Note

THE AMBIGUITY OF GATT ARTICLE XXI: SUBTLE SUCCESS OR RAMPANT FAILURE?

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INTRODUCTION

International trade regulation has grown increasingly prominent since the World Trade Organization (WTO) was created in 1994.[1] The WTO incorporated by reference the General Agreement on Tariffs and Trade (GATT), which had been in use since 1947.[2] Article XXI of GATT 1994 permits WTO members to breach their GATT obligations for national security reasons.[3] The broadest and most

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1. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994).

2. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1154, para. 1(a) (1994). The Uruguay Round added several "understandings" to the GATT 1947, General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT], which has been amended several times since 1947. The GATT governs trade relations between its signatories, including, *inter alia*, permissible uses of tariffs and quantitative restrictions. Although the GATT includes specific trade concessions on tariff levels, it also includes more generalized obligations not to discriminate against foreign trade in goods. GATT art. I (containing Most Favored Nation obligations); *id.* art. III (listing national treatment duties).

3. *Id.* art. XXI. Article XXI provides that

> Nothing in [the GATT] shall be construed
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> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
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> (b) to prevent any contracting party from taking action which it considers necessary for the protection of its essential security interests
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> (i) relating to fissionable materials or the materials from which they are derived;
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> (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;
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> (iii) taken in time of war or other emergency in international relations; or

controversial of the exceptions included in Article XXI states that the GATT will not prevent a WTO member "from taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations."[4] This exception confers a potentially broad grant of authority, because the GATT does not define critical terms such as "considers necessary," "essential security interests," "time of war," and "emergency in international relations." Consequently, the scope of the "war" and "emergency" exception in Article XXI is not readily discernible. Similarly, the fact that a WTO member may take any action to protect "essential" interests that "it considers necessary" leaves open the question of whether the use of Article XXI is subject to review by a WTO panel.

Although some scholars suggest that the invocation of Article XXI is reviewable under the dispute settlement mechanisms of GATT Article XXIII,[5] the question of whether a WTO (or previously a GATT) panel has jurisdiction over this exception has never been

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

Before the World Trade Organization was formed, signatories to GATT 1947 were known as "contracting parties."

4. *Id.* art. XXI(b). Although subparagraph (b) also permits action to protect "essential security interests" relating to fissionable materials, traffic in arms, and the supply of a military establishment, the most widespread and controversial use of Article XXI stems from its invocation relating to war and international emergencies. Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM. J. INT'L L. 424, 431 (1999).

5. *See, e.g.*, Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT'L L. 413, 420 (2001) (arguing that the WTO Dispute Settlement Body should develop standards for reviewing use of the security exception); Antonio F. Perez, *To Judge Between the Nations: Post Cold War Transformations in National Security and Separation of Powers—Beating Nuclear Swords into Plowshares in an Imperfectly Competitive World*, 20 HASTINGS INT'L & COMP. L. REV. 331, 408–10 (1997) (contending that because the WTO dispute settlement bodies have a more adjudicative role than the previous arbitration system, they have more power to interpret substantive law, including the security exception); Schloemann & Ohlhoff, *supra* note 4, at 426–27 (asserting that the WTO dispute settlement bodies have "authority to interpret GATT law," including Article XXI). GATT Article XXIII, along with the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), permit a WTO member to petition for a WTO panel to decide if the member's benefits under the GATT have been nullified or impaired by the actions of another member. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31 (1994), 33 I.L.M. 112, art. 6 (1994) [hereinafter DSU].

definitively settled. Through an examination of the WTO's previous approaches to similar issues, this Note offers new evidence for why a panel might not assert jurisdiction. This evidence includes (1) a recent arbitration in which a WTO panel confronted language similar to that used in Article XXI, and (2) current arguments over the interpretation of the *Declaration on the TRIPS Agreement and Public Health*. Although I conclude that a WTO panel would likely assert jurisdiction over disputes involving Article XXI, my analysis demonstrates that both advocates and opponents of jurisdiction have strong arguments and that the issue presents a close question.

The second Part of this Note argues that it is important to appreciate the tension regarding jurisdiction, because this tension drives WTO members to resolve informally disputes that contain national security concerns. Rather than refer the matter to a panel, WTO members have often relied on international pressure and diplomacy to resolve Article XXI trade disputes. A desire to retain the constructive ambiguity of Article XXI drives, at least in part, this informal, diplomatic resolution process. This approach does not necessarily represent a failure of the current system. Rather, it can be viewed as a success because it encourages nations to resolve disputes without resorting to a third-party adjudicator, and it affords states an appropriate amount of flexibility to deal with sensitive issues of national security.

Part I explores the jurisdictional question behind Article XXI. It compares the arguments and counterarguments for why a WTO panel would claim jurisdiction over Article XXI national security defenses. The Note concludes that a WTO dispute settlement body would likely assert jurisdiction over Article XXI defenses. Part II explains why, even if a WTO panel could assert jurisdiction, parties to an Article XXI dispute face incentives to settle the dispute outside of formal WTO processes and how such incentives serve as a check against inappropriate use of the national security exception.

Before beginning an analysis of a WTO panel's jurisdiction over Article XXI, however, a preliminary objection must first be addressed. According to one argument, the question of whether a WTO panel has the necessary jurisdiction to determine an Article XXI claim is inconsequential, because, at step one, the WTO body is not the proper body to resolve certain disputes in which an Article XXI claim would be made. This argument asserts that the WTO lacks jurisdiction over such disputes because they involve only peripheral trade concerns. Thus, the WTO would never get to the point of

deciding whether they had jurisdiction to hear an Article XXI defense if the dispute encompasses primarily political and national security issues rather than trade concerns. Consistent with this argument, some countries have refused to submit disputes to a GATT panel, because the issues involved transcended matters of trade, even though the countries could have invoked Article XXI with respect to any trade elements.[6] This argument is especially persuasive when the WTO claims are "inextricably linked" to "other rules of international law," so that the WTO claims could not be decided independently of these other rules.[7]

This argument has several weaknesses. First, in many situations, the trade claims are significant enough that parties will not be able to argue persuasively that the WTO lacks jurisdiction over the entire dispute. Second, an alternative view suggests that the WTO does have jurisdiction over disputes containing both trade elements and other issues. This position is advanced by Article XXIII of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).[8] DSU Article 23 provides that "[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements . . . *they shall have recourse to*, and abide by, the rules and procedures of this Understanding."[9] The mandatory language suggests that parties claiming an impairment of GATT benefits *must* bring these claims before the WTO dispute settlement bodies.[10] WTO jurisprudence supports this view. A WTO panel retains jurisdiction over a trade dispute despite the fact that the WTO's political organs may also be considering the

6. *See* GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 601 (updated 6th ed. 1995) [hereinafter ANALYTICAL INDEX] (describing how the terms of reference of a GATT panel precluded it from examining the validity of an Article XXI defense by the United States in a military dispute with Nicaragua that also involved trade sanctions); *cf.* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, paras. 35–36 (noting Iran's argument that its dispute with the United States should be viewed in all of its historical complexity and not focused only on the hostage situation).

7. JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (forthcoming 2003) (manuscript at 452, on file with the *Duke Law Journal*).

8. The DSU provides the framework and rules for WTO members to claim a violation of GATT obligations or impairment of GATT benefits by another WTO member. *See supra* note 5 and accompanying text.

9. DSU, *supra* note 5, art. 23.1 (emphasis added).

10. PAUWELYN, *supra* note 7, at 451.

issues.[11] Because other tribunals have asserted jurisdiction over complex disputes with several dimensions, it is difficult for a WTO member to assert that a WTO panel would not have jurisdiction over such a dispute.[12] Thus, a WTO panel would likely reject such arguments.

But even if a WTO panel may initially dismiss claims that it lacks jurisdiction over complex disputes involving multiple issues, it must still contend with challenges to its authority over GATT Article XXI claims. For this reason, this Note focuses on the jurisdictional scope of Article XXI and assumes that a WTO member could not remove the dispute from the WTO because of the presence of nontrade elements.

I. WTO JURISDICTION OVER GATT ARTICLE XXI

A. Evidence Disfavoring Jurisdiction

This Section presents evidence against WTO jurisdiction in Article XXI disputes. This evidence includes textual interpretations of Article XXI, recent interpretations of other WTO declarations, a decision by the International Court of Justice (ICJ), and historical interpretations and use of Article XXI by WTO members. Although some of these arguments are not new, I review them here to demonstrate the weight of the evidence disfavoring jurisdiction.

Interpretations of international agreements begin with the protocols established by the Vienna Convention.[13] The WTO dispute settlement bodies have used these protocols in construing the GATT.[14]

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11. Frieder Roessler, The Institutional Balance Between the Judicial and the Political Organs of the WTO, Paper Presented at Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium, John F. Kennedy School of Government, Harvard University (June 1–2, 2000), *at* http://ksgwww.harvard.edu/cbg/Conferences/trade/roessler.htm (on file with the *Duke Law Journal*).

12. *Cf.* PAUWELYN, *supra* note 7, manuscript at 452 (noting the International Court of Justice's (ICJ) rejection of arguments by Iran that the ICJ should not adjudicate the hostage situation without considering twenty-five years of history and dealing between the United States and Iran).

13. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, arts. 31–33, 1155 U.N.T.S. 332, 340, *reprinted in* 8 I.L.M. 679, 691–94 (1969).

14. The DSU provides that its provisions are to be used to clarify the GATT and other covered agreements "in accordance with customary rules of interpretation of public international law." DSU, *supra* note 5, art. 3.2. The WTO Appellate Body has determined that portions of the Vienna Convention on the Law of Treaties constitute customary rules of interpretation of public international law. WTO Appellate Body Report on United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (Apr. 29, 1996), http://www.wto.org/

One protocol provides that treaties "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[15] This rule is of minimal help in connection with GATT Article XXI, however, because Article XXI's "ordinary meaning" is not easily discernible in light of its context, object, and purpose. Another protocol looks to state practice to assist in questions of interpretation.[16] Although not decisive, state practice sheds some light on the interpretation of Article XXI.[17]

The plain text of Article XXI suggests that a WTO panel would not have the necessary jurisdiction to decide an Article XXI disputes. Article XXI differs from other textually defined exceptions to the GATT, because it appears to permit the WTO member itself to define the scope of the exception. The exception states that the GATT does not prevent a WTO member "from taking any action which *it considers* necessary for the protection of its essential security interests."[18] Thus, the self-defining nature of the national security exception suggests a subjective standard for assessing the necessity of a measure under Article XXI. In contrast, other GATT exceptions suggest an objective standard—a standard under which WTO judicial bodies may define "necessary" and examine measures against this definition.[19]

Recent interpretations of other WTO declarations also provide some support for the self-defining nature of Article XXI. The

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english/docs_e/docs_e.htm (on file with the *Duke Law Journal*) [hereinafter WTO Gasoline Report] (making such a determination for Article 31(1) of the Vienna Convention on the Law of Treaties).

15. Vienna Convention on the Law of Treaties, *supra* note 13, art. 31(1), 1155 U.N.T.S. at 340.

16. *Id.* art. 31(3)(b), 1155 U.N.T.S. at 340; *see infra* notes 35–37, 67–72 and accompanying text.

17. *See infra* notes 34–36 and accompanying text.

18. GATT, *supra* note 2, art. XXI(b) (emphasis added).

19. Article XX, for example, provides an exception for compliance with GATT obligations based on measures "necessary to protect human, animal or plant life or health," *id.* art. XX(I)(b), or "relating to the conservation of exhaustible natural resources," *id.* art. XX(I)(g). In a series of cases, WTO panels and the Appellate Body have interpreted key terms in Article XX (including "necessary") and developed a legal framework, under Article XXIII, for determining when the exception may be used. *See* WTO Appellate Body Report on European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/ AB/R (Mar. 12, 2001), paras. 26–29, http://www.wto.org/english/docs_e/docs_e.htm (on file with the *Duke Law Journal*) (interpreting GATT art. XX(I)(b)); WTO Gasoline Report, *supra* note 14 (interpreting GATT art. XX(I)(g)).

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS agreement) protects the intellectual property rights of individuals whose governments belong to the WTO.[20] The TRIPS agreement permits members, however, to abrogate those rights if "the proposed user has made efforts to obtain authorization from the right holder."[21] A WTO member may waive this requirement "in the case of a national emergency or other circumstances of extreme urgency."[22] Recent negotiations in the Doha Round have clarified the use of this waiver for developing countries.[23] Recognizing the incredible health crises faced by many third-world countries and their inability to pay for licenses on patented medicines, the *Declaration on the TRIPS Agreement and Public Health* (*Declaration*), adopted in Doha, in November of 2001, provides that "[e]ach member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency."[24] The *Declaration* also calls for a system of compulsory licensing, whereby nations facing a public health emergency could, independent of the wishes of the patent holder, license domestic and foreign manufacturers to produce the critical medicine.[25]

The interpretation of the *Declaration* is currently a subject of great debate within the WTO, representing an obstacle in the progression of the Doha Round. Concerned that developing countries will broadly engage in compulsory licensing of foreign manufacturers,

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20. Preface, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81, 84 (1994) [hereinafter TRIPS Agreement].

21. *Id.* art. 31(b).

22. *Id*.

23. The Fourth Ministerial Conference in Doha, Qatar (Doha Round), produced a "November 2001 declaration [that] . . . provides the mandate for negotiations on a range of subjects and other work, including issues concerning the implementation of the present agreements." *Negotiations, Implementation and Development: The Doha Agenda*, *at* http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Mar. 25, 2003) (on file with the *Duke Law Journal*).

24. Ministerial Conference, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, (Nov. 20, 2001), para. 5(c), http://www.wto.org/english/docs_e/docs_e.htm (on file with the *Duke Law Journal*).

25. *Id.* paras. 5–6. Paragraph 6 instructs:

> We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

the United States has attempted to limit the use of this authority to specific "infectious diseases and epidemics."[26] Developing nations have challenged this interpretation, asserting that the language and purpose of the *Declaration* suggest that the compulsory licensing decision is self-judging.[27] Both sides have rejected compromises that attempted to give the authority to another body to decide which diseases would allow compulsory licensing.[28] Hence, the stage is set for a

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26. *U.S. Rejects EC's Formula to Resolve TRIPS, Health Issues*, FIN. EXPRESS, Jan. 19, 2003 (describing how the United States blocked a compromise by the EU that would have allowed foreign compulsory licensing for certain diseases and oversight by the World Health Organization for other diseases); *see also* Robert B. Zoellick, U.S. Trade Representative, Press Conference at the Sheraton Hotel, Pretoria, South Africa (Jan. 13, 2003) (citing concerns about the burgeoning number of countries that wanted to take advantage of foreign compulsory licensing and an expanding list of suspect diseases that could qualify as an "emergency need") (transcript at 2003 WL 2045596). Alan Sykes has suggested that the compulsory licensing provisions of the *Declaration* may hinder public health advances in developing nations over the long run by reducing incentives to develop internal research capacities within the developing nations. Alan O. Sykes, *TRIPS, Pharmaceuticals, Developing Countries, and the Doha "Solution,"* 3 CHI. J. INT'L L. 47, 55–66 (2002).

27. Editorial, *The Importance of Patent Remedies: A Deal on Trade in Essential Medicines Must Be Reached*, FIN. TIMES (London), Jan. 3, 2003, at 14 (suggesting that the United States blocked agreement on compulsory licensing because of pressure from the pharmaceutical lobby); Sandy Thomas, Letter to the Editor, *Problems of Making Low-Cost Medicines*, FIN. TIMES (London), Jan. 8, 2003, at 18 (presenting the opinion of a former member of the United Kingdom Commission on Intellectual Property Rights: U.S. attempts to block agreement on compulsory licensing ignore the original purpose of the *Declaration*, which reaffirms nations' "freedom to issue compulsory licences [sic] on grounds of their own choosing"); *RP and EU Remain at Odds Over Drug Import Licenses*, BUS. WORLD (Phillipines), Jan. 21, 2003, at 2 (quoting Manuel A. Roxas, II, Philippine Trade and Industry Secretary):

> 'The Philippines finds that EU's proposal [sic] on the determination of the scope of diseases detracts from the flexibility granted by the TRIPS Declaration which allows countries to determine on their own what constitutes public health problems without need of confirmation or advice by any other country or international organization. . . . The Philippines has never agreed with this premise as it erodes the broad and comprehensive scope of public health problems agreed upon by ministers in Doha.'

Frustrated by the lack of progress on the *Declaration*, Supachai Panitchpakdi, director-general of the WTO, commented that "There are hundreds of diseases which need treatment . . . [m]ost members do not think the definition of diseases is necessary." Carol Goar, Editorial, *AIDS Relief Lost in the Desert*, TORONTO STAR, Mar. 24, 2003, at A22.

28. *Japanese Bid to Break WTO Impasse on Access to Cheap Medicines*, AGENCE FR.-PRESSE, Feb. 5, 2003 (outlining Japanese proposal to allow compulsory foreign licensing for additional diseases as decided by WTO TRIPS Council and the rejection of this proposal by several African nations); *Developing Countries Should Have Greater Access to Drugs: Phillipines*, AGENCE FR.-PRESSE, Jan. 21, 2003 (describing the EU compromise that allowed foreign licenses for twenty-two diseases and the possibility for more if approved by the World Health Organization); Pascal Lamy, The Doha Development Agenda, the European Union—and the Commonwealth, Global Dimensions Lecture Series, London School of Economics (Jan. 20, 2003), *at* http://www.lse.ac.uk/collections/globalDimensions/lectures/lamy/transcript.htm (on file with the *Duke Law Journal*) (detailing the United States's rejection of the EU compromise) .

debate over whether certain language from the *Declaration* is self-defining. Accordingly, the self-defining interpretation of Article XXI will be strengthened if the parties eventually agree that an "emergency" under the *Declaration* is self-judging.[29] Regardless of how the compulsory licensing issue is resolved, the debate evidences the viability of an interpretive argument based on a self-judging analysis. The intense debate shows that WTO members have not dismissed the self-defining argument as outdated. Instead, they have confronted the implications of the argument even in a trade environment of greater legalism and multilateralism.

Other international tribunals have considered the significance and interpretation of the "it considers" clause. The ICJ interpreted this clause when it examined treaty language that allowed a national security exception to certain treaty obligations.[30] In 1986, the ICJ considered claims brought by Nicaragua against the United States for violations of a 1956 treaty.[31] The treaty permitted either signatory to take action "necessary to protect its essential security interests."[32] The ICJ decided that this clause did not preclude it from evaluating U.S. attempts to invoke the national security exception to the treaty. It noted that, unlike GATT Article XXI, the 1956 treaty mandated an objective standard of review, (the national security measure must be "necessary") instead of the subjective standard implied by the GATT (the country may take measures "*it considers* necessary").[33]

This subjective reading of GATT Article XXI is also supported by the comments of various WTO members made throughout the history of the GATT. As early as 1949, GATT Council discussions

29. The definition of a "national emergency" under the TRIPS Agreement is not identical to Article XXI's exception to the GATT for actions "taken in time of war or other emergency in international relations," GATT art. XXI(b)(iii). In both instances, though, the "emergency" deals with an exception to WTO obligations based on matters of great national importance to the invoking member.

30. Cann, *supra* note 5, at 422–23.

31. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 22 (June 27) (considering alleged violations of the Treaty of Friendship, Commerce, and Navigation, Jan. 21, 1956, U.S.-Nicar., 9 U.S.T. 465).

32. *Id.* at 116 (quoting Treaty of Friendship, Commerce, and Navigation, *supra* note 31, art. 21(1)(d)).

33. *Id.* at 116–17.

included a statement that "every country must be the judge in the last resort on questions relating to its own security."[34]

Later, in 1961, Ghana justified its boycott of Portuguese goods under Article XXI(b)(iii): "[U]nder [Article XXI] each contracting party was the sole judge of what was necessary in its essential security interest. There could therefore be no objection to Ghana regarding the boycott of goods as justified by security interests."[35] Similarly, in 1982, the European Economic Community (EEC) justified its trade restrictions against Argentina during the Falkland/Malvinas controversy on the basis of its "inherent rights, of which Article XXI of the General Agreement was a reflection."[36] Reinforcing the EEC's view, the United States representative at that time asserted that "[t]he General Agreement left to each contracting party the judgment as to what it considered to be necessary to protect its security interests. The contracting parties had no power to question that judgment."[37]

B. Evidence Favoring Jurisdiction

Despite the evidence favoring a self-judging interpretation of Article XXI, WTO judicial bodies will likely exercise jurisdiction to review disputes involving the national security exception.[38] The evidence favoring such jurisdiction includes textual interpretations of Article XXI that limit the self-judging language, WTO interpretations of similar self-defining language in other WTO agreements, and historical interpretations of Article XXI.

Even though much has been made of the discretionary language in Article XXI, the language may not preclude WTO jurisdiction. Hannes L. Schloemann and Stefan Ohlhoff advance a textual interpretation of Article XXI that retains a self-defining element, while still permitting review of national security defenses by WTO judicial

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34. ANALYTICAL INDEX, *supra* note 6, at 600 (quoting EPCT/A/PV/33, p. 20–21 and Corr.3). This statement arose in the context of a dispute between the United States and Czechoslovakia in which the United States invoked Article XXI. *See infra* notes 67–70 and accompanying text.

35. *Id.* (quoting SR.19/12, p. 196).

36. *Id*.

37. *Id.* at 601 (quoting C/M/159, p. 19). This view is not simply a historical anachronism. Jeffrey Schott, an economist with the Institute of International Economics, asserts that defending actions "based on national security considerations . . . is a virtually bulletproof defense" under international trade law. Paul Blustein, *Ruling Sought on U.S. Trade Law: EU Complaint to Force a Legal Showdown Over the Embargo on Cuba*, WASH. POST, Feb. 5, 1997, at D10.

38. Cann, *supra* note 5, at 425–29; Schloemann & Ohlhoff, *supra* note 4, at 438–41.

bodies. They maintain that, while WTO members may freely define what is "necessary" for the protection of their "essential security interests,"[39] the members' determination of whether "war or other emergency" exists is reviewable by a WTO panel on a good faith standard.[40] Extending the "self-defining" element to the second part of Article XXI, the scholars note, would vitiate the restrictive or limiting intent of Article XXI.[41] This interpretation would essentially permit a WTO member to decide *what* national security measure it may take, while subjecting the decision of *when* the party may take the measure to an objective review. This paradigm is not without potential problems, but it does represent a solution to the textual conundrum created by the "it considers" language of Article XXI.[42]

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39. Schloemann & Ohlhoff, *supra* note 4, at 444. They also maintain that this definitional prerogative would not extend to "security interests that are entirely a function of the economic capacities, activities and effects that are the very substance of WTO law." *Id.*

40. *Id.* at 446–47. Schloemann and Ohlhoff acknowledge, however, that another scholar has concluded that a "good faith" determination under Article XXI would not be reviewable. *Id.* at 448 n.126 (citing David D. Knoll, *The Impact of Security Concerns upon International Economic Law*, 11 SYRACUSE J. INT'L L. & COM. 567, 586–90 (1984)). The good faith argument is also embodied in the international law concept of *abus de droit*. The *abus de droit* concept "refers to a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State." Alexandre Kiss, *Abuse of Rights*, *in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 4 (Rudolf Bernhardt ed., 1992); *see also* Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 390–91 (2003) (suggesting an interpretation of Article XXI that incorporates the principle of *abus de droit* under DSU art. 3.2).

41. Schloemann & Ohlhoff, *supra* note 4, at 447–48.

42. Several potential problems may exist under the Schloemann-Ohlhoff framework. Although Schloemann and Ohlhoff argue that the decision of whether war exists is a determination that has long been committed to international law, *id.* at 445, international law offers few clear answers on these issues—particularly in the trade context. *See* Clinton E. Cameron, Note, *Developing a Standard for Politically Related State Economic Action*, 13 MICH. J. INT'L L. 218, 223–29, 253 (1991) ("The legal regulation of the use of economic diplomacy is one of the most unclear areas of international law."). The current war against terrorism (against both state and nonstate actors) offers evidence that the definition of "war" and "emergency" may always be in flux, as well as a nation's views of what constitutes "essential security interests." *See The National Security Strategy of the United States of America* 13–16, http://www.whitehouse.gov/nsc/nss.html (Sept. 17, 2000) (on file with the *Duke Law Journal*) (adopting the doctrine of preemptive self-defense to protect national interests).

Assuming that the use of force or "war" is defined and authorized in a given situation, as it might be in the case of a U.N. Security Council resolution, WTO judicial bodies might reasonably rely on this determination in adjudicating Article XXI disputes. *See* Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. PA. J. INT'L ECON. L. 263, 275–76 (1998) (suggesting increased coordination between the WTO and the United Nations Security Council in situations in which a WTO member invokes Article XXI(b)). But absent this clear direction, a WTO panel may hesitate to interject itself in

WTO action in other areas in which it has examined the "it considers" language also suggests that a WTO panel would find jurisdiction to review a national security defense. For instance, a WTO arbitration on the suspension of concessions has confronted this language.[43] The DSU provides a general hierarchy of preferences for how parties should seek to suspend concessions in response to an unremedied violation.[44] First, the party should "seek to suspend concessions . . . [in] the same sector(s)" in which the original violation occurred,[45] or if that is not practicable, within the same agreement.[46] Second, DSU Article 22.3(c) provides that if the "*party considers* that it is not practicable or effective to suspend concessions . . . with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions . . . under another covered agreement."[47] Allowing suspension of concessions when the "party considers that it is not practicable" implies the same discretion provided by the "it considers" language of GATT Article XXI.

The WTO Appellate Body interpreted the discretionary provisions of DSU Article 22.3(c) in a WTO arbitration between Ecuador

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a process that could politicize the WTO dispute settlement mechanisms. Antonio F. Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 YALE J. INT'L L. 301, 365–75 (1998) (asserting that the WTO should consider giving comity in the security lawmaking of the U.N., because U.N. processes represent a more democratic and balanced method to develop such jurisprudence and practice).

Finally, deciding that Article XXI is, at least in part, subject to an objective review does not answer the question of what level of scrutiny a WTO panel should apply. The heavier the scrutiny becomes, the greater the danger that the objective review begins to define the "essential security interest" and not simply assure that is used at the appropriate time. Questions of when an essential security interest may be protected by Article XXI are not easily separated from definition of an "essential security interest" itself. A heavy-handed approach to reviewing Article XXI(b) simply becomes a backdoor to defining an essential security interest, because such a determination means very little outside its use to invoke the national security exception.

43. When a WTO dispute settlement body has determined that a measure violates the GATT, the member who imposed the measure has an obligation to eliminate the measure and bring its actions in conformity with the GATT or make compensation. JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 266–67 (4th ed. 2002). If the member does not eliminate the offensive measure within a reasonable period of time, the complaining party then has the opportunity to suspend concessions. DSU, *supra* note 5, art. 22.1. The GATT violator may also voluntarily offer compensation to the complaining party in lieu of following the recommendations and rulings of the dispute settlement body. *Id*.

44. *Id.* art. 22.3.

45. *Id.* art. 22.3(a).

46. *Id.* art. 22.3(b).

47. *Id.* art. 22.3(c) (emphasis added).

and the European Communities (EC).[48] The EC had violated the GATT by installing a licensing regime for the importation of bananas that favored EC importers.[49] After the EC failed to withdraw the measure, Ecuador retaliated by suspending concessions, not under the GATT, but under the intellectual property provisions of an entirely separate agreement, the TRIPS agreement.[50] Ecuador claimed that DSU Article 22.3(b) and (c) allowed it to determine whether it was practicable to suspend concessions within the same agreement or under another agreement.[51] Ecuador asserted that the discretionary "party considers" language insulated the decision of where to suspend concessions from any substantive review by arbitrators.[52] Rather, the arbitrators would be limited to deciding whether the procedural requirements of Article 22.3 had been met.[53] The EC, on the other hand, argued that Article 22.3(b) required Ecuador to submit objective evidence explaining why it was impracticable to suspend concessions within the same agreement.[54]

The arbitrators rejected Ecuador's arguments. They concluded that, although the "party considers" language "leave[s] a certain margin of appreciation to the complaining party" with respect to the practicality and effectiveness of suspending concessions in another sector or agreement, the "margin of appreciation by the complaining party . . . is subject to review by the Arbitrators."[55] The arbitrators decided that their "margin of review . . . implies the authority to *broadly* judge" whether the complaining party objectively determined that it could not effectively suspend concessions in the same sector or

48. European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU: Decision by the Arbitrators, WT/DS27/ARB/ECU (Mar. 24, 2000), http://www.wto.org/english/docs_e/docs_e.htm (on file with the *Duke Law Journal*) [hereinafter European Communities Under Article 22.6 of the DSU]. Article 22.6 of the DSU enables a country that violated the GATT to protest the type or amount of concessions suspended by the complaining party and to submit the dispute to arbitration. DSU, *supra* note 5, art. 22.6.

49. European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R (Sept. 9, 1997), http://www.wto.org/english/docs_e/docs_e.htm (on file with the *Duke Law Journal*).

50. European Communities Under Article 22.6 of the DSU, *supra* note 48, at 2. TRIPS, or the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, represents an integral part of the WTO framework, although it is an entirely separate agreement from the GATT.

51. *Id.* ¶ 22.

52. *Id*.

53. *Id*.

54. *Id.* ¶ 23.

55. *Id.* ¶ 27.

agreement.[56] The arbitrators made it clear that they had authority to review Ecuador's decision to suspend concessions under the TRIPS agreement, despite the deferential language implied by the "party considers" clause. The arbitrators' conclusions offer some precedent indicating how a WTO judicial body might interpret the "it considers" clause of Article XXI,[57] providing some basis for a panel to reject an argument that a defense based on Article XXI is outside of its jurisdiction.

On the other hand, DSU Article 22.3 may be distinguished from GATT Article XXI. The arbitrators used a highly contextual approach to interpret DSU Article 22.3—an approach that relied, in part, on the mandatory language of the chapeau: "[T]he complaining party *shall* apply the following principles and procedures . . . ."[58] Additionally, arbitrators read the potentially self-defining "party considers" clause to be qualified by language stating that the party may "*seek* to suspend concessions."[59] The fact that a party may only "seek" to suspend concessions implies the existence of some situations in which it may be unable to do so, perhaps because of some form of objective review.

This contextual analysis provided the arbitrators with a solid argument for rejecting the discretionary language of DSU Article 22.3. Although a WTO panel may use such an approach in examining GATT Article XXI, it will have difficulty limiting the subjective aspect of Article XXI, because the self-defining element of Article XXI

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56. *Id.* (emphasis added).

57. Although WTO dispute settlement bodies are not bound by the principle of *stare decisis*, they nonetheless accord some weight to previous interpretations of the provision at hand. JACKSON ET AL., *supra* note 43, at 265–66.

58. European Communities Under Article 22.6 of the DSU, *supra* note 48, ¶ 27 (quoting DSU, *supra* note 5, art. 22.3 (emphasis added)). Additional contextual considerations included the fact that, the "party considers" clause appears as a subsection, DSU arts. 22.3(b) and 22.3(c), along with other subsections that require the party seeking to suspend concessions in other sectors or under another agreement to state the reasons for its decision, *id.* art. 22.3(e), and take other factors into account, *id.* art. 22.3(d). These other factors include an examination of the original GATT violation and the importance of the trade to the violator in that trade sector, as well as "broader economic consequences of the suspension of concessions or other obligations." *Id*. The latter subsections do not contain the discretionary "party considers" language. Rather, they appear to be mandatory and reviewable by a WTO panel. Hence the objective review of the latter factors "inevitably . . . colour[]" the arbitrators' "margin of review of the complaining party's considerations under subparagraphs (b) and (c)." European Communities Under Article 22.6 of the DSU, *supra* note 48, ¶ 29.

59. European Communities Under Article 22.6 of the DSU, *supra* note 48, ¶ 55 (quoting DSU, *supra* note 5, arts. 22.3(b)–(c)).

appears much stronger than DSU Article 22.3. First, the mandatory language in the chapeau to Article XXI arguably directs more, not less, deference to the party claiming the exception.[60] Second, in Article XXI, the discretionary "it considers" language is situated in the chapeau to subparagraph (b) of Article XXI. Thus, arguably, the flexibility and deference such language affords applies to the requirements in subparts (i), (ii), and (iii).[61] Finally, unlike Article 22.3, Article XXI does not include any qualifying language ("seek to suspend concessions") to limit the prerogatives of parties asserting an Article XXI defense. Article XXI states that nothing in the GATT shall prevent a party "from *taking any action* which it considers necessary."[62]

A broader contextual reading of Article XXI, however, suggests that a WTO panel may nonetheless be able to limit the effect of the discretionary language in the exception. The new multilateralism embodied in the WTO through its enhanced dispute settlement system provides some momentum for limiting the discretionary language of Article XXI. The new emphasis on "legalism" within the WTO suggests a greater likelihood that a panel would use a broader interpretation to contain the discretionary elements of Article XXI.[63] A panel may reach this "broader" and more limited interpretation by invoking the larger purposes of the GATT (to liberalize trade and avoid exceptions to GATT obligations) and through interpretations of other

60. The chapeau instructs that "[n]othing in this Agreement shall be construed" to prevent a party from taking action to protect its security interests. GATT, *supra* note 2, art. XXI. Rather than placing *affirmative duties* on a party as part of an authorization process under DSU Article 22.3, the chapeau uses the strong language to preserve the strength and scope of the exception: "[n]othing in this Agreement shall be construed."

61. This is in contrast to DSU 22.3, which contains the discretionary "party considers" language within only a few of the subpart requirements. DSU, *supra* note 5, arts. 22.3(b)–(e). *But see* Schloemann & Ohlhoff, *supra* note 4, at 438–40 (making structural arguments for why the broad discretionary language in the chapeau of subparagraph (b) does not extend to subparts (i), (ii), and (iii)).

62. GATT, *supra* note 2, art. XXI(b) (emphasis added).

63. *See* 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. 559, 579–81 (1997) (describing the procedural efficacy of the new WTO dispute settlement system when compared to the older GATT rules); Cann, *supra* note 5, at 436–39 (contending that the multilateralism embodied in the WTO and UN Charter argue against "[t]he unilateral imposition of security-based sanctions, based upon a self-defining and fluid security exception"); C. Todd Piczak, Comment, *The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, the National Security Exception to the GATT and the Political Question Doctrine*, 61 U. PITT. L. REV. 287, 310–11 (1999) (suggesting that the new legalism in the WTO dispute settlement procedure would empower a WTO panel to decide an Article XXI defense on the merits).

GATT provisions. Such a contextual reading that limits the discretionary language of Article XXI may be possible using the interpretive principles of the Vienna Convention on the Law of Treaties.[64]

Thus, although some textual differences distinguish DSU Article 22.3 from GATT Article XXI, a reading of Article XXI in the context of the entire GATT agreement and the multilateral emphasis of the WTO suggests that a WTO panel would likely adjudicate an Article XXI claim on the merits.

History provides even more evidence that a WTO panel may review the use of an Article XXI defense. During the GATT drafting process, Article XXI was converted into a separate exception, and it was noted:

> 'It is true that an action taken by a Member under Article [XXI] could not be challenged in the sense that it could not be claimed that a Member was violating the Charter; but if that action, even though not in conflict with the terms of Article [XXI], should affect another Member, I should think that that Member would have the right to seek redress of some kind under Article [XXIII] . . . .'[65]

Although this passage indicates that certain drafters perceived that parties could not "violate" the GATT when they invoked Article XXI, it does suggest that those injured from the use of the security exception could seek some form of redress under Article XXIII. The passage appears to envision some form of compensation via Article XXIII processes for a nonviolation that results in a nullification of benefits.[66]

Additionally, those who argue that Article XXI is justiciable point out that national security defenses have been considered under Article XXIII.[67] In 1949, the contracting parties rejected a complaint

64. René E. Browne, Note, *Revisiting "National Security" in an Interdependent World: The GATT Article XXI Defense After Helms-Burton*, 86 GEO. L.J. 405, 421–22 (1997); *see supra* notes 13–18 and accompanying text.

65. ANALYTICAL INDEX, *supra* note 6, at 606 (quoting WTO doc. EPCT/A/PV/33, p. 26–27).

66. *See* Bhala, *supra* note 42, at 279 (asserting that a panel may be willing to entertain a claim for nullification or impairment from a nonviolation, even if it would refuse to adjudicate an Article XXI defense on the merits, because of sensitive political and diplomatic issues). A U.S. trade representative has noted that even this interpretation is complicated by the question of whether parties have "reasonable expectations" that their benefits under the GATT will not be impaired by the national security considerations of other member nations. ANALYTICAL INDEX, *supra* note 6, at 608.

67. Schloemann & Ohlhoff, *supra* note 4, at 432–37.

brought by Czechoslovakia under Article XXIII(2), alleging that the United States had illegally imposed a system of export licenses.[68] The United States claimed, among other defenses, that national security (Article XXI) justified the export regime.[69] This defense, however, did not remove the dispute from the scrutiny, under Article XXIII, of the other contracting parties.[70]

Finally, in 1991, the European Communities (EC) invoked Article XXI to restrict trade with the states of the former Socialist Federal Republic of Yugoslavia.[71] Yugoslavia requested a panel under Article XXIII:2, but the Council suspended the panel until the question of succession had been resolved between the Socialist Federal Republic and the Federal Republic of Yugoslavia.[72]

Both the U.S.-Czechoslovakia and EC-Yugoslavia disputes suggest that Article XXI defenses are subject to Article XXIII. The Czechoslovakia dispute indicates that the GATT Council was willing to consider national security claims under Article XXIII at a very

68. *Id.* at 432.

69. *Id*.

70. This precedent is somewhat attenuated by the fact that the contracting parties showed great deference to the United States in deciding it had met its burden for invoking Article XXI. *Id*. Such deference could be seen as a weak or uncertain attempt to bring Article XXI under the umbrella of Article XXIII. But Schloemann and Ohlhoff explain this deference on historical grounds. They point out that the contracting parties were not anxious to disrupt the newly formed GATT by scrutinizing national security issues at the beginning of the Cold War. *Id.* at 433. Despite this tendency to gloss over the substantive issue, they emphasize that the United States did respond to Czechoslovakian claims that the interpretation of "war material," GATT, *supra* note 2, art. XXI(b)(ii), used by the United States was overly broad. Schloemann & Ohlhoff, *supra* note 4, at 433. This response, Schloemann and Ohlhoff suggest, indicates an early willingness to submit Article XXI exceptions to discussion on the merits. *Id*.

This contention is weakened in part by subsequent attempts to bring disputes involving an Article XXI defense before a GATT panel. In 1985, the United States placed a complete import and export embargo on Nicaragua and justified the measure on national security grounds. *Id.* at 434. At the request of Nicaragua, the GATT Council established a panel, but they adopted terms of reference that prohibited the panel from "'examin[ing] or judg[ing] the validity of or motivation for the invocation of Article XXI:(b)(iii) by the United States.'" *Id.* (quoting GATT Doc. C/M/196, at 7 (1986)). The restrictive terms of reference prevented the panel from even considering the national security exception of the United States. Frustrated by this lack of authority to address the substantive issues, the panel did ask whether Article XXI would be sufficiently checked if not subject to Article XXIII. GATT Secretariat, *United States—Trade Measures Affecting Nicaragua*, GATT Doc. L/6053 (Oct. 13, 1986), para. 5.17, 1986 WL 363154 at *14. Although this dictum is limited by the fact that the Council never adopted the panel report, ANALYTICAL INDEX, *supra* note 6, at 604, Schloemann and Ohlhoff emphasize that the Panel did not reject jurisdiction, but rather, declined to decide the national security question merely because of the limited terms of reference. Schloemann & Ohlhoff, *supra* note 4, at 435.

71. ANALYTICAL INDEX, *supra* note 6, at 604 (citing GATT Doc. L/6948).

72. *Id*.

early point in GATT history. This is significant given the emphasis placed on comments made during the formation of the GATT about the self-defining nature of Article XXI.[73] The EC-Yugoslavia dispute is significant for what did not happen. Although using a national security defense, the EC never objected to the establishment of a panel in its dispute with the former Yugoslavian states.[74] This implies that the EC believes that WTO dispute settlement mechanisms apply to Article XXI defenses.

The view that Article XXI is subject to Article XXIII also finds support in historical statements made by WTO members. In certain disputes under the GATT, parties have asserted that "'the provisions of Article XXI were subject to those of Article XXIII:2,'" and that they have reserved their rights under Article XXIII to claim relief from any injury sustained as a result of measures applied on the basis of Article XXI.[75] This argument is bolstered by the fact that other significant exceptions to GATT obligations are reviewable under Article XXIII.[76]

The foregoing reasons suggest that a WTO panel would not reject jurisdiction over an Article XXI dispute. To reject jurisdiction would openly suggest an indefinitely large loophole that could seriously weaken the strength of the multilateral commitments made under the WTO. But despite these legitimate bases for asserting jurisdiction, a WTO panel confronting a national security defense may restrain itself from developing a comprehensive and scrutinizing jurisprudence for Article XXI. The panel would likely recognize that, even if jurisdiction is asserted, the tension inherent in Article XXI is a necessary feature that must be retained to maintain the delicate balance between the WTO's two competing concerns.

Deciphering the ambiguities of Article XXI would require answering important questions relating to sovereignty and the nature of the WTO.[77] Although WTO panels have not avoided po-

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73. *See supra* notes 34–37 and accompanying text.

74. Schloemann & Ohlhoff, *supra* note 4, at 436.

75. ANALYTICAL INDEX, *supra* note 6, at 606 (quoting a discussion of trade measures established for noneconomic reasons, which affected Argentina (WTO doc. C/M/157, p. 9)); *see also* Decision Concerning Article XXI of the General Agreement, Nov. 30, 1982, GATT B.I.S.D. (29th Supp.) at 23–24 ("[W]hen action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement.").

76. *See supra* note 19 and accompanying text.

77. Antonio F. Perez asserts that interpretation of Article XXI pits those who see the WTO as a negotiating body attempting to achieve an even balance of concessions against those

litical issues,[78] these elements become paramount when cloaked in the vernacular of national security. In fact, the political nature of Article XXI disputes helps to explain the inclusion of self-defining language within the exception.[79] At the same time, the self-judging language creates a concern that the national security exception will weaken the WTO or swallow the agreements liberalizing free trade.[80] Thus, a WTO panel would likely seek to walk the fine line between these two competing concerns.

The comparison between arguments favoring and disfavoring WTO jurisdiction over the national security exception demonstrates that one view does not clearly dominate over the other. The arguments both for and against jurisdiction are real and should not be ignored. A close examination of the issue suggests that WTO members both understand and utilize this tension when dealing with Article XXI disputes. Other scholars have catalogued the rationales for and against WTO jurisdiction and have placed them on the scales in an effort to determine which rationale carries the substantive weight.[81] This approach, however, does not adequately emphasize the value provided and the role served by the presence of this productive tension over the last fifty years. Instead of simply choosing one approach over another, a proper recognition of the role served by this tension suggests an alternative lesson: a WTO panel must be cautious in addressing Article XXI defenses, so as to maintain this productive tension.[82] In Part II of the Note, I address how this tension has promoted settlement of national security disputes under the GATT.

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who view the WTO as a quasi-constitutional body with the prerogative of interpreting WTO agreements and appropriately enforcing such interpretations. Perez, *supra* note 42, at 306, 312–24.

78. Paul Stanton Kibel, *Awkward Evolution: Citizen Enforcement at the North American Environmental Commission*, 32 ENVTL. L. REP. 10,769, 10,771 (2002) (citing the controversial health and environmental issues addressed by the WTO Appellate Body in the Hormone-Beef and Shrimp-Turtle cases, which were claimed to be detrimental to national sovereignty by protesters in Seattle, Washington).

79. *See supra* Part I.A.

80. *See supra* Part I.B.

81. *See supra* note 5 and accompanying text.

82. William J. Davey suggests that dispute settlement bodies at the WTO might be well served in certain circumstances by utilizing "issue-avoidance techniques" such as the common law doctrines of mootness and ripeness. William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and Its Use of Issue-Avoidance Techniques*, 4 J. INT'L ECON. L. 79, 96, 99–103 (2001) (arguing that even if a WTO panel has jurisdiction over a dispute involving a regional trading agreement, given the complexities of such a dispute, it may be preferable to allow

II. WTO SUCCESS? WHY COUNTRIES MAY PREFER NOT TO SUBMIT ARTICLE XXI DISPUTES TO A WTO PANEL

In this Part, I first offer several rationales for why Article XXI has maintained its ambiguous nature and how that ambiguity may lead to a constructive result. I then examine the national security exception in the North American Free Trade Agreement (NAFTA) as an example of another international agreement that adopted the constructive ambiguity of GATT Article XXI. Finally, I consider examples of WTO members who have invoked Article XXI, explaining how the rationale behind the Article's ambiguity led the WTO members to resolve their disputes.

Even though a WTO panel could arguably claim a legal basis for asserting jurisdiction over Article XXI claims, it is not clear that this is an optimal solution. The current fear is that potentially abusive invocations of Article XXI will undermine the GATT's strength.[83] However, commentators have not emphasized how the current ambiguity of Article XXI checks abusive invocations through diplomatic processes.[84]

A. Rationales for an Ambiguous Article XXI

Several reasons explain why WTO members handle Article XXI defenses through informal diplomacy, rather than through the dispute settlement bodies of the WTO. These reasons include (1) the flexibility that diplomatic resolutions offer, (2) concerns over the unanticipated loss of sovereignty, and (3) acknowledgement that the forego-

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a WTO committee to handle the issue). Conceivably some matters of national security may resolve themselves by the time a WTO panel is prepared to rule on a dispute involving Article XXI. Similarly, although a panel is not likely to refuse to consider an Article XXI dispute because of a "political question" doctrine, issues involving political questions may cause a panel to extend greater deference to the decisions of respective WTO members than it otherwise might. *See id.* at 104–05 (noting that the potentially self-defining language of GATT Article XXI may cause WTO panels or the Appellate Body to give greater deference to the judgment of WTO members).

83. It should be noted, however, that commentators who point out this flaw generally do not offer much evidence of actual abuse.

84. Interestingly, the United States indicated that it would have possibly agreed to such a solution in the debate over parallel imports of drugs by developing nations. Frances Williams, *US May Soften Stance on Cheap Medicines*, FIN. TIMES (London), Feb. 6, 2003, at 5. A U.S. trade representative reported that "the US had initially been prepared to accept the 'constructive ambiguity' of the Doha Declaration," but that reports of the broad interpretation of the Declaration by some developing nations foreclosed that option. *Id.*

ing factors create incentives to settle such disputes and avoid abuse of Article XXI.

First, diplomatic resolutions of trade disputes involving national security issues allow some flexibility in timing that is lost when the matter is turned over to more formal dispute settlement mechanisms. To bring a complaint before a WTO panel, a WTO member must consult with the member against whom it is alleging the violation.[85] The members only have to consult for a minimum of sixty days before requesting adjudication before a third party.[86] Additionally, once a WTO member requests a panel and formally begins the dispute settlement process, other deadlines assure that the settlement process proceeds in a timely fashion.[87] These deadlines facilitate quicker resolutions to trade issues, but they also create a timetable that may hinder a more optimal, negotiated resolution. This is particularly true with Article XXI defenses. These disputes typically contain highly politicized elements, elements that could be worked through given the passage of months and even years, but which might be difficult to resolve under the abbreviated timeframe created for panel and Appellate Body Reports.[88]

Second, sovereignty concerns intertwined with questions of national security may cause WTO members to prefer an ambiguous Article XXI that remains outside the traditional bodies of WTO dispute settlement.[89] "National security" is an elastic and highly contextual concept—a concept whose flexibility allows it to serve a range of different purposes. For instance, the United States has invoked claims of

85. DSU, *supra* note 5, art. 4.7.

86. *Id*.

87. *See id.* art. 12.8–.9 (instructing a panel to issue its report within six months, with the possibility of extending the period to nine months); *id.* art. 17.5 (instructing the Appellate Body to release its report within sixty days with the possibility of a thirty- day extension).

88. This concern may not be unique to Article XXI defenses, but it is certainly exacerbated in the Article XXI context because of the political nature of the Article and the fact that WTO jurisdiction over Article XXI defenses has never been definitively settled.

89. Even in the context of the WTO, the U.S. Congress has insisted upon measures to ensure that WTO decisions do not threaten U.S. sovereignty. For example, WTO decisions are not self-executing under U.S. law, and U.S. trade representatives are required to review and analyze WTO policies against U.S. interests. *See* David T. Shapiro, Note, *Be Careful What You Wish for: U.S. Politics and the Future of the National Security Exception to the GATT*, 31 GEO. WASH. J. INT'L L. & ECON. 97, 106–07 (1997) (describing congressional controls over U.S. participation in the WTO as included in the implementing legislation); *see also supra* note 42 (suggesting that Article XXI represented a necessary reservation of sovereignty in the formation of the GATT).

self-defense and national security to justify the use of force in Iraq.[90] Though the application of national security principles in this context remains contested, the war on terrorism has clearly reshaped the definition of national security and moved it away from the traditional state-actor paradigm.[91] Some have even tied national security to the protection of human rights in foreign countries.[92] Using unilateral economic sanctions to prevent violations of human rights may serve an important purpose by signaling information to third parties and helping to form international norms of security, even if the sanctions themselves are not perfectly effective.[93]

These concerns about maintaining the flexibility of the term "National Security" help to explain why the drafters of the GATT knowingly left Article XXI as an ambiguous instrument. It also explains why WTO members reserved sovereign powers in this area. Even though nations have impliedly surrendered some sovereignty to join the WTO and take advantage of its benefits, in deciding the question of whether Article XXI is justiciable, any waiver of sovereignty should be express and not implied, particularly given its history.[94] In

90. *US Ambassador Urges France, Germany to Rethink Anti-War Stance*, AGENCE FR.–PRESSE, Feb. 6, 2003 (noting Secretary of State Colin Powell's expression of concern regarding Iraq's arms possessions and potential involvement in terrorism).

91. Nonstate sponsors of terrorism may drive a WTO member to seek recourse in Article XXI. Some have contended that Al Qaeda has profited from trafficking in diamonds that they had bought from African rebels seeking funds to fight against their governments. *See* Tracey Michelle Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 MINN. J. GLOBAL TRADE 1, 8 (2003); Editorial, *Sell Diamonds for Love, Not War*, CHI. TRIB., Dec. 15, 2001, at 26. They argue that the war on terrorism is enough to justify an import ban under Article XXI on diamonds that are not certified to have come from legitimate sources. Price, *supra*, at 59–62; *Sell Diamonds for Love, Not War*, *supra*. The United States may be able invoke Art. XXI(c) because of UN resolutions to deal with the same problem, Price, *supra*, at 59–62, but even in the absence of such resolutions, the United States could arguably resort to Art. XXI(b) to justify such an import ban.

92. *See generally* Ryan Goodman, *Norms and National Security: The WTO as a Catalyst for Inquiry*, 2 CHI. J. INT'L L. 101 (2001) (arguing for the validity of invocations of GATT Article XXI to defend unilateral economic sanctions based on foreign human rights violations, because these violations may represent a legitimate security threat, so that invoking Article XXI is actually consistent with international security norms).

93. *Id.* at 116.

94. In *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the U.S. Supreme Court made an analogous argument in connection with waiver of immunity to suit in the United States. A Liberian ship owner, who lost a ship when it was attacked by the Argentine Air Force, brought suit against Argentina in the United States under the Alien Tort Statute. *Id.* at 431–33. The ship owner alleged that Argentina had impliedly waived its immunity to suit under international agreements and that this permitted the owner to sue Argentina in U.S. courts. *Id.* at 441–42. Chief Justice Rehnquist rejected this argument and, writing for the Court, decided that in the context of a treaty, a foreign government cannot impliedly waive its immunity to suit.

essence, nations may hesitate to submit what they see as important questions of national security to a WTO panel, where that panel has its own paradigm of "national security" and where the members have not expressly surrendered sovereignty.[95]

The foregoing factors create incentives for WTO members to settle Article XXI matters and to avoid abusive invocations of the exception. Some signatories to the GATT like the fact that there is an exception for national security—one that they, and they alone, may decide when and how to invoke.[96] This self-judging exception becomes a trump card that could be played for national security issues of great political importance. Yet it is clear that frequent or abusive use of this prerogative would undermine the cooperation and obligations that attach under the GATT.[97] Several forces, however, provide a natural check against the occurrence of such abuses. First, the simple knowledge that inappropriate use of the exception would undercut the GATT helps to curb its abuse.[98] A second, and more important, check comes from the knowledge that the self-defining interpretation of Article XXI is not definitively settled, particularly

Id. at 442–43. The doctrine of immunity to suit stems from notions of sovereignty (*sovereign* immunity). The United States could argue this position within the context of Article XXI.

95. *But see* Akande & Williams, *supra* note 40, at 400–02 (suggesting that other international tribunals have successfully adjudicated similar national security exceptions but have done so giving the invoking nation a wide margin of discretion).

96. Certainly this is evident from the position the United States took in the Nicaragua affair. *See* GATT Secretariat, *United States—Trade Measures Affecting Nicaragua*, GATT Doc. L/6053 (Oct. 13, 1986), para. 4.5, 1986 WL 363154, at *4–5 (stating the United State's position that Article XXI "left the validity of the security justification to the exclusive judgement [*sic*] of the sentencing party taking action" and that the debate over the existence of a security threat was outside the GATT's competence).

97. It is not possible to classify easily nations according to these potentially competing principles. For example, the United States, which has often demonstrated its desire to retain the self-judging nature of Article XXI, was also one of the advocates for establishing the WTO and a dispute settlement system that would encourage greater compliance with the GATT and other trade obligations. *See* 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. 1225, 1231 (1998) (arguing that although the United States loses some sovereignty by joining the WTO, it also receives assurances that trade will occur in compliance with WTO principles).

98. This knowledge motivates correct behavior because of both the fear of destroying the progress the WTO has made in trade liberalization and the potential reputational costs of inappropriately invoking Article XXI. *See* Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 179, 193-99 (2002) (arguing that reputational costs do affect countries' decisions to renege on their treaty commitments). Although Professors Schwartz and Sykes contend that reputational costs may be enhanced by a dispute settlement system, *id.*, it is also likely that these costs are evaluated when nations consider invoking Article XXI—especially given the publicity that invocations of national security tend to draw.

since the advent of the WTO. If WTO members want to retain the traditional flexibility of Article XXI, they know that they must be circumspect in invoking its protections.

As Part I demonstrated, there are longstanding tensions among the competing principles of sovereignty, flexibility, and limiting abuse of GATT Article XXI. The jurisdictional uncertainty of Article XXI reflects these potentially conflicting interests. Although some scholars call for jurisdiction and greater jurisprudential clarity by WTO dispute settlement bodies,[99] the current ambiguity may lead to a workable balance between national sovereignty and multilateral commitment.

B. North American Free Trade Agreement Example

NAFTA exemplifies another international agreement that contains an ambiguous national security exception. Drafted much later than the GATT, NAFTA deliberately adopted an ambiguous security exception. Although a WTO panel would not consider the NAFTA agreement to be binding in an interpretation of GATT Article XXI, the NAFTA agreement offers evidence that some WTO members consider an interpretation of Article XXI that acknowledges its constructive ambiguity desirable.

Article 2102 of NAFTA contains a national security exception that is virtually identical to GATT Article XXI.[100] The exception states that, subject to limited exceptions, "nothing in this Agreement shall be construed . . . to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations."[101] The language creates the same interpretive difficulties that Article XXI faces. NAFTA, however, contains other language related to its national security exception. For example, NAFTA also provides, under Chapter Eleven, several exclusions to its arbitration provisions.[102] One of these exclusions states that a state's decision to invoke the national security exception and "to prohibit or restrict the

99. *See supra* note 5 and accompanying text.

100. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., art. 2102, 32 I.L.M. 605, 699–700 (1993) [hereinafter NAFTA].

101. *Id.* art. 2102(1)(b)(ii), 32 I.L.M at 605–06.

102. Chapter Eleven addresses arbitrations between individual investors and state signatories to the agreement. For a discussion of how Chapter Eleven arbitration works, see J.C. Thomas, *Investor-State Arbitration Under NAFTA Chapter Eleven*, *in* CANADIAN BAR ASS'N, NAFTA CHAPTER 11 INVESTOR-STATE DISPUTES: LITIGATING AGAINST SOVEREIGNS (2000).

acquisition of an investment in its territory by *an investor* of another Party" is not subject to the dispute settlement mechanisms of NAFTA Chapter Eleven or Chapter Twenty.[103] Thus, the dispute settlement procedures do not apply when NAFTA signatories invoke the national security exception in actions brought by private investors to protest restrictions against the acquisition of an investment.

The fact that the parties expressly agreed that the dispute settlement mechanisms would not apply in one instance (vis-à-vis private investors) suggests that the procedures would apply in the other instance (vis-à-vis another state).[104] NAFTA, however, *affirmatively* leaves this question open. The dispute settlement exclusion for private party actions applies "[w]ithout prejudice to the applicability or nonapplicability of the dispute settlement provisions" in other actions involving the invocation of the national security exception.[105] Thus, while NAFTA expressly takes national security defenses against private investors out of the dispute settlement mechanisms, it also affirmatively leaves open the question of whether such defenses are subject to dispute settlement in other areas.

In spite of the additional discussion of the national security exception in Chapter Eleven, the agreement intentionally leaves ambiguous the question of whether NAFTA dispute settlement processes cover the invocations of the national security exception by a state party. It is not surprising that NAFTA parties would exclude issues of national security from an arbitration panel where the complainant is a private investor. These sensitive and diplomatic issues appropriately lend themselves to settlement between states, as opposed to settlements between states and private investors. Nevertheless, it is intriguing that the ambiguity over whether the state-to-state

103. NAFTA, *supra* note 100, art. 1138.1, 32 I.L.M. at 647 (emphasis added).

104. This follows from the principle of interpretation that the expression of one is the exclusion of the other (*expressio unius est exclusio alterius*). BLACK'S LAW DICTIONARY 602 (7th ed. 1999).

105. NAFTA, *supra* note 100, art. 1138.1, 32 I.L.M. at 647. NAFTA art. 2102 (national security) is subject to an exception (art. 607) for trade of energy between Canada and the United States; this exception also does not use the self-judging "it considers" language employed in Article 2102. Perez, *supra* note 42, at 323–27. Perez sees this energy exception as evidence that the treaty parties considered the broader language of the NAFTA national security exception to be self-defining. *Id.*; *see also* Perez, *supra* note 5, at 401–05 (distinguishing between NAFTA's "general self-judging exception" for national security and its "non-self-judging security exception" for energy matters). This position appears to be undermined by the language in NAFTA Article 1138 regarding "the applicability or non-applicability" of the dispute settlement system under Articles Eleven or Twenty to cases where nations invoke the national security exception.

dispute settlement mechanisms apply to national security defenses is affirmatively maintained by NAFTA Article 1138. Certainly, NAFTA drafters knew of the jurisdictional tension created by the self-defining language of GATT Article XXI. Yet they nonetheless adopted this language, and rather than clarifying its meaning, they overtly referred to the ambiguity it creates. This suggests that the NAFTA parties saw this ambiguity as an appropriate way to address national security issues.

C. Examples of WTO Members Invoking Article XXI

Several nations have invoked Article XXI, either expressly or impliedly, both before and after the creation of the WTO. These examples include the voluntary withdrawal of trade restrictions by Sweden; an agreement by Taiwanese officials not to invoke Article XXI against the People's Republic of China (PRC); a tentative agreement between Colombia and Nicaragua to resolve issues before the ICJ; and the settlement of a dispute between the European Union (EU) and the United States over the Helms-Burton Act. These situations exemplify how WTO members may use the current flexibility of Article XXI, in conjunction with diplomatic solutions, to resolve Article XXI disputes. Further, these resolutions demonstrate the benefit of interpreting Article XXI to reflect its constructive ambiguity.

This informal process of dealing with and checking questionable invocations of Article XXI is not new to the WTO. It was also used during the period that preceded the formation of the WTO. For example, in November of 1970, Sweden defended its import quota system on footwear as necessary for national security.[106] It contended:

> [The] decrease in domestic production has become a critical threat to the emergency planning of Sweden's economic defence [*sic*] as an integral part of the country's security policy. . . . Such [domestic production] capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations.[107]

Other contracting parties in the GATT Council quickly questioned the legitimacy Swedish measure's legitimacy and its justification

106. ANALYTICAL INDEX, *supra* note 6, at 603. Although Sweden never formally invoked Article XXI, its position was supported by the exception. EBBA DOHLMAN, NATIONAL WELFARE AND ECONOMIC INTERDEPENDENCE: THE CASE OF SWEDEN'S FOREIGN TRADE POLICY 35 (1989).

107. ANALYTICAL INDEX, *supra* note 6, at 603 (quoting GATT Doc. L/4250, p. 3).

based on national security.[108] Sensing international disapproval, Sweden quickly offered to hold consultations, and eventually withdrew the measure within two years.[109] Although Sweden did not immediately withdraw the measure, the two-year lag is not significantly longer than the average time it takes for a dispute to be resolved under the streamlined processes of the WTO dispute settlement system.[110]

The Swedish example also reflects the importance of diplomatic pressure under the GATT 1947 rules of dispute resolution. Under these rules, any member could block the adoption of a panel report.[111] The WTO strengthened the dispute resolution system by implementing a rule of reverse consensus in the adoption of panel and Appellate Body reports.[112] On the one hand, this rule appears to lessen the incentives of parties to resolve disputes involving Article XXI defenses informally, because it is easier to obtain relief under the WTO's judicial mechanisms. On the other hand, the reasons and impulses behind a self-judging exception have not disappeared. The new WTO procedures do, however, give WTO members challenging the invocation of Article XXI extra leverage in negotiations.[113] The threat of bringing the matter before a WTO panel strengthens the ability of members to check any abusive uses of Article XXI, as compared with the position of the parties under GATT 1947.

The same diplomatic processes that nations use to check Article XXI defenses after the fact may also be used to curb or prevent their inappropriate invocation. When Taiwan acceded to the WTO, it confronted a serious economic downturn and the potential loss of jobs and industry to the PRC.[114] During this time, Taiwan also faced

108. John A. Spanogle, Jr., *Can Helms-Burton Be Challenged Under WTO?*, 27 STETSON L. REV. 1313, 1331 (1998).

109. *Id*. Sweden withdrew the quotas with respect to leather and plastic shoes on July 1, 1977. ANALYTICAL INDEX, *supra* note 6, at 603.

110. *See supra* notes 85–87 and accompanying text.

111. JACKSON ET AL., *supra* note 43, at 263–64.

112. Articles 16.4 and 17.14 of the DSU provide that panel and Appellate Body reports shall be adopted by the Dispute Settlement Body unless there exists a consensus not to adopt the report.

113. These new procedures include the automatic formation of a panel if consultations fail, time limits for forming panels, panel adoption by reverse consensus, the creation of an Appellate Body to review panel reports, provisions that create time limits for compliance, and authorized retaliation. Alexander, *supra* note 63, at 579–80.

114. Karen M. Sutter, *WTO and the Taiwan Strait: New Considerations for Business*, CHINA BUS. REV., Jan. 1, 2002, at 28.

"strong international pressure . . . not to liberally invoke Article [XXI]" upon its accession.[115] Two months prior to Taiwan's accession, its Prime Minister, Chang Chun-hsiung, responded to the question of whether Taipei would "invoke national security reasons . . . to exclude any Chinese products."[116] He answered that Taiwan would rely on already established internal security mechanisms to protect Taiwanese financial markets.[117] Although Taipei is still free to invoke Article XXI, this international pressure has created a situation in which its invocation is less likely.[118]

The diplomatic pressures to settle Article XXI claims also apply to small nations, as well as the large nations that have significant foreign policy operations. In 1999, Honduras and Colombia ratified a treaty that delineated maritime boundaries.[119] Nicaragua, believing that these boundaries encroached on its territorial rights, instituted a 35 percent tariff on all goods from Honduras and Colombia.[120] When Colombia complained to the WTO, Nicaragua defended on the basis of Article XXI and its self-defining provisions.[121] Colombia requested a panel[122]—which the Dispute Settlement Body (DSB) granted—but only after DSB members noted their concern and suggested that the matter be resolved outside the WTO. Using a potential procedural impairment, the U.S. representative suggested that the request for a panel be delayed and that "[t]he parties to the dispute could use this additional time to try to solve the dispute."[123] Similarly, the Japanese representative "strongly urged the parties to seek any possible means in an effort to settle this dispute in other fora outside the WTO."[124] Although the DSB authorized a panel, its members were never se-

115. *Id*.

116. *The View From Taipei; Taiwan's Prime Minister Chang Chun-hsiung Talks About His Hopes That WTO Membership Will Open a Dialogue with the Mainland*, BUS. WK. ONLINE, Nov. 8, 2001 (reproducing the transcript of an interview between *BusinessWeek* Asia Regional Editor Mark L. Clifford and Prime Minister Chun-hsiung), *available at* 2001 WL 25755558.

117. *Id*.

118. *See also* Qingjiang Kong, *Can the WTO Dispute Settlement Mechanism Resolve Trade Disputes Between China and Taiwan?*, 5 J. INT'L ECON. L. 747, 748, 756–57 (2002) (cautioning that Taiwan and China face incentives to use and avoid, respectively, the WTO's dispute settlement mechanisms to forward their own political agendas towards each other).

119. Dispute Settlement Body, Minutes of Meeting, WT/DSB/M/78 (Apr. 7, 2000), para. 51.

120. *Id.* para. 54.

121. *Id.* paras. 55–61.

122. Request for the Establishment of a Panel by Colombia, WT/DS188/2 (Mar. 28, 2000).

123. Dispute Settlement Body, Minutes of Meeting, WT/DSB/M/80 (May 18, 2000), para. 31.

124. *Id.* para. 32.

lected[125] because the parties chose to await resolution of the dispute before the ICJ.[126] While the parties did not informally resolve the dispute, it is apparent that other WTO members advocated such an approach. Further, the dispute-resolution process finally agreed upon achieved the same results that an informal resolution would have achieved. The parties chose to allow the ICJ to address the underlying issues—an approach that will resolve the underlying issues, while still maintaining the flexibility of an ambiguous Article XXI.

The Helms-Burton Act, and the accompanying dispute between the United States and the EC, is the most telling example of how the impulses for a self-judging security exception combine with the threat of WTO adjudication to check informally the use of Article XXI. On February 24, 1996, Cuban jets shot down two unarmed civilian planes, killing four people, including three American citizens.[127] On March 12, 1996, the United States quickly responded by passing the Cuban Liberty and Solidarity Act, popularly known as the Helms-Burton Act.[128] The most controversial portions of the Act were Title III and IV.[129] Title III made foreign companies liable for damages if they knowingly trafficked in property that had formerly belonged to U.S. nationals, but had been confiscated by the Cuban government.[130] Title IV mandated excluding persons from the United States who have trafficked in confiscated property or have associated with a business entity that has been involved with the trafficking of confiscated property.[131] The EU, Canada, and Mexico objected to these measures, labeling them

125. Overview of the Dispute Settlement System, Jan. 22, 2003 (WT/DS/OV/10), *available at* http://www.wto.org/english/docs_e/docs_e.htm (on file with the *Duke Law Journal*).

126. Maritime Delimitation Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Honduras), Application Instituting Proceedings, Dec. 8, 1999, Nicaragua, *at* http://www.icj-cij.org/ (on file with the *Duke Law Journal*); Press Release no. 2002/17, International Court of Justice, Fixing of Time-Limits for the Filing of a Reply by Nicaragua and Rejoinder by Honduras (June 18, 2002), *at* htpp://www.icj-icj.org/icjwww/ipresscom/ipress2002/ipresscom2002-17nh_20020618.htm (on file with the *Duke Law Journal*).

127. *Exiles Commemorate Downing of Planes by Cuba 5 Years Ago*, CHI. TRIB., Feb. 25, 2001, at C7. The victims were members of a "Miami-based Cuban exile group Brothers to the Rescue" that scoured the Florida straits in search of Cuban drifters attempting to flee the island. Warren Richey, *A Spy Trial in Miami on a Last Cold-War Front*, CHRISTIAN SCI. MONITOR, Feb. 15, 2001, at 1. Cuba claimed that the planes had provoked the attack by repeatedly violating Cuban airspace while the United States asserts that the planes were shot down over international waters. *Exiles Commemorate Downing of Planes by Cuba 5 Years Ago*, *supra*.

128. Alexander, *supra* note 63, at 563.

129. *Id.* at 564.

130. 22 U.S.C.A. § 6082 (West Supp. 2002).

131. 22 U.S.C.A. § 6091(a) (West Supp. 2002).

as an extraterritorial attempt to impose U.S. law.[132] The EU challenged the Helms-Burton Act by requesting a panel at the WTO.[133] Canada and Mexico also considered challenging the legislation through NAFTA provisions.[134]

The United States defended the legislation on national security grounds, and threatened to invoke Article XXI—even suggesting that they would refuse to recognize a WTO panel's jurisdiction over the question.[135] Despite criticism from home and abroad over whether Cuba really represented a national security threat, the United States maintained its position.[136] Eventually, likely fearful of the potential consequences of adjudicating an Article XXI dispute before a WTO panel, the United States and the EU resolved their differences.[137]

The understanding reached over the Helms-Burton Act called for President Clinton to waive the application of Title III of the Act and to seek such waiver authority from Congress for Title IV.[138] Addi-

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132. Alexander, *supra* note 63, at 566–69.

133. Blustein, *supra* note 37, at D10.

134. Alexander, *supra* note 63, at 568; Kees Jan Kuilwijk, *Restrictions Hit Traders*, FIN. TIMES (London), Oct. 10, 1996, at 19. Canada later hesitated to pursue this course to its conclusion. *Britain Berates Canadians*, FIN. TIMES (London), May 2, 1997, at 4.

135. Guy de Jonquie'res, *US Dodges Brussels Onslaught; Washington Buys Time as Anti-Cuba Law Dispute Goes to World Trade Body*, FIN. TIMES (London), Feb. 21, 1997, at 6.

136. Editorial, *Fixing a Bad Law*, BOSTON GLOBE, Apr. 18, 1997, at A14; *US Must Play by WTO Rules*, STRAITS TIMES (Singapore), Feb. 26, 1997, at 32. Whether Cuba really represents a national security threat to the United States is an issue that is still being debated. At least one person suggests that perceptions of Cuba's threat linger from the Cold War and are maintained for political reasons (e.g., the common belief that Florida is an important swing state). Maya Bell, *Experts Debate Taking Cuba off Terrorism List*, ORLANDO SENTINEL, Apr. 7, 2002, at A1. Others maintain that Cuba's threat continues in the form of aggressive espionage. Tim Golden, *White House Wary of Cuba's Little Spy Engine that Could*, N.Y. TIMES, Jan. 5, 2003, at 3; *see also* Piczak, *supra* note 63, at 311–17 (describing arguments for why Cuba may continue to represent a national security threat to the United States). Certainly terrorism became a prominent theme at the sentencing hearing of a Cuban spy who allegedly knew about plans by the Cuban government to shoot down planes operated by the anti-Castro group Brothers to the Rescue. *See* Catherine Wilson, *U.S. Sentences Cuban Spy to Life in Prison*, CHI. TRIB., Dec. 13, 2001, at 22 (quoting the prosecutor as arguing that the actions of the convicted spy were "a crime against America" and that "[t]he threat was to the country at large and to this community").

137. Dan Balz, *U.S. Eases Stand on Cuba, Iran Sanctions; Helms Condemns, Europe Hails Move*, WASH. POST, May 19, 1998, at A15. The negotiations resulted in a Memorandum of Understanding that stopped the legal challenge to measures that the United States defended on the basis of Article XXI. European Union–United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, Apr. 11, 1997, 36 I.L.M. 529, 530.

138. *Id*. Under the Helms-Burton Act, the president has authority to suspend application of Title III for up to six months if he gives notice to the appropriate congressional committees and "[the] suspension is necessary to the national interests of the United States and will expedite a

tionally, the president agreed to waive economic sanctions under the Iran and Libya Sanctions Act of 1996[139] against three foreign energy companies seeking to invest in an offshore oil field in Iran.[140] In turn, the EU agreed not to pursue its complaint before the WTO and to make efforts to "chill" future investment in Cuba.[141] True to the agreement, both Presidents Bill Clinton and George W. Bush have continuously suspended application of Title III, despite potential political repercussions from Cuban Americans.[142] Legislation granting presidential waiver power for Title IV, however, has not passed, due to stiff opposition from Congress. The defeat of this legislation, though, may not represent a breach of the agreement, because the U.S.-EU understanding may have been based only on a promise to seek such authority and not on its realization.[143]

This resolution is an example of a situation where diplomatic pressures have achieved a satisfactory result without necessitating involvement by WTO adjudicatory bodies. Much has been said about the advantages embodied by the advent of the new legalism in international trade that has developed since the establishment of the WTO.[144] In this particular context, at least one scholar has advocated expanding this legalism to encompass Article XXI claims, and has even suggested specific principles under which a WTO panel could evaluate an Article XXI defense.[145] These principles represent a

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transition to democracy in Cuba." 22 U.S.C.A. § 6085(c) (West Supp. 2002). The president may make additional suspensions as necessary. *Id*.

139. Pub. L. No. 104–172, 110 Stat. 1541 (1996). This Act also gives the president the power to suspend the application of these economic sanctions. *Id.* § 4(c), 110 Stat. at 1542; *id.* § 9(c), 110 Stat. at 1547–48.

140. Alexander, *supra* note 63, at 569–70; Balz, *supra* note 137, at A15.

141. Balz, *supra* note 137, at A15.

142. Rafael Lorente, *Bush Puts Brake on Cuba Law; Trade War Could Result, Critics Say*, SUN-SENTINEL (Fort Lauderdale, Fla.), July 17, 2001, at A1.

143. Michael S. Lelyveld, *Lawmakers Eye Leash on Clinton over Waivers*, J. COM., May 22, 1998, at A1.

144. For a discussion of the arguments for and against the legalism embodied by the WTO Dispute Settlement Understanding, see Mark L. Movsesian, *Sovereignty, Compliance, and the World Trade Organization: Lessons from the History of Supreme Court Review*, 20 MICH. J. INT'L L. 775, 791–95 (1999).

145. *See generally* Cann, *supra* note 5 (acknowledging that although the WTO may not yet be prepared to adjudicate Article XXI claims, his suggested principles may provide a future framework). Cann's principles include: considerations of whether the target of the national security measure is a developing nation, *id.* at 442–44; the impact of the measure on the target and other parties, especially long-run consequences, *id.* at 446–47, 457–58; the likelihood of the measure's success in light of its goals, *id.* at 447–49; the consistency with which the security measure is applied to target nations in like circumstances, *id.* at 450–52; and exhibition of good

careful attempt to distinguish genuine national security threats from the conduct intended to effect broader foreign policy goals.[146] In essence, this proposal attempts to sort out "justified" or "true" invocations of Article XXI from their counterfeit cousins. Although this approach is appealing because it offers a way to measure an Article XXI defense and a means to enforce its abuses, the approach also creates unfavorable rigidity in the fluid field of national security. WTO members may be uncomfortable submitting claims of national security to a WTO panel that does not acknowledge the need for some flexibility in this area.[147]

Even though these members may desire a panel review when they are challenging an Article XXI defense, the inevitability of unknown future emergencies arising suggests some wisdom exists in having an Article XXI defense in one's back pocket. For instance, although the EU recently criticized the United States's argument that Article XXI is self-defining, the United Kingdom made the same argument in connection with its confrontation with Argentina over the Falkland Islands.[148] These concerns may prevent WTO members from rushing to embrace the new legalism for issues of national security.

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faith in applying the measure, *id.* at 452. This analysis borrows from the WTO jurisprudence that has developed around exceptions in GATT Article XX. Cann, *supra* note 5, at 452–54. It is not clear that this analysis would import easily into Article XXI. The consistency principle, for example, finds express support in the chapeau to Article XX but not in Article XXI. GATT, *supra* note 2, art. XX (providing that the exception is "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail"). Arguably, it is questionable whether consistency should play the same role in the politics-laden world of national security. *See* Alan O. Sykes, *Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: A Pessimistic View*, 3 CHI. J. INT'L L. 353, 366–68 (2002) (noting that although consistency analysis may help to resolve certain Article XX claims, the analysis also presents several difficulties even in the more straight-forward scientific context of Article XX).

146. *See* Cann, *supra* note 5, at 433 ("While the [WTO] agreement does indeed provide some exceptions, including one for the protection of essential security interests, it does not provide an exception for the achievement of foreign policy goals or for the advancement of a particular ideology."). *But see* STEPHEN D. COHEN ET AL., FUNDAMENTALS OF U.S. FOREIGN TRADE POLICY 15 (2d. ed. 2003) (noting that "[t]here is growing consensus that economic strength is now an integral part of the national security equation," and giving examples of how the United States hesitated to impose barriers to trade on steel because the United Kingdom and Russia, both steel exporters, were considered important allies during recent hostilities in Afghanistan).

147. *See* Akande & Williams, *supra* note 40, at 403 (concluding that a WTO panel would likely have jurisdiction over Article XXI defenses but acknowledging that "one needs to adopt an approach which is sensitive to the wording of [Article XXI] and which does not ignore the intention of the drafters to leave flexibility to States invoking that provision").

148. *See supra* notes 36 and 133 and accompanying text.

The resolution of the Helms-Burton dispute demonstrates that diplomatic pressures may also be used to sort out the appropriate from the inappropriate uses of Article XXI. Most in the international community scoffed at the idea that Cuba represented a national security threat to the United States.[149] Also, many have pointed out the apparent futility of U.S. economic sanctions in ousting Cuban leader Fidel Castro.[150] These arguments carry considerable support and merit. Nevertheless, whether out of a sincere belief that Cuba represents a threat to U.S. interests or out of political desires to court the Cuban American vote, the U.S. Congress saw the legislation as important enough to defend on national security grounds.[151] Review by WTO dispute settlement bodies may have found that Article XXI did not justify the legislation. However, such a decision would also have negative consequences, creating a zero-sum game with a winner, the EU, and a loser, the United States. The loss may have engendered further resentment against the WTO amidst claims of encroachment on the national sovereignty of the United States. The diplomatic solution was beneficial because it took the pressure off the WTO, while still achieving a reasonable result.

The understanding reached between the United States and the EU is not above scrutiny. On its face, the settlement appears strange or even bizarre: a president who agrees not to enforce a law that Congress insists should be enforced; a Congress that refuses to do anything about the nonenforcement; and an EU that initially complains about the law but agrees not to retaliate.[152] This strange settlement, however, allowed each side to announce that it achieved its aims. The EU claimed that the agreement effectively neutralized the Helms-Burton Act, while the United States asserted that the understanding furthered the foundational principles of the Act.[153] This dip-

149. Reginald Dale, *U.S. Is Wrong over Cuba, as Usual*, INT'L HERALD TRIB., Oct. 8, 1996, at 13. This contention is not without its detractors. *See supra* note 136.

150. Thomas W. Lippman, *Drive to Change U.S. Stance on Cuba Intensifies*, WASH. POST, Jan. 16, 1998, at A16; Michael Zamba, *Helms-Burton Law Strengthened Castro*, DALLAS MORNING NEWS, Apr. 5, 1997, at 27A.

151. *See* Piczak, *supra* note 63, at 305–07 (describing domestic concerns confronting President Clinton and the U.S. Congress when adopting the Helms-Burton Act); *see also* Perez, *supra* note 5, at 400 (contending that both international and domestic institutional structures must be considered when framing the elements that constitute policy involving both trade and national security concerns).

152. Richard Lawrence, *Helms, Burton and Kafka*, J. COM., Aug. 19, 1998, at A7.

153. Pascal Fletcher, *Cuba 'Need Not Fear' US-EU Deal*, FIN. TIMES (London), June 12, 1998, at 6. The EU saw the Act as essentially neutralized, because President Clinton agreed to

lomatic technique—reconciling differences while failing to eliminate the underlying cause of the dispute—is not unique to issues of national security; it is a common tool used to settle other types of trade differences.[154] Such diplomatic settlements do produce significant consequences; here, the EU eliminated most of the negative effects of the Helms-Burton Act, and the United States kept the Act and maintained its position against Cuba. In addition, such diplomatic settlements permit a flexibility of discussion and compromise that provides time for the dispute to fade from public view, a result which is often not possible with more formal adjudicatory processes.[155]

CONCLUSION

Article XXI was created in ambiguity—an ambiguity necessitated by the need to allow countries the ability to respond to legitimate security concerns without destroying advances in trade liberali-

suspend application of Title III and the State Department sparsely used its powers under Title IV, thus engaging in "a de facto Title IV waiver." Lawrence, *supra* note 152, at A7. The United States saw its victory in the EU's agreement not to adjudicate its WTO complaint and not to support European investors in investing in Cuban property claimed by U.S. nationals. Fletcher, *supra*, at 6. *But see* Sarah Ryle, *Business Focus: America's Door Policy: Red Light*, OBSERVER, June 3, 2001, at 5 (describing how several prominent British businessmen were denied entrance into the United States based on Title IV of the Helms-Burton Act). It has allowed the United States to continue to argue that Article XXI is self-defining. *See Preview of Upcoming World Trade Organization Ministerial in Seattle, Washington*, Hearing of the Senate Finance Committee (Sept. 29, 1999), Federal News Service, at 20 ("[T]he WTO has a provision for exceptions to national security. . . . It is a self-defining exception. . . . The WTO, obviously, doesn't have anything to say about a country's determination of its own national security needs." (comments by Charlene Barshefsky, Ambassador, U.S. Trade Representative)).

154. *See Helpful Fudge*, FIN. TIMES (London), July 15, 2002, at 16 (noting that diplomatic settlements buy time for the dispute to pass over, even if they do not immediately address the underlying source of tension). The Financial Times pointed out that the United States and the EU recognize their trade interdependence, so that when push comes to shove in trade disputes, both parties are willing in fact—even if not in appearance—to back down. *Id*. The Financial Times cited the dispute over the EU banana regime as just such an instance—although the WTO resolved the issue, in the end, the United States accepted a regime "not greatly different from its predecessor." *Id*.

155. Of course, diplomatic compromise and adjudicatory processes are not mutually exclusive. Hugo Paemen, a former EU ambassador to the United States, noted that one of the purposes for the WTO dispute settlement procedures is that "it encourages the parties to come to an agreement before the work of the panel is finished." Blustein, *supra* note 37, at D10. Even the United States, which has staunchly maintained that Article XXI is self-defining and outside the jurisdiction of a WTO panel, praises the new legalism. *See Preview of Upcoming World Trade Organization Ministerial in Seattle, Washington*, *supra* note 153, at 2 ("[The WTO] has advanced the rule of law with a strong dispute settlement system that has helped us significantly improve our enforcement of trade commitments." (comments of Ambassador Charlene Barshefsky, U.S. Trade Representative)).

zation. One of the participants in the drafting of the original GATT Charter recognized this tension: "[W]e thought it well to draft provisions which would take care of real security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance."[156] Commentators, acknowledging this tension, have increasingly attempted to remedy the situation by marshalling arguments to support jurisdiction over Article XXI by the WTO dispute settlement bodies. To fully understand the tension, it is important to assess carefully the arguments both favoring and disfavoring WTO jurisdiction over Article XXI.

Arguments disfavoring jurisdiction include the discretionary "it considers" language of Article XXI itself. International tribunals, such as the ICJ, have emphasized the significance of this language. The argument for a discretionary exception also finds support from analogous arguments developing nations are making about the self-defining element of "emergency" in the *Declaration on TRIPS and Public Health*. Finally, historical statements made by WTO members also support a self-judging Article XXI.

Arguments favoring jurisdiction include textual efforts to construe Article XXI in a way that limits the reach of its self-judging language. A recent WTO arbitration between Ecuador and the EC over the suspension of concessions suggests that a WTO panel may be open to this interpretation. The arbitration rejected attempts by Ecuador to invoke self-judging language to justify the manner in which Ecuador suspended concessions. History also provides several instances in which WTO or GATT bodies have considered Article XXI claims under the dispute settlement provisions of Article XXIII.

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156. ANALYTICAL INDEX, *supra* note 6, at 600. This concern continues today; a July, 2001 report by the European Union on barriers to trade "acknowledged that the principle of national security was an important element of trade policy," but it complained "that national security concerns are used by the US to exclude foreign contractors from defence business, beyond exemptions allowed under World Trade Organisation procedures." *EU Voiced Concern on US 'Protectionism'*, FIN. TIMES (London), Apr. 6, 2002, at 9. Of course, others contend that legitimate security interests are being threatened by the specter of a narrow reading of Article XXI. One commentator has noted that the United States included an exception to GATT 1994 for the Jones Act, which "reserves shipping between U.S. ports to ships built in U.S. shipyards," and which is necessary for the United States to maintain the shipbuilding capacity to support a strong navy. William R. Hawkins, *The WTO as Battleground: A Realist Revival*, WORLD AND I, March 1, 2001. Yet, Japan and the EU have led calls for the United States to justify the GATT waiver since the requisite five-year review of the waiver. *Id*.

Several commentators have evaluated these arguments and have concluded that a WTO panel should accept jurisdiction over a national security defense.[157] Although the WTO is unlikely to reject jurisdiction over such a defense, this framework ignores the relative success achieved by the constructive ambiguity of Article XXI. Despite almost fifty years under the GATT and nine years under the WTO, the basic understanding of Article XXI has not significantly changed. Article XXI is as ambiguous today as it was in 1947. Yet, despite this ambiguity, the GATT continues to function and trade liberalization continues.

Rather than hindering trade, nations may appreciate certain virtues in the ambiguous interpretation of Article XXI. WTO members may prefer to address the national security exception with less formal methods. These informal methods permit greater flexibility in timing and response, protect real and perceived concerns over national sovereignty, and provide the necessary checks against abusive overuse of Article XXI claims. This preference is detected, for example, in the development of NAFTA, where the parties deliberately chose to maintain an ambiguous national security exception. The parties adopted this interpretation in spite of the "problems" of Article XXI—"problems" highlighted by commentators over the long history of the GATT.

While an ambiguous Article XXI is not free from abuse, history suggests that the ambiguity is often a constructive one. Nations have checked informally perceived abuses of Article XXI in several instances. The GATT community persuaded Sweden to withdraw its national security protection over shoes. WTO members have been successful in persuading Taiwan not to invoke the Article in connection with the accession of the People's Republic of China to the WTO. Colombia and Nicaragua have submitted their border dispute to the ICJ in lieu of arguing the matter in the WTO. Finally, the United States and the EC reached a settlement in their dispute over the Helms-Burton Act.

The ambiguity of Article XXI has not necessarily frustrated implementation of the GATT. It may not produce perfect results, but such results often depend on the time, place, and perspective of the parties. This is particularly true in the arena of national security. As the WTO matures, it will inevitably face more arguments over the

157. Cann, *supra* note 5, at 420; Perez, *supra* note 5, at 408–10; Schloemann & Ohlhoff, *supra* note 4, at 426–27.

proper interpretation of Article XXI. These arguments are important and may affect the future understanding of who is to interpret the national security exception. But the arguments should not overlook the advantages of an ambiguous exception—advantages recognized by both the framers and the players in the arena of international trade.