4.1 Article XXI: The GATT Security Exception

To witness vague, unconstrained exceptions to binding commitments, one need not look all the way back to medieval law, or nineteenth century Bismarckian power struggles. Since the early days of the trade regime, the GATT has featured a set of exceptions of disconcerting breadth. One of these, GATT Article XXI, may be the broadest, least constrained formal exception in the trade regime: so “broad, self-judging, and ambiguous that it obviously can be abused” (Jackson, 1997a, 230).

I outline policymakers’ full menu of flexibility options in the regime in the next chapter, yet it is worth first considering the design of and reliance on Article XXI, and comparing it to its non-security analogue provision, Article XX, the General Exceptions. Indeed, the “catch-all” flexibility provision in Article XXI makes for an ideal case study of how member states treat unchecked exceptionality. The puzzle is a familiar one by now: how can the trade regime tolerate the continued existence of a flexibility provision that is prima facie costless, and the use of which is effectively unchecked? Why has the existence of Article XXI not led to the system’s downfall, given the lack of constraints put on its use?

The relevant section of GATT Article XXI, which was part of the original 1947 text but applies to the WTO agreements to this day, reads:

Nothing in this Agreement shall be construed:

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

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1 Jackson (1997a) repeatedly refers to Article XXI as a catch-all clause.
(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 fissile materials or the materials from which they are derived;
(ii) relating to the traffic in arms, ammunition and implements of war and such traffic in other goods and materials as is carried on directly 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.

In the following examination of Article XXI, I put forward three main points. First, what may well be the least constrained exception to GATT rules is also its least employed, a surprising fact both in the face of theory and of the early widespread fears of abuse of this particular provision. Second, in those rare instances when Article XXI has been invoked, it has led to consistent reactions and warnings by other members over the systemic implications of invoking the provision. Third, in all these cases, there is an observable effort to keep the matter from setting any sort of precedent, by steering clear of its explicit invocation, and by avoiding, at all cost, a legal ruling over its applicability. The result is that a panel has not once ruled on the substance of Article XXI. Countries like the United States have argued that a panel would have no jurisdiction in an Article XXI matter, since countries must be the ultimate judge in questions relating to their security. Even taking into account the institution’s push for settlements over litigation, the effort to keep the issue from going to court has been notable, to the point where countries such as the United States have preferred to lose a formal dispute and be proclaimed in violation of their international commitments, rather than to risk setting a precedent over Article XXI.

The result is continued ambiguity about what is allowed or not under the trade regime’s security exception. Article XXI today is only useful as an unspoken reference point: governments may allude to its existence without invoking it explicitly. Its inclusion in the texts may well affect behavior, as WTO members internalize one another’s option to invoke the security exception, but it does not serve its purported function. Indeed, there has developed a norm against its explicit invocation, much as in the case, earlier, of rebus sic stantibus. As was the case then, the reason countries do not rely on XXI is not because it is too hard to do so, but because it is too easy. On the one hand, this state of affairs goes against pessimistic accounts that warned that the vagueness of the clause would lead to its abuse. On the other hand, it also defies the designers’
intent – that Article XXI be a real instrument used to manage the conflict between the political and economic needs of states. The upshot is that the very thing that governments appear to fear most, that is, a ruling on the meaning of Article XXI, is also the only means of “saving” the security exception from desuetude. If the membership wants a workable security exception, then allowing it to be challenged before the Appellate Body is the only means of achieving this.

I also leave open the possibility that as the regime’s superpower, the United States, in particular, may prefer for Article XXI to remain precisely in the legal limbo it is in today, where its current vague nature means that they can both lean on it informally, and deter others from explicitly invoking it. While this does not seem to have been the US intent during the design stage, judging by the archival record, the United States may nonetheless have little incentive today to allow for further clarification of the security provision, especially through the uncertain means of adjudication, over which they exert little definite control.

I use the second part of the chapter to demonstrate how the lack of jurisprudence over Article XXI falls in contrast with the regime’s General Exceptions clause, Article XX. Article XX has been increasingly invoked as its meaning has been progressively defined and narrowed, and its limits formalized, through legal interpretation. This pattern has been repeated anew in the WTO era. The harder it becomes to satisfy the requirements of Article XX, the more appealing it appears to governments.

**Origins of Article XXI: Early Fears**

There was little debate over the need for a security exception of one sort or another in the trade regime. As Mavroidis (2007, 368) puts it, “absent inclusion of the security exception, few if any would have agreed to join the GATT.” Adam Smith himself agreed in *The Wealth of Nations* that the main exception to trade should be security considerations. There is a lasting consensus that trade interests are secondary to states’ security interests. In the wake of WWII and at the eve of the Cold War, this conviction is likely to have been especially strongly held. Article XXI was a reflection of these beliefs.

It is fair to preface the discussion by saying that the national security exception in trade law is unlikely to have been designed for the sake of countries’ security: sovereign states do not require an Article XXI provision to act on their security interests. Rather, what comes across from the start of the negotiations is how self-evident it was among country
representatives that sovereign nations would think little of flouting trade rules in a situation where state survival was truly at stake. Instead, just as with the exception for fishing herring on the Sabbath day, the GATT security exception was meant to protect the sanctity of rules in the event that states’ security concerns and their trade obligations came to a head. In both cases, the designers of rules knew the likely outcome: given the short season, fishermen would go out fishing even on the Sabbath, and threatened countries would impose trade sanctions and restrictions in violation of their GATT obligations, if their security was ever at stake.

Then why bother with the exception at all? Because as writers from Machiavelli to Hamilton foresaw, the habit of breaking rules risks spilling over beyond the exceptional event. The exception acquires real meaning in situations at the margin, when there is ambiguity over the degree to which state security is truly at stake. How easy the exception is to invoke in those ambiguous situations is what the whole discussion is about. Accordingly, while there was little debate among drafters over the necessity for a security exception of one sort or another, there emerged a fierce debate over its design, and specifically, over the constraints that would be put on its usage.

Fears of unilateralism have dominated the GATT from its inception to the present day. In part for this reason, few questions within the GATT have generated as much concern as Article XXI. As Brown (1950) warned at the time, Article XXI was “so broad, as to permit a member to take almost any action it desired in the name of national security and it provided therefore one of the broadest of all escapes in the Charter. That it was readily accepted by the Conference is a commentary on the times.”

These concerns did not only appear with the benefit of hindsight, once the agreement concluded. The drafters themselves were well aware of the risks posed by the exception. As the Dutch representative asked in July 1947 of the United States, which had single-handedly written the first draft of the provision: 2 “what are the ‘essential security interests’ of a Member? I find that kind of exception very difficult to understand, and therefore possibly a very big loophole in the whole Charter.” 3 What if, the representative went on, a country insisted that it was “essential” to do everything to expand its agriculture in a way that violated the provisions

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2 As Mr. Leddy of the United States replied: I suppose I ought to try to answer that, because I think the provision goes back to the original draft put forward by us and has not been changed since” (UN Doc E/PC/T/A/PV/33, p.20, July 24, 1947).
3 UN Doc E/PC/T/A/PV/33, p. 19, July 24, 1947.
of the treaty, could that be justified under the provision? “It might be a little bit far fetched,” the delegate admitted, “but as it stands here it really is worrying me.”

The design of Article XXI was thus one more instance of the architectural challenge. In fact, in 1947, in a discussion over the meaning of what constituted sufficient necessity, the US country delegate, Mr. Leddy, came as close as one could be to articulating the question at the core of this book:

It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.4

In other words, how can one attain the important benefits of flexibility while preventing its abuse?

This passage from the US representative is useful not only as further evidence that the question being posed in this book is the correct one; it is further evidence that it is in these very terms that the designers themselves were posing the problem. From the start of this book, I have been using the term “designers of the treaty” to describe the actors negotiating over the shape of the rules. To social scientists used to thinking about rules as “emerging from interactions among states,” the degree of agency thus vested in individual negotiators may appear odd. In this case, however, the phrase proves apt. The same US delegate, Mr. Leddy, had prefaced his statement with the following:

“We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception.”5

In the mid-1940s, the trade regime was so much in its infancy that these matters were truly being considered ex nihilo. That same delegate concluded his statements by highlighting once again, with disarming humility, how conscious the designers of the treaty had been of the security exception’s competing considerations: “We have given considerable thought to it and this is the best we could produce to preserve that proper balance.”6

5 ibid.
6 ibid.
By all accounts, despite the “good deal of thought” devoted to it, the negotiators failed to reach this proper balance. The resulting exception is thought to give far too much autonomy to the party invoking the exception. And this view is not only present within small countries afraid of bigger countries availing themselves of the exception for political purposes. Richard Gardner, writing in 1974, a low point in the US’ trust of international organizations, made the claim that that Article XXI had “effectively vitiated” all the principles represented by GATT’s promulgation,” and repeated this claim before Congress. Similarly, Whitt (1987, 605) has claimed that “the ambiguous language of Article XXI, coupled with its unilateral interpretation, creates a broad GATT exception which threatens to undercut the overall stability and goodwill inherent in the GATT system.” As Reiterer (1997, 192) asked, “could it [Article XXI] justify practically every action taken under the label ‘essential security interests’, thus allowing ‘anything under the sun’?”

Much of the drafting history of the Article testifies to the desire to create a space for political matters within an inherently economic agreement. Early on, country representatives negotiating the ITO within UNCTAD wanted Article XXI to be a means of navigating the linkages between the two organizations: the ITO, which was to deal with economic matters, and the United Nations, which had a political mandate. The aim was to avoid conflicts of responsibilities between the two, specifically when actions sanctioned by the United Nations might run up against multilateral trade rules, as in the case of economic sanctions. The result of these discussions yielded the last part of Article XXI, paragraph (c), cited above.

The wording of Article XXI is indeed remarkably loose, relying as it does on a state’s *own* assessment of its security interests, a point that members, and the United States and United Kingdom in particular, have insisted on since its creation. Because of this formulation, each state

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7 Gardner (1974).
9 As the Havana Sub-Committee explained, the Article “is designed to deal with any measure which is directly in connection with a political matter brought before the United Nations in a manner which will avoid conflict of responsibility between the United Nations and the Organization with respect to political matters.” (GATT doc E/CONF.2/C.6, p.93, para.15.)
10 The UK summed up this view in the first GATT discussion of Article XXI usage, by the US: “every country must have the last resort on questions relating to its own security.” (UK delegate, GATT/CP.3/SR.22, p.7).
has the exclusive ability to assess its security interests.\footnote{In the original drafts of the ITO Charter, the same article brought together the provisions of what today are Article XXI (Security Exception) and Article XX (General Exceptions). Only later did negotiators in Geneva split the two into separate articles. The main implication of this split is that the \textit{chapeau} of Article XX, which prohibits an arbitrarily discriminatory application of an exception, cannot be used to require the same of Article XXI applications.} As a result, Article XXI has been called \textit{prima facie} the most powerful exception to the GATT agreements (Alexandroff and Sharma, 2005), because it is the least constrained.

Such an ill-defined exception has led to fears of rampant overuse. That alarmist predictions have been disconfirmed by decades of evidence from state practice has done little to assuage observers’ fears. Even those scholars who recognize that Article XXI has not been invoked abusively warn of the risk of it happening yet: “the number of express or implicit invocations of Article XXI remains relatively small” concedes Bhala (1998, 272). “Nevertheless,” he continues, “the potential for abuse exists.” Bhala repeatedly insists on the point, later stating that “the risk of a corrosive effect on the multilateral trading system from abusive invocations of Article XXI(b) is real.” Bhala is known as a prime advocate of the position according to which \textit{de facto} precedent operates in the WTO – a notable fact, insofar as fears over precedent seem to have prevented reliance on Article XXI more surely than formal constraints would have. Similarly, after conceding that Article XXI has been “invoked infrequently as a defense,”\footnote{Whitt (1987, 617).} Whitt (1987, 621) is nonetheless quick to warn that “in the future, the many possible misuses of Article XXI may swallow the legitimate purposes for which the exception was originally created.”

Such concerns over the implications of the self-designating nature of the exception arise all the way up to the present day. In the context of negotiations of a number of new preferential trade agreements (PTAs) in 2006, US House Democrats sent a letter to the United States Trade Representative (USTR), inquiring whether Article XXI, which is the model of similar provisions in the boilerplate US PTA text, is truly “self-judging,” as per the USTR’s position. The Democrats recalled that the European Union had taken the opposite position, and that the WTO appeared ready to rule on the matter in the Helms-Burton dispute. In that case, the litigants reached a settlement and, as in other cases, the matter was never put forth before a panel. The twist came in the House Democrats’ last question. After seeking to assure themselves that the clause truly is self-judging, and that no WTO court could “second-guess”
the US decision to invoke the exception, the legislators asked, what does the US position mean for other countries?:

That is, if the U.S. [...] for any reason that it deems ‘necessary to its essential security interests’ can invoke a self-defining ‘essential security’ exception, what is to prevent other countries from using this exception to block U.S. exports or other U.S. rights such as enforcement of intellectual property rights without ample justification?

The legislators then recalled the argument made by some countries that food security is a matter of national security, and asked whether the US position on the self-judging nature of Article XXI meant that countries could invoke the exception in a way that would be “extremely detrimental to U.S. farmers”?13

Despite such fears stretching over a seventy-year period, from the security provision’s creation to the present day, my claim is that Article XXI’s lack of constraints is the very reason why it is rarely invoked. In a multilateral body where actions of each actor shape everyone else’s expectations, strategic governments will refrain from invoking an exception that may legitimate further use by others. The fear is over precedent, even as the notion of formal precedent plays no role in public international law.

A sense of this possibility can even be found in the farsighted discussions of the drafters themselves. The passage found above, where the US negotiator declares that “we have got to have some exceptions” is an oft-cited one, yet it is the overlooked comment from the meeting’s chairman that follows it that may be more interesting still. The official GATT record has the chairman saying that “the spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuses of this kind.”14 The verbatim record is more striking still.15 The Chairman’s exact words were: “In defence of the text, we might remember that it is a paragraph of the Charter of the ITO and when the ITO is in operation I think the atmosphere inside the ITO will be the only efficient guarantee against abuses of [this] kind.”

In other words, the Chairman of the negotiations himself saw the ultimate bulwark against abuse not in the formal provisions themselves, or in the requirements put on the use of the security exception, but in state practice. Ultimately, abuse would be prevented by informal constraints – by the requirement to follow the spirit of the agreement, rather than its letter; by the existence of an atmosphere that would impede abuse. In the

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14 ibid. Mr. Colban, Norway. (emphasis added).
15 These meetings produced two sets of records: a third person descriptive account, and a verbatim transcript which usually remained classified.
context of an anarchic global order recovering from a world war, this faith in state practice may appear jarring. Yet the very type of restraint envisioned by the meeting’s Chairman has indeed come to pass, perhaps more so than he would have imagined likely.

Article XXI’s Record of Use

Through the nearly seventy years of GATT and WTO history, Article XXI has been invoked a grand total of six times. It has been formally used as a defense in legal proceedings only once. It has never been explicitly ruled on.

In those cases where the security exception has been invoked, it has invariably been challenged and criticized by other countries on similar grounds. Chiefly, members have warned of the effect of one invocation on the odds of subsequent invocations. As with other loosely formulated exceptions and escape clauses, the concern underlying the security provision has been over precedent.

Judges have never ruled on a country’s use of Article XXI, though one instance produced something that came close. The stand-out case is the very first resort to Article XXI, in 1949, in the context of the Marshall Plan. Czechoslovakia had first been designated a beneficiary of the reconstruction plan, but ultimately drew back under pressure from the Soviet Union. The United States then implemented the export control regime that underlay the Marshall Plan, which excluded exports to Eastern European countries that could have a military application. Czechoslovakia was affected, and complained in the GATT, calling the US measure a violation of the MFN rule, according to which all trade partners should be treated equally.

The United States objected to Czechoslovakia’s claim of violation, citing the exception to GATT obligations under Article XXI. Czechoslovakia rejected the defense. While Article XXI b(ii) refers to exclusions for trade in “material... directly for the purpose of military establishment,” Czechoslovakia claimed that the United States had interpreted the expression “war material” so extensively “that no one knew what it really covered.” The United States responded by addressing Czechoslovakia’s claims on the merits, arguing that its exports to the country had not actually declined in value. When Czechoslovakia maintained its accusations,

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16 GATT/CP.3/SR.22. Czechoslovakia argued for a distinction between traded goods that had a “war potential,” and those products that did not.
17 See GATT/CP.3/38, June 2, 1949. The United States also relied on Article XXI(a) to deny Czechoslovakia’s request for a list of the items that the United States considered of strategic significance, citing security concerns.
the United States, together with the support of the United Kingdom, which had imposed similar export controls, finally stated that “every country must have the last resort on questions relating to its own security.” The United States would maintain this stance for the next half-century, though strictly speaking, it lacks any textual support — that is, the self-judging aspect of the exception is not explicitly stated in the Article or its drafting texts.

Czechoslovakia’s arguments consisted in great measure of warnings against the systemic effect of allowing the US’ interpretation of the security exception to stand. It warned the membership of the implications for the future if its challenge were rejected: “on the ground that security could be undermined by dependence on foreign supplies, a country might similarly restrict its imports, either discriminatorily or otherwise, by invoking the security clause of the Agreement.” The Czech delegate referred back to the exception’s drafting history, reminding the assembled members of their shared fears over Article XXI just a few years earlier, when it was being negotiated: “When this question was discussed at Havana many delegations wished to have these security exceptions interpreted as narrowly as possible in order to avoid misuses.” The current use by the United States, the Czech argued, was anything but narrow, and increased the odds of such misuse in the future.

Most parties supported the US export controls themselves. In fact, there was remarkably little interest in whether the measures themselves were in compliance with the requirements of Article XXI(b). Yet countries reiterated the need for balance between the maintenance of security interests and trade interests, and showed concern over the implications of the United States’ expansive interpretation of the article for the future. After affirming its support for the American policy and its XXI defence, the UK itself nonetheless sought to strike this balance: “[...] On the other hand, the Contracting Parties should be cautious not to take any step which might have the effect of undermining the General Agreement.”

The decision among the contracting parties that ensued is usually cited as the only ruling on the substance of Article XXI(b). As Bhala (1998, 280) has it, “the 1949 Czechoslovakian decision of the Contracting Parties may prove to be the first and last major substantive ruling on the invocation of Article XXI rendered under GATT-WTO adjudication procedures.” Observers have even referred to the decision as that of a “GATT panel” (Rose-Ackerman and Billa, 2007), though this is technically incorrect.

Czechoslovakia never obtained a “formal ruling” as it had called for,\textsuperscript{21} in a way that is relevant to the discussion in this chapter. There was consensus over how the matter was best kept as a bilateral negotiation, and all parties agreed that it would be best \textit{not} to let the issue go before a working party, as panels were referred to at the time. As the chairman of the relevant meeting summarized, “[t]he proposal for a Working Party to be set up to examine the issue had not found support during the discussions.”\textsuperscript{22} What took place instead was a roll-call among the members, where the membership sided with the United States in the view that the US measures were justified, without specifying whether they were justified under Article XXI(b):iii, or simply by the spirit of the law.

In this way, the only decision over the legality of an Article XXI defense in the trade regime’s history resulted from a vote by the Contracting Parties themselves, rather than by an independent working party, and it produced no legal reasoning to rely on. The parties simply voted, by supermajority, that the US was within its rights in imposing the export controls.

Article XXI was to be invoked a handful more times during the trade regime’s history, providing us with an opportunity to observe how similar the reactions of GATT members have been to these invocations. Among these incidents, the Falkland crisis and the US’ opposition to the Sandinista regime in Nicaragua yielded the most fruitful discussion of the limits and dangers of Article XXI.

\textbf{Pushback and Fears about Systemic Implications}

In 1982, the European Community, Australia, and Canada suspended trade with Argentina in reaction to the Falkland crisis. In doing so, they explicitly referred to their rights under Article XXI,\textsuperscript{23} and spoke of the “natural right” the exception offered them to adopt these measures without any need for notification, justification, or compensation.

The measure led to the most in-depth discussions of the security exception up to that point. As with every other instance of a country relying on the vaguely worded security exception, the Falklands embargo met with push-back on the same grounds: even those members that supported the

\textsuperscript{21} That had been the Czech request: “That is one more reason why the [US measures] should receive the very careful study of a working party” (GATT/CP.3/39, 3).

\textsuperscript{22} GATT/CP.3/SR.22

\textsuperscript{23} The countries declared that they had “taken these measures on the basis of their inherent rights of which Article XXI of the General Agreement is a reflection.” (GATT Doc L/5319, May 5, 1982).
goals pursued by governments invoking the exceptions warned that using this loosely worded provision could lead to others doing the same. As the Chairman of that meeting of the text’s original negotiators had correctly predicted in 1947, restraint in the use of Article XXI would result from the “atmosphere” within the organization. Specifically, all invocations have systematically met with general opprobrium.

Argentina challenged the measures as violations of the GATT, and rejected the use of Article XXI. Before the assembled GATT delegates, Argentina demanded that the embargo be lifted, “to prevent measures of this nature from being imposed in the future,” and repeatedly stated that the measures were not justified under Article XXI.24

As opposed to Czechoslovakia thirty five years earlier, this time Argentina benefited from the support of a number of members states. Representatives from Uruguay, Peru, Ecuador, Colombia, the Dominican Republic, Cuba, chimed in, offering support for Argentina’s position, and echoing its warnings against the systemic implications of these actions. Nor was support limited to Latin America, as countries like Zaire raised the systemic issue: “his delegation saw a dangerous precedent for GATT, since trade and economic measures had been taken by a number of contracting parties against another contracting party for non-trade reasons.” Even countries that agreed with the measures themselves, like Spain, nonetheless warned that they posed “a very serious danger for future international economic relations.” Others, like Singapore, went as far as agreeing that Article XXI did allow for the measures, but “nonetheless saw a danger in the broad interpretation which Article XXI permitted,” taking the incident as an opportunity to reflect on the problematic wording of Article XXI. Finally, the median position seemed to be one of extreme prudence, given the systemic consequences of whichever interpretation of the exception would be accepted. As summed up best by the Philippines, “As this case would set a precedent for the future, [the Philippines’ country representative] asked the Council to proceed with caution.”25 It is worth remembering that the early 1980s were a time of economic duress across the world, including liquidity and balance of payments crises in developing countries. There was widespread fear that members would give in to the temptation to fall back on protectionism through any means. The period was thus ripe for concerns over contagion, and worries over the systemic consequences of isolated measures.

24 C/M/157, 3. 25 C/M/159, 18.
Brazil offered the most extensive reasoning, offering a detailed reading of the text of the Article. Its representative allowed that “the motives for the trade sanctions against Argentina were clear” but countered that “the justification was not.” Brazil warned that if the Falkland measures were argued to fall under subparagraph (b):iii, that is, if they were considered “necessary for the protection of essential security interests,” this could set a “dangerous precedent,” since “such interests had not been demonstrated.” Brazil’s conclusion was telling of members’ concerns: the European Communities (EC) may have been right in that the definition of security interests was up to the country invoking the security provision, but Brazil wished that the EC had made an effort in making this case. Its concern, in other words, was not over the present case; it was over what this case spelled for future uses of the exception. Brazil yearned for a practice of explicit justification to set in, even though it begrudgingly agreed that the text of the provision did not require it per se (Hahn, 1990).

While the northern countries imposing the embargo relied in part on Security Council resolution 502 to justify their measures, members pointed out that the resolution said nothing of economic sanctions or trade measures, and could thus not serve as justification under Article XXI (c), the subparagraph making the link to the United Nations. Moreover, some opined that even as Europe may have had a case to invoke the exception, Canada and Australia were not involved in the conflict, and thus surely had no grounds on which to invoke Article XXI. Their invocation risked stretching the definition of the exemption beyond its intended meaning.

In vain, members wrung their hands and insisted that the underlying issue was a political one, and that the GATT was designed to deal with economic issues – refusing to accept that by the very nature of the case, the two were inextricably linked. Their relationship was at the heart of the matter: in creating the security exception, the GATT recognized that concerns outside of its ambit could lead to a suspension of obligations within it. By delineating a zone of exception, the institution was inevitably passing judgment over what lay within that zone. Yet the issue remained: given the vagueness of the language delineating the exception, GATT members found themselves in the position of having to opine on political questions, e.g. was the Falklands dispute an “emergency” of international relations within the meaning of Article XXI? Did Article XXI confer a “natural right” on the country invoking it that made justification unnecessary? Did

26 C/M/157, 5. 27 C/M/157, 5.
the Security Council resolution offer sufficient justification for the invocation of the security provision, and did that justification extend to countries like Canada and Australia, which were not directly involved in the conflict? And finally, were any of these questions subject to adjudication by a panel made up of judges accustomed to ruling on commercial matters?

In the end, the general opprobrium had an observable effect: the measures were suspended “conditionally” by June 21, 1982, after having been in place for less than two months, even though, as Argentina itself pointed out with detectable smugness, the underlying political problem had not yet been solved.28

Even once the measures had been suspended, Argentina proposed addressing the root of the problem, by going ahead and adopting a consensus opinion clarifying the meaning of Article XXI. It argued that “in view of the precedent this interpretation would create,” it would be wise to request a note from the Council on the interpretation of the security exception.29 Argentina was proposing to use the crisis to close what had been from the start “a very big loophole.” Argentina added how such an interpretive note that aimed to solve the problem “for the future” was preferable to a legal ruling by a panel, but that such a ruling could serve as a substitute. Speaking directly to a matter which is being hotly debated today, its representative opined then that “[o]nce approved by the Contracting Parties,” the “conclusions and findings of panels” created “necessary tradition and precedents.”30 Argentina made a point of reserving its right to a panel, even after the measures were suspended, since it rejected the conditions on which the EC had agreed to their suspension.

What was the response to Argentina’s call for clarity in the security exception? While those countries that had supported Argentina’s position in arguing that the invocation of Article XXI had been illegitimate agreed

28 C/M/159, 13.
29 As Argentina proposed, “In the present complex case, his [Argentina’s] delegation therefore considered it appropriate that the Council, acting by consensus, should pronounce itself in the form of a note interpreting Article XXI so that all contracting parties would know their rights and obligations under that provision of the General Agreement. [...] He then proposed that the Chairman of the Council be asked, assisted by the Director-General, to make an exhaustive analysis of all the relevant elements in connection with Article XXI, including the precedents that had arisen from previous use, the genesis of Article XXI and its origins in the Havana Charter, in order to determine exactly the extent, scope, possibilities and formal use of Article XXI. This should be done in a way which was specifically divorced from the present case. [...] He said that such a note by the Council would remove an element of uncertainty as far as the General Agreement was concerned, and the problem would be solved for the future.” (C/M/159).
30 C/M/159, 15.
with it, others demurred. Canada suggested that the GATT had other priorities, and that other GATT articles required more urgent examination. Similarly, the US representative stated that “his delegation had doubts as to the utility of such an examination, given the nature and language of that Article.” The Australian representative stated that “Given the infrequent use of Article XXI thus far, his delegation expressed a doubt for the need for an interpretation of that Article.” New Zealand fell back on the question of dealing with political issues within the context of the GATT, and concluded that the Argentinean idea required “further reflection.” In the end, the questions at the heart of Article XXI that Argentina raised remained unanswered.

It was in this “atmosphere,” less than a year following the discussions over the Falkland crisis, that the United States suddenly reduced its sugar quota for Nicaragua by 90 percent, from 58000 short tons to 6000 short tons, reallocating the difference to other sugar producing countries. The measure was purportedly taken in response to the Sandinista regime. But as opposed to the EC the prior year, the United States staunchly refused to invoke Article XXI. The United States pushed the division between economic and political matters to its extreme, by refusing to justify its measures within the trade regime. As its representative put it in its submission during litigation, “the action of the United States did of course affect trade, but was not taken for trade policy reasons.”

When Nicaragua requested the formation of a panel, the United States stated that it “regretted” this move. Yet the United States did not block the panel’s formation, as remained within its purview under GATT. It merely suggested a legal solution within the GATT was futile: “A political solution could resolve the trade aspect of this dispute; but a GATT panel could not appropriately examine or assist in the resolution of the political or security issues that lay at its core.” Most strikingly, however, the United States never actually sought to defend its measures. During litigation, the United States openly stated that “it was neither invoking any exceptions under the provisions of the General Agreement nor intending to defend its actions in GATT terms.”

31 C/M/159.
32 “The President stated that the additional quotas for these three countries were likely to represent a total of US$1.4 million in foreign exchange per year, and that by denying Nicaragua this benefit he hoped to reduce the resources available to that country for financing its military build-up, and its support for subversion and extremist violence in the region.” (United States – Imports of Sugar from Nicaragua. Report of the Panel adopted on March 13, 1984 (L/5607-31S/67)).
33 C/M/170, 12.
The US behavior illustrates the second point put forth in this chapter. GATT/WTO members have done everything in their power to keep Article XXI from ever being ruled on. Just as with the *rebus sic stantibus* clause, Member states have been observably reluctant to make any formal mention of Article XXI. Most of all, however, they have been loath to invoke it during litigation, in a way that would allow judges to rule on its scope. Article XXI is at once a bullet-proof defense, and an unassailable trump card that no state dares invoke, lest it be met with membership-wide recriminations. In the Nicaraguan case, the United States knowingly lost the case, rather than invoke Article XXI, which would have, by all accounts, led to a finding of no violation. As Whitt (1987) has it, “the ruling in favor of Nicaragua, on the basis of evidence far less incriminating than that involved in the current dispute, surely stems from the U.S. decision not to invoke Article XXI as a defense.”35 The panel itself seemed taken aback by the US’ choice not to refer to the security exception, and went to some pains to point this out in its report: “the United States had not invoked any of the exceptions provided for in the General Agreement permitting discriminatory quantitative restrictions”36 Since it did nothing to defend its measures, except to repeatedly affirm their compliance with GATT obligations, and to keep to the position that the “broader dispute was [not] within the ambit of the GATT”37, the panel had little choice but to find the United States in violation.

The first Nicaragua episode shows a country preferring to lose a formal legal dispute, rather than to let the matter be formally ruled on. While there is little doubt that the United States would not have been found in violation had it chosen to invoke Article XXI, what is less certain is the effect such a validation of the national security exception might have had subsequently, and this appears to have been a risk the United States was unwilling to take. As I argue below in reference to the other set of GATT exceptions, found in Article XX, a ruling would likely have clarified the applicability of the exception, by outlining some conditions for its use, and thus increased its usability. The United States had at least as much reason not to want even a favorable decision by a panel, lest it normalize resort to XXI. As Dattu and Boscariol (1997) have it: “If a panel permits the United States to rely on Article XXI in these circumstances, then

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35 Whitt (1987), fn. 106.
37 ibid.
one can certainly conclude, as Professor Jackson did over a decade ago, that the door has been opened very wide to the arbitrary abuse of the exception.” The United States may have done better by leaving the issue to the vagueness of the text. As it stood, fear over the jurisprudential impact of a ruling generated a self-perpetuating taboo over Article XXI’s invocation.

The United States did not comply with the panel’s recommendations by reallocating Nicaragua its full original quota. Rather, the confrontation escalated the following year, when on May 1, 1985, President Reagan declared a national emergency and this time, placed all trade with Nicaragua under a two-way embargo.38

Nicaragua, economically crippled by the sanctions, turned once again to the GATT. A special plenary meeting was called to discuss the matter on May 29, 1985. This time, facing potentially more far-ranging consequences given the extent of the trade restriction, the United States formally invoked Article XXI. The United States held that “the US measures had been taken for national security reasons, and that they fell squarely within the national security exception of the General Agreement as contained in Article XXI, specifically its paragraph (b)(iii).” Once again, the United States took the legal view that while GATT contained an exception dealing with extra-GATT (i.e. political) circumstances, it lacked the capacity to decide what fell under this exception, since that itself would constitute a political judgement, precisely what the exception sought to avoid:

It was not for GATT to approve or disapprove the judgement made by the United States as to what was necessary to protect its national security interests; GATT was a trade organization, and had no competence to judge such matters.

It is worth pointing out that in the special situation of the trade embargo, Nicaragua had no material sanction at its disposal: the ultimate remedy of a suspension of concessions, or retaliation, under XXIII:2 of

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38 The relevant section of the executive order reads:

I, RONALD REAGAN, President of the United States of America, find that the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and hereby declare a national emergency to deal with that threat.

I hereby prohibit all imports into the United States of goods and services of Nicaraguan origin, all exports from the United States of good to or destined for Nicaragua, except those destined for the organized democratic resistance, and transactions relations thereto.

(United States – Trade Measures Affecting Nicaragua. Communication from the United States. GATT L/5803.)
GATT, was left meaningless under a two-way embargo, since there were no concessions to suspend. Nicaragua could only push to have the US action formally recognized as unlawful, and have the Council adopt the recommendation to have the embargo lifted.

During plenary meetings over the matter, Nicaragua followed a familiar line of reasoning, centering on the wrongful interpretation of Article XXI and its systemic consequences. In other words, it insisted on the precedent this set. As Argentina had done before it during the Falkland Crisis, Nicaragua warned against the precedent generated by the US interpretation of the security exception. “If the US interpretation of Article XXI were to be accepted, any contracting party wanting to justify introduction of certain trade measures against any other contracting party could simply refer to Article XXI and declare that its security was threatened.”

Nicaragua insisted on the implications for other countries, especially small countries: “If such unilateral, arbitrary actions were not opposed, any small contracting party could find itself in the same situation as Nicaragua.” The potential for abuse ushered by the US interpretation, in other words, was thought to have distributional consequences. When politics are re-introduced into the legal sphere, they tend to favor the strong against the weak.

Nor was Nicaragua and other countries alone in condemning the US invocation. The United States faced extensive domestic criticism, from scholars concerned about legal precedent, and from industry groups concerned about resulting uncertainty. It was Article XXI’s Roosevelt moment. Surveys of the US business community found that most were critical of the embargo, and particularly of the security provision justification (Whitt, 1987). In a representative statement, the National Corn Growers Association stated at the time that the US action “demonstrates once again that the U.S. is inconsistent, unreliable, and will impose sanctions anytime a country steps out of political line.”

When Nicaragua pressed for a panel to be formed to adjudicate the matter, the United States once again agreed not to block litigation. This, by itself, should be taken as another reminder of the strength of the much-maligned GATT legal system: despite the lack of automaticity – that is, despite the fact that any defendant could block proceedings at any point – most did not, likely in recognition of the underlying reciprocity. Countries thus agreed to litigation as defendants so that they would get access to litigation as complainants. Yet in exchange of agreeing to a panel, the

United States demanded to define its terms of reference. It would not oppose the establishment of a panel, “provided it was understood that the Panel could not examine or judge the validity of or motivation for the invocation of Article XXI:(b)(iii) by the United States in this matter.” By this condition, and in a way that Nicaragua seemed not to have fully appreciated, the United States made sure that the panel would be unable to rule on the central issue of the validity of the US’ Article XXI invocation.

Nicaragua also pursued the matter in other settings, notably in the ICJ. During litigation, Nicaragua held that reliance on Article XXI had to be made in concurrence with decisions by the ICJ and the United Nations, neither of which had upheld the US’ measures as lawful. The United States, in turn, stuck to its initial position: Article XXI was self-judging, and no court had any standing to question its invocation: “This provision, by its clear terms, left the validity of the security justification to the exclusive judgement of that contracting party taking the action. The United States could therefore not be found to act in violation of Article XXI.”

The United States also sought to block any arguments by Nicaragua pertaining to any aspects of Article XXI, since it argued that these arguments were outside of the panel’s terms of reference. The panel pushed back, saying that its terms of reference imposed limits on the content of its ruling, but did not affect the parties’ rights to submit their arguments, and the obligation on the panel to report these arguments. Nicaragua’s arguments over Article XXI thus made it into the final panel report. Yet in the end, the GATT panelists balked. In a way that Nicaragua seemed not to realize when litigation began, the inability to rule on the validity of Article XXI:(b)(iii)’s invocation meant that the panel could not arrive at a finding. As Hahn (1990, 619), the court’s constrained terms of reference turned the dispute into a farce. The panelists repeatedly referred to the limits put on them by their terms of reference: the report made clear that this was because “as it was not authorized to examine the justification for the United States’ invocation of a general exception to the obligations under the General Agreement, it could find the United States neither to be complying with its obligations under the General Agreement nor to be failing to carry out its obligations under that Agreement.” The panel followed its formal mandate and did not rule on the central issue of whether the US’ invocation of Article XXI was valid. Neither did it consider the more general issue of whether Article XXI itself precluded

42 Security Council Resolution 562 and General Assembly Resolution 40/188.
43 Panel Report, GATT L/6053.
44 L/6053, 8.
45 Panel Report, GATT L/6053.
an examination by a panel. The panel also demurred from ruling on the related issue of whether actions justified under Article XXI could lead to nullification and impairment.

In barely cloaked language, the United States commended the panel on having respected its terms of reference, and on the circumspection of its findings. It, too, spoke in terms of jurisprudence and precedent. Specifically, it warned that it was going beyond the terms of reference and ruling on Article XXI that would have generated a dangerous precedent: “the Panel had acted wisely in refraining from a decision that could create a precedent of much wider ramifications for the scope of GATT rights and obligations ...”46

Nicaragua, for its part, declared the panel report to be invalid, and refused to adopt it. As such, the decision lacks formal legal standing, which has not kept it from becoming, likely in view of the lack of any other decisions on the matter, a key reference point in any discussion of Article XXI.

Yet the panel allowed itself a single pointed critique of the proceedings in the form of obiter dicta, or “remarks in passing,” that technically lack binding power. In the very last two paragraphs of the ruling, the judges reflected on the implications of an exception that could not be challenged in court:

“If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the CONTRACTING PARTIES ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in this provision?”47

Members’ fears of abuse, the judges suggested, risked being realized if countries insisted on the impossibility of judicial review when it came to Article XXI, and on the self-judging character of the exception. The panel then pushed back against the futility of its mandate, questioning whether a dispute with terms of reference curtailed to this extent fulfilled the function of a dispute settlement panel under GATT: “If the Contracting Parties give a panel the task of examining a case involving an Article XXI invocation without authorizing it to examine the justification of that invocation, do they limit the adversely affected contracting party’s right to have its complaint investigated [...]?”

When the chairman of the panel introduced the final report for adoption to the membership, he emphasized the unusual nature of the

46 emphasis added. GATT C/M/204. 47 Panel Report, GATT L/6053.
case: how the terms of reference were constrained, how there were no prior precedents or guidelines to go on. He first observed how the panel had kept to these constraints, but then highlighted the panel’s remarks in the last two paragraphs of the ruling.\(^{48}\) Rarely have GATT judges engaged in so much tiptoeing around an issue.

Even so, and even as the panels’ “remarks in passing” held no formal power, the United States chastised the panel for asking the “hypothetical questions” it concluded its ruling with, which, the United States claimed, “could launch an interminable political debate in GATT.”\(^{49}\) The United States warned against reading too much into the panel’s *dicta* by calling for any “amending” of Article XXI. In fact, the US rhetoric grew hyperbolic on this count, claiming that any revision to limit a country’s national security rights “could [...] even threaten the existence of GATT as a multilateral trade agreement and a trade organization.”\(^{50}\) The United States motioned for the adoption of the report and the closing of the whole matter.\(^{51}\)

Not everyone agreed. Uruguay, Nigeria, Argentina, Colombia, Cuba, Peru, Hungary, Trinidad and Tobago, Czechoslovakia, Yugoslavia, Romania, Poland, India, Mexico, and Tanzania all supported the position of Nicaragua in demanding that the embargo be brought down. One by one, representatives of these countries warned that Article XXI should only be used when national security was truly at stake; they referred back to the ICJ decision that had found no justification for the embargo; and they regretted that the panel’s terms of reference had been such, that it was unable to provide more guidance as to the interpretation of Article XXI. Even countries that did not side with Nicaragua in the question of the embargo, such as Sweden, stated that a panel should be able to examine all measures taken in the context of Article XXI, and that the narrow terms of reference of this case should not prejudice subsequent panels.

Faced with an inconclusive ruling, Nicaragua blocked its adoption once more, ridding the panel report of formal legal power. It called

\(^{48}\) “In keeping with its mandate, the Panel had neither examined nor taken a position on the US invocation of Article XXI, but the report *did contain certain considerations and suggestions that were broader than those usually made by panels.*” (Emphasis added. Minutes Of Meeting Held in the Centre William Rappard on November 5–6, 1986, GATT C/M/204, 6).

\(^{49}\) Minutes Of Meeting Held in the Centre William Rappard on November 5–6, 1986. GATT C/M/204, 9.

\(^{50}\) ibid.

\(^{51}\) “The Panel report should simply be adopted and contracting parties should dispose of a matter that never belonged before a panel in the first place” (ibid).
on renewed consultations leading to litigation and a “broadening of the Panel’s mandate as would enable the Panel to fulfil the functions prescribed in GATT’s dispute settlement provisions.”\textsuperscript{52} In response, the United States did not cede one inch. It reaffirmed its interpretation of the security provision, whereby the nature of the exception dictated the very terms of reference the panel had been given, adding that: “the same terms of reference applied to the CONTRACTING PARTIES themselves: they could not examine or judge the validity of or motivation for invocation of Article XXI. \textit{That was a matter of law.}”\textsuperscript{53}

The inescapable conclusion is that by constructing the exception in the first place, the GATT had already examined countries’ national security purview, just as the United States was arguing it should never be allowed to do. The security exception could only be the product of such an examination. The US position on Article XXI, in other words, is difficult to reconcile with the existence of that provision in the first place. Similarly, the insistence that panelists would have no say over what constituted “essential security interests” or a “time of war or other emergency in international relations” has little legal basis.

The twin Nicaragua disputes were not aberrations; they were symptomatic of the general trend. The United States only invoked the exception when pushed to do so: it paid a real cost in the first Nicaragua episode, being shown in contumacious violation, so as not to have to invoke the provision. In the second episode, the United States only allowed for litigation after ensuring that the ruling would have no means of questioning its invocation of the exception. It warned that doing otherwise might set a risky precedent, whereby the GATT would be deciding on matters beyond its mandate, in a way that threatened the viability of a treaty among sovereign states.\textsuperscript{54} On both sides of the debate, states worried about precedent, even as public international law remains devoid of the notion in its formal sense. On the one hand, states worried that illegitimate invocation would lower the barriers to using the provision. On the other hand, states worried that a ruling put the interpretation of a key provision regarding state sovereignty at the mercy of unelected judges, and might thus impinge on countries’ ability to invoke it. The two sides of the architectural challenge were faithfully represented: exceptions must

\textsuperscript{52} ibid, 17.  \textsuperscript{53} Emphasis added. ibid.  
\textsuperscript{54} “The United States believed that each contracting party should therefore reflect carefully on the implications of a broader GATT role in national security matters, not only for its own sovereign rights but for the functioning of the GATT.” (ibid)
be usable, while deterring abuse. And beyond the design of the exception, its very usage affects these two parameters.

Yet the record on Article XXI leaves us with a familiar paradox. There is no doubt that the US position in the Nicaragua cases offered little to formally constrain the use of Article XXI. In the wake of the second Nicaragua dispute, the security provision was confirmed to be as broad and unconstrained as its earliest critics had feared. Yet the United States itself had done everything to avoid it, and most interestingly, no generalized abuse followed. And this, despite the fact that the very stance of the hegemon seemed to confirm that the provision could be invoked at will.

What constraint there was on the invocation of Article XXI, rather, operated in an entirely informal fashion. It emerged from the widespread condemnation of the US use of the provision. Even the EC, which had to be sympathetic to the US interpretation given its own single invocation of the security provision during the Falkland Crisis, warned following the Nicaragua rulings that “the discretionary right inherent in Article XXI should not be arbitrarily invoked.”

Despite the unconstrained nature of the security provision, despite US insistence that its invocation could effectively not be legally challenged, despite warnings from contemporary observers that “In the future, the many possible misuses of Article XXI may swallow the legitimate purposes for which the exception was originally created” (Whitt, 1987), Article XXI was to be invoked exactly once more over the next 30 years. In December 1991, the EC withdrew preferential concessions and Generalized System of Preferences (GSP) treatment from the Yugoslavia, in the wake of the Balkan conflict, “upon consideration of its essential security interests and based on GATT Article XXI.” Yugoslovia attacked the EU’s Article XXI justification: “The situation in Yugoslavia is a specific one and does not correspond to the notion and meaning of Article XXI(b) and (c).”

The notable difference was that this being 1991, the 1989 “improvements” to the panel procedures had been put in place, and defendants could no longer block a panel from being formed. While these reforms are usually adduced to the creation of the WTO, the discussions surrounding Yugoslavia’s right to litigation make clear that in this respect, the type of

55 C/M/204, 16.
56 Trade Measures Taken By The European Community Against The Socialist Federal Republic Of Yugoslavia Communication from the European Communities. GATT L/6948, 1. Ten other countries also withdrew preferential treatment of one sort or another, but the EC was the only one to invoke the security exception.
The EC recognized this fact, stating that “If a panel were indeed established [by the Council], the Community would be bound to accept that decision.”57 In other words, the law was on Yugoslavia’s side in obtaining litigation. The EC attempted to stave off this prospect, claiming that “the time was not opportune,” since the political situation was ongoing. Most interestingly, the EC implicitly cited the spirit of Article XXI in avoiding the automaticity of litigation: “however, the rules were silent on the question of whether, in situations where measures taken for non-economic reasons were involved, a different course could be taken such as, for example, agreeing to establish a panel in principle but delaying its activation subject to further clarity in the situation.”58 Opinions over the desirability of litigation were split. India, Pakistan, Argentina, Peru, Cuba, and Venezuela all supported Yugoslavia’s right to a panel. Meanwhile, the United States, New Zealand, Chile, Mexico, Japan, and Tanzania all pushed for a delay in its establishment. The European invocation of Article XXI against Yugoslavia thus became a first serious test of the institution’s shift towards legalism and the “right to a panel.” The test was inconclusive, however. The Chairman of the meeting discussing the matter was forced to agree to the formation of a panel in principle, unless the parties agreed to a resolution within a negotiation period. Yet by the end of this period, the EC had successfully invoked the transformation of the Socialist Federal Republic of Yugoslavia (SFRY) into the Federal Republic of Yugoslavia (FRY) to question whether Yugoslavia, in its current state, had standing within the Council. The panel was never formed.

A summary is in order. By almost any measure, and by comparison to its clearest equivalent, the General Exceptions, which I examine briefly below, usage of Article XXI has been scarce, to say the least. Countries are seen attempting to avoid its invocation even when it would be indicated. Furthermore, once invoked, no instance goes unchallenged, and challenges are always made on the same basis: countries worry about how the present action will affect subsequent practice. The reason is that they recognize what the designers of the provision knew in the 1940s: that in the absence of formal textual conditions, the only constraints are informal. Related to this point, powerful countries, especially, have

57 Minutes Of Meeting Held in the Centre William Rappard on March 18, 1992. GATT C/M/255, 15.
58 ibid.
been loath to allow the matter to be ruled on in any way. They have weathered findings of violation rather than to mount a defense. They have stripped the panel’s terms of reference to render it incapable of ruling on the substance of the security provision. They have delayed proceedings and questioned a country’s status under the GATT to block proceedings. The result is that no ruling on Article XXI has ever been delivered, and rulings on related issues have never been adopted.

The fear of a legal opinion over the scope or conditions of Article XXI is not limited to the users of the exception. There is visible pressure on other countries to avoid letting matters where Article XXI could be invoked by an eventual defendant escalate to litigation, even when the security provision has yet to be mentioned by anyone. Following the accession of China and Taiwan in 2001, in the midst of economic woes in Taiwan, many feared that Taipei would give in to protectionist demands at home against the flow of goods from China. While Article XXI was acknowledged as being on the table, there was “strong international pressure on Taiwan not to liberally invoke Article [XXI]” (Sutter, 2002). In the end, Taiwan appeared to strategically retain the option of Article XXI, yet never did invoke it to address imports from China.

The closest WTO members came to an invocation of Article XXI in the WTO era, however, was in the midst of the Helms-Burton controversy. In 1998, during the presidential elections season, and under pressure from the politically powerful Cuban lobby, President Clinton signed the Helms-Burton Act into law (after originally opposing it), ratcheting up measures against any investors, including foreign investors, trafficking in property that had been expropriated by Castro, and allowing suits against such investors in US courts. WTO members protested, and the EU formally challenged the Act in the WTO.59 There was much speculation that if it came to litigation, the United States would invoke Article XXI. Jackson (1997b) described it as the biggest test of the WTO’s compulsory adjudication system (which had already been “tested” in similar ways in the case of European measures against Yugoslavia in 1992). Yet Jackson (1997b) correctly foresaw the likely outcome of the dispute: “it is likely not to be in the interests of the European Community to create a precedent that intruded too far on national determinations about ‘essential security interests.’” Both countries had reason to fear a precedent.

Before the United States even had a chance to cite Article XXI, legal observers like Dattu and Boscariol (1997, 198) warned that the United

States will “likely justify the legislation in a GATT-inspired challenge, or under the NAFTA, by recourse to what is commonly known as the ‘national security exception.’” And they added, “in our view, any justification by the United States for the measures taken under Helms-Burton on the basis of the national security exception would constitute one of the most alarming instances of reliance on this exception in the history of the GATT, and would pose a significant threat to the credibility of the multilateral trading system as it exists today.” Their fear was not that a panel might constrain countries’ ability to respond to national security concerns. Rather, they warned that a panel would leave the XXI defense untouched if it avoided pronouncing itself on the meaning of “essential” in the phrase “essential security interest,” and that it would thus definitively endorse the self-defining quality of Article XXI. Such reification would ensure that “the door has been opened very wide to the arbitrary abuse of the exception” (Dattu and Boscariol, 1997, 209). Other contemporary observers echoed this concern, claiming that if the US reading of the provision gained the court’s support, then “any country could invoke the provision to escape review of trade restrictions that might, in fact, actually be motivated by commercial rather than security concerns” (Browne, 1997). Interestingly, Browne feared the impact of such a ruling, even as he maintained that the GATT negotiating history and preparatory work supported this self-judging nature. Through its legal endorsement, a panel would open the door to abuse further than the vague wording of the agreement did in the first place. In view of these authors, the optimal outcome was that the article be left in legal limbo, leaving all members equally reluctant to resort to it.

Be that as it may, in a reiteration of prior events, the United States never did invoke the Article XXI defense. While a panel was formed, the United States agreed to water down the legislation in exchange for symbolic cooperation on Europe’s part over Cuba. Jackson (1997b) was likely right: Europe wanted to avoid a ruling on XXI as much as the United States, and the panel never began its work.

Some have argued, with the Helms-Burton example high in mind, that the security provision’s record of (no) use actually points to its chief benefit: in this view, designers would have willfully retained the considerable ambiguity of Article XXI so as to force state actors to reach informal solutions, outside of formal GATT mechanisms. Lindsay (2003) is representative of this belief, as he claims that it is by maintaining its untouchable character that Article XXI retains its “constructive ambiguity.” And it is precisely the desire to retain this ambiguity that drives settlement
before litigation. Lindsay agrees that litigation would be a bad outcome, since it would risk “unfavorable rigidity in the fluid field of national security.” Article XXI is thus a success, since it is rarely invoked, and never litigated, but still exerts an effect through its sheer existence. Similarly, Alford (2011) claims that “the record has been impressive. While no doubt there have been departures, the self-judging security exception has worked reasonably well.”

The fear of litigation, in these accounts, is itself the beneficial aspect of Article XXI, since it leads countries to settle their differences without the aid of third party adjudication. There is no denying that settlements represent good solutions, and that litigation, which can be inefficient, should most often be avoided if circumstances allow for it. As Lindsay has it, “If WTO members want to retain the traditional flexibility of Article XXI, they know that they must be circumspect in invoking its protections” (Lindsay, 2003, 1300).

Yet there is something incongruous to the view that to retain Article XXI’s utility, members must keep from using it. More importantly, the accounts from negotiators cited above, where country representatives declare themselves aware of the risk of a vague provision, and attempt to strike the right balance between flexibility and constraint, would argue against the view that this benefit, such as is it, is the result of willful planning.

Alford (2011) is correct when writing that “whatever may be motivating Member States to respect the limits of the security exception, it is not fear of sanction.” What accounts for the restraint, then? As in the case of rebus sic stantibus, what drives countries’ restraint is the fear that invoking such a broad exception will lead others to do the same, with no formal means of stopping the abuse.

It is worth asking, at this point, what abuse of the security exception would actually look like. After all, there have been many economic sanctions implemented in the name of national security. Should each of these be considered an instance of invocation of the national security exception, and should we thus not conclude that abuse is more rampant than this discussion has allowed? Put simply, use of the exception requires its invocation. And abuses of flexibility are those that are taken under circumstances that fall short of true necessity. The fear of GATT negotiators was that countries could opportunistically invoke national security to justify protection of anything from agriculture to automobiles. Yet we have seen no such wave of abuse.

The matter may be further clarified by pointing to the one case that unambiguously fits the criteria of abuse. In 1975, the government of
Sweden introduced an import quota system on footwear. Specifically, leather shoes, plastic shoes and rubber boots. Sweden did so under the cloak of Article XXI. “The Swedish Government considered that the measure was taken in conformity with the spirit of Article XXI and stated, inter alia, that the ‘decrease in domestic production has become a threat to the planning of Sweden’s economic defence in situations of emergency as an integral part of its security policy’." The reaction on the part of the membership was predictable, as “many representatives expressed doubts as to the justification of these measures under the General Agreement.” The event remains to this day the go-to example of abuse of the security exception, or of its spirit, in the trade regime. As Bhala was still denouncing twenty years later, “Sweden’s argument is outrageous and causes a slippery slope” (Bhala, 1998, 273). Sweden’s invocation of Article XXI thus gives us a rare sense of what abuse of the national security exception would look like. It is exactly what the designers of the rules feared at the outset, and what observers have warned against ever since. The point is that this case is unique. The question is why there have not been more Swedens protecting footwear manufacturers under the guise of national security, given how unconstrained the exception really is. Thus, insofar as we see economic sanctions taken in the name of national security that are not taken in conjunction with an invocation of Article XXI, and insofar as, moreover, countries go out of their way to avoid making reference to the exception, the problem is one of under-use, rather than abuse.

Contrarily to the views of Lindsay and Alford and others who see success in Article XXI’s low record of use, the GATT security provision has been a failure. This failure results from the vague nature observers have pointed to since its creation, yet the effect has not been abuse, it has been the lack of use. The ease of use of the security exception has rendered its invocation impossible. As such, countries have not turned to it even when national security interests have legitimately clashed with commercial rules. The article can only be said to be a success if one is to believe that the type of situation for which is was created has yet to arise.

The very reluctance to let the matter of the security exception go to court holds further strategic implications. At the time of this book’s writing, the most recent debate concerning Article XXI was over the legality of the US sanctions against Russia following the latter’s encroachment into the Ukraine’s territory in 2014. As Argentina and Yugoslavia

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60 MTN.GNG/NG7/W/16, 7. See also: L/4250, 3. 61 C/M/109.
before it, Russia has threatened a formal legal complaint challenging the US sanctions. And while some observers were quick to say that the threats were not credible, since the United States could easily turn to the self-designating security exception under GATT Article XXI – though the United States was careful never to utter mention of the security provision—others warned that this would be far from a desirable outcome for the United States. In fact, a Russian official was quoted as acknowledging the possibility of an Article XXI defense, but countered that the United States may shy away from it, since “an interpretation that the Members are at full discretion as to when and how to use this provision will not only create an open door in WTO rules, it will destroy the walls around and the foundation beneath the WTO building [...] We do not think anybody, including the U.S., is interested in such scenario.” Some went as far as to suggest that Russia’s very objective in challenging the American sanctions might be to push the United States “into a corner” where it would have to invoke Article XXI, thus setting a precedent legitimating its use, and allowing Russia to strategically invoke it in turn in the future, in the event that its newly acquired WTO obligations weighed on it too heavily. The premise, which is not implausible, would be that Russia would have more to gain from a legitimated and normalized security exception than the United States.

The larger point is that the potential precedential effects of Article XXI invocations are widely acknowledged. Despite the absence of any form of binding precedent in international public law, the past actions of states affect the acceptability of similar actions today, and states are eminently aware of this. The result is that they sometimes act against their immediate self-interest in order to preserve the meaning of the rules, to prevent their distortion in a way that would come at a future cost.

Bhala has argued that no WTO judge would ever touch Article XXI. In this way, the security exception can never be “saved from itself,” and made usable by further restrictions: “is a WTO panel or appellate body likely to adjudicate the merits of a non-sanctioning member’s attack on the invocation of Article XXI? The answer is almost assuredly no” (Bhala, 1998, 279). Bhala goes on to claim that a panel would be likely to interpret its terms of reference in such a way as to abstain from ruling on the substantive matter of an Article XXI decision. And while this is plausible, looking at rulings on Article XX exceptions, which I examine next, as well

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63 ibid.
as case law over the GATT/WTO safeguard, suggests that judges have found ways of walking the necessary line between curtailing members’ rights and clarifying the criteria of use of even fundamental exceptions.

This does not take away from Bhala’s main point: for all intents and purposes, in its present state, Article XXI is not actionable. This becomes germane to the discussion of the coming chapters. Because of its self-judging nature, because of countries’ insistence on never allowing judges to rule on this self-judging aspect of the exception, and because of judges’ possible reluctance to do so even if they were given the opportunity, Article XXI cannot be formally challenged. And while conventional wisdom would lead us to believe that it would as a result be abused to the point of destroying the trade regime, the opposite has been true.

Yes, Article XXI is a failure. Yet it is a failure not for the reason that observers have usually put forth, namely that its vague nature makes it prone to abuse. Article XXI fails on the opposite end of the architectural challenge: in a diplomatic setting based on reciprocity, where state practice changes expectations over subsequent behavior, the very ease of use of the security provisions ends up making it unusable.

4.2 Article XX: The Value of Constraint

As the preceding section demonstrated, Article XXI, a self-judging exception with few, if any, formal restrictions on its use, has been invoked exceedingly rarely throughout the GATT period; it has never been formally invoked by WTO members; and it has never been reviewed by a panel or the Appellate Body. It is no exaggeration to say that a norm against the invocation of Article XXI exists among WTO members. While its existence may continue to affect country behavior, it has become all but a taboo provision. This has not been the case with all GATT/WTO exceptions. The contrast is especially acute when compared to the other trade exception devoted to political objectives, Article XX, the “General Exceptions” clause. The comparison between the two articles speaks to how constraints become desirable in settings where current state practice influences subsequent practice.

Both articles have similar scope, insofar as the General Exceptions, just like Article XXI, cover all country obligations assumed under the WTO, in any of its agreements. Article XX has even been ruled to cover countries’ specific accession protocols.64 This is where the similarity ends.

64 This was the question at issue in the recent China – Raw Materials dispute.
Indeed, Article XX was more constrained than the security exception from the start of the institution, and it has grown progressively more constrained through time, as judges have ruled on its invocation. Yet far from meaning that countries have spurned the General Exceptions clause as a result, these added constraints have led countries to rely on Article XX with ever greater frequency. In other words, not only is Article XX invoked disproportionately more than Article XXI, which one could write off as a result of the wider range of social objectives covered by Article XX, but it has been invoked with increasing frequency through time, as the conditions for its use have grown more demanding. The same pattern is observed first in the GATT, and then again in the WTO.

Article XX covers a list of ten outlined exceptions, listed under Article XX paragraphs (a) to (j), covering state interests ranging from the protection of “public morals” to that of “treasures of artistic value.” The implication is that the grounds for exception to the GATT agreements are listed exhaustively in these ten items. Any other objective that does not fall under an item of this list is not covered by Article XX. Just as Alanus Anglicus claimed in the thirteenth century about religious law, the law may recognize exceptions to its primary rules, but in any case where it does not explicitly do so, the primary rule is said to apply.65 When the European Union recently included an exemption for indigenous community hunting in its ban on seal products, it could not point to any exception under Article XX to justify the distinction, thus invalidating one possible defense of its measure.66 The two provisions most relied upon in the General Exceptions have been Article XX(b), which covers the protection of “human, animal or plant life or health,” and Article XX(g), which covers the “conservation of exhaustible natural resources,” which has been interpreted to also cover living natural resources.

The incentive to abuse the General Exceptions for political purposes is plain. Barriers can be dressed up as a government’s desire to further one of the political priorities carved out in Article XX. A demand by domestic groups for trade protection against, for example, foreign media can be promptly dressed up in the pretense of safeguarding the nation’s cultural heritage. Such standards are now commonly described as the “trade barriers of the twenty-first century.” Yet there was widespread awareness of the potency of standards, and the risks for abuse, even prior

65 See supra, 11. 66 See DS400: European Communities – Measures Prohibiting the Importation and Marketing of Seal Products.
to the negotiations over Article XX. As Percy Bidwell wryly laid it out in 1939, alluding at once to the risk of abuse and to the way it can be mimicked by others:

Under the guise of biological protection, however, it is very easy to introduce economic protection. European governments taught us this trick 30 or 40 years ago when they maintained embargoes on our pork products long after the danger of trichinosis had been eliminated. But it must be conceded that our cattle ranchers and our nurseries have proved apt pupils. They have not hesitated to insist upon sanitary restrictions which, on biological grounds, were far from defensible.67

Aware of such risks, governments introduced the first clear constraints on exceptions in a trade agreement before there was any talk of the GATT. Much of the wording of Article XX, indeed, emerges not in the negotiations of the Havana Charter, but two decades earlier, in history’s first multilateral trade round, the International Convention for the Abolition of Import and Export Prohibitions and Restrictions, held under the purview of the League of Nations in 1927. As Charnovitz (1991) puts it, alluding to this Convention, “The reason why there was no comprehensive debate on the scope of this exception at the U.N. Conference is that the debate had already taken place twenty years earlier.” Years later, the United States quoted this very claim by Charnovitz in its own submission in the notorious US–Shrimp WTO dispute.68 In that case, the litigants were arguing over whether the intent of the designers of Article XX had been for national standards to extend outside of a country’s jurisdiction. In doing so, they found themselves going back to the language of the 1927 Prohibitions Convention.

The Convention was wildly ambitious, vowing to “abolish within a period of six months from the date of the coming into force of the present convention ... all import and export prohibitions and restrictions.”69 Even in this antediluvian agreement, however, policy space was reserved for policies aiming at social objectives like environmental protection. Article 4 of the Convention reads that among the “restrictions [that] are not prohibited by the present Convention” were “Prohibitions or restrictions imposed for the protection of public health or for the protection of animals or plants against disease, insects and harmful parasites.” This was the passage that the United States cited in the Shrimp dispute, arguing

that the intent of the drafters of the Convention was not limited to purely domestic concerns or to sanitary measures alone.\textsuperscript{70}

While carving out policy space for policy objectives like environmental conservation, governments negotiating the 1927 Convention also recognized the need for constraints on the exceptions to countries’ primary obligations. The “prohibitions and restrictions” on trade could be legally relied on by governments “on condition, however, that they are not applied in such a manner as to constitute a means of arbitrary discrimination between foreign countries where the same conditions prevail, or a disguised restriction on international trade.”\textsuperscript{71} The Convention’s Article 5, meanwhile, allowed for the adoption of measures protecting the “vital interests of the country,” but specified that the circumstances must be of an “extraordinary and abnormal” character. The measures that fell under these exceptions reflected many of the same state priorities that would be included in the GATT and WTO texts, \textit{inter alia}: environmental exceptions,\textsuperscript{72} culture,\textsuperscript{73} and moral concerns.\textsuperscript{74} The 1927 Convention never went into force. Yet formal language, once agreed upon, has a way of sticking around and re-emerging in later agreements. As the United States noted in the Shrimp dispute, much of the phrasing of the Convention has survived to the present day. Chiefly, the requirements that any exceptions not amount to “arbitrary discrimination” or “disguised restriction on international trade” are found whole in the GATT Article XX. As the US submissions in \textit{US–Shrimp} attest, to this day, the 1927 text continues to inform the debate over standards. The “trade barriers of the 21st century” are constrained by language that is nearly a century old.

Then, as now, the onus was on the party invoking a general exception to prove that the policy at issue meets the requirements of Article XX. While it is always up to the complainant to establish the violation that it alleges, it is thus up to the party invoking the exception, usually the defendant in a dispute, to prove that it meets the conditions set out in Article XX.\textsuperscript{75} This is the “affirmative defense” aspect of the General Exceptions. The accepted meaning of these conditions, moreover, has only gotten more stringent with time, as panels and the AB have

\textsuperscript{70}WT/DS58/R, Report of the Panel, para 3.189.  \textsuperscript{71}Article 4 of the 1927 Convention.  
\textsuperscript{72}Article 4:4. Prohibitions or restrictions imposed for the protection of public health or for the protection of animals or plants against disease, insects and harmful parasites.  
\textsuperscript{73}Article 4:5. Export prohibitions or restrictions issued for the protection of national treasures of artistic, historic or archaeological value.  
\textsuperscript{74}Article 4:2. Prohibitions or restrictions imposed on moral or humanitarian grounds.  
\textsuperscript{75}See, for instance, \textit{Turkey – Textiles}.  

been asked to interpret them. The exact requirements put on the use of Article XX exceptions vary somewhat across the different Article XX subparagraphs. Exceptions pertaining to e.g. exhaustible resources are not treated the same way as environmental exceptions. Yet they all reflect a similar spirit. And no matter the subparagraph a measure falls under, any invocation of Article XX must satisfy the requirements set forth in the Article’s preamble, called the *chapeau*, where the conditions taken from the 1927 Convention are found. In practice, it is clearing the *chapeau* that has constituted the greatest legal hurdle for countries seeking to defend their practices as justified under Article XX.

The most prevalent constraint put on the exercise of Article XX, which concerns subparagraphs (a), (b), (d), and (j), requires that the measure at issue be “necessary” to attain the grounds for exception. The perceived meaning of necessity also offers insight into how the requirements for the invocation of the General Exceptions have evolved through time. It is worth acknowledging how tightly related this contemporary version of necessity is to its historical treatment, as explored in Chapter 3. Recall that thinkers from the canonists onwards saw necessity not so much as a state where the actor lacks agency, but one where the actor is confronted with overwhelming need. Hunger in the case of David and the showbread; survival of the city in the case of Machiavelli. The categorization underlying Article XX sets out the different dimensions of such need: moral protection, environmental protection, cultural protection, and so on. The rules, in this way, enshrine those values which excuse breaches of the primary commercial rules. The role of necessity, as stated in Article XX, comes only subsequently: it refers to the measures or behavior viewed as necessary to secure those values set out in subparagraphs (a) to (j). One could argue, however, that the values encoded into Article XX themselves arise out of recognition of state necessity: in this reading, Article XX exists because states cannot allow themselves to make commitments that may prevent them from securing essential state values: moral, environmental, and cultural welfare, among others. If this is so, then Article XX can be

76 This reading of the necessity requirement was first laid out with regards to Article XX(b), concerning “human, animal or plant life or health,” but was then applied to the other Article XX paragraphs that contain the mention of necessity. As the panel in *Thailand – Cigarettes* reasoned, “The Panel could see no reason why under Article XX the meaning of the term ‘necessary’ under paragraph (d) should not be the same as in paragraph (b). In both paragraphs the same term was used and the same objective intended: to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable.” (Panel Report, para. 74.)
suggested to rest on a double treatment of necessity: it is designed to allow those measures (which would otherwise be in contravention of the primary GATT rules) that are necessary to secure those values that are necessary to the well-functioning of the state.

The different considerations of Article XX were clarified through a series of disputes where defendants invoked a clause from the General Exceptions as an affirmative defense, to justify what would otherwise have been a breach of GATT obligations. The first ruling on Article XX defenses had to interpret this central concept of necessity, yet Article XX offered little guidance as to its meaning or scope. Panelists drew on negotiating history to specify the requirements understood by “necessity,” and the concept took on a particular meaning through case law. It came to be understood as requiring that no alternative policy could have been employed by the defendant country to attain the policy objective being pursued in a way that would have been more consistent with primary trade rules. In other words, necessity meant that the amount of trade distortion resulting from the measure was unavoidable if the policy objective was to be attained. The phrase that embodied this interpretation was “least trade restrictive.”

The Appellate Body also added to the current interpretation of the meaning of necessity in the context of Article XX. It ruled that while the measures judged “necessary” under Article XX were not limited to those that were indispensable to the attainment of the legitimate policy objective being pursued: “the term ‘necessary’ refers, in our view, to a range of degrees of necessity [...] a ‘necessary’ measure is [...] located significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to’.”

Later rulings have added nuance by taking into account a range of factors concerning both the measure at issue, and the social objective being pursued, further reflecting a balancing rationale between the degree of necessity, and the distortion entailed. A passage from the AB’s ruling in Korea–Beef serves as an apt encapsulation of the degree to which the concept of necessity has been formalized. As the AB claimed, determining the existence of necessity according to Article XX involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to

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the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.  

And perhaps clearest of all, the AB specified that “the greater the contribution [to the realization of the end pursued], the more easily a measure might be considered to be ‘necessary’.”80 The greater point is that the meaning of ‘necessity’ as a requirement for the invocation of an exception under Article XX has been thoroughly explored through the course of litigation. Insofar as there was ambiguity over the meaning of necessity, a problem that confronted earlier writers going as far back as the canonists, panelists and the AB have worked to resolve it within the meaning of the WTO. They have not always increased its restrictiveness, such as when the AB ruled that “necessary” encompassed a broader set of cases than those that were strictly “indispensable,” though there is little doubt that greater restrictiveness has been the aggregate result of the sum of rulings pertaining to Article XX. As the legal scholar Bal (2001, 102) puts it, judges have “created a very high threshold for the term necessary.” The same author concludes that “the practice of panels has been to interpret Article XX narrowly.” It is also plain that this threshold for the term necessity has been progressively raised during GATT and WTO history. Not coincidentally, and in keeping with this book’s argument, the invocation of the relevant provisions of Article XX has increased alongside it.

The other subparagraph of Article XX that is frequently invoked is Article XX(g), concerned with “conservation of exhaustible natural resources.” This is the provision that came up in notorious disputes like US – Tuna. The distinction of XX(g) is that it does not require that the measure at issue be “necessary” to the conservation of natural resources. It suggests instead a more lax requirement:

\[(g) \text{ relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.}\]

The absence of the term “necessary” would seem to allow a broader range of measures than merely those strictly “necessary” to the conservation of natural resources. So long as a measure was in some way related to this objective, it could pass muster. What happened in the case of Article XX(g) is instructive. While judges recognized the distinction

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80 Korea—Various Measures on Beef, Appellate Body Report, para. 163.
81 GATT Article XX (g), emphasis added.
between Article XX(g) and the other exceptions, they were quick to impose additional restrictions through their jurisprudence. What is more, member-states have been strikingly supportive of what can only be described as judicial activism, a practice that usually raises considerable concern among sovereign states, not to mention some legal scholars (Ragosta, Joneja, and Zeldovich, 2003).

In Canada – Salmon and Herring, the panel read in an original interpretation of Article XX(g), which is worth reproducing here:

...the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources. The Panel concluded for these reasons that, while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as “relating to” conservation within the meaning of Article XX(g).82

This new requirement stipulated that the “primary” purpose of the measure at issue had to be the conservation objective being promoted. The objective could not merely be a byproduct of a measure that was primarily aimed at different policy objective. It is worth stressing that the interpretation of “relating to” as meaning “primarily aimed at” had no textual basis. The phrase is not to be found anywhere. The AB highlighted this fact in US – Gasoline,83 but by then, the requirement had been willfully internalized by the parties.

Indeed, member states have not fought the new requirement, even as it remains nowhere to be found in the legal texts. The panel in Canada – Salmon and Herring may have effectively saved Article XX(g) from obsolescence. Had the threshold for XX(g) been too low, it may well have gone the way of Article XXI: an exception so broad as to be untouchable, because of fears over the precedent that any invocation might set. As with the rest of Article XX, case law has added requirements, and in so doing increased use of the General Exceptions.

As mentioned above, beyond the distinctions in the requirements set out for the different subparagraphs of the General Exceptions, any reliance on Article XX must satisfy the chapeau, or preamble of the Article, which reads that the policy at issue must not be “applied in a manner which would constitute a means of arbitrary or unjustifiable

82 Emphasis added, Canada – Salmon and Herring, Panel Report, para. 4.6.
83 The AB noted, “the phrase ‘primarily aimed at’ is not itself treaty language.” AB ruling, US – Gasoline.
discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”

The requirement set forth in the *chapeau* should be a familiar one. At its heart, the phrase prohibiting “disguised restriction” aims at preventing opportunism. The first time it ever ruled on Article XX, in the WTO’s second dispute, *US—Gasoline*, the AB looked back to the article’s drafting history to conclude that “the purpose and object of the introductory clauses of Article XX is generally the prevention of ‘abuse of the exceptions’.” And again, “The fundamental theme [of the *chapeau*] is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.” Judges have stressed that the *chapeau* is concerned entirely with the *application* of the measure, rather than with the measure itself, which falls under the relevant subparagraph. As a result, a measure is often found to be in compliance, but its application is in violation – this is the case, for instance, with *EC–Seal Products*: the ban on seal products was justifiable as it was seen as “necessary to protect public morals” under the meaning of Article XX(a), but the way it was applied, carving out products of the indigenous hunt, was in violation. Judges have opined that the *chapeau* thus represents “a heavier task” than merely showing that an exception like Article XX(g) encompasses the policy at issue. In interpreting the *chapeau*, judges have thus had the task of deciding whether the measure at issue, justifiable as it may be under one of the subparagraphs, seems to have a protectionist purpose.

In the case of *US—Gasoline*, the AB overturned the panel ruling on the *chapeau*, and found that the United States could have availed itself of less restrictive measures to accomplish the same objective, and that its policies thus amounted to a “disguised restriction on international trade.” In ruling on the matter, judges do no less than assess the intent of the measure, basing themselves on the “design, architecture and revealing structure” of the measure.

As a rule, both panel and AB judges have not called into question the social objectives, *per se*, pursued by countries seeking to justify measures otherwise in breach of their obligations. Although Article XX does not have the same “self-judging” quality as Article XXI which some claim allows countries to determine what constitutes a security threat, judges have rarely challenged countries’ analogous arguments with respect to

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85 DS400: *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*
87 ibid, 29.
Article XX. There is a broad consensus that the role of the WTO is not to rule on the appropriateness of e.g. restrictions on non-organic foods if a given society insists on the health benefits of organic produce, but rather to keep such policies from being used as protectionist devices. In this way, rulings on the legality of an Article XX invocation have centered on the legality of the measure’s application, rather than the aptness of the policy, or the social objective it pursues. In an illustrative opinion in that first WTO dispute examining Article XX, the panel in US—Gasoline ruled that:

It was not its [the panel’s] task to examine generally the desirability or necessity of the environmental objectives of the Clean Air Act or the Gasoline Rule. [...] Under the General Agreement, WTO Members were free to set their own environmental objectives, but they were bound to implement these objectives through measures consistent with its provisions, notably those on the relative treatment of domestic and imported products.88

When the UN Conference in Havana was debating the content of the exception that was to become Article XX, it sought to restrict it and make it harder for countries to abuse, but it did so not by narrowing the scope of the Article XX subparagraphs, but by making reliance on an exception more contingent.89 They added the chapeau conditions. As Charnovitz (1991, 48) argues, distinguishing protectionist measures from legitimate ones is not easy, “But having a multilateral organization make such judgments was certainly an expectation of the authors of the GATT.”

The fact that in practice, the chapeau, rather than the demonstration of the legitimacy of the policy objective, or how it belongs under one of the Article XX exceptions, has been the real hurdle in the invocation of Article XX is also telling of the political economic interests underlying the exception. It hints at the fact that the measures that seek the defense of Article XX are perhaps being taken in response to domestic interests looking for protection from competition: time and again, the particular application of the standards invoked appears to have distributional consequences that favor some (invariably domestic) producers over (invariably foreign) others. While the underlying social objectives are most often legitimate, and ruled as such, their application reflects the interests asking for, or supporting, the measure. The United States agrees to ban clove cigarettes from Indonesia because these are claimed to be a

88 The AB reflected a similar view when it argued in the EC—Asbestos case that every country had a “right to determine the level of protection of health that [it] considered appropriate in a given situation” (EC—Asbestos, Appellate Body Report, para. 168).
driver of youth smoking, but it is more reluctant to impose a similar ban on menthol cigarettes produced in the United States, which lead to the same social ill. As in the case of EC—Seal Products, the social objective of the ban is ruled to be legitimate, but its partial application is not. The exception per se is supported, but the motivation behind it is shown to be driven by more than concern over the social objective. This endogenous element, a demand from a domestic group seeking protection, is what the chapeau of Article XX is designed to pick out.

In effect, the existence of the chapeau reflects the recognition of the two-level game aspect of international trade. Protectionist measures are most often taken in reaction to demands by domestic groups. The chapeau is designed to ensure that while legitimate public policies are carved out of the agreement, their implementation in favor of domestic interests groups is invalid. The particularity of domestic demands for protection, as I have argued in Chapter 2, is that they are endogenous: groups lobby if their demands are likely to be successful (whereas the incidence of exogenous shocks, like a public health crisis, does not depend on the likelihood of measures taken to address it). The chapeau shields the government from such demands, and in so doing, makes it less likely that one invocation of the General Exceptions will make further invocations more likely. Once more, the concern is not as much with the exception per se, as with what comes after. What appears as a strict concern with the application of the exception faced with unforeseen circumstances can thus be read as an attempt to stave off future demands, and to ensure that one invocation does not increase the odds of further invocations.

4.3 CONCLUSION: ARTICLE XXI VS. ARTICLE XX

Having shown some of the ways in which the exercise of Article XX is constrained and actionable, and how such constraints have increased over time, chiefly as a result of litigation, it is worth recalling the record of use of Article XXI, and comparing it side-by-side to that of Article XX.

90 The case is DS406: United States—Measures Affecting the Production and Sale of Clove Cigarettes. Here, the panel declined to rule on the US Article XX(b) defense, but ruled on its analogue in the TBT Agreement, TBT 2.2. The panel found that Indonesia failed to demonstrate that the US ban was “more trade-restrictive than necessary” to fulfill a legitimate objective (reducing youth smoking) within the meaning of Article 2.2 of the TBT Agreement. In other words, the ban per se, and the exception it fell under, were not the problem; it was its discriminatory application that was in violation of TBT Article 2.1 (which can be usefully read as the analogue of the Article XX chapeau.)
On the one hand, there are no formal invocations of Article XXI in litigation, in either the GATT or the WTO period. The record for Article XX starts out similarly: the first 30 years of GATT see no reliance on the General Exceptions by a defendant. But as can be seen in Table 4.1, whereas it saw no invocation until 1980, the use of Article XX increased during the remainder of the GATT period. Similarly, during the WTO period, countries did not invoke Article XX for almost the first decade of the institution, until 2003, but the membership then began relying on it regularly, with at least one instance every year, until the present day.

In both instances, the empirical records confounds the conventional wisdom. On the one hand, the unconstrained, self-judging exception remains untouched, and this appears to be the result of willful efforts on the part of countries not to rely on it. On the other hand, Article XX, the more constrained of the two exceptions, increases in popularity exactly as its requirements become more strenuous. “Necessity,” for instance, one of the key principles underlying exception in law, no longer carries the vagueness it held under Machiavelli: judges interpret it first as meaning “least trade restrictive,” and continue to add nuance to its meaning through their jurisprudence in a series of rulings. Strikingly, what becomes a “very high threshold” for the demonstration of necessity, together with the increased requirements for other aspects of Article XX, such as the *chapeau*, does not result in countries spurning the General Exceptions. Quite the opposite, Article XX becomes a reliable exception, and judges are routinely made to distinguish genuine necessity from disguised protectionism. Countries turn to Article XX not in spite of its many requirements, but because of them. The constraints put on Article XX are what reassure countries that one invocation will not make another more likely, since what limits abuse of Article XX is not strictly the “spirit” in which countries invoke it, as is the case with the national security exception, but actual actionable constraints.

The court saves Article XX, while it is never allowed to rule on the essence of Article XXI, which also explains why the latter falls into desuetude, and why a taboo emerges over its invocation, just as it had in the case of the nineteenth century *rebus sic stantibus* provision. Article XX continues to serve as a template for the construction of general exceptions clauses in newer trade agreements. It is explicitly referenced, for

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91 Looking at adopted rulings. Considering unadopted rulings leaves the Nicaragua panel report, though there, the terms of reference were such, that the panel never ruled on any aspect of Article XXI.

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<td>November 2, 2009</td>
<td>2013</td>
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<tr>
<td>US – Clove Cigarettes, DS406</td>
<td>April 7, 2010</td>
<td>2011</td>
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<td>China – Rare Earths, DS431, 432, 433</td>
<td>March 13, 2012</td>
<td>2014</td>
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instance, in the two most recent major agreements, the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA), and the Transatlantic Trade and Investment Partnership (TTIP) between the United States and the European Union. No analogous references exist to Article XXI in agreements outside of the WTO agreements. In both the GATT national security exception and the *rebus sic stantibus* doctrine, countries grew to fear how their invocation might set a precedent, normalizing reliance on a provision that held nothing else to stop it. Fearing the implications of an invocation today on abuse tomorrow, countries have consistently preferred not to rely on the exception at all, even when they have a legitimate case to do so. In an information-rich environment resting on diffuse reciprocity, constraints are what saves exceptions from disuse.

93 In public consultations over TTIP, the EU cites the CETA draft text, which reads:

Article Y: General exceptions 1. For the purposes of Chapters X through Y and Chapter Z (National Treatment and Market Access for Goods, Rules of Origin, Origin Procedures, Customs and Trade Facilitation), Section 2 (Establishment of Investments) and Section 3 (Non-discrimination of Investment), GATT 1994 Article XX is incorporated into and made part of this Agreement.