It is important to note that Member States strongly value the presence of this exception in the GATT, for, not only the original signatories, but also each of

<sup>9</sup> Report of the Panel, *Decision Concerning Article XXI of the General Agreement*, L/5426, GATT B.I.S.D. (29th Supp.) (December 2, 1982) (“Decision concerning Article XXI”).

<sup>10</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, May 16, 1947 – October 6, 1947, *Corrigendum to the Verbatim Report of the Thirty-Third Meeting of Commission A*, U.N. Doc. E/PC/T/A/PV/33 (July 30, 1947) (Dr. Spekenbrink on behalf of the Netherlands).

<sup>11</sup> *Id.*

the twenty five subsequently acceding countries, had explicitly reaffirmed their right to use this exception at the time of agreeing to join the WTO.<sup>12</sup>

In the subsequent sections, I will attempt to lay down the arguments for and against review by a Panel into cases where a State invokes Article XXI as a defence against sanctions that it imposes against other Member States. The arguments presented attempt to maintain a balance between the competing interests of trade liberalisation and national autonomy.

### III. POSSIBILITY OF REVIEW BY A WTO ADJUDICATORY BODY

#### A. ARGUMENTS AGAINST PANEL REVIEW

##### 1. Literal interpretation: Usage of subjective terminology

According to the Vienna Convention on the Law of Treaties, which has been used to interpret the WTO covered agreements on numerous occasions in the past,<sup>13</sup> treaties are to be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>14</sup> Using this tool of interpretation, a strong argument can be made to the effect that a Member State invoking the exception is allowed to unilaterally decide what constitutes ‘necessary’ and ‘essential’ security interests. The provision states that “Nothing in this Agreement shall be construed to prevent any contracting part from taking any action which *it considers* necessary for the protection of its essential security interests”<sup>15</sup> (emphasis added). The usage of the phrase ‘it considers’, before the word ‘necessary’ suggests, by its plain and ordinary meaning, that the necessity of the circumstances surrounding the measure are to be determined by the country invoking the measure itself.<sup>16</sup>

In support of this interpretation, it is important to note that, in the other provisions of the GATT, the ‘necessity’ analysis is not couched in such subjective terms. For example, in Article XX of the GATT, countries are allowed to impose “measures necessary to protect public morals”<sup>17</sup> and “measures necessary to protect human, animal or plant life or health”<sup>18</sup>. There is a

<sup>12</sup> Roger Alford, *The Self-Judging WTO Security Exception*, 3 Utah L. Rev. 722 (2011).

<sup>13</sup> See e.g. Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, ¶17, WT/DS2/AB/R (April 29, 1996); Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, ¶ 10, WT/DS8/AB/R (October 4, 1996).

<sup>14</sup> Vienna Convention on the Law of Treaties, May 22, 1969, 1155 U.N.T.S. 340, Art. 31(1).

<sup>15</sup> The GATT, *supra* note 1, Art. XXI(b).

<sup>16</sup> Peter Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 Duke L. J. 1278.

<sup>17</sup> The GATT, *supra* note 1, Art. XX(a).

<sup>18</sup> *Id.*, Art. XX(b).

clear omission of the subjective ‘it considers’ terminology, and various Panels and Appellate Bodies of the WTO have proceeded to develop objective criteria for determining what would amount to a ‘necessary’ measure in this context.<sup>19</sup> Therefore, any Panel adjudicating a case involving Article XXI will need to develop some objective criteria to test the challenged measure, but it may not be justified in devising an objective definition of ‘necessity’, as the literal interpretation of the Article gives this autonomy to the States themselves.

## 2. Interpretation by the International Court of Justice

Despite the absence of a definitive ruling on Article XXI by GATT or WTO Panels, a highly persuasive *obiter dictum* was furnished by the International Court of Justice (‘ICJ’) in the 1986 dispute involving the United States of America (‘USA’) and Nicaragua.<sup>20</sup> In analysing a national security exception in the Treaty of Friendship, Commerce and Navigation,<sup>21</sup> the ICJ ruled that the exception in the Treaty mandated an objective standard of review in conducting the ‘necessity’ analysis, precisely for the reason that while the GATT under Article XXI used the phrase ‘it considers’, the Treaty in dispute did not do so.<sup>22</sup> This interpretation gives great deference to the semantics of the provisions, and is strongly posited against any WTO Panel engaging into a determinative analysis of ‘necessity’.

## 3. Analogy from the TRIPS Agreement

One school of thought remains apprehensive of the risk of having an exception entirely out of the purview of the WTO dispute settlement regime.<sup>23</sup> However, a closer look at similar provisions of another WTO covered agreement - the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>24</sup>- reveals that the WTO has, in the past, accorded full discretion to Member States, in relation to invoking an exception, similar to the Security Exception covered in Article XXI of the GATT. As per Article 31(b) of the TRIPS,<sup>25</sup> in case of a “national emergency or other circumstances of extreme urgency”, countries are allowed to use patents without the authori-

<sup>19</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶172, WT/DS135/AB/R (March 12, 2001); Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, ¶5.169, WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014).

<sup>20</sup> *Military and Paramilitary Activities (Nicaragua v. USA)*, 1986 ICJ 14, 22 (considering alleged violations of The Treaty of Friendship, Commerce, and Navigation (USA and Nicaragua), January 21, 1956, 367 U.N.T.S. 3).

<sup>21</sup> The Treaty of Friendship, Commerce, and Navigation (USA and Nicaragua), January 21, 1956, 367 U.N.T.S. 3.

<sup>22</sup> *Id.*

<sup>23</sup> Alford, *supra* note 12.

<sup>24</sup> The Agreement on Trade-Related Aspects of Intellectual Property, January 1, 1995, 1869 U.N.T.S. 299; 33 I.L.M. 1197 (1994).

<sup>25</sup> *Id.*

sation of the rights-holder, and without taking reasonable steps towards obtaining the permission of the rights-holder. The WTO Member States, in the 2001 Ministerial Conference, released a declaration on the TRIPS Agreement, stating that “each member has the right to determine what constitutes a national emergency or other circumstances of extreme emergency”.<sup>26</sup> While this provision leans towards the public health dimension, and not solely towards national security, the Declaration clearly shows that the WTO is not reluctant to enact self-defining provisions giving wide autonomy to Member States.

## B. INTERPRETATIONS FAVOURING PANEL REVIEW

### 1. Reasonable Nexus Test propounded by India

During the turbulent global political environment in the 1980s, Article XXI was thrown into the spotlight during the aforementioned political dispute between USA and Nicaragua, where apprehensions regarding the abuse of the security exception were brought to light.<sup>27</sup> Despite Nicaragua being a small economic and political power, the USA, in furtherance of its political interference in Central America, imposed sanctions on Nicaragua; and upon challenge, it sought to shield itself by citing a threat to its national security,<sup>28</sup> and furthermore claimed that the matter was outside the purview of the GATT.<sup>29</sup> However, many developing countries were sceptical of this act, as they feared that the national security exception could be abused by larger developed countries in order to coerce smaller developing countries with impunity.<sup>30</sup>

The Indian delegation proposed a course of action that could lend balance to the usage of Article XXI, preserving the discretionary autonomy, while ensuring a minimal level of accountability at the international level.<sup>31</sup> India suggested that while the self-judging nature of the terms ‘necessity’ and ‘essential security interests’ should be retained, the Member State invoking Article XXI must be prepared to demonstrate a reasonable nexus between its threatened security interests and the measure taken.<sup>32</sup> A variety of other developing countries including Cuba, Poland, Czechoslovakia, among others,

<sup>26</sup> World Trade Organisation Ministerial Conference, *Doha Declaration on the TRIPS Agreement and Public Health*, ¶5(c), WT/MIN(01)/DEC/2, (November 20, 2001).

<sup>27</sup> Analytical Index, *supra* note 3.

<sup>28</sup> *Id.*

<sup>29</sup> See Report of the Panel, *Minutes of Meeting Held in the Centre William Rappard on May 29, 1985*, ¶1–17, C/M/188 (June 28, 1985) (‘Minutes 1985’) (“It was not for GATT to approve or disapprove the judgment made by the USA as to what was necessary to protect its national security interests; GATT was a trade organisation, and had no competence to judge such matters.”).

<sup>30</sup> William R. Sprance, *The World Trade Organization and United States’ Sovereignty: The Political and Procedural Realities of the System*, 13 Am. U. Int’l L. Rev. 1231 (1998).

<sup>31</sup> Minutes 1985, *supra* note 29.

<sup>32</sup> *Id.*

agreed with this potential interpretation, as it would check arbitrary usage of the Security Exception.<sup>33</sup> While in the aforementioned dispute, the USA was able to use its economic and political power to escape accountability for its sanctions, the viability of this interpretation still holds good. The ‘reasonable nexus’ test ensures some measure of accountability, by asking for this minimal objective threshold to be satisfied, while still retaining a large portion of the subjective autonomy given to States, as they are free to determine whether a measure is required to protect their essential security interests.

## 2. Separation of the subjective and objective portions of Article XXI

In the quest to develop a basic threshold of permissible review, another interpretation surfaces with respect to Article XXI(b) of the GATT. One school of thought suggests that Article XXI cannot be used in a completely unbridled fashion, but concedes that the language of the provision, as embodied in the term ‘it considers’, cannot be abrogated. To solve this conundrum, one possible balanced interpretation is to confer complete discretion against the terms ‘necessity’ and ‘essential security interests’, but to make reviewable the sub-paragraphs of Article XXI(b), particularly Article XXI(b)(iii), which deals with measures ‘taken in the time of war or other emergency in international relations’.<sup>34</sup>

This interpretation seems to be a more balanced attempt at resolving the interpretative tussle, as it can help to ensure that an adequate threshold is maintained with respect to what events are classified as ‘war or other emergency in international relations’. However, this route is not without its own drawbacks. What objective criteria will be used to judge whether a situation amounts to ‘war’ or ‘emergency in international relations’? Does a ‘war’ have to be bilateral or plurilateral? What kind of ‘emergency in international relations’ can justify the use of economic sanctions? No country has suggested a plausible definition for this term, which could be possibly interpreted further.<sup>35</sup> Subjecting this phrase to objective determination by a Panel or Appellate Body might also lead the WTO to overstep its mandate of acting solely as a trade-regulator.<sup>36</sup> During the debates held by the GATT Council, countries had cautioned against the GATT going beyond its mandate, arguing that the effectiveness of the regime may be diluted if it becomes a forum for debating political issues, and that it was essential to ensure that trade issues are kept separate from the political factors upon which many foreign policy decisions are based.<sup>37</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> Lindsay, *supra* note 16.

<sup>35</sup> *Id.*

<sup>36</sup> Alford, *supra* note 12.

<sup>37</sup> Minutes 1985, *supra* note 29.



Another obstacle that a Panel may face in trying to apply either of the two proposed tests is the issue of fact-finding. Either while determining the nexus, or the nature of ‘war or other emergency’ in international relations, the Panel will have to enter into an objective assessment of the facts of the case, and it will have to gather information for this purpose, primarily from the parties themselves. However, Article XXI(a) states that “Nothing in this Agreement shall be construed to require any contracting party to furnish any information, the disclosure of which it considers contrary to its essential security interest”.<sup>38</sup> As a result of this provision, entrenched within the Security Exception itself, a country can effectively impinge upon the Panel’s ability to make an objective determination of the facts of the case by simply invoking its right to withhold information under Article XXI(a). A determination of the nexus between a country’s essential security interest, and the restrictive measure imposed, will require the Panel to understand clearly what the security interest is, and how it is being threatened. However, a country may, for legitimate reasons, choose to keep details about its national security hidden from the international eye. Even where the reasons are not so legitimate, countries may use Article XXI(a) as an impenetrable shield against accountability for its actions. The power of the non-obstante right under Article XXI(a) is further strengthened by the fact that, it too uses the ‘it considers’ terminology, and thus encompasses the self-defining nature of Article XXI(b) as well.

#### IV. RESOLUTION OF DISPUTES INVOLVING THE SECURITY EXCEPTION

The preceding discussion appears to demonstrate that Member States are granted exclusive authority to impose measures in situations where they themselves can judge the need for such measures, and that they possess the power to prevent a Panel from entering into a substantive, objective determination as to the consistency of their actions with provisions of the GATT. This presents a worrying prospect, as the risk of abuse and overuse of the Security Exception inevitably accompanies such unbridled power. The exception has been invoked several times in the past, and has been met with varying degrees of resistance. However, in none of these instances has a dispute been resolved through definitive adjudication by the GATT or WTO dispute settlement systems. Particularly, in the pre-WTO era, Member States displayed great reluctance to submit issues of their national security to an adjudicatory body within the GATT system.<sup>39</sup> As discussed below, history shows that the disputes that led to the invocation of Article XXI have been resolved not through adversarial litigation, but through diplomacy and multilateral political pressure.

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<sup>38</sup> The GATT, *supra* note 1, Art. XXI(a).

<sup>39</sup> Alford, *supra* note 12.

The first invocation of Article XXI took place in 1961 when Ghana justified its boycott against Portuguese goods using the Security Exception. These economic sanctions were imposed in protest against the oppressive colonialism undertaken by Portugal against African States, particularly Angola.<sup>40</sup> The situation persisted over several years, with Ghana even invoking Article XXXV of the GATT<sup>41</sup> to free itself of non-discrimination obligations against Portugal. No GATT Panel was formed, but the issue was finally resolved and trade relations assumed some level of normalcy only when the political circumstances i.e. colonialism ceased, rather than through litigation or interpretation of Article XXI itself.<sup>42</sup>

In the subsequent case of the European Economic Community ('EEC') imposing sanctions on Argentina in relation to the Falkland Islands dispute, the EEC claimed justification for its actions under Article XXI, highlighting that the United Nations Security Council ('UNSC') itself had condemned the occupation of the Falkland Islands by Argentina. Thus, it asserted that its sanctions were squarely justified by Article XXI(b)(iii), if not Article XXI(c).<sup>43</sup> On the other hand, several countries voiced their concerns over this incident setting a dangerous precedent, wherein the imbalance between the developed and developing world could be legitimised by a safeguard clause, which is more potent in the hands of the economically powerful, and yet is outside the purview of reasonable adjudication.<sup>44</sup> Though a GATT Panel was not formed in this case, the GATT Council released a decision concerning Article XXI of the GATT, which acknowledged that "trade measures taken for security reasons could constitute, in certain circumstances, an element of disruption and uncertainty for international trade."<sup>45</sup>

The aforementioned dispute between the USA and Nicaragua is an instance where a GATT dispute settlement authority nearly approached adjudicating on Article XXI. In the face of heated international criticism, the USA agreed to the formation of a GATT Panel, but limited the Panel's jurisdiction such that the Panel could not examine or judge the validity of, or motivation for, the invocation of Article XXI(b)(iii) by the USA.<sup>46</sup> Given the contrasting principles of respecting State sovereignty in matters of security, on the one hand, and the enormous trade-restrictive effects of sanctions on the other, the Panel stated that it was incumbent on "each contracting party, whenever it made use of its rights under Article XXI, to carefully weigh its security needs against the

<sup>40</sup> Analytical Index, *supra* note 3.

<sup>41</sup> Article XXXV deals with the non-application of the GATT between particular contracting parties - predominantly based on party consent, or the lack thereof.

<sup>42</sup> Alford, *supra* note 12.

<sup>43</sup> Analytical Index, *supra* note 3.

<sup>44</sup> Alford, *supra* note 12.

<sup>45</sup> Decision concerning Article XXI, *supra* note 9.

<sup>46</sup> Report of the Panel, *United States—Trade Measures Affecting Nicaragua*, ¶¶5.1–5.17, L/6053, GATT (October 13, 1986).

need to maintain stable trade relations.<sup>47</sup> However, the Panel acknowledged the need to propound a more “formal interpretation” of the provision by a Panel with the requisite authority in the future.<sup>48</sup> The USA blocked the adoption of the Panel Report, in spite of the Panel adhering to its limited mandate.<sup>49</sup> Eventually, the USA lifted the sanctions five years after they were imposed, because it felt that the conditions justifying the imposition of the sanction had ceased to exist,<sup>50</sup> and not because it acknowledged the concerns of many countries that there did not exist a legitimate situation of ‘war or other emergency’.

In a later instance, the EEC imposed sanctions against the Socialist Federal Republic of Yugoslavia (‘SFRY’). In this case, the EEC defended its measures under Article XXI.<sup>51</sup> A key point to note in this dispute is that the EEC, like the USA in the Nicaragua dispute, allowed the formation of a Panel. This represents recognition on the part of one of the most influential WTO members that a Panel *can* in fact exercise jurisdiction over claims relating to Article XXI, and that this provision is not entire self-judging. However, before the Panel could proceed with its inquiry, the SFRY was replaced by the Federal Republic of Yugoslavia (‘FRY’). Thus, the Panel was dissolved, citing that until there was clarity about whether the new FRY could validly succeed the SFRY in multilateral bodies as per public international laws of State succession, the issue pending before the Panel could not hold validity; and thereby, no enquiry into the invocation of Article XXI could be made.<sup>52</sup>

Later, with the onset of the WTO in 1994, only one major dispute has been debated amongst members. The dispute occurred with regard to the enactment of the Helms-Burton Act, 1996 by the USA, which placed strict sanctions on exporting certain products to Cuba, and extended these sanctions against any country who exported products to Cuba.<sup>53</sup> Many countries, once again questioned whether Cuba represented a legitimate security threat to a country as powerful as the USA.<sup>54</sup> Further, countries who were otherwise trading partners of the USA, took strong objection to this attempt to impose the USA’s law extraterritorially.<sup>55</sup> The European Communities (‘EC’), Canada and

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Lindsay, *supra* note 16.

<sup>50</sup> Analytical Index, *supra* note 3, 604.

<sup>51</sup> Communication from the European Communities, *Trade Measures Taken by the European Community against the Socialist Federal Republic of Yugoslavia*, 1, L/6948 (December 2, 1991).

<sup>52</sup> Minutes 1985, *supra* note 29.

<sup>53</sup> Klinton W. Alexander, *The Helms-Burton Act and the WTO Challenge: Making a Case for the United States under the GATT National Security Exception*, 11 FLA. J. INT’L L. 579-581 (1997).

<sup>54</sup> Lindsay, *supra* note 16.

<sup>55</sup> Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on October 16, 1996* ¶7, WT/DSB/M/24 (November 26, 1996) (‘Dispute Settlement Body’) (The USA would invite the EC to reflect on the fact that certain measures had been expressly justified by

Mexico requested the formation of a Panel.<sup>56</sup> By this time, the amended Panel procedure in the new Dispute Settlement Understanding of the WTO did not require the USA's consent, and a Panel was established.<sup>57</sup> The USA voiced its strong displeasure over submitting a political issue to a trade panel, but was unable to block the formation of the Panel.<sup>58</sup> However, diplomacy and political considerations prevailed yet again, as the USA and the EC both agreed that it would not be in their interests to continue the proceedings of the Dispute Settlement Body.<sup>59</sup> They agreed that bitter and politically sensitive litigation, at the early stages of the development of the WTO, could undermine its institutional credibility, and could destabilise the progress made in the Uruguay Rounds, which had culminated in the enactment of the Marrakesh Agreement.<sup>60</sup> The Panel proceedings were then suspended upon the request of the complainants.<sup>61</sup>

The most recent international instance where Article XXI has played a role is in the trade sanctions imposed by the USA and the European Union ('EU') against Russia, in protest against Russia's military involvement in Ukraine in recent years. If Russia approaches the WTO challenging the sanctions, Article XXI is likely to be invoked as a defence. If the matter were to reach the WTO Panel for adjudication, the plausible avenues of argumentation of the USA and the EC, could be Article XXI(b)(iii) (actions taken at a time of war or other emergency in international relations) or Article XXI(c) (actions taken pursuant to obligations under the United Nations Charter). However, with respect to Article XXI(c), it is important to note that a UNSC resolution regarding Ukraine does not exist. Perhaps, the only potential route to invoke Article XXI(c) would be by stating that Russia failed to observe a United Nations General Assembly Resolution which "calls upon all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and integrity of Ukraine, including any attempts to modify Ukraine's borders through threat or use of force or other unlawful means".<sup>62</sup> Furthermore, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations ('Friendly Relations Declaration') states in its Preamble, "the duty of States to refrain in their international relations from military, political,

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the USA under the GATT 1947, as measures taken in pursuit of its essential security interests); See also European Parliament Directorate-General for External Policies, *The Extraterritorial Effects of Legislations and Policies in the EU and US*, 21 (May, 2012).

<sup>56</sup> *Id.*

<sup>57</sup> Understanding on rules and procedures governing the settlement of disputes, Marrakesh Agreement establishing the World Trade Organization, April 15, 1994, Legal Instruments-Results of the Uruguay Round, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 ('DSU'), Art. 6 (a panel 'shall' be established if the complaining party so requests).

<sup>58</sup> Dispute Settlement Body, *supra* note 55.

<sup>59</sup> Communication from the Chairman of the Panel, *United States: The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/5 (April 25, 1997).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> G.A. Res. 68/262, U.N. Doc. A/RES/68/262 (March 27, 2014).

economic or any other form of coercion aimed against the political independence or territorial integrity of any State”;<sup>63</sup> and, furthermore, asserts in its substantive provisions that “armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.”<sup>64</sup>

The law relating to Article XXI(c), and as to whether express sanction of the United Nations is required, is still unclear, and has not received any interpretation from the GATT or WTO bodies. However, in this particular instance, the use of the General Assembly resolution and the Friendly Relations Declaration, to support the invocation of Article XXI(c), can be viewed as a valid countermeasure against Russia’s continued failure to observe the principles enshrined in these instruments.<sup>65</sup> On the other hand, the lack of a UNSC resolution could be cited as a factor that weakens the arguments in favour of the USA and the EU, particularly considering that all previous State practice in this matter suggests that trade sanctions are imposed only after Security Council authorisation.<sup>66</sup> Furthermore, Russia has not responded to these trade restrictions by backing down from its involvement in Ukraine, or by approaching the WTO; instead, it has engaged in its own economic warfare by implementing a ban on food imports from the EU.<sup>67</sup>

The common thread between each and every one of the trade sanctions outlined in this part, right from the beginning of the multilateral trading system to the present day, is that they have all been resolved through diplomacy and political pressure, and not through the application and interpretation of Article XXI of the GATT. This observation is crucial in any discussion of the Security Exception and the threat of its misuse or abuse. History shows that the most effective resolution of disputes, where the Security Exception is invoked, does not lie in adversarial litigation or by treating Article XXI as any other rule of positive law. In this context, I will proceed to discuss the advantages of resolving national security disputes through diplomacy, and will subsequently discuss how the modern WTO trading system provides significant natural safeguards against the abuse of the Security Exception of the GATT.

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<sup>63</sup> G.A. Res. 2625, U.N. Doc. A/RES/2625(XXV) (October 24, 1970) (“Friendly Relations Declaration”).

<sup>64</sup> *Id.*

<sup>65</sup> Dr. Diane A. Desierto, *The EU/US v. Russia Trade Wars: Revisiting GATT Article XXI and the International Law on Unilateral Economic Sanctions*, September 22, 2014, available at <http://www.ejiltalk.org/the-eu-us-v-russia-trade-wars-revisiting-gatt-article-xxi-and-the-international-law-on-unilateral-economic-sanctions-2/> (Last visited on February 28, 2016).

<sup>66</sup> *Id.*

<sup>67</sup> The Guardian, *Western Food Imports off the Menu as Russia Hits Back over Ukraine Sanctions*, August 7, 2014, available at <http://www.theguardian.com/world/2014/aug/07/russia-bans-western-food-imports-retaliation-ukraine-sanctions> (Last visited on February 29, 2016).

## V. EFFICACY OF SOLVING A SECURITY DISPUTE: DIPLOMACY OVER LITIGATION

### A. FLEXIBILITY IN SOLUTIONS

One key advantage of solving such politically-charged disputes through the diplomatic route is that diplomatic negotiations allow for a much wider set of solutions. Many options, which are available to the countries as sovereign negotiating entities, may not be available to a multilateral body like the WTO Dispute Settlement Body ('DSB'), whose mandate extends purely to trade issues, and is regulated strictly by the powers given to it under the Dispute Settlement Understanding ('DSU')<sup>68</sup> and the relevant WTO covered agreements. The restricted ambit of the DSB is demonstrated by the limited power granted to Panels and Appellate Bodies in Article 19 of the DSU to recommend methods to bring the disputed measure into conformity with the relevant agreement(s).<sup>69</sup> The primary mandate of the Panel or the Appellate Body is to make a finding of consistency or inconsistency of a measure with the relevant provisions of the WTO covered agreement involved, which in this case is Article XXI of the GATT.<sup>70</sup> The adjudicatory bodies do not have the power to implement an alternative, after finding the existence of an inconsistency. At the most, after several rounds of litigation, the DSB can recommend countermeasures in the form of suspension of concessions, under Article 22 of the DSU,<sup>71</sup> for non-implementation of a ruling. However, even if this stage is reached, one can question the efficacy of countermeasures in a situation where there is a claim of threat to national security. Countermeasures do not target the root of the problem - they do not facilitate the cessation of the national security threat; and in many cases, they do not possess the potential to influence the state imposing sanctions, to back down, owing to imbalances in the bargaining powers of States. For example, in the situations discussed above, relating to the USA's sanctions on Nicaragua or Cuba, any authority given to the complaining States, to suspend their concessions as retaliation, would not have had significant effect on the USA, as its dependency on concessions and trade from these countries is very minimal. On the other hand, the continuing sanctions against the smaller, developing nations can have a crippling effect on their economies. In a situation between two powerful countries on opposite sides, countries may engage in a race-to-the-bottom by continuously increasing the sanctions they impose on each other as a means of constant retaliation, rather than addressing the root national security concern. This is visible in the ongoing exchange of sanctions between the USA and the EC on one side, and Russia on the other

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<sup>68</sup> DSU, *supra* note 57.

<sup>69</sup> *Id.*, Art. 19.

<sup>70</sup> *Id.*, Art. 11.

<sup>71</sup> *Id.*, Art. 22.

side.<sup>72</sup> It is, therefore, tough to foresee countermeasures as the most effective solution to inherently political and complex national security concerns.

Article 19.1 of the DSU states that a Panel or Appellate Body may suggest ways in which the Member States concerned can bring the measure into conformity with WTO obligations.<sup>73</sup> However, in a dispute involving a matter of political import and dealing with national security, can a WTO body propose solutions outside the trade regime? The adjudicatory bodies within the DSB can hardly propose a withdrawal of troops from the Ukraine, or the cessation of USA government aid to Nicaraguan rebels, which are the root causes of the respective trade disputes. This would certainly be an overreach of the WTO's mandate, for the Member States had strictly sought to exclude all matters of political import from the WTO,<sup>74</sup> and to grant specific powers in this regard to the United Nations (UN) and the ICJ.<sup>75</sup>

In contrast to the restricted powers of the WTO, when it comes to resolving the underlying dispute and the trade sanctions imposed under Article XXI, diplomatic negotiations have virtually limitless boundaries, wherein the concerned States can resolve their issues through mutually agreed solutions. These solutions may encompass not only the removal of the impugned trade barrier, but also any sphere of international relations over which States exercise their sovereignty. Given the complexity of many of the disputes outlined above, and that many political disputes may arise in the future, the myriad solutions offered by diplomatic negotiations would certainly serve as a more effective method of resolving situations where Article XXI stands otherwise invoked.

## B. PROCEDURAL HINDRANCES IN WTO LITIGATION

One of the key features of the WTO DSU is that it prescribes specified time limits within which the DSB, in conjunction with the Panels and Appellate Body, has to come out with a decision.<sup>76</sup> This framework is beneficial when it comes to ordinary trade disputes; for instance, economic loss from a

<sup>72</sup> Friendly Relations Declaration, *supra* note 63.

<sup>73</sup> DSU, *supra* note 57, Art. 19.

<sup>74</sup> Minutes 1985, *supra* note 29 (Statements made by delegations were as follows - European Community: "GATT had never had the role of settling disputes essentially linked to security. Such disputes had only rarely, and for good reason, been examined in the context of the General Agreement, which had neither the authority nor the competence to settle matters of this type [...]"; the USA: "This was wise [...] since no country could participate in GATT if in doing so it gave up the possibility of using any measures, other than military, to protect its security interests. [...] [F]orcing the GATT [...] to play a role for which it was never intended, could seriously undermine its utility, benefit and promise for all contracting parties"; Japan: "the interjection of political elements into GATT activities would not facilitate the carrying out of its entrusted tasks" and that "one of the most important contributing factors for the effective and efficient functioning of the GATT was that contracting parties had developed a working habit of dealing with trade affairs in a businesslike manner.").

<sup>75</sup> Alford, *supra* note 12.

<sup>76</sup> DSU, *supra* note 57, Arts. 4, 12, 16, 17,20.

non-conforming measure is minimised by ensuring that litigation is completed in a time-bound manner. However, the average period taken to decide a trade dispute under the DSU, can last for around 15 months.<sup>77</sup> While this period is seen as a sufficient balance between a fair investigation and minimisation of economic loss, the stakes in a dispute involving trade embargo under Article XXI are far more diverse than merely economic loss. First, the situations where Article XXI is invoked, can relate to war, serious emergencies in international relations,<sup>78</sup> such as trading in nuclear (fissionable) materials,<sup>79</sup> or trafficking in arms, ammunition and other goods for supply to a military establishment.<sup>80</sup> These situations are of extreme significance, and can require immediate efforts towards resolving the international emergency, such as halting the trade of fissionable materials, or halting the supply of arms trafficking. Second, it is understandable that a trade embargo affects not only the economic rights of citizens in the affected country, but also their social, political and cultural rights, as it has a crippling effect on the economy as a whole.<sup>81</sup> Given these two crucial factors, having an investigation and adjudication period of over a year, for the sake of observing rigid procedural rules, can exacerbate the ill-effects of the prevailing scenario. While the time limits introduced in the DSU go a long way in correcting the many deficiencies and delays in the erstwhile GATT dispute settlement mechanism, the DSB still does not serve as an efficacious system for the resolution of disputes, when not just economic rights, but also the very conditions of peace and security of States, are threatened.

It is in this context that diplomatic negotiations serve as a potentially superior alternative. Sovereign States, motivated by the seriousness of the situation, are free to determine the urgency with which they attempt to resolve war or other emergencies in international relations, as set out in Article XXI(b), for they control their own diplomatic efforts. The process of institutionalised litigation *may* serve as a procedural hindrance in resolving a pressing international issue. This issue of timing, coupled with the limited relief that a WTO body can offer, makes DSB litigation an unappealing and inefficient method of resolving international crises. At the same time, it is acknowledged that a diplomatic negotiation may sometimes hit roadblocks of its own, and may lead to prolonged situations of international conflict, as is evident in the current standoff between the West and Russia, over Ukraine.<sup>82</sup> However, even in these

<sup>77</sup> Murasoli Maran, Commerce & Industry Minister, Speech at the Round Table Conference on WTO Dispute Settlement Mechanism, organised jointly by the Indian Institute of Foreign Trade and the Bangalore Law School in New Delhi (February 22, 2001); See also DSU, *supra* note 57, Art. 19.

<sup>78</sup> The GATT, *supra* note 1, Art. XXI(b)(iii).

<sup>79</sup> *Id.*, Art. XXI(b)(i).

<sup>80</sup> *Id.*, Art. XXI(b)(ii).

<sup>81</sup> Desierto, *supra* note 65.

<sup>82</sup> The Guardian, *supra* note 67; The International Business Times, *Russia UN vetoes on Syria, Ukraine Undermining the United Nations Security Council, US Warns*, September 23, 2015, available at <http://www.ibtimes.com/russia-un-vetoes-syria-ukraine-undermining-united-nations-security-council-us-warns-2110080> (Last visited on December 1, 2016).



situations, if countries are in such a serious state of political turbulence, it is unlikely that they will submit their dispute to a trade body in any case.<sup>83</sup>

### C. POTENTIAL REPERCUSSIONS OF AN OBJECTIVE INTERPRETATIVE TEST FOR ARTICLE XXI

If a WTO Panel or Appellate Body enters into a definitive determination of the boundaries of Article XXI, it will have to delineate an objective test or threshold using which it can assess the conformity of a measure with the provision. This potential move would harbour several risks. National security is, by its very nature, elastic and contextual.<sup>84</sup> There are concerns that the flexibility of this concept might be lost if a Panel or Appellate Body attaches objective criteria to the terms ‘war’, ‘other emergencies in international relations’ or ‘essential security interests’.<sup>85</sup> While the bodies may refrain from developing very strict criteria, and decide to adjudicate disputes on a case-to-case basis, it may lead to a loss in predictability and consistency in the trading system, contrary to one of the aims of the DSB as set out in Article 3.2 of the DSU.<sup>86</sup>

A Panel determination in this regard can lead to an unanticipated loss of sovereignty for States, even though the mandate of the WTO is to encourage trade liberalisation, without curtailing a member State’s right to regulate its trading and security interests.<sup>87</sup> The DSU itself recognises this, through Article 3.5, which states that “All solutions to matters formally raised [...] under the dispute settlement provisions [...] shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements”.<sup>88</sup>

## VI. NATURAL SAFEGUARDS IN THE WTO SYSTEM AGAINST ARTICLE XXI ABUSE

Ostensibly, Article XXI appears to give broad and almost unrestricted powers to Member States to impose trade restrictions. However, there exist sufficient safeguards and mechanisms within the WTO regime to prevent abuse of this Article, while at the same time, preserving the strength and relevance of the WTO as a crucial component of the international law regime.

<sup>83</sup> The apprehensions raised by many States in this regard are discussed in Part IV.

<sup>84</sup> Lindsay, *supra* note 16, 1297.

<sup>85</sup> Rachit Ranjan, *National Security and Economic Diplomacy: Is There Any Room for Trade Litigation?*, October 5, 2014, available at <http://thebricspost.com/national-security-and-economic-diplomacy-is-there-any-room-for-trade-litigation/> (Last visited on March 2, 2016); See also Lindsay, *supra* note 16, 1297.

<sup>86</sup> DSU, *supra* note 57, Art. 3.2 (“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”).

<sup>87</sup> Ranjan, *supra* note 85.

<sup>88</sup> DSU, *supra* note 57, Art. 3.5.

The importance and efficiency of diplomatic and amicable resolution of disputes has been outlined in the previous part, although unequal bargaining power between States can, at times, skew the outcome in favour of one side. In this context, it is pertinent to note that the WTO (through its member States) does not see itself as a rigid or a rules-based litigation forum alone. In fact, greater importance is given to consultations, conciliations, mediation and other alternate and mutually acceptable forms of dispute settlements. Article 3.7 of the DSU<sup>89</sup> states: “The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred”. In furtherance of this, Articles 4 and 5 of the DSU prescribe the methodology to undertake resolution of disputes through Consultations, Good Offices, Conciliation and Mediation, which are to be attempted *before* the formation of a Panel. Further, the opportunity to resolve a dispute amicably does not end when a Panel is composed. Article 11 of the DSU encourages mutual settlement by prescribing that “Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution”,<sup>90</sup> and it is only when the parties have failed to develop a mutually satisfactory solution, that the panel will submit its finding to the DSB.<sup>91</sup> In the context of Article XXI disputes, it is clear that the WTO does not envisage itself to be a final arbiter of any trade-related dispute. Instead, it affords ample scope, for the parties to approach the DSB for the settlement of a dispute, in an amicable manner, whereby all trade and non-trade related concerns (particularly those of national security) can be taken into account.

Furthermore, the DSU, as compared to the pre-WTO system of dispute resolution under the GATT, has been strengthened significantly. The new focus on multilateralism has led to the evolution of a system, wherein a single country cannot block the adoption of a Panel Report.<sup>92</sup> Thus, the binding value of a Panel’s determinations is far greater in the modern regime. This is in contrast with, say, the situation in the dispute between the USA and Nicaragua discussed earlier, where the USA was able to unilaterally block the adoption of the Panel Report, despite already restricting the Panel’s mandate. This new system may, on the face of it, suggest that Article XXI disputes are resolved more easily through the DSB litigation mechanism, rather than uncertain diplomatic negotiations, as it can offer a solution that is both bipartisan and binding.<sup>93</sup> On the other hand, the Member States’ desires and incentives to not subject Article XXI to definitive interpretation, and to leave its wording open and ambiguous, still remain.<sup>94</sup> Thus, the threat of WTO litigation *itself* can be used as

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<sup>89</sup> *Id.*, Art. 3.7.

<sup>90</sup> *Id.*, Art. 11.

<sup>91</sup> *Id.*, Art. 12.7.

<sup>92</sup> *Id.*, Arts. 16.4, 17.14.

<sup>93</sup> Lindsay, *supra* note 16, 1303.

<sup>94</sup> *Id.*

a bargaining tool during negotiations, particularly in situations where countries are perceived to be abusing Article XXI rights against countries with less economic power,<sup>95</sup> as in the USA-Nicaragua situation. Thus, Member States, in the interest of retaining the flexibility offered by Article XXI for genuine security concerns, may be spurred to prevent a dispute from reaching the Panel or Appellate Body, as once this process is set in motion by the complaining state, it is very difficult to escape the findings of the DSB, without losing credibility in the international sphere.

Beyond the DSU, the Marrakesh Agreement and other covered agreements have adequate scope to allow members to resolve international crises, without even invoking Article XXI, or without being exposed to the threat of unfair use of Article XXI. Article XXXV of the GATT<sup>96</sup> and Article XIII of the Marrakesh Agreement<sup>97</sup> permit members to exclude the application of the covered agreements to specific Member States. This provision has been invoked in the past during crises in international relations. For example, in the dispute between Ghana and Portugal discussed above, the eventual course of action employed by Ghana was not to invoke Article XXI of the GATT, but to opt out of its obligations towards Portugal altogether, *via* Article XXXV, in retaliation for Portugal's colonial and imperialistic activities around the world.<sup>98</sup> Nigeria and India also followed Ghana's lead, and Portugal, in turn, invoked the opt-out clause against all these countries.<sup>99</sup> Admittedly, this course of action is an extreme, perhaps a last resort, measure but it nevertheless presents an alternative to States that mistrust the wide and ambiguous scope of powers granted

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<sup>95</sup> *Id.*

<sup>96</sup> The General Agreement on Tariffs and Trade, *supra* note 1, Art. XXXV reads:

“Non-application of the Agreement between Particular Contracting Parties -

1. This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if:
  - (a) the two *contracting parties* have not entered into tariff negotiations with each other, and
  - (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.
2. The contracting parties may review the operation of this Article in particular cases at the request of any contracting party and make appropriate recommendations.”

<sup>97</sup> Marrakesh Agreement establishing the World Trade Organization, April 15, 1994, Legal Instruments- Results of the Uruguay Round, 1869 U.N.T.S. 401, 33 I.L.M. 1226, Art. XIII-  
“Non-Application of Multilateral Trade Agreements between Particular Members

1. This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application.
2. Paragraph 1 may be invoked between original Members of the WTO which were contracting parties to GATT 1947 only where Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force for them of this Agreement.”

<sup>98</sup> Alford, *supra* note 12.

<sup>99</sup> Report of the Panel, *Accession of Portugal - Invocation of Article XXXV*, L/1764 GATT (May 10, 1962).

to other members under Article XXI, and that also do not wish to make a trade panel the final arbiter of a complex political dispute.

Furthermore, parties are also free to dispense with the ambiguity of Article XXI by entering into preferential trading agreements with their regional or political trading blocs - as authorised by Article XXIV of the GATT - wherein they can incorporate a more objectively defined security exception.<sup>100</sup> Such definitional exercises can account for the unique political considerations of a specific trading bloc, and may be easier to undertake on a smaller scale, as compared to a multilateral institution as large and diverse as the WTO.

## VII. CONCLUSION

Due to its ambiguity and uncertainty in application, Article XXI of the GATT remains, to this day, one of the more controversial provisions, in an otherwise successful multilateral framework of trade law. While it appears as though no invocation of the Security Exception can be challenged before the WTO DSB, valid arguments exist for bringing the provision at least partially under scrutiny by a Panel or Appellate Body. At the same time, the experience with past and present GATT and WTO disputes, which involve the Security Exception, suggests that these situations have been resolved through diplomacy, political pressure or other facets of public international law, rather than through litigation before the WTO. This demonstrates that the issue of national security stretches far beyond the trading system, and forms a core aspect of a State's sovereignty and international relations as well.

For this reason, it does not appear prudent to resolve a dispute concerning the Security Exception, through litigating and interpreting Article XXI, even if the invocation seems *prima facie* arbitrary. This could lead to controversial infringements upon State sovereignty, and could engender incomplete resolutions of genuine security concerns of States, as well as a destabilisation of the carefully constructed international trading system. With litigation proving to be a problematic method of resolution, concerns over the abuse of Article XXI are very real, and have often materialised in the past. However, I conclude that due to a significant amount of natural safeguards imbricate in the WTO regime as it exists today, the strength of the multilateral trading system can serve predominantly as an effective check against abuse of this controversial provision of the GATT.

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<sup>100</sup> Consumer Unity & Trust Society (CUTS) International, ABC of Preferential Trade Agreements (2009), available at [http://www.cuts-citee.org/pdf/monograph09-abc\\_of\\_preferential\\_trade\\_agreements.pdf](http://www.cuts-citee.org/pdf/monograph09-abc_of_preferential_trade_agreements.pdf) (Last visited on September 25, 2016).