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Interpreting the Justiciability of GATT's Article XXI: Security Exceptions*

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Resumen:

El presente trabajo analiza la justiciabilidad del artículo XXI del Acuerdo General sobre Aranceles Aduaneros y Comercio. Para ello, se analiza: (i) el contenido del artículo XXI; (ii) su carácter auto-justiciable; (iii) los trabajos preparatorios que conducen a su redacción; (iv) las discusiones llevadas a cabo en el Acuerdo General sobre Aranceles Aduaneros y Comercio/Organización Mundial del Comercio; (v) las consideraciones de la Corte Internacional de Justicia; (vi) las posturas académicas; (vii) el estándar de revisión; (viii) la práctica de los Estados; (ix) las estrategias para prevenir el abuso del Derecho; y (x) consideraciones finales.

Palabras clave:

General Agreement on Tariffs and Trade, World Trade Organization, Article XXI, security exceptions, self-judging.

Abstract:

This paper analyzes the justiciability of Article XXI of the General Agreement on Trade and Tariffs. To this end, it delves into: (i) the content of Article XXI; (ii) its self-judging character; (iii) the preparatory works that led to its factual wording; (iv) the discussions conducted before the General Agreement on Trade and Tariffs and the World Trade Organization system; (v) the International

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Court of Justice considerations; (vi) scholarly writings; (vii) the standard of review; (viii) the state practice; (ix) the strategies for preventing legal abuses; and (x) it offers some final considerations.

Keywords:

Acuerdo General sobre Aranceles Aduaneros y Comercio, Organización Mundial del Comercio, artículo XXI, excepciones relativas a la seguridad, auto-justiciable.

I. Introduction

The General Agreement on Trade and Tariffs (GATT)[1] embodies exceptions to the obligations and principles of the agreement. Specifically, Article XXI deals with security exceptions and reads as follows:

> "Nothing in this Agreement shall be construed
>
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
>
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) taken in time of war or other emergency in international relations; or
>
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."[2]

This provision is treated separately from the general exceptions contained in Article XX of the same instrument with an evident differentiation purpose. Article XXI deals with security exceptions, perhaps the most subjective and sensitive issue nations have jurisdiction over. This article has been subject of debate, particularly over its self-judging character and justiciability. Among the legal questions raised is whether Article XXI exceptions are subject to the GATT dispute settlement mechanism, enshrined in Article XXIII. Those who claim its justiciability elaborate on the standard of review that a panel should apply when determining violations of GATT obligations. The jurisprudence of the GATT/WTO does not provide a definitive answer to these questions[3]. Since the establishment of the GATT, members have brought few complaints regarding measures justified under Article XXI but no binding report has been adopted. Under the original GATT dispute

[1] GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT), Geneva (October 30, 1947).
[2] GATT, art. XXI.
[3] LINDSAY, Peter (2003): "The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure", *Duke Law Journal*, Vol. 52, pp. 1278-1279.

settlement system, the panels' jurisdiction was curtailed by a requirement of consensus among member States in order to issue a binding report. With the establishment of the World Trade Organization (WTO) and the adoption of the *Dispute Settlement Understanding* (DSU), a new dispute settlement mechanism gave panels more independence and much less power to members to block the reports. Only on one occasion has an Article XXI complaint been brought under the new system, and it was settled before a panel could issue a decision.

The lack of a definitive GATT/WTO panel interpretation on the justiciability of measures invoked under the security exceptions has left a loophole to be filled by alternative interpretations. The purpose of this paper is to provide guidance on the question of justiciability of Article XXI, security exceptions. The paper analyzes the preparatory works of Article XXI, along with its subsequent interpretation by member States in GATT/WTO forums. Additionally, considerations by the International Court of Justice will be provided. Academic opinions and relevant State practice regarding Article XXI will complement the discussion.

II. Article XXI: A Self-Judging Clause

According to Stephan Schill and Robyn Briese, self-judging clauses are "provisions in international legal instruments by means of which States retain the right to escape or derogate from an international obligation based on unilateral considerations and based on their subjective appreciation of whether the circumstances required for the invocation of the clause exist"[4]. For Schill and Briese, self-judging clauses possess two identifiable characteristics: they provide a unilateral opt-out from an international obligation and they give the invoking State the discretion of determining whether the elements for the opt-out have been fulfilled[5]. Schill and Briese follow the rules of interpretation of the Vienna Convention on the Law of Treaties (VCLT), specifically Article 31(1), when asserting that self-judging clauses should clearly state that a Contracting Party will retain the discretion to decide the scope and applicability of the provision (for example, by using the words "if the State considers")[6].

The language of Article XXI favors the conclusion that it is a self-judging provision. Since it is an exception, its invocation provides an opt-out of GATT obligations. In addition, it uses the word "*nothing*", and the wording of its sub-paragraphs (a) and (b) provide for the article's invocation when a contracting party considers it necessary[7]. The content of this provision neither signals the existence of an objective standard of review nor explicitly provides jurisdiction to the GATT/WTO for determining the righteousness of the measure. In contrast, Article XX's chapeau, which enshrines an objective standard of review, does provide the WTO with jurisdiction to examine various aspects of an invocation under such exceptions, such as the necessity of the measure[8].

[4] SCHILL, Stephan & BRIESE, Robyn (2009): "If the State Considers: Self-Judging Clauses in International Dispute Settlement", *Max Planck Yearbook of United Nations Law*, Vol. 13, p. 92.
[5] Ídem, p. 68.
[6] Ídem, pp. 69-70.
[7] ALFORD, Roger P. (2001): "*The Self-Judging WTO Security Exception*", *UTAH Law Review*, No. 3, p. 759.
[8] LINDSAY (2003), p. 1282.

The self-judging character of Article XXI remains subject of academic and legal debate. This paper will offer contrasting positions and arguments regarding the justiciability of the provision and the question of its self-judging character.

III. Preparatory Works

Preparatory works, as supplementary means of interpretation[9], are relevant when dealing with the ambiguity surrounding the justiciability and self-judging character of Article XXI, and the implausibility of resolving the question through the ordinary meaning of the clause. In general, preparatory works provide useful insight in cases of ambiguity or obscurity of legal provisions. Ultimately, the analysis of the preparatory works of Article XXI will afford a reasonable interpretation of the article's object and purpose as conceived by the GATT's Contracting Parties.

As evidenced by the first drafts of the GATT, the United States' State Department Proposal[10] and the London Draft[11], States recognized the need to establish exceptions to the obligations and general principles that were going to be agreed upon in the new trade organization. The GATT 1947 eventually separated general exceptions (Article XX) from security exceptions (Article XXI); however it wasn't originally conceived that way. In the New York Draft of Charter[12], these exceptions were all included under "general exceptions", as follows:

> "Article 37
>
> *General exceptions to chapter V*
>
> Subject 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, or a disguised restriction on international trade, nothing in Chapter V shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (a) Necessary to protect public morals;
> (b) For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country;
> (c) Relating to fissionable materials;
> (d) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;

[9] VIENNA CONVENTION ON THE LAW OF TREATIES (VCLT), Vienna (May 23, 1969), Art. 32.
[10] UNITED STATES OF AMERICA, DEPARTMENT OF STATE: "Proposals for Expansion of World Trade and Employment" (November 1945).
[11] UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL: "Conference on Trade and Employment, Report of the First Session of the Preparatory Committee", E/PC/T/33 (December 1946).
[12] UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL: "Conference on Trade and Employment, Report of the Drafting Committee of the Preparatory Committee", E/PC/T/34 (March 1947).

(e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member;

(f) Relating to the importation or exportation of gold or silver;

(g) Necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of Chapter V, such as, those relating to customs enforcement, deceptive practices, and the protection of patents, trade marks and copyrights;

(h) Relating to the products of prison labour;

(…)

(k) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security."[13]

If the article had remained as originally presented, any measure otherwise prohibited and justified under sub-paragraphs (c), (d), (e), and (k) would also need to comply with the conditions imposed by the article's chapeau. In other words, measures justified under security exceptions could not have been applied in a manner that would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or in a manner which constituted a disguised restriction on international trade[14]. The only difference between the chapeau of Article 37, and the current text of Article XX of the GATT is insignificant.

The United States delegation proposed an amendment to the New York Draft Charter, which suggested the exclusion of items (c), (d), (e), (j) and (k) from Article 37, stating that this article related only to Chapter V, and their inclusion in a new article to be placed "toward the end of the Charter (…) [making] these items general exceptions to the entire charter" [15].

When submitting the proposal for the consideration of the commission discussing the general exceptions, the Chairman himself stated that the proposal intended to make those sub-paragraphs apply to the Charter as a whole and not only to Chapter V[16]. During the discussion of these security exceptions, the Netherlands delegate asked for clarification as to what meaning would be given to the phrases *emergency in international relations* and *essential security interests*, feeling they could create a large loophole[17]. The United States' (US) delegate attempted to address the previous concerns, feeling an obligation to do so as they had originally drafted the text of those provisions. He argued that the right or need of a Member to determine what their security interests are and to take action accordingly should be unquestionable. In explaining what would constitute an emergency in international relations, the US delegate gave as an example the restrictions to imports and exports by his government during World War II. More significantly, he explained that during the drafting efforts the US recognized a

[13] Ídem.

[14] PAUWELYN, Joost H.B. *et al.* (2016): *International Trade Law* (Wolters Kluwer, 3rd ed.), p. 419.

[15] UNITED STATES OF AMERICA, UNITED STATES DELEGATION TO THE UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL: "Proposal submitted to the Second Session of the Preparatory Committee of the U.N. Conference on Trade and Employment", E/PC/T/W/23 (May 1974), p. 5 ("*US Proposal*").

[16] UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL: "Second Session of the Preparatory Committee of the U.N. Conference on Trade and Employment, 25th mtg. of Comm'n A, E/PC/T/A/PV/25 (July 1947), p. 39.

[17] UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL: "Second Session of the Preparatory Committee of the U.N. Conference on Trade and Employment, 33rd mtg. of Comm'n A, E/PC/T/A/PV/33 (July 1947), p. 19 ("*Verbatium of 33rd Meeting*").

need for balance. The exceptions could not be too tight as to prohibit measures "needed purely for security reasons" nor too broad as to permit the pretext of security to allow "anything under the sun"[18].

Continuing the discussion of the US proposal, the commission then proceeded to consider the introductory paragraph for the new article. The introductory text for the new article disposed: "Nothing in this Charter shall be construed to require any Member…"[19]. The Chairman opened the floor for discussion on the issue of the possibility of reviewing measures invoked under these exceptions. Special weight is given to the remarks by the delegation who introduced the amendment. The US delegate stated that a Member who invokes such exceptions would not violate the Charter, but if that unilateral action affected another Member "that member would have the right to seek redress of some kind under Article 35"[20]. Article 35 of the New York Draft referred to dispute settlement within the organization. The Australian representative suggested the inclusion of either a paragraph or a note that would further clarify that the security exceptions did not conflict with Article 35[21]. After receiving assurances by the US delegation that the lack of conflict was "perfectly clear"[22], the Australian representative withdrew his reservation. Subsequently, the proposal was approved. The content of Article XXI as we know it today was settled in the Geneva Final Act of October 30, 1947 and it has never been amended[23]. Needless to say, the current language of the article is almost identical to the US' proposal.

After examining the discussions leading up to the adoption of this article, it is possible to assert the following conclusions. The decision to relocate the security exceptions from the general provision to a separate article gives us strong indications that the Contracting Parties wished these exceptions to be granted a special treatment. The parties also recognized their individual right to determine what constitutes a security interest while at the same time asserting that the article would be justiciable.

IV. Article XXI Discussions in the GATT/WTO System

Very few cases have been subject to a formal dispute settlement procedure under Article XXI exceptions. Even though GATT/WTO panels have not been able to issue binding jurisprudence, it is relevant to reproduce some of the discussions that took place around those formal complaints. Additionally, further recollection of the opinions of member States at council meetings regarding the scope of the article will provide important insight.

During the Third Session of the GATT, Czechoslovakia requested a decision under Article XXIII regarding whether the US had failed to meet its GATT obligations by issuing export licenses[24]. The US' defense was based on Article XXI, arguing the export licenses were being issued to products they

[18] Ídem, pp. 20-22.
[19] *US Proposal* (1974).
[20] *Verbatium of 33rd Meeting* (1947), p. 26-27.
[21] Ídem, pp. 27-28.
[22] Ídem.
[23] WORLD TRADE ORGANIZATION, SECRETARIAT (2012): "GATT Analytical Index – Guide to GATT Law and Practice" ("Analytical Index").
[24] GENERAL AGREEMENT ON TARIFFS AND TRADE, REQUEST FOR A DECISION UNDER ART. XXIII BY CZECHOSLOVAKIA: "United States – Issue of Export Licenses", GATT/CP.3/33 (May 1949).

considered could potentially be used by a military establishment[25]. When the issue was discussed with the members, the Czech delegate protested that because the US' interpretation of "war materials" was so broad there was no way to know what the term actually covered[26]. The British delegate argued that each State "must have the last resort on questions relating to its own security" and, as such, the Czechoslovakian complaint should be dismissed[27]. The members voted on the complaint and the majority found that the US had not failed to carry out its GATT obligations.

In 1961 Ghana considered the Portuguese' presence in Angola as a threat to African peace, and justified the establishment of a boycott on Portuguese goods under Article XXI (b) (iii). Specifically, Ghana's interpretation of the article entailed that each country was to be the "sole judge" of what was necessary for its security interests, and added that the threat which prompted those measures could be either perceived or apparent[28]. In this instance, the issue of GATT jurisdiction over Article XXI claims was not raised[29].

Sweden, in 1976, placed a global import quota for certain footwear[30] justified under Article XXI. At the time, Sweden was facing a decrease in domestic production and determined that the maintenance of a minimum domestic production capacity in the footwear industry was "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"[31]. Even though Sweden offered to consult bilaterally with affected members, and despite the quota was in place for only two years, this situation exemplifies the complexities of national security exceptions. As Raj Bhala has accurately stated, "[t]here are cases in which commercial and national security interests are so intertwined that a bright line between the two interests can't be drawn"[32]. This is just one example of how almost anything can be justified, rightfully or wrongfully, as essential for national security.

The European Communities (EC), Canada, and Australia applied a total ban on imports from Argentina after the 1982 Falklands/Malvinas conflict. They justified the measure under Article XXI and said the exercise of rights under this exception was not subject to notification, justification, or approval[33] by other members. Argentina argued that a failure to notify trade restrictions was not only a violation of fundamental GATT obligations but also a lack of respect for all Contracting Parties[34]. The Brazilian delegate sided with Argentina and stated that while every member has the right to

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[25] GENERAL AGREEMENT ON TARIFFS AND TRADE, REPLY BY THE UNITED STATES DELEGATION: "United States – Issue of Export Licenses", GATT/CP.3/38 (June 1949).
[26] GENERAL AGREEMENT ON TARIFFS AND TRADE, THIRD SESSION OF THE CONTRACTING PARTIES: "Summary Record of the Twenty-Second Meeting", GATT/CP. 3/SR.22 (June 1949).
[27] Ídem, p. 7.
[28] GENERAL AGREEMENT ON TARIFFS AND TRADE, NINETEENTH SESSION OF THE CONTRACTING PARTIES: "Summary Record of the Twelfth Session", SR.19/12 (December 1961), p. 196.
[29] SCHOLEMANN, Hannes L. & OHLHOFF, Stefan (1999): "Constitutionalization and Dispute Settlement in the WTO: National Security as an Issue of Competence", *American Journal of International Law,* Vol. 93, pp. 424, 436.
[30] *Analytical Index (2012)*, p. 603.
[31] GENERAL AGREEMENT ON TARIFFS AND TRADE, NOTIFICATION BY THE SWEDISH DELEGATION: "Sweden – Import Restrictions on Certain Footwear", L/4250 (November 1975), p. 3.
[32] BHALA, Raj (1998): "National Security and International Trade Law: What the GATT Says, and what the United States Does", *University of Pennsylvania Journal of International Economic Law*, Vol 19, pp. 263, 273.
[33] GENERAL AGREEMENT ON TARIFFS AND TRADE, COUNCIL: "Trade Restrictions Affecting Argentina Applied for Non-economic Reasons", C/M/157 (June 1982), p. 10.
[34] Ídem, pp. 11-12.

determine what their essential security interests are, justification had to be provided in cases where no involvement of security interests were apparent[35]. Although a panel was not established, this discussion led the Contracting Parties to adopt the *Decision concerning article XXI of the General Agreement*[36]. The document provides that when a measure is taken under Article XXI, Contracting Parties must be notified, subject only to the exceptions in Article XXI (a). However, it still left significant loopholes. It neither provided an objective standard by which a panel could evaluate an Article XXI claim nor defined "reasons of security". It was also of a temporary character, until the Contracting Parties decided to make a formal interpretation of the article. More significantly, it was a missed opportunity for members to provide clarification on the issue of justiciability. Instead, they determined that all contracting parties affected by an Article XXI measure retained their full rights under the GATT. Among those rights remains to bring forth a complaint to a dispute settlement body and receive a determination on the righteousness of the measure. The document, therefore, seems to echo the position taken by the members during the preparatory works regarding Article XXI not being in conflict with Article XXIII.

In 1985, the US imposed a trade embargo against Nicaragua[37], prompting the latter to bring a complaint before the GATT Council. Nicaragua asked the Council to condemn the embargo and request the US to revoke the measures on the grounds that these were taken as a coercion tool for political reasons[38]. The Nicaraguan representative added that it was "absurd to suggest that Nicaragua, a small and underdeveloped country, could pose a threat to the national security of one of the most powerful countries in the world", and further noted that there was currently no armed conflict between them[39]. The US justified the embargo based on Article XXI (b) (iii) and sustained that proper notification of the measure was provided to the members. The US rejected the GATT's jurisdiction to judge political or security issues, reinforcing their claim that the organization could not approve or disapprove measures deemed to be necessary for the safeguard of national security interests[40].

In regards to the jurisdiction of the GATT, Australia supported the US' challenge and added that the appropriate forum for discussions of security issues was the United Nations Security Council[41]. The EC approached the question differently, by simply stating that Article XXI of GATT was self-judging. However, they also noted that in exercising this discretion, members should act responsibly, and with discernment and moderation, in order to avoid arbitrary invocations[42]. Nineteen out of the forty-three countries who addressed the Panel supported the self-judging interpretation[43]. In contrast, Poland and

[35] Ídem, p. 12.
[36] GENERAL AGREEMENT ON TARIFFS AND TRADE: "Decision concerning article XXI of the General Agreement", L/5426 (December 1982).
[37] UNITED STATES OF AMERICA, Executive Order No. 12513, (05/01/1985).
[38] GENERAL AGREEMENT ON TARIFFS AND TRADE, COUNCIL: "United States - Trade measures affecting Nicaragua", C/M/188 (June 1985), p. 2.
[39] Ídem, p. 3.
[40] Ídem, pp. 4-5.
[41] Ídem, p. 12.
[42] Ídem, p. 14.
[43] ALFORD (2001), p. 713.

Chile rejected the argument that the GATT was not competent to know and decide Article XXI claims[44].

There were also significant arguments against the self-judging character of the article. The Cuban delegate, siding with Nicaragua, stressed that whenever invoking Article XXI, parties should be required to justify it with relevant facts in order to prevent abuses of the system[45]. Similarly, but providing more specificity, India sustained that a member invoking Article XXI (b) (iii) should provide a nexus between the measure taken and its security interest[46]. Brazil further noted that the invocation of the article "should only be exercised in light of other international obligations such as those assumed under the UN charter"[47].

A panel was established to decide on the US trade embargo against Nicaragua, but its terms of reference precluded it from examining or judging the validity or motivation for the invocation of Article XXI (b) (iii) by the US[48]. These narrow terms were the result of a compromise, given the US' opposition to the establishment of a panel if this provision was to be evaluated. Nonetheless, the panel still made some observations about the article. They suggested that even tough trade embargoes are contrary to GATT principles of certainty and trade liberalization, the purpose of the article was not to make parties forego measures needed to protect their essential security interests[49]. The most relevant contribution of the report was a statement stressing that a party invoking a measure under Article XXI should carefully weigh its security needs against the need to maintain stable trade relations[50]. Despite the report was not adopted[51], the panel implied the standard of review under which an Article XXI measure would be analyzed. They would consider if the member "carefully", perhaps reasonably, weighted the balance of their alleged national security interest being protected and the trade relationship with the member subjected to the measure. The panel's view of a "careful" balance when deciding the measure was the echo of statements of a significant number of States who considered that the invocation of the article should be made with utmost prudence, especially when invoked by a developed country.

The first and only complaint brought to a WTO panel has been United States-The Cuban Liberty and Democratic Solidarity Act. The EC filed a request for consultations after the US adopted the Cuban Liberty and Democratic Solidarity Act[52]. The US, following their same argument as in previous cases,

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[44] GENERAL AGREEMENT ON TARIFFS AND TRADE, COUNCIL: "United States - Trade measures affecting Nicaragua", C/M/188 (June 1985), p. 8.
[45] Ídem, p. 5.
[46] Ídem, p. 11.
[47] Ídem, pp. 7-8.
[48] GENERAL AGREEMENT ON TARIFFS AND TRADE, COUNCIL: "United States – Trade measures affecting Nicaragua - Panel established under Article XXIII:2", C/M/196 (Apr. 1986).
[49] GENERAL AGREEMENT ON TARIFFS AND TRADE, PANEL REPORT (1986): "United States – Trade measures affecting Nicaragua", L/6053, ¶5.16.
[50] Ídem.
[51] The panel ultimately concluded that, as it couldn't analyze this provision, they could not find the US neither non-compliant nor compliant with its GATT obligations. See ídem, ¶5.3.
[52] WORLD TRADE ORGANIZATION, REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES: "United States - The Cuban Liberty and Democratic Solidarity Act", WT/DS38/2 (October 1996).

invoked Article XXI to justify its measure[53]. This was the first opportunity for a panel to fully analyze Article XXI and issue a binding report. The EC did not make counterarguments to the invocation of the provision[54]; perhaps because they had been on the other side of the dispute before and used the same exception to justify several measures. The parties settled the case.

V. Considerations by the International Court of Justice

It is worth mentioning how another dispute settlement body, the International Court of Justice (ICJ), has understood Article XXI in light of similar national security exception clauses in bilateral treaties. Nicaragua brought a complaint to the ICJ alleging, *inter alia*, that the trade embargo imposed upon them by the US was in open violation of the obligations acquired under the bilateral treaty on Freedom, Commerce, and Navigation (FCN). The FCN contained a clause that stated that "the present Treaty shall not preclude the application of measures ... (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests." The Court compared the FCN's security exceptions with those in the GATT. They manifested that the GATT's Article XXI contained the phrase *it* [the member] *considers necessary*, and the FCN, on the other hand, did not make reference "to what the party 'considers necessary' for that purpose"[55]. In its decision, the ICJ found the trade embargo violated the FCN and that the security exception clause was not self-judging. The Court also implied, *au contraire*, that Article XXI of the GATT was self-judging.

In the Oil Platforms Case[56], the ICJ addressed a controversy dealing preliminarily with a similar exception under a FCN treaty. In this regard, the Court maintained the opinion that such provisions were not self-judging and therefore subject of an objective standard of review[57]. However, in this case the ICJ did not offer any analogy with the GATT security exceptions clause.

It is possible to infer from the ICJ's statements that security exceptions are justiciable in the cases concerned (Oil Platforms and Nicaragua). However, while acknowledging the justiciability of such exceptions under FCN treaties, the ICJ clearly distinguished Article XXI of the GATT and inferred its self-judging character.

VI. Academic Debate

[53] WORLD TRADE ORGANIZATION, DISPUTE SETTLEMENT BODY (1996): "United States - The Cuban Liberty and Democratic Solidarity Act - Request by the European Communities and their member States for the establishment of a panel", WT/DSB/M/24.

[54] ORLD TRADE ORGANIZATION, DISPUTE SETTLEMENT BODY (1997): "United States - The Cuban Liberty and Democratic Solidarity Act - Request by the European Communities and their member States for the establishment of a panel", WT/DSB/M/26.

[55] *MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA* (Nicar. v. U.S.), International Court of Justice. Judgment, June 27, 1986, I.C.J. Rep. 14, ¶282. See also Opinion of Jose E. Alvarez, Sempra Energy Int'l & Camuzzi Int'l v. Republic of Argentina, ARB/02/16 and ARB/03/02, p. 6 (9/12/2005). Available at: http://ita.law.uvic.ca/documents/CamuzziSempraAlvarezOpinion.pdf.

[56] *OIL PLATFORMS* (Iran v. U.S.), International Court of Justice. Judgment on the Merits, November 6, 2003.

[57] ALFORD (2001), p. 41.

The academic debate around the scope and extent of Article XXI of the GATT is diverse. While some scholars advocate for the justiciability of Article XXI, others argue that such provision cannot be subjected to the GATT's dispute settlement dispositions. Raj Bhala favors the latter interpretation. He contends that Article XXI (b) provides an effective solution to this debate, in the context that its own language purposely inserts the word 'it', and therefore "no WTO panel or other adjudicatory body, has any right to determine whether a measure … satisfies its requirements"[58]. He shares the defense made by the EC regarding the trade embargo against Argentina, which asserts that the sanctioning member does not have to notify or justify to, or seek approval or ratification from any Member when invoking Article XXI. He sustains that the *Decision Concerning Article XXI* does not impose on Members an obligation to notify since its wording lets them decide whether notification is "possible"[59]. Although Bhala's argument is certainly valid, the *Decision Concerning Article XXI* should be read as imposing an obligation to notify while giving the sanctioning member the discretion to determine which details will not be disclosed.

Bhala also suggests that while nothing prevents a State from bringing a claim against a member invoking Article XXI, a WTO panel is not likely to adjudicate on the merits the claimant's invocation of that article[60]. He says it is likely that the WTO will keep interpreting its terms of reference narrowly, as in the US-Nicaragua report.

Bhala suggests that good faith of the members is the *only* way to avoid abusive invocations of article XXI[61]. Nevertheless, he advocates for the delimitation of Article XXI (b), based on a reasonableness standard that would objectively evaluate whether a reasonable government facing the same circumstances would have invoked the provision. This argument appears to be in contradiction with his self-judging interpretation of Article XXI. If the article is not justiciable, the question remains open on who should delimit subparagraph (b) and who should determine the reasonableness of the measure. Bhala does not clarify this. For Bhala's claim of delimitation to be valid, it would have to at least require Article XXI (b) to be justiciable.

Roger Alford analyzed the preparatory works and also advocates for the self-judging characteristic of the exception, concluding that the members' intention was for Article XXI to be invoked in limited circumstances but for them to reserve the right to determine when they would invoke it[62].

Contrary to Bhala and Alford, other commentators have elaborated strong arguments in favor of the justiciability of article XXI. Particularly, the opinions of Lindsay, Scholemann and Ohlhoff, and Akande and Williams are noteworthy.

Akande and Williams argue that allowing Article XXI to be self-judging would be to undermine the legal effects of the GATT since it will leave compliance with obligations to the members' discretion[63]. Scholemann and Ohlhoff sustain that allowing members to block the jurisdiction of the dispute settlement bodies just by invoking this article would be to transform a substantive issue into a

[58] BHALA (1998), pp. 268-69.
[59] Ídem, pp. 270-271.
[60] Ídem, p 279.
[61] Ídem, p 313.
[62] ALFORD (2001), p. 699.
[63] AKANDE, Dapo & WILLIAMS, Sope (2003): "International Adjudication on National Security Issues: What Role for the WTO", *Virginia Journal of International Law*, Vol. 43, pp. 365, 384.

procedural one, and would contradict the WTO's purpose of strengthening the multilateral system[64]. They further argue that because the DSU applies to all covered agreements, including the GATT, and there is no explicit reference excluding Article XXI, it is clear that a panel has jurisdiction to decide these claims[65]. This argument is very compelling because, once again, members had the opportunity to exclude the invocations of security exceptions from the DSU. Furthermore, they label as "clearly justiciable" those situations where there is no risk to a security interest or whenever a measure has no effect protecting said interest[66]. Nonetheless, this assertion remains dubious at best. The determination of essential security interests is subjective to each country and their sociopolitical circumstances; it is not possible for those limits to be "clear".

Scholemann and Ohlhoff tend to favor the position that while panels should have an interpretative role, they would not have definitional authority[67]. Clarifying this interpretation, Lindsay pointed out that it is up to members to decide *what* measure to apply, while leaving to a WTO panel the jurisdiction to objectively review *when* the measure would be applied[68]. It should be noted that a member, when making a decision to protect its security interests, does not only analyze the measure to be taken but also the correct timing and duration of it. Separating the substance of the measure from the member's determination of when to apply it would likely render an incomplete and flawed analysis.

Lindsay suggests that the US – Czechoslovakia and EC – Yugoslavia disputes are clear indications that Article XXI is subject to Article XXIII[69]. The Czechoslovakia case was significant since the GATT Council did not deny jurisdiction to make a determination on the issue. The EC, in the dispute with Yugoslavia, never objected the establishment of a panel, indicating that they would accept the panel's jurisdiction to decide on the matter. The latter, in addition to Contracting Parties' statements during the preparatory works and the *Decision Concerning Article XXI*, have driven Lindsay to suggest that it is unlikely a panel would reject jurisdiction[70]. Furthermore, he warns about the large loophole that would be created in the system if the WTO were to reject its jurisdiction on Article XXI.

VII. Standard of Review

The panel in its non-binding report in *US – Trade Measures Affecting Nicaragua*, discussed above, hinted which standard of review would be applicable in the event of having the terms of reference to do so. The panel would analyze if the member "carefully" weighted the balance of the security interest and the trade relation with the member subject of the measure. Nevertheless, it would be naïve not to stress that typically nations value their security interests much higher than its trade relations. Consequently, while a member may give careful thought to its trade relations before imposing a measure based on Article XXI, the balance will generally tilt towards safeguarding its alleged national security.

[64] SCHOLEMANN & OHLHOFF (1999), pp. 439-440.
[65] Ídem, p. 441.
[66] Ídem, p. 443.
[67] Ídem, p. 448.
[68] LINDSAY (2003), p. 1287.
[69] Ídem, pp. 1293-1294.
[70] Ídem.

Cann[71], joined by Akande and Williams[72], hold that the determination of the necessity of a measure for security reasons is subjective and as such should be determined by the members themselves and not be reviewable by third parties. They also concur that a panel should have the jurisdiction to reviewing the measure under a good faith standard. Akande and Williams add that in order to properly analyze the member's good faith, a panel would have to review the purpose of the measure[73]. Both positions seem contradictory. In order to determine good faith under their proposed standard, and to review the purpose of the measure, a panel must do some analysis of the necessity of the measure.

Furthermore, Cann argues that applying this good faith standard should be enough to "prohibit discriminatory actions" [74]. But, if the Contracting Parties had intended for security exception invocations to be non-discriminatory they would have left them under Article XX and subjected to the chapeau test. Akande and Williams suggest that in order to comply with the good faith standard, the invoking member "must genuinely believe that the measure taken is necessary to protect its national security interests". They argue a panel should examine whether the member considered an essential security interest threatened and whether the measure was a proportional response to the threat[75]. However, this interpretation would give panels too much authority to determine what is not an "essential security interest", what is not a "threat", and what is not "proportionate response"; these determinations should always be left to the States' since an objective evaluation of these elements is highly unlikely.

Scholemann and Ohlhoff, who also propose a good faith standard of review, contend that it should be applied by analyzing the reasonableness of the measure[76]. Akande and Williams reject the reasonableness standard on the basis that the drafters could have included this requirement but refrained from doing so. Using the same argument, we could rebuttal their good faith standard proposition on the grounds that drafters could also have included a good faith requirement.

The scholars that support the good faith standard do recognize the challenges in applying it. Difficulty of proving a government acted in bad faith[77] and who bears the burden[78] are but a few of them.

VIII. State Practice

The WTO Agreement states that the organization "shall be guided by the decisions, procedures and customary practices"[79] of its members. With this clause, the WTO acknowledged the prospective effects of State practice *vis-a-vis* the treaty. The VCLT provides for general and supplementary rules

[71] CANN, Wesley A. Jr. (2001): "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", *Yale Journal of International Law*, Vol. 26, pp. 413, 480.
[72] AKANDE & WILLIAM (2003), pp. 398-399.
[73] Ídem, p. 396.
[74] CANN (2001), p. 452.
[75] AKANDE & WILLIAMS (2003), p. 399.
[76] SCHOLEMANN & OHLHOFF (1999), pp. 443-445.
[77] Ídem; AKANDE & WILLIAMS (2003), p. 393.
[78] AKANDE & WILLIAMS (2003), p. 394.
[79] MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, Morocco (4/15/1994), Article 16.

for treaty interpretation[80]. The general rule remains that a treaty should be interpreted in light of the principle of good faith, its ordinary meaning with due regard for the context, and its object and purpose. Nevertheless, the VCLT signals that together with the context, it should be taken into account, *inter alia*, "any subsequent practice in the application of the treaty which establishes the agreement of the parties"[81]. The VCLT, showing its own age, prompted the International Law Commission (ILC) to expand or clarify the scope and content of several of its provision. In 2014, the ILC developed a series of guidelines for the effects of subsequent practice of States in relation to treaties[82]. In its report, special rapporteur Georg Nolte referred to the WTO Appellate Body's report on *Japan – Alcoholic Beverages II*, which offered a definition of subsequent practice in treaty interpretation as the sequence of acts or pronouncements that are "concordant, common, and consistent"[83]. While acknowledging the position of the Appellate Body, he asserted that such standard establishes a high threshold under Article 31 (3) (b) "requir[ing] a particularly broad-based, settled, and qualified form of collective practice in order to establish agreement between the parties regarding interpretation"[84]. He further notes that the Appellate Body seems to have taken that standard from Sir Ian Sinclair[85], who considered the value of subsequent practice dependent on "the extent to which it is concordant, common and consistent". Subsequently, in *EC — Computer Equipment*, the Appellate Body loosened the criteria established in *Japan – Alcoholic Beverages II*. It held that "[t]he purpose of treaty interpretation is to establish the *common* [emphasis in original] intention of the parties to the treaty. To establish this intention, the prior practice of only *one* [emphasis in original] of the parties may be relevant, but it is clearly of more limited value than the practice of all parties"[86]. The Appellate Body implied that in order for subsequent practice to be a legitimate mean of interpretation it does not need to be practiced by all members. Rather, the interpretative value increases in the measure more members engage in such practice. Therefore, the lack of a formal interpretation of the article, together with these provisions and statements, leads to the conclusion that pronouncements and actions by a majority of states is the most legitimate and reliable mechanism to interpret the scope and applicability of Article XXI.

During the preparatory works discussions, the Contracting Parties seemed to have accorded a special treatment to Article XXI but nonetheless made it subject to judicial review under the proper dispute settlement mechanisms. Due regard should be given to the statement by the US delegate, who shared that the security exceptions were not outside the scope of the dispute settlement provisions. However, there has been an apparent shift from that position. The parties' statements and practice since the GATT entered into force seem to indicate that a significant number of States favor the position that

[80] VIENNA CONVENTION ON THE LAW OF TREATIES (VCLT), Vienna (May 23, 1969) Art. 31-32.

[81] Ídem, Article 31 ⁋3(b).

[82] UNITED NATIONS, INTERNATIONAL LAW COMMISSION: "Second Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties of Its Sixty-Sixth Session", A/CN.4/671 (3/ 26/2014) (*ILC Report*).

[83] WORLD TRADE ORGANIZATION, APPELLATE BODY REPORT (1996): "Japan — Alcoholic Beverages II", WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

[84] ILC Report, ⁋21.

[85] SINCLAIR, Ian (1984): *The Vienna Convention on the Law of Treaties* (Manchester University Press), p. 137.

[86] WORLD TRADE ORGANIZATION, APPELLATE BODY REPORT (1998): "EC — Computer Equipment", WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, ⁋93.

the invocation of national security exception is enough to preclude a panel from knowing and judging the righteousness of such measure.

Close attention must also be paid to the frequency with which members have invoked Article XXI and brought complaints under it. The few Article XXI cases brought to the GATT/WTO during its more than 60-year history evidences a lot of restraint from members in invoking security exceptions. This restraint, however, together with weak dispute settlement provisions that were in place before the adoption of the DSU, must be the principal reason panels and appellate bodies have not had the opportunity to determine the justiciability and scope of the article, much less its standard of review.

One reason for such restraint may be that States acknowledge that the ambiguity surrounding the justiciability of the article actually favors them. Scholars as Lindsay favor this 'constructive' ambiguity, arguing that allowing members to address the security exception through less formal methods permits greater flexibility in timing and response, protects real and perceived concerns over national sovereignty, and provides the necessary checks against abuse of these exceptions[87].

In the discussions regarding *United States – Trade Measures Affecting Nicaragua* a majority of States seemed to have agreed that an Article XXI invocation should be made in good faith and exercised with prudence; but leaving those determinations to each member. As Alford has correctly pointed out, regardless a panel may interpret it otherwise, Article XXI *has* been self-judging[88].

IX. Mitigating Abuses

The main argument of States who oppose the self-judging interpretation is that this determination will lead to abuses and its invocation could serve as a hard bargaining technique used by powerful members against weak ones. These are valid concerns; nonetheless, States themselves can prevent abuses by holding each other accountable in a number of ways.

Alford has suggested four mechanisms contemplated by the WTO which would help mitigating abuse of the clause. Under Article XXXV of the GATT, and upon the accession of a new member, a Contracting Party may declare their trading relations will not be subject to GATT/WTO obligations[89]. Since a super-majority is needed to accede the organization, according to Alford the purpose of the article was to allow members who voted against the admission not to be obliged towards the new member. This opt-out, or non-application, provision has seldom been invoked.

Just as the system lets members opt-out of obligations, Article XXIV permits parties to enter into preferential trade agreements (PTA) to further liberalize trade between its members. Alford suggests that members of a PTA can incorporate an objective security exception. This way, the invocation of such security exception will be justiciable in relation to the PTA members, while the self-judging standard will remain for non-PTA members[90].

[87] LINDSAY (2003), p. 1312.
[88] ALFORD (2001), p. 708.
[89] Ídem, p. 726.
[90] Ídem, p. 733.

Another mechanism a member can implement is altering the discretionary tariff benefits given to other members. However, these discretionary tariff benefits can only be applied by developed countries *vis-a-vis* developing countries[91]. Nonetheless, this alternative could prevent the over invocation of Article XXI, since a developed country could meet its objectives by removing or suspending a tariff benefit without the need of invoking a security exception.

The WTO also contemplates cases where a measure adopted is not contrary to the covered agreements but nonetheless nullifies or impairs benefits. In fact, when discussing the inclusion of this non-violation remedy[92], the working party used the example of an invocation under the security exceptions which would be permissible by the Charter but could nonetheless impair or nullify other members' benefits[93]. In those cases, the working party continued, a member could bring a claim not on the grounds that the measure violates the Charter, but on the basis of an impairment or nullification of benefits. Therefore, while a Panel could not review an Article XXI measure, it would retain the jurisdiction determine whether there is an impairment or nullification of benefits. The invoking member does not have to remove the measure, but the affected party is entitled to damages[94]. Alford correctly argues that this is an exceptional remedy which "should be approached with caution"[95] and therefore should be invoked only for controversial national security invocations[96].

Member States also have the ability to solve the issues that prompt the adoption of Article XXI measures by recurring to alternate mechanisms other than those contemplated in the GATT/WTO. For example, the US reached an agreement with the EC outside the GATT/WTO system, which led the latter to withdraw its WTO complaint.

Parties who are members of the same regional organization could attempt to discuss the issue and work out a solution with the help of other members; or, they can use it as a platform to rally support for their position. Moreover, members must certainly look to the United Nations to seek redress for measures adopted for national security reasons. Article 33 of the United Nations Charter mandates parties to any dispute which is likely to endanger the maintenance of international peace and security to seek solutions through the appropriate means of pacific settlement of disputes. The Security Council, when it deems it necessary, can call upon the parties to solve their dispute through such means[97]. It can be argued that State's real or perceived threat to its national security is likely to endanger or constitute a threat to international peace and security. Consequently, if a State believes its national security is compromised because of the actions another State, it could recur to the United Nations system to seek relief instead of imposing a GATT/WTO measure under Article XXI[98]. In fact, during the preparatory works of the GATT the Contracting Parties addressed which organization, if any, was

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[91] Ídem, p. 741.
[92] Ídem, p. 747.
[93] UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT: "Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII", E/CONF.2/C.6/W.30 (1/9/1948).
[94] MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, Understanding on Rules and Procedures Governing the Settlement of Disputes Article 26 ¶ 1(b), Annex 2, (1994) (DSU).
[95] WORLD TRADE ORGANIZATION, APPELLATE BODY REPORT (2001): "European Communities-Measures Affecting Asbestos and Asbestos-Containing Products", WT/DSl35/AB/R, ¶186.
[96] ALFORD (2001), p. 748.
[97] UNITED NATIONS CHARTER, San Francisco (6/26/1945) Article 33, ¶ 2.
[98] With due regard to the imbalance that exists between countries with veto power in the Security Council and those without it.

to determine the impact of political measures in the international trade system. They agreed it should to be the United Nations and not the trade organization. Particularly, the representatives of the United Kingdom and Greece stated that the trade organization was to be created to deal with economic measures and not political matters, and as such the latter should be under the United Nations' competence. The Greek delegate went further by arguing that "an economic measure taken for political reasons was not properly speaking an economic measure but a political measure and as such was not of the competence of the [trade] Organization"[99]. The US delegate's statement followed the same argument as the British and Greek representatives, but emphasized that a political dispute was to be dealt by the United Nations when the issue was within its jurisdiction, and that the Conference's function was not to take any stand on whether or not it supported unilateral economic sanctions[100]. The Committee recommended drafting a specific article that would clarify the relationship and jurisdiction of the new trade organization and the United Nations[101], but it never made it to the final General Agreement.

X. Conclusion

This paper has attempted to gather the various, and contradictory, interpretations given by several sources regarding Article XXI's justiciability. Any member can request the establishment of a panel to analyze the validity of an Article XXI exception, as they have this right under Article VI of the DSU, but we consider the panel should reach the conclusion that the invoking member has the right to determine the appropriateness of the measure. A WTO panel should not have the jurisdiction to define what does not constitute a national security interest, an essential security interest, or an emergency in international relations. Members must be the ones who determine what issues concern their national security and the measures to be taken in order to safeguard them.

Although some arguments in favor of Article XXI's justiciability are persuasive, particularly the fact that members had several opportunities to clarify or modify the article to make it expressly self-judging, Article XXI should not be reviewable. If, as proposed by some scholars, a panel should have the jurisdiction only to determine the necessity or the timing of the measure, such analysis could not be made without making an assessment of its content and purpose.

The most compelling argument in favor of its self-judging characteristic is the interpretation States have given to it. While concerns for abuse of the clause are valid, bringing a complaint to a GATT/WTO panel is not the only mechanism an affected member can use to seek relief. The article's ambiguity is not necessarily bad for the system, and the members' restraint in invoking it demonstrates an underlying commitment not to abuse the invocation of security exceptions and an implied recognition of alternative means to safeguard its security interests. The time may come sooner rather than later for a panel to finally issue a binding decision on the justiciability and scope of Article XXI.

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[99] UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT: "Summary Record of the Thirty-Seventh Meeting", E/CONF,2/C.6/SR.37 (3/11/1948).
[100] Ídem.
[101] UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT: "Report of the Sixth Committee: Organization", E/CONF.2/68 (1948), Article 83 ¶a.