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The Self-Judging WTO Security Exception

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I. INTRODUCTION

The World Trade Organization (WTO) is a remarkably successful international body. Now in its sixteenth year, it boasts 153 Member States and an additional thirty countries pursuing membership.[1] Only fifteen countries of the world—all small and economically insignificant—are not in the WTO or clamoring to join it.[2] The WTO Member States and applicant countries account for 99.95 percent of world trade, 99.97 percent of world Gross Domestic Product (GDP), and 99.30 percent of the world's population.[3]

Equally remarkable is the success of the WTO's judicial branch, the Dispute Settlement Body (DSB). Four hundred twenty-nine complaints have been filed with the WTO, an average of over twenty-five cases per year.[4] WTO panels have rendered 179 decisions,[5] more in seventeen years than the International Court of Justice (ICJ) decided in sixty-three years.[6] The overwhelming majority of these decisions—almost ninety percent—result in a finding of WTO violations.[7] Even more remarkable, the respondent State complies with adverse decisions over ninety

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[1] The thirty countries pursuing membership are Afghanistan, Algeria, Andorra, Azerbaijan, Bahamas, Belarus, Bhutan, Bosnia and Herzegovina, Comoros, Equatorial Guinea, Ethiopia, Iran, Iraq, Kazakhstan, Laos, Libya, Montenegro, Russia, Samoa, Sao Tomé, Serbia, Seychelles, Sudan, Syria, Tajikistan, Uzbekistan, Vanuatu, and Yemen.

[2] These countries are: East Timor, Eritrea, Kiribati, Kosovo, North Korea, Marshall Island, Micronesia, Monaco, Nauru, Palau, San Marino, Somalia, Turkmenistan, Tuvalu, and the Vatican.

[3] *Handbook on Accession to the WTO*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c1s1p1_e.htm (last visited June 16, 2011).

[4] As of March 7, 2012, there have been 429 complaints filed. *See Chronological List of Dispute Cases*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Mar. 7, 2012).

[5] *See WTO Panel Reports*, WORLDTRADELAW.NET, http://www.worldtradelaw.net/reports/wtopanels/wtopanels.asp (last visited March 7, 2012); *Current Status of Disputes*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm (last visited Mar. 7, 2012).

[6] According to the ICW, 151 cases have been filed and fifteen of those are still pending. *See Cases*, INT'L COURT OF JUSTICE, http://www.icj-cij.org/docket/index.php?p1=3 (last visited June 16, 2011).

[7] For examples of some of the most contentious disputes involving hundreds of millions in dispute, see *infra* note 350.

percent of the time.[8] In short, the WTO docket is almost always full, the complainant State almost always wins, and the respondent State almost always complies.

Given this impressive record, it is surprising to find in the WTO an unreviewable trump card, an exception to all WTO rules that can be exercised at the sole discretion of a Member State—the WTO security exception. Yet that is what the exception essentially is: a self-judging provision that a Member State can invoke whenever "it considers" a measure to be "necessary for the protection of its essential security interests."[9] As one skeptical delegate from Argentina stated in 1982—responding to the European Union's invocation of the security exception in the Falkland War—it is "a magnificent safeguard clause" that allows any country to take security action without it "having to be justified or approved" by anyone.[10] He was correct, and a generation later his country would become the strongest proponent of unreviewable security exceptions.[11]

Concerns about abuse of the security exception were recognized from the beginning. General Agreement on Tariffs and Trade (GATT) negotiators feared that the exception would create a "very big loophole in the whole [GATT] Charter."[12] The delegation from the United States, which drafted the exception, shared this concern stating that there "was a great danger of having too wide an

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[8] Gary Horlick & Judith Coleman, *A Comment on Compliance with WTO Dispute Settlement Decisions*, *in* THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES 771, 772 (Merit E. Janow et al. eds., 2008) (finding compliance rates of sixty-seven percent for full compliance, twenty-four percent for partial compliance, and nine percent for unabashed noncompliance); Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 J. INT'L ECON. L. 397, 398–99 (2007) (of the 109 cases where a panel or Appellate Body report was adopted, a violation was found in nearly ninety percent of the cases; the DSB granted authorization to retaliate in only eight cases as a result of noncompliance); *see also* Steve Charnovitz, *The Enforcement of WTO Judgments*, 34 YALE J. INT'L L. 558, 563 (2009) (discussing compliance record with WTO judgments); *Facts and Figures on Dispute Settlement (2010)*, WORLDTRADELAW.NET, http://www.worldtradelaw.net/dsc/database/basicfigures.asp (last visited June 16, 2011). In the event a Member State remains in noncompliance, the WTO provides remedies, including compensation and suspension of concessions, equal to the injury caused by the Member State's failure to comply with the adverse decision. WTO Dispute Settlement Understanding, art. 22.

[9] General Agreement on Tariffs and Trade art. XXI(b), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

[10] GATT Council, *Minutes of Meeting Held in the Centre William Rappard on May 7, 1982*, C/M/157, at 12 (June 22, 1982) [hereinafter GATT Council Meeting of May 7, 1982], http://www.wto.org/gatt_docs/english/sulpdf/90440042.pdf.

[11] *See infra* text accompanying notes 272–278.

[12] United Nations, Econ. & Soc. Council, Preparatory Comm. of the U.N. Conference on Trade & Emp't, Thirty-Third Meeting of Commission A, at 19, U.N. Doc. E/PC/T/A/PV/33 (1947) (Dr. Speekenbrink on behalf of the Netherlands), http://www.wto.org/gatt_docs/English/SULPDF/90240170.pdf.

exception . . . that would permit anything under the sun."[13] Therefore, the exception was drafted so it could be invoked in limited circumstances—such as war or international emergencies—but then left to the Member States' sole discretion when invoked in those circumstances:

> I think no one would question the need of a Member, or the right of Member, to take action relating to its security interests and to determine for itself—which I think we cannot deny—what its security interests are . . . . I think there must be some latitude here for security measures. 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 for purely 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 . . . . This is the best we could produce to preserve the proper balance.[14]

We can only hope, the Norwegian Chairman added, that "when the [GATT] is in operation . . . the atmosphere inside the [GATT] will be . . . [an] efficient guarantee against abuses . . . ."[15]

Those hopes have been realized. Despite the risks associated with a self-judging exception, Member States have exercised good faith in complying with their trade obligations. In over sixty years of international trade, invocations of the security exception have only been challenged a handful of times, and those challenges have never resulted in a binding GATT/WTO decision. An unaccountable sovereign domain prevails in one small corner of the trade regime, and yet the WTO continues to thrive.

Trade restrictions in furtherance of national and international interests are exceedingly common. The United Nations (U.N.) Charter presumes that the Security Council will pursue the "complete or partial interruption of economic relations" before it authorizes the use of armed force.[16] The U.N. has embraced this approach with gusto, leading David Cortright and George Lopez to describe the 1990s as the "Sanctions Decade."[17] Examining fourteen U.N. case studies, Cortright and Lopez conclude that comprehensive trade sanctions are the most effective of all types of sanctions, provided they are enforced so as to have the

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[13] *Id.* at 20 (Mr. Leddy on behalf of the United States).

[14] *Id.* at 20–21.

[15] *Id.* at 21 (Mr. Colban on behalf of Norway).

[16] U.N. Charter art. 41.

[17] DAVID CORTRIGHT & GEORGE LOPEZ, THE SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990S (2000).

greatest possible economic and social impact[18]—objectives antithetical to the WTO's goal of a "substantial reduction of tariffs and other barriers to trade."[19]

Nations routinely restrict trade and other economic relations for security reasons. For example, in the United States, the president is given broad authority to regulate trade that threatens the national interest. The Export Control Act authorizes the president, "[i]n furtherance of world peace and the security and foreign policy of the United States . . . to control the import and the export of defense articles and defense services."[20] The International Emergency Economic Powers Act grants the president wide discretion to impose economic sanctions and trade embargoes whenever a national emergency threatens the "national security, foreign policy, or economy of the United States."[21] Foreign investment is severely restricted under the Exon-Florio amendment to the 1988 Trade Act, which grants the President the authority to block mergers and acquisitions which would result in "foreign control of persons engaged in interstate commerce."[22] The Foreign Assistance Act restricts foreign aid to countries that promote terrorism, engage in money-laundering, or fail to punish illicit drug trafficking.[23]

These are just a few of the many laws and regulations that authorize or require executive action to restrict trade in the national interest. According to a recent study, in one ten-year period the United States imposed trade sanctions against ninety countries, two-thirds of which were WTO members.[24] The result is a patchwork of sanctions limiting trade with friends and enemies.

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[18] David Cortright & George A. Lopez, *Introduction: Assessing Smart Sanctions: Lessons from the 1990s*, *in* SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT 8–9 (David Cortright & George Lopez eds., 2002).

[19] GATT 1947, *supra* note 9, at 3.

[20] 22 U.S.C. § 2778 (2006).

[21] 50 U.S.C. § 1701 (2006).

[22] Exon-Florio Amendment to the 1988 Trade Act, Pub. L. No. 100-418, § 5021, 102 Stat. 1425 (codified at 50 U.S.C. app. § 2170 (Supp. 1989)); *see also* José E. Alvarez, *Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT'L L. 1 (1989).

[23] 22 U.S.C. § 2291.

[24] MICHAEL P. MALLOY, STUDY OF NEW U.S. UNILATERAL SANCTIONS 1997–2006, at 74–87 (2006), *available at* http://www.usaengage.org/storage/usaengage/Publications/2006_study_of_new_%20us_unilateral_%20sanctions.pdf. The WTO countries included in the report on U.S. unilateral sanctions are: Angola, Armenia, Bahrain, Bangladesh, Belize, Bolivia, Brazil, Burundi, Cambodia, Canada, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Cuba, Cyprus, Djibouti, Dominican Republic, Ecuador, Egypt, Gambia, Georgia, Guatemala, Guinea Bissau, Haiti, Honduras, India, Indonesia, Italy, Jamaica, Japan, Jordan, Kuwait, Kyrgyzstan, Maldives, Mauritania, Mexico, Moldova, Morocco, Nigeria, Oman, Pakistan, Panama, Paraguay, Peru, Qatar, Romania, Rwanda, Saudi Arabia, Sierra Leone, Sri Lanka, Taiwan (Chinese Taipei), Tanzania, Thailand, Tunisia, Uganda, Ukraine, United Arab Emirates, Venezuela, Vietnam, and Zimbabwe. *See id.*

Absent the security exception, such actions violate core WTO rules that guarantee most-favored-nation treatment (MFN),[25] national treatment,[26] and prohibit quantitative restrictions.[27] Indeed, a targeted ban on goods and services is among the most pernicious of trade restrictions, imposing an absolute limit on imports, distorting trade through an opaque and burdensome mechanism and rewarding less efficient competitors from non-targeted countries.[28]

This Article analyzes the security exception in detail, with a particular focus on State practice. In the absence of any GATT or WTO jurisprudence, State practice affords the best vehicle to understand its meaning. As discussed in Part II, in the few instances when invocation of the security exception has been challenged, State practice suggests that the security exception is not reviewable.

If a Member State can avoid WTO obligations through a self-judging security exception, what is to prevent bad faith invocations? As discussed in Part III, the WTO regime includes a number of devices to address this concern, including opting out of normal trade relations, opting in to deeper trade relations, granting preferential treatment to developing countries consistent with security interests, and protecting against the nullification or impairment of Member States' legitimate expectations even in the absence of a WTO violation. These arrangements provide broad discretion to act in furtherance of the national interest without violating trade rules. As such, Member States quite often can advance national objectives without the need to invoke the security exception.

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[25] General Agreement on Tariffs and Trade 1994 art. I, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 154, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994]. Article I of the GATT 1994 requires MFN treatment, which in practice demands non-discrimination between products from all WTO member states and prohibits the products from one Member State from being treated less favorably than the products from any other Member State. Likewise, MFN treatment is guaranteed with respect to services under Article II of the General Agreement on Trade in Services, ensuring equal opportunity for services providers from all WTO Member States. General Agreement on Trade in Services art. II, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter GATS].

[26] Article III:4 of GATT 1994, *supra* note 25, requires products from Member States to be accorded "treatment no less favorable" than that accorded to like products of national origin in respect of all laws, regulations and requirements. Article XIII:1 of GATT 1994, *supra* note 25, addresses discriminatory quantitative restrictions, stating that "[n]o prohibition or restriction shall be applied . . . on the importation of any product of the territory of any other contracting party . . . unless the importation of the like product of all third countries . . . is similarly prohibited or restricted."

[27] Article XI of GATT 1994, *supra* note 25, prohibits quotas, import bans, and similar quantitative restrictions on the products of other Member States. Likewise, a prohibition on services is a market access barrier that violates Article XVI of the GATS, *supra* note 25.

[28] *See* Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, ¶ 63, WT/DS34/AB/R (Oct. 22, 1999), *available at* http://www.worldtradelaw.net/reports/wtoab/turkey-textiles(ab).pdf.

Notwithstanding these mitigating factors, a self-judging security exception poses grave risks. If abused, it could undermine the entire WTO regime. But the practice of WTO Member States is to invoke the security exception in good faith, with a margin of discretion. A Member State may do so because of a fear of sanction, out of a sense of norm legitimacy, or because it is in its self-interest to do so. The Article concludes in Part IV with brief reflections on why nations comply with the good faith obligation of a self-judging exception. Compliance with a self-judging rule offers useful insights into larger questions of why nations obey international law. Rational choice and normative theories best explain compliance with a self-judging international norm.

With over $16 trillion in annual world trade, every nation must weigh the economic rewards and security risks of international trade. Finding a proper balance between free trade and national security is fundamental for international relations to flourish. This Article explains how the WTO regime facilitates nations achieving that balance.

II. THE WTO SECURITY EXCEPTION

The WTO security exception is unlike other exceptions in international trade law, establishing a domain of trade relations beyond WTO judicial review. In adopting these exceptions, the WTO recognized certain trading behavior as the international equivalent of a political question, in which a nation is "invested with certain political powers, in the exercise of which [it] is to use [its] own discretion . . . ; and whatever opinion may be entertained of the manner in which [such] discretion may be used, still there exists, and can exist, no power to control that discretion."[29] In the international context this is described as the doctrine of self-judging: whether factual circumstances satisfy the requirements of the security exception is left to the sound discretion of the Member State invoking the exception. As the summary report of the Geneva Draft stated in 1947, under the security exception "Members may . . . do whatever they think necessary to protect their security interests relating to atomic materials, arms traffic, and wartime or other international emergencies . . . ."[30]

Article XXI provides that:

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[29] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–66 (1803).

[30] U.N. Conference on Trade and Employment, Havana, Cuba, Nov. 21, 1947–Mar. 24, 1948, *An Informal Summary of the ITO Charter*, U.N. Doc. E/CONF.2/INF.8 at 35 (Nov. 21, 1947), *available at* http://www.wto.org/gatt_docs/English/SULPDF/90180098.pdf; *see also* Summary Record of the Twenty-Second Meeting, *Request of the Government of Czechoslovakia for a Decision Under Article XXIII*, at 7, GATT/CP.3/SR.22 (June 8, 1949) (citing statement from Mr. Shackle of the United Kingdom) ("[E]very country must have the last resort on questions relating to its own security.").

> Nothing in this Agreement shall be construed
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> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
> (i) relating to fissionable materials or the materials from which they are derived;
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
> (iii) taken in time of war or other emergency in international relations; or
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[31]

While there is no dispute that the security exception is generally beyond WTO review, as discussed below, the scope of Member State discretion is contested. The security exception embraces five broad categories: (1) national security information;[32] (2) nuclear material;[33] (3) military goods and services;[34] (4) war and international emergencies;[35] and (5) U.N. Charter obligations.[36] Only one of these

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[31] GATT 1994, *supra* note 25, art. XXI.

[32] *Id.* art. XXI(a); *see also* GATS, *supra* note 25, art. XIV(a) ("Nothing in this Agreement shall be construed (a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests.").

[33] GATS, *supra* note 25, art. XXI(b)(i); *see also id.* art. XIV(b)(ii) ("Nothing in this Agreement shall be construed . . . (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests: . . . (ii) relating to fissionable and fusionable materials or the materials from which they are derived . . . .").

[34] *Id.* art. XXI(b)(ii); *see also id.* art. XIV(b)(i) ("Nothing in this Agreement shall be construed . . . (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests: (i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment.").

[35] *Id.* art. XXI(b)(iii); *see also id.* art. XIV(b)(iii) ("Nothing in this Agreement shall be construed . . . (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests: (iii) taken in time of war or other emergency in international relations.").

[36] *Id.* art. XXI(c); *see also id.* art. XIV(c) ("Nothing in this Agreement shall be construed . . . (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.").

exceptions—relating to Member State action taken pursuant to U.N. Charter obligations—adopts an objective standard.[37] The other four are self-judging: it is sufficient to trigger the exception that a Member State considers the action necessary to further its essential security interests.

A. Possible Interpretations

The degree to which these exceptions are self-judging is an open question. According to one interpretation, a Member State can decide for itself whether a measure is essential to its security interests *and* relates to one of the enumerated conditions.[38] Another interpretation would recognize a Member State's prerogative to determine for itself whether a security exception is applicable, but would impose a good faith standard that is subject to judicial review. Under a third interpretation, a Member State can decide for itself whether "it considers" a measure to be "necessary for the protection of its essential security interests," but the enumerated conditions are subject to judicial review.[39]

To illustrate these interpretations in action, in November 1975 Sweden introduced a global import quota on certain footwear, arguing that the sharp decline in domestic production "had become a critical threat to the emergency planning of Sweden's economic defense as an integral part of its security policy."[40] Other Member States expressed doubts as to the justification, but no GATT panel decision was ever established to challenge the measure.[41] Under all three interpretations, combat boots would satisfy the requirements of Article XXI(b)(ii) as goods used to outfit the military. The same could not be said of, say, slippers.[42] Under the first theory, the choice of which products to restrict under Article XXI is solely left to the Member State. Under the second approach, the WTO review would be limited to an examination of whether the trading restriction on footwear was taken in good faith.[43] Under the third approach, the WTO would be free to scrutinize whether a particular boot, in fact, constituted a military product.

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[37] This Article does not address Article XXI(c) further. The discussion of self-judging should not be interpreted as applying to this part of Article XXI.

[38] *Id.* art. XXI(b)(ii).

[39] *Id.* art XIV(1)(b)(iii) (An enumerated condition is, is for example, whether a measure "relat[es] to . . . an implement of war" or was "taken in time of war or other emergency.").

[40] Council of Representatives, *Report on Work Since the Thirtieth Session*, at 17–18, L/4254 (Nov. 25, 1975) [hereinafter *Report on Work*]; *Sweden—Import Restrictions on Certain Footwear*, at 3, L/4250 (Nov. 17, 1975) [hereinafter *Sweden—Import Restrictions*].

[41] *Report on Work*, *supra* note 40, at 18; Minutes of Meeting, at 8–9, GATT Doc. C/M/109 (Oct. 31, 1975).

[42] The tariff classification on the global import included "footwear with outer soles of rubber or plastic material and with uppers of plastic material, other than slippers." *Sweden—Import Restrictions*, *supra* note 40, at 2.

[43] The WTO could, for example, use an objective standard such as the Control List of the Wassenaar Arrangement to identify civilian goods that also serve a military purpose.

Few scholars have analyzed the security exception, and those who have are sharply divided as to the appropriate interpretation. Those who take a textual, historical, or prudential viewpoint favor a self-judging approach. Raj Bhala, for example, concludes that "the implication of the word 'it' indicates that no WTO Member, nor group of Members, and no WTO panel or other adjudicatory body, has any right to determine whether a measure taken by a sanctioning member satisfies the requirements."[44] Others point to the longstanding and unified practice of the major powers in asserting exclusive competency over security measures,[45] and prudential considerations similar to those raised in *Baker v. Carr*[46] to argue that the security exception is self-judging.[47] Any other conclusion would subject national security decisions to international judicial review and graft an Article XX *chapeau* onto Article XXI, forcing nations to establish that they did not take national security measures as a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.

Those who oppose a self-judging rule argue, at a minimum, for a good faith standard.[48] Some scholars support this approach based on the context of the Article

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See Wassennaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (Dec. 2009), http://www.wassenaar.org/guidelines/docs/Guidelines%20and%20procedures%20including%20the%20IE%20-%202009.pdf. Target countries have, on occasion, challenged the scope of military goods subject to export controls. *See infra* text accompanying notes 59–74.

[44] Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. PA. J. INT'L ECON. L. 263, 268–69 (1998); *see also* Andrew Emmerson, *Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse*, 11 J. INT'L ECON. L. 135, 142–43 (2010); Richard Sutherland Whitt, *The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and Article XXI Defense in the Context of the U.S. Embargo of Nicaragua*, 19 LAW & POL'Y INT'L BUS. 603, 616 (1987).

[45] Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT'L L. 413, 430 (2001) ("[T]he United States, Canada, Japan, New Zealand, Australia, and the European Union have been unified in their belief that political, foreign policy, and national security issues are beyond the auspices of the agreement and that the GATT has no power, competence, or experience to resolve such disputes.").

[46] 369 U.S. 186 (1962).

[47] Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558, 612–14 (1991); Peter Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure*, 52 DUKE L.J. 1277, 1296–1300 (2003); C. Todd Piczak, *The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, The National Security Exception to the GATT and the Political Question Doctrine*, 61 U. PITT. L. REV. 287, 318–24 (1999).

[48] *See, e.g.*, Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 390–96 (2003); Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 INT'L L. & POL. 437, 467 (2008); Cann, *supra* note 45, at 479–80; Hannes L. Schloemann & Stefan

XXI within the GATT framework.[49] "[N]ot just any noneconomic political or military motive can satisfy the condition of essentiality . . . . The test for proportionality, here as in other areas of the law, is the reasonableness of the measure in the context."[50] Other scholars focus on international tribunal interpretations of similar treaties,[51] and the need to develop a norm of accountability in an age of global interdependence.[52]

Some approaches go further still and contend that the security exception has both objective and subjective elements. On this reading, whether a measure is necessary to protect essential security interests is a self-judging question, but the remaining provisions of Article XXI are subject to an objective standard of review.[53] These scholars, such as Dapo Akande and Sope Williams, adopt a purposive approach that balances the competing interests of protecting national sovereignty and maintaining stability in the international trading regime. "[S]ince Article XXI was intended to create a legal obligation, it must be interpreted in a way that the final decision does not rest with the party invoking national security."[54]

B. State Practice

One of the reasons for the diverging views on the security exception is that the traditional means of treaty interpretation do not provide much clarity.[55] The "ordinary meaning" of the phrase "it considers" requires at least *some* of the exception to be self-judging, but it is not clear whether those words modify all or part of Article XXI(b).[56] The "object and purpose" of the entire treaty is trade liberalization, but the "object and purpose" of the exception is to protect security interests.[57] A focus on the purpose requires a balancing of competing goals, but it does not answer who should strike that balance, or how it should be struck. The obligation to interpret a treaty in "good faith" presents the same problem. No one

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Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM. J. INT'L L. 424, 446 (1999).

[49] Schloemann & Ohlhoff, *supra* note 48, at 443–45.

[50] *Id.* at 444–45.

[51] Akande & Williams, *supra* note 48, at 393–94.

[52] Cann, *supra* note 45, at 479.

[53] *See, e.g.*, Akande & Williams, *supra* note 48, at 399–400; Hahn, *supra* note 47, at 587–91.

[54] Akande & Williams, *supra* note 48, at 383.

[55] Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention].

[56] For example, does "it considers" modify "necessary for the protection of its essential security interests" only, or does it also modify "taken in time of war or other emergency in international relations"? One interpretation would leave to the Member State a determination as to whether an emergency existed, while the other interpretation would not.

[57] *See supra* text accompanying notes 30–37.

disputes that nations should invoke in good faith, but who is to judge whether that has occurred: the Member State or the institution? Finally, as for context, the most significant textual context is the Article XX general exceptions,[58] which are not self-judging and have been the subject of significant WTO litigation.[59] But this textual comparison provides an answer that is obvious and unhelpful: unlike Article XX, the security exception is either partially or totally self-judging.

Exacerbating the problem is the absence of any authoritative pronouncement as to the meaning of the security exception. Prior to the establishment of the WTO in 1995, Member States could block the creation of GATT panels, limit their terms of reference, and veto adverse panel decisions, effectively foreclosing judicial review.[60] There have been a small handful of disputes addressing Article XXI,[61] but no binding GATT or WTO panel decision has ever interpreted the security exception. Surprisingly, the most important judicial pronouncement has come from the ICJ, which has distinguished the self-judging language in Article XXI from non-self-judging language in other treaties.[62] Such an interpretation offers significant persuasive authority for a self-judging interpretation of the WTO national security exception.

In the absence of authoritative judicial pronouncements, and without greater clarity from other traditional tools of treaty interpretation, this Article argues that sixty years of State practice goes far toward understanding the meaning of the security exception. Reliance on State practice is a common tool of treaty interpretation. The Vienna Convention on the Law of Treaties requires Member States to take into account "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[63] Moreover, State practice is given heightened importance in the WTO, with Article XVI of the WTO Agreement stipulating that "the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING

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[58] GATT 1994, *supra* note 25, art. XX ("Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; . . . (g) relating to the conservation of exhaustible natural resources . . . .").

[59] *See infra* text accompanying notes 70–190.

[60] *See* Judith L. Goldstein & Richard H. Steinberg, *Negotiate or Litigate? Effects of WTO Judicial Delegation on Domestic Trade Politics* 12 (The Law and Politics of International Delegation, Workshop, 2007), *available at* http://www.law.duke.edu/cicl/pdf/dsworkshop/goldstein.pdf.

[61] WORLD TRADE ORGANIZATION, GUIDE TO GATT LAW AND PRACTICE: ANALYTICAL INDEX 600–05 (1994), *available at* www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.doc.

[62] *See infra* text accompanying notes 280–289.

[63] Vienna Convention, *supra* note 55, art. 31(3)(b).

PARTIES to GATT 1947. . . ."[64] The *lex generalis* of treaty interpretation and the *lex specialis* of WTO law require reliance on State practice in interpreting treaty provisions.

A final reason to analyze State practice is that, regardless of whether a future WTO panel may interpret the security exception as self-judging, for the past sixty years it *has been* self-judging. As such, State practice sheds the best possible light on the scope and meaning of the security exception. It also helps answer broader questions as to why States obey a self-judging rule of international law.

A review of the State practice outlined below leads to several conclusions. All States agree that the security exception can only be invoked in good faith and a strong majority of the States maintain that the security exception is self-judging.[65] States interpreting the exception as self-judging are concerned with the need to effectively protect their security interests and to subordinate trade commitments to those interests.[66] They are also concerned about institutional competency and politicizing the WTO.[67] The minority of States that oppose a self-judging interpretation express concerns about abuse of the security exception by economically powerful States.[68]

1. The Marshall Plan

In March 1948, the U.S. Congress approved spending billions of dollars to save Western Europe from imminent economic collapse.[69] With total outlays of over $13 billion, the Marshall Plan was a desperate attempt to keep Western Europe from the fate suffered by countries behind the Iron Curtain.[70] As part of the

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[64] Marrakesh Agreement Establishing the World Trade Organization art. XVI(1), Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement].

[65] GATT Council, *Minutes of Meeting Held in the Centre William Rappard on May 29, 1985*, C/M/188 (June 28, 1985), http://www.wto.org/gatt_docs/English/SULPDF/91150029.pdf.

[66] *See infra* Part I.

[67] *See infra* Part I; *see also* Michael Freund, *Israel Not Bringing Arab Boycott to WTO*, JERUSALEM POST, May 5, 2006.

[68] *See infra* text accompanying notes 117–118.

[69] GREG BEHRMAN, THE MOST NOBLE ADVENTURE: THE MARSHALL PLAN AND THE TIME WHEN AMERICA HELPED SAVE EUROPE 141–66 (2007).

[70] In a national radio address, Secretary of State George Marshall outlined the importance of European recovery in stark terms. The choice was between government tyranny in the Soviet bloc and European unification in the west: "[t]he issue is really clear-cut . . . . [T]he Soviet Union . . . openly predict[s] that this restoration will not take place. We . . . are confident in the rehabilitation of Western European civilization . . . . The situation must be stabilized." *The Nation: Cold & Clear*, TIME (Dec. 29, 1947), http://www.time.com/time/magazine/article/0,9171,804378,00.html. American support was essential to "preserve all that has been gained in the past centuries by these nations and all that their cooperation promises for the future." *Text of Marshall Radio Report on Big 4 Parley*, N.Y. TIMES, Dec. 20, 1947, at 4. In testimony before Congress advocating the passage of the aid package, Marshall underscored that if the United States decided that it

Marshall Plan, the United States established an export control program. Shipments of products in short supply or of military significance were licensed freely to sixteen participating countries in Western Europe, but were carefully controlled if exported to Eastern Europe.[71] The disparate treatment of the export control regime was established in order "1) to ensure an adequate flow to participating countries of goods needed for their economic recovery and 2) to prevent the shipment to Eastern Europe of things that would contribute significantly to the military potential of that region."[72]

Czechoslovakia originally accepted the invitation to participate in the Marshall Plan, but pressure from the Soviet Union ultimately forced it to decline.[73] So instead Czechoslovakia challenged the Marshall Plan as a violation of MFN. In 1949, Czechoslovakia filed a complaint before the GATT alleging that the export control regime violated its trading rights. It argued that Article XXI should be interpreted narrowly, otherwise "practically everything may be a possible element of war," an interpretation that would "change the face of civilization" and stretch the war power "until it covers the whole nation."[74]

In response, the United States argued that it was entirely within its rights under Article XXI to restrict exports to Eastern Europe and that "most of the

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"is unable or unwilling . . . to assist in the reconstruction of western Europe we must accept the consequences of its collapse into the dictatorship of police states." *Marshall's Testimony in Support of ERP Before Senate Committee Hearing*, N.Y. TIMES, Jan. 9, 1948, at 4.

[71] Statement by the Head of the Czechoslovak Delegation Mr. Zdeněk Augenthaler to Item 14 of Agenda, *Request of the Government of Czechoslovakia for a Decision Under Article XXIII as to Whether or Not the Government of the United States of America Has Failed to Carry Out Its Obligations Under the Agreement Through Its Administration of the Issue of Export Licenses*, at 5, 12, CP.3/33 (May 30, 1949) [hereinafter Statement by the Head of Czechoslovak Delegation] (quoting Willard L. Thorp for the United States), *available at* http://www.wto.org/gatt_docs/English/SULPDF/90320183.pdf.

[72] *Id.*

[73] *See* MICHAEL BRECHER & JONATHAN WILKENFELD, A STUDY OF CRISIS 339–41 (1997); Andrea Komlosy, *The Marshall Plan and the Making of the "Iron Curtain" in Austria*, *in* THE MARSHALL PLAN IN AUSTRIA 98, 111–12 (Günter Bischof, & Anton Pelinka eds., 2000).

[74] Statement by the Head of the Czechoslovak Delegation, *supra* note 71, at 6 (Under the United States' broad interpretation, "[w]ar power stretches away from the actual [military] organizations until it covers . . . 'the young mother, peacefully feeding her tender baby at her breast, [who] is transfigured from an idyllic picture of motherhood into a grim amazon, pouring sinews of war into a recruit ready to take up a rifle on the twentieth year of hostilities.'"). Among the products allegedly subject to control were equipment for dried milk production, electric bulb wire, electrodes, X-ray tubes, enameled copper wire, and mining equipment. *Id.* at 8. *But see* Reply by the Vice Chairman of the U.S. Delegation, Mr. John W. Evans, to the Speech by the Head of the Czechoslovak Delegation Under Item 14 on the Agenda, at 10, CP.3/38 (June 2, 1949) [hereinafter Statement of U.S. Delegation], *available at* http://sul-derivatives.stanford.edu/derivative?CSNID=90320196&mediaType=application/pdf (United States' response to list of alleged products subject to control).

delegates present will feel greater security for their own future because the United States is, in fact, making use of these exceptions."[75] The United States defended the application of export controls for goods which appeared to be intended for peaceful use, but which in fact had military applications.[76]

At the GATT Council meeting of June 8, 1949, Czechoslovakia requested a decision on "whether the . . . United States had failed to carry out its obligations under the Agreement through its administration of . . . export licenses."[77] With the exception of Czechoslovakia, the members unanimously voted against referring the matter to a Panel for decision.[78] The British delegate summarized the delicate balance struck any time a Member State invokes Article XXI:

> [S]ince the question clearly concerned Article XXI, the United States action would seem to be justified because every country must have the last resort on questions relating to its own security. 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.[79]

It would be over thirty years before the GATT Council debated the security exception again.

2. The Falkland War

On April 2, 1982, Argentine forces occupied the Falkland Islands, defending the occupation as an effort to regain islands "that legitimately form part of our national patrimony—safeguarding the national honor."[80] The following day the U.N. Security Council passed a resolution demanding "an immediate withdrawal of all Argentine forces from the Falkland Islands . . . ."[81]

On May 7, 1982, the European Community, together with Australia and Canada, established a trade embargo, the "most sweeping [economic sanctions]

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[75] Statement of U.S. Delegation, *supra* note 74, at 4.

[76] For example, export licenses for ball bearings were denied because the specifications showed they were designed for use in military aircraft or other military applications. The request for mining drills was rejected because the drills were not designed to extract coal, but rather for the deep underground exploration of uranium mineral deposits extracted for use in nuclear weapons. *Id.* at 10–11.

[77] GATT Council, *Summary Record of the Twenty-Second Meeting*, at 9, CP.3/SR.22 (June 8, 1949), *available at* http://www.wto.org/gatt_docs/English/SULPDF/90060100.pdf.

[78] The vote was seventeen in the negative, three abstentions, and one affirmative vote. *Id.*

[79] *Id.* at 7–8.

[80] *Argentina Seizes Falkland Islands; British Ships Move*, N.Y. TIMES, Apr. 3, 1982, at 1.

[81] S.C. Res. 502, ¶ 3, U.N. Doc. S/RES/502 (Apr. 3, 1982), *available at* http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/435/26/IMG/NR043526.pdf.

that the community had ever imposed."[82] The British prime minister Margaret Thatcher described the embargo as "a very important step, unprecedented in its scope."[83]

Argentina was one of the most indebted countries in the world,[84] and economic pressure posed a serious threat. Annual exports to the European Economic Community (EEC) alone were valued at $2.3 billion, and "[w]ithout these revenues it would have been difficult for Argentina, which had reserves of approximately $5 billion, to pay the nearly $10 billion in annual interest and other charges on its foreign debt."[85]

Argentina alleged that the trade embargo could not be justified under Article XXI, particularly given that its territorial dispute was with only one country, the United Kingdom.[86] On May 7, 1982, the GATT Council met to address the dispute, with delegates from thirty-seven countries expressing an opinion on the matter. Twenty countries described the trade embargo as falling within the inherent right of Member States and beyond GATT's competence.[87] Six countries argued that the embargo was subject to GATT review,[88] and eleven countries lamented the crisis but did not address GATT's authority to review it.[89] Thus, an overwhelming majority of the Member States believed that trade sanctions fell within a country's inherent rights and that Article XXI was self-judging.

The arguments for and against self-judging were illuminating. The European Community, on behalf of its ten Member States, argued that it was their "inherent right" to take action under Article XXI, and the "exercise of these rights . . . required neither notification, [nor] justification, nor approval, a procedure

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[82] Communication by the Commission of the European Communities, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, at 1, L/5319 (May 18, 1982), *available at* http://www.wto.org/gatt_docs/English/SULPDF/90990462.pdf; GATT Council Meeting, *supra* note 10, at 10; Paul Lewis, *E.E.C. to Embargo Argentine Imports*, N.Y. TIMES, Apr. 15, 1982, at D19.

[83] *Excerpts From Mrs. Thatcher's Talk*, N.Y. TIMES, Apr. 15, 1982, at A14.

[84] Edward Schumacher, *The Squeeze on Argentina*, N.Y. TIMES, Apr. 15, 1982, at D1.

[85] DANIEL K. GIBRAN, THE FALKLANDS WAR: BRITAIN VERSUS THE PAST IN SOUTH AMERICA 92 (1998).

[86] Communication by Argentina, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, at 2, L/5317 (Apr. 30, 1982), *available at* http://www.wto.org/gatt_docs/English/SULPDF/90990459.pdf; GATT Council Meeting, *supra* note 10, at 2–4.

[87] The countries were Australia, Canada, Hong Kong, Hungary, Japan, New Zealand, Norway, the Philippines, Singapore, the United States, and the ten countries of the European Communities (Belgium, Denmark, France, West Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, and the United Kingdom). *See* GATT Council Meeting, *supra* note 10, at 7–11.

[88] These countries were Argentina, Brazil, Cuba, Pakistan, Poland, and Uruguay. *See id.* at 2–9.

[89] These countries were Colombia, Czechoslovakia, Dominican Republic, Ecuador, India, Indonesia, Peru, Romania, Spain, Yugoslavia, and Zaire. *See id.* at 4–9.

confirmed by thirty-five years of implementation of the General Agreement."[90] The United States agreed, stating that:

> GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis. This was wise . . . since no country could participate in GATT if in doing so it gave up the possibility of using any measures, other than military, to protect its security interests. . . . [F]orcing the GATT . . . to play a role for which it was never intended, could seriously undermine its utility, benefit and promise for all contracting parties.[91]

Japan echoed this concern, stating that "the interjection of political elements into GATT activities would not facilitate the carrying out of its entrusted tasks" and that "one of the most important contributing factors for the effective and efficient functioning of the GATT was that contracting parties had developed a working habit of dealing with trade affairs in a businesslike manner."[92]

On the other hand, the risk of an unbounded security exception was obvious to many Member States. From such arguments, Argentina responded, "[i]t would appear that trade restrictions could be adopted without having to be justified or approved and . . . explained, anyone could now have recourse to that magnificent safeguard clause."[93] Brazil likewise found it "difficult . . . to accept that the countries in question, except [the United Kingdom], were taking this action in protection of their essential security interests." The embargo against Argentina "could set a dangerous precedent if the measures . . . were considered necessary for the protection of essential security interests . . . [when] such interests had not been demonstrated."[94]

No GATT panel was formed to review the embargo against Argentina. The GATT Council did, however, render a decision encouraging greater transparency when Member States invoke Article XXI. The Council recognized that trade measures taken for security reasons "could constitute, in certain circumstances, an element of disruption and uncertainty for international trade."[95] Nonetheless, the security exception "constitute[s] an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved."[96]

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[90] *Id.* at 10.
[91] *Id.* at 8.
[92] *Id.* at 9.
[93] *Id.* at 12.
[94] *Id.* at 5.
[95] GATT Council, *Decision Concerning Article XXI of the General Agreement*, L/5426 (Dec. 2, 1982), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91000212.pdf.
[96] *Id.*

3. The Reagan Doctrine

In his State of the Union address on February 6, 1985, President Ronald Reagan proclaimed that "[w]e cannot play innocents abroad in a world that's not innocent; nor can we be passive when freedom is under siege. . . . Support for freedom fighters is self-defense . . . . It is essential that the Congress continue all facets of our assistance to Central America."[97] A prominent commentator dubbed it the "Reagan Doctrine," demanding "overt and unashamed American support for anti-Communist revolutions."[98]

One facet of this policy was economic isolation. On May 1, 1985, President Reagan issued Executive Order 12,513, concluding that "an unusual and extraordinary threat to the national security and foreign policy" existed and that the United States was imposing a trade embargo on Nicaragua prohibiting all imports and exports of goods and services to and from Nicaragua.[99] The trade sanctions halted an estimated $169 million in bilateral trade.[100]

On May 6, 1985, Nicaragua requested a special meeting of the GATT Council to examine the trade embargo.[101] The GATT Council met on May 29, 1985, and as before, an overwhelming majority of States affirmed the inherent right of a Member State to protect its essential security interests.[102] Of the forty-three nations addressing the Council, nineteen argued that Article XXI was self-judging;[103] nine argued that it was not;[104] and fifteen expressed no opinion on the matter.[105] Again,

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[97] Ronald Reagan, President of the U.S., State of the Union Address (Feb. 6, 1985), *available at* http://millercenter.org/scripps/archive/speeches/detail/5681.

[98] Charles Krauthammer, *Essay: The Reagan Doctrine*, TIME (Apr. 1, 1985), http://www.time.com/time/magazine/article/0,9171,964873,00.html; *see also* JAMES M. SCOTT, DECIDING TO INTERVENE: THE REAGAN DOCTRINE AND AMERICAN FOREIGN POLICY 14–39 (1996).

[99] Exec. Order No. 12,513, 3 C.F.R. 342 (1985).

[100] Shirley Christian, *Reagan Reported Planning Nicaragua Trade Embargo, Retaining Diplomatic Links; Decision Imminent*, N.Y. TIMES, May 1, 1985, at A1.

[101] Communication from Nicaragua, *United States—Trade Measures Affecting Nicaragua*, at 1, L/5802 (May 8, 1985), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91130209.pdf.

[102] GATT Council, *Minutes of Meeting Held in the Centre William Rappard on May 29, 1985*, at 1–17, C/M/188 (June 28, 1985), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91150029.pdf.

[103] These countries were Australia, Canada, Iceland, Japan, Norway, Portugal, Sweden, Switzerland, the United States, and the ten countries of the European Economic Community (Belgium, Denmark, France, West Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, and the United Kingdom). *See id.* at 4, 10–17.

[104] These countries were Argentina, Brazil, Chile, Cuba, Czechoslovakia, India, Nicaragua, Peru, and Spain. *See id.* at 2–11.

[105] These countries were Austria, China, Colombia, Costa Rica, Dominican Republic, Egypt, Finland, Hungary, Jamaica, Mexico, Poland, Romania, Trinidad and Tobago, Uruguay, and Yugoslavia. *See id.* at 7–15.

as with the Falkland crisis, an overwhelming majority of Member States found the security exception to be self-judging.

The United States argued that GATT was the wrong forum to address national security questions. "It was not for GATT to approve or disapprove the judgment 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."[106] The United States argued further that "GATT's effectiveness in addressing trade issues would only be weakened if it became a forum for debating political and security issues."[107] Japan concurred, stressing that "it was essential to separate trade issues from political factors" if the GATT was to function effectively.[108]

Given the nature of the dispute, several delegates doubted GATT's institutional competence. Australia argued that the U.N. Security Council, not GATT, was the appropriate international forum for addressing this issue.[109] Canada likewise viewed the conflict between the United States and Nicaragua as one that "was fundamentally not a trade issue, but one which could only be resolved in a context broader than GATT."[110]

The European Community underlined the longstanding tradition of leaving security questions out of GATT, stating that:

> GATT had never had the role of settling disputes essentially linked to security. Such disputes had only rarely, and for good reason, been examined in the context of the General Agreement, which had neither the authority nor the competence to settle matters of this type . . . . In their wisdom, the authors of the General Agreement . . . left to each contracting party the task of judging what was necessary to protect its essential security interests.[111]

Numerous countries doubted the need for sanctions against Nicaragua, including those that otherwise supported the U.S. position. Sweden agreed that it was up to "each country to define its essential security interests," but lamented that "[i]n this particular case, . . . the United States had not shown the necessary prudence [and] had chosen to give a too far-reaching interpretation to Article XXI."[112]

Those favoring GATT review focused on the threat of unreasonable and arbitrary invocations of Article XXI by the major powers. "It was absurd to suggest that Nicaragua, a small and underdeveloped country, could pose a threat to the national security of one of the most powerful countries in the world," argued

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[106] *Id.* at 5.
[107] *Id.*
[108] *Id.* at 14.
[109] *Id.* at 12.
[110] *Id.*
[111] *Id.* at 13.
[112] *Id.* at 10.

Nicaragua.[113] "[T]here must be some correspondence between the measures adopted and the situation giving rise to their adoption."[114] India reasoned that the country imposing sanctions must "demonstrate a genuine nexus between its security interests and the trade action taken," a nexus the United States had not been able to establish.[115] Cuba agreed, stating that "[i]t was a mockery . . . for such a powerful country to cite Article XXI as a basis for imposing economic sanctions on a small, poor country that could not possibly threaten U.S. security."[116]

Poland underscored that Article XXI was a provision that only powerful countries could invoke, and that smaller countries—"handicapped by their inferior economic and trading potential"—were harmed disproportionately by such "discriminatory, unilateral and arbitrary actions."[117] Czechoslovakia feared that the U.S. action would set a precedent, such that:

> 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. . . . If such unilateral, arbitrary actions were not opposed, any small contracting party could find itself in the same situation as Nicaragua.[118]

After months of negotiations, the United States acquiesced in the formation of a GATT 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)(3) by the United States in this matter."[119] Subsequently, the United States blocked the adoption of the Panel report.[120] Thus, the GATT Panel's decision was not binding, and at best offered persuasive authority as to the meaning of a provision it was expressly prohibited from reviewing.

The Panel recognized its limited mandate and refused to examine the validity of the trade sanctions under the security exception.[121] It did, nonetheless, offer certain reflections as to the meaning of Article XXI. The Panel observed that trade embargos "ran counter to basic aims of the GATT, namely to foster non-discriminatory and open trade policies, to further the development of the less-

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[113] *Id.* at 3.

[114] *Id.* at 16.

[115] *Id.* at 11.

[116] *Id.* at 5.

[117] *Id.* at 8.

[118] *Id.* at 10.

[119] GATT Council, *Minutes of Meeting Held in the Centre William Rappard on Oct. 10, 1985*, at 6, C/M/192 (Oct. 24, 1985), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91170093.pdf.

[120] *See id.* at 11.

[121] Panel Report, *United States—Trade Measures Affecting Nicaragua*, ¶¶ 5.1–5.17, L/6053 (Oct. 13, 1986), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91240197.pdf.

developed contracting parties and to reduce uncertainty in trade relations."[122] Having said that, the Panel recognized that the GATT "protected each contracting party's essential security interests through Article XXI" and that it's "purpose was therefore not to make contracting parties forego their essential security interests for the sake of these aims."[123] It was therefore incumbent on "each contracting party, whenever it made use of its rights under Article XXI, [to] carefully weigh[] its security needs against the need to maintain stable trade relations."[124]

After conceding that the invocation of the security exception was a Member State's right, the Panel expressed concerns regarding any interpretation of Article XXI that foreclosed all judicial review.

> If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the [Member States] 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?[125]

Such concerns, the Panel concluded, required "further consideration" by Member States in a future "formal interpretation of Article XXI."[126]

4. War in Yugoslavia

On June 25, 1991, the republics of Slovenia and Croatia declared independence from Yugoslavia.[127] The ensuing war engulfed Yugoslavia for the next decade, culminating in the NATO campaign in 1999.[128] The European response to the crisis was to slowly ratchet up pressure on Yugoslavia.[129] The initial response was to broker peace talks.[130] After months of failed negotiations, the European Community then imposed economic sanctions on Yugoslavia,

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[122] *Id.* ¶ 5.16.

[123] *Id.*

[124] *Id.*

[125] *Id.* ¶ 5.17.

[126] *Id.* ¶ 5.18.

[127] JOSEPH ROTHSCHILD & NANCY M. WINGFIELD, RETURN TO DIVERISTY: A POLITICAL HISTORY OF EAST CENTRAL EUROPE SINCE WORLD WAR II 262 (3d ed. 2000), *available at* http://digital.library.upenn.edu/ebooks-public/pdfs/0195119924.pdf

[128] *See* LAWRENCE KAPLAN, NATO AND THE UN: A PECULIAR RELATIONSHIP 133–85 (2010); RICHARD HENRY ULLMAN, THE WORLD AND YUGOSLAVIA'S WARS (1996).

[129] WILLIAM ZARTMAN, PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS AND TECHNIQUES, 385–414 (2007); CAROLE ROGEL, THE BREAKUP OF YUGOSLAVIA AND ITS AFTERMATH, 55–102 (2004).

[130] WILLIAM DURCH, TWENTY-FIRST-CENTURY PEACE OPERATIONS 55 (2006); ZARTMAN, *supra* note 129, at 411.

affecting over two-thirds of all Yugoslav trade, totaling over $34 billion.[131]

It then pursued multilateral sanctions. The United States joined the European Community, banning imports of all Yugoslav goods, valued at $776 million annually.[132] On May 30, 1992, the United Nations Security Council passed Security Resolution 757, obligating all U.N. member States to ban import and export trade with the Federal Republic of Yugoslavia (Serbia Montenegro).[133] In subsequent years, the European Community expanded its sanctions to include an oil embargo, an arms embargo, visa restrictions, a flight ban, an investment ban, and financial sanctions.[134]

On November 16, 1991, Yugoslavia presented to the GATT Council the issue of the European Community's trade sanctions, stating that it "is of crucial importance that the Contracting Parties re-evaluate the problem of punitive trade measures taken for non-economic reasons."[135] At least initially, Yugoslavia did not claim that the measures violated "the relevant GATT provisions, taking into account that [they] . . . could be justified under Article XXI."[136]

The European Community defended the sanctions as taken pursuant to its "essential security interests and based on GATT Article XXI."[137] In an impassioned defense of its actions, the European Community stated:

> The response of the Community and its member States to violence, intolerance and irrationality is a peaceful one: recourse to trade measures based on Article XXI . . . . It is hoped that these peaceful measures will act as a deterrent . . . . [E]ven if they do not have a direct impact on the battlefield, at least they will have an effect on people's hearts and common-sense.[138]

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[131] Communication from Yugoslavia, *Trade Measures Against Yugoslavia for Non-Economic Reasons*, at 2, L/6945 (Nov. 26, 1991) [hereinafter *Trade Measures Against Yugoslavia*], *available at* http://www.wto.org/gatt_docs/English/SULPDF/91600027.pdf.

[132] David Binder, *U.S. Suspends Trade Benefits to All 6 Yugoslav Republics*, N.Y. TIMES, Dec. 7, 1991, at 1.

[133] S.C. Res. 757, ¶ 4, U.N. Doc. S/RES/757 (May 30, 1992).

[134] Anthonius W. de Vries, *European Sanctions Against the Federal Republic of Yugoslavia from 1998 to 2000: A Special Exercise in Targeting*, *in* SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT 87, 91–99 (David Cortright & George Lopez eds., 2002).

[135] *Trade Measures Against Yugoslavia*, *supra* note 131, at 3.

[136] *Id.* at 2. Subsequently, Yugoslavia argued that the subsidies could not be justified under Article XXI. Recourse to Article XXIII:2 by Yugoslavia, *EEC—Trade Measures Taken for Non-Economic Reasons*, at 2, DS27/2 (Feb. 10, 1992), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91600334.pdf.

[137] Communication from the European Communities, *Trade Measures Taken by the European Community Against the Socialist Federal Republic of Yugoslavia*, at 1, L/6948 (Dec. 2, 1991), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91600060.pdf.

[138] Statement by the Delegation of the European Communities, *Trade Measures Taken Against Yugoslavia for Non-Economic Reasons,* at 2, L/6950 (Dec. 10, 1991), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91600140.pdf.

In April 1989, the GATT Council strengthened the dispute settlement process, establishing a new set of procedures for the automatic establishment of panels any time a Member State filed a complaint.[139] These new procedures changed the nature of the debate when Yugoslavia filed a complaint seeking GATT panel review of the European Community trade sanctions. Given these new procedures, the GATT Council debate on March 18, 1992 did not address whether Article XXI was self-judging. Rather, the focus was on institutional competency and the disruption that a GATT panel would have on the broader peace negotiations.[140] As the European Community stated:

> The Community could not see how a panel established at the present time could aid [the ongoing peace] process. Indeed, it would only complicate the issue. . . . The [new] rules [on establishing panels] were silent on the question of whether, in situations where measures taken for non-economic reasons were involved, a different course could be taken . . . . Whatever the course of action taken at the present meeting, the Community reserved its rights as to what constituted standard terms of reference for a panel which dealt with measures taken for non-economic reasons.[141]

The Council approved the establishment of a panel, while recognizing the European Community's reservations.[142] It also encouraged both sides to negotiate the panel's terms of reference given the invocation of Article XXI.[143] Shortly thereafter, the matter abruptly ended. Yugoslavia's dissolution foreclosed further GATT proceedings, and no further action was taken with respect to its complaint.[144]

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[139] Decision of 12 April 1989, *Improvements to the GATT Dispute Settlement Rules and Procedures*, at 3–4, L/6489 (Apr. 13, 1989), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91420188.pdf ("If the complaining party so requests, a decision to establish a panel or working party shall be taken at the latest at the Council meeting following that at which the request first appeared . . . unless at that meeting the Council decides otherwise. . . . Panels shall have the following terms of reference unless the parties to the dispute agree otherwise . . . : 'To examine, in the light of the relevant GATT provisions, the matter referred to the Contracting Parties . . . and to make such findings as will assist the Contracting Parties . . . .'"). As before, the losing party could block any adverse GATT Panel. *Id.* at 7 ("The practice of adopting panel reports by consensus shall be continued . . . .").

[140] GATT Council, *Minutes of Meeting Held in the Centre William Rappard on March 18, 1992*, at 14–18, C/M/255 (Apr. 10, 1992), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91610102.pdf.

[141] *Id.* at 14–15.

[142] *Id.* at 18.

[143] *Id.*

[144] GATT Council, *Minutes of Meeting Held in the Centre William Rappard on June 16–17, 1993*, at 3, C/M/264 (July 14, 1993), *available at* http://www.wto.org/gatt_docs/

5. Secondary Boycott Against Cuba

On February 24, 1996, a Cuban Air Force Mikoyan MiG-29 shot down two American civilian airplanes.[145] President Clinton's response was immediate: "I condemn this action in the strongest possible terms."[146] Three weeks later, Congress passed the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996.[147] On signing the LIBERTAD Act, President Clinton stated:

> This Act is a justified response to the Cuban government's unjustified, unlawful attack on two unarmed U.S. civilian aircraft that left three U.S. citizens and one U.S. resident dead. . . . It is a clear statement of our determination to respond to attacks on U.S. nationals and of our continued commitment to stand by the Cuban people in their peaceful struggle for freedom.[148]

The Act imposed severe economic sanctions, including new sanctions on any foreign individual or corporation who "traffics in property which was confiscated by the Cuban Government on or after January 1, 1959."[149] "Traffics" was broadly defined to include any commercial activity relating to the expropriated property,[150] thereby imposing liability on many foreign corporations conducting business with Cuba.

The following day, in the first and only time Article XXI was placed before the WTO, the European Community filed a request for WTO consultations, expressing "their profound concern about the apparent lack of conformity of certain aspects of this Act . . . to the international obligations of the United States under GATT 1994 and GATS."[151] Unless withdrawn or settled, panel review was guaranteed under the strict new dispute settlement procedures.[152]

English/SULPDF/91720028.pdf; GATT Council, *Minutes of Meeting Held in the Centre William Rappard on June 19, 1992*, at 3, C/M/257 (July 10, 1992), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91630187.pdf.

[145] Larry Rohter, *Exiles Say Cuba Downed 2 Planes and Clinton Expresses Outrage*, N.Y. TIMES, Feb. 25, 1996, at 1.

[146] *Id.*

[147] 22 U.S.C. § 6021 (2006).

[148] *Remarks on Signing the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, 32 WEEKLY COMP. PRES. DOC. 478, 478 (Mar. 12, 1996).

[149] 22 U.S.C. § 6082.

[150] 22 U.S.C. § 6023.

[151] Request for Consultations by the European Communities, *United States—The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/1 (May 13, 1996).

[152] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 1125, 1228–29 [hereinafter Dispute Settlement Understanding], *available at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

Unlike all other Article XXI disputes, this time the major powers were on opposite ends of a security dispute. At the Dispute Settlement Body (DSB) meeting on October 16, 1996, the United States underscored what was at stake:

> [T]he United States would invite the [EC] to reflect on the fact that certain measures . . . had been expressly justified by the United States under the GATT 1947 as measures taken in pursuit of [its] essential security interests.[153]

By injecting this disagreement regarding Cuba with the United States over foreign and security policy into the WTO, the Community had taken this organization into unexplored territory.

The European Community neither responded to the Article XXI concerns, nor altered its course of action.[154] At the following DSB meeting on November 20, 1996, a WTO panel was automatically established, consistent with the Dispute Settlement Understanding rules.[155] The United States re-emphasized that this dispute was "not fundamentally a trade issue and thus the trade panel should not be requested to decide on this matter."[156] It then warned of dire consequences to come: "proceeding further with this matter would pose serious risks for this new and invaluable organization, which was only in the early stage of its development."[157]

Neither the European Community nor the United States wanted a dispute over the Cuban secondary boycott to undermine the fledgling trade organization, then in its second year of operation. Both sides had invoked Article XXI to impose sanctions in the past, and recognized the value in keeping divisive political disputes out of the WTO. Moreover, the new WTO dispute settlement procedures included binding commitments that, unlike the GATT procedure, could not be blocked by Member States.[158] For both sides, strategic ambiguity as to the meaning of Article XXI was at a premium.

Moreover, the political significance of the sanctions had waned for the Clinton Administration.[159] Many speculated that Clinton's hard-line was calibrated to appeal to Florida voters in an election year, and with his second term secure, he

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[153] Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on October 16, 1996*, at 7, WT/DSB/M/24 (Nov. 26, 1996), *available at* http://www.worldtradelaw.net/dsbminutes/m26.pdf.

[154] Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 20 November 1996*, at 1, WT/DSB/M/26 (Jan. 15, 1997).

[155] *Id.* at 2; *see also* Dispute Settlement Understanding, *supra* note 152, art. 6.

[156] Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 20 November 1996*, at 2, WT/DSB/M/26 (Jan. 15, 1997).

[157] *Id.*

[158] Dispute Settlement Understanding, *supra* note 152, art. 21.

[159] *See* Walt Vanderbush & Patrick J. Haney, *Policy toward Cuba in the Clinton Administration*, 114 POL. SCI. Q. 387, 406–07 (1999).

could step back from the WTO precipice.[160] On January 3, 1997, Clinton waived indefinitely the effective date of the secondary boycott provisions of the Act.[161] The threat of WTO litigation was clearly a factor in Clinton's decision to stand down, but so was the changed political climate following his election to a second term in office.

The Clinton waiver took the wind out of the EU's argument. With the WTO authorized to provide prospective relief, calculating damages from an Act that might never take effect would be impossible. At best, the European Community could win only a Pyrrhic victory. What cost did this represent to the fledgling WTO? On April 25, 1997, the European Community notified the WTO that it had requested the Panel to suspend proceedings while a solution mutually agreed to was negotiated.[162] The parties reached a final settlement of the dispute the following year, with President Clinton promising to amend the LIBERTAD Act to remove the provisions most offensive to Europe.[163] The European Community quietly let the deadline lapse for pressing its case before the WTO.[164]

6. Saudi Arabia's WTO Accession

The most recent Article XXI dispute arose in the context of Saudi Arabia's accession to the WTO. Since 1995, twenty-five countries have acceded to the WTO and, with the exception of China,[165] none have been as contentious as the Saudi application.[166] With all applications to the WTO, the membership process is long and arduous. Unlike accession to most international treaties, becoming a member of the WTO requires years of negotiations. Seven countries have been

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[160] *See id.*

[161] Steven Lee Myers, *One Key Element in Anti-Cuba Law Postponed Again*, N.Y. TIMES, Jan. 4, 1997, at 1; *see also* 22 U.S.C. § 6085(b)(1) (2006) ("The President may suspend the effective date . . . for a period of not more than 6 months if the President determines . . . that the suspension is necessary to the national interests of the United States . . . ."); 22 U.S.C. § 6085(b)(2) (2006) ("The President may suspend the effective date . . . for additional periods of not more than 6 months each . . . if the President determines . . . that the suspension is necessary to the national interests of the United States . . . .").

[162] Communication from the Chairman of the Panel, *United States—The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/5 (Apr. 25, 1997).

[163] James Bennet, *To Clear Air with Europe, U.S. Waives Some Sanctions*, N.Y. TIMES, May 19, 1998, at A6.

[164] Note by the Secretariat, *Lapse of the Authority for Establishment of a Panel, United States—The Cuban and Democratic Solidarity Act*, WT/DS38/6 (Apr. 24, 1998).

[165] *See generally* Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469 (2000).

[166] These countries are, in order of accession, Ecuador, Bulgaria, Mongolia, Panama, Kyrgyz Republic, Latvia, Estonia, Jordan, Georgia, Albania, Oman, Croatia, Lithuania, Moldova, China, Taiwan, Armenia, Macedonia, Nepal, Cambodia, Saudi Arabia, Vietnam, Tonga, Ukraine, and Cape Verde. For a discussion of Saudi Arabia's WTO accession, see Raj Bhala, *Saudi Arabia, the WTO, and American Trade Law and Policy*, 38 INT'L LAW. 741 (2004).

negotiating membership for over fifteen years[167] and one country, Algeria, has been attempting to join for over twenty-three years.[168] The shortest successful accession process was just under three years for the Kyrgyz Republic,[169] and the longest was for China, which took just over fifteen years.[170] Saudi Arabia's accession took over twelve years.[171]

Membership negotiations include both bilateral and multilateral negotiations.[172] The bilateral negotiations address the applicant's promises to individual members about opening its market to products or services that the existing member wishes to export to the applicant's market.[173] Over a series of bilateral negotiations, the applicant effectively exchanges current concessions for the benefits it will enjoy from other countries' market access concessions in past negotiations.[174] Failure to make appropriate concessions with key countries will result in the delay or denial of membership.[175]

Notwithstanding the ability of Member States to demand fundamental concessions of the applicant country, the security exception is routinely invoked in the accession process. All twenty-five applicant countries that have joined the WTO since 1995 expressly reserved the right to impose trade restrictions based on the security exception.[176] Most of the accessions include detailed annexes of

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[167] These countries (with their application date) are: Algeria (1987), Belarus (1993), Russia (1993), Seychelles (1995), Sudan (1994), Uzbekistan (1994), and Vanuatu (1994). *See* WTO Secretariat, *WTO Accessions: 2010 Annual Report by the Director-General*, at 21, WT/ACC/14 (Dec. 8, 2010).

[168] *Id.*

[169] *See* Press Release, World Trade Organization, Kyrgyz Republic to Become WTO Member, PRESS/114 (Oct. 14, 1998), *available at* http://www.wto.org/english/news_e/pres98_e/pr114_e.htm.

[170] *See* Press Release, World Trade Organization, WTO Successfully Concludes Negotiations on China's Entry, PRESS/243 (Sept. 17, 2001), *available at* http://www.wto.org/english/news_e/pres01_e/pr243_e.htm.

[171] *See* Press Release, World Trade Organization, WTO General Council Successfully Adopts Saudi Arabia's Terms of Accession, PRESS/420 (Nov. 11, 2005), *available at* http://www.wto.org/english/news_e/pres05_e/pr420_e.htm.

[172] Bhala, *supra* note 165, at 1472.

[173] *Id.*

[174] Approximately forty members requested China to undertake bilateral negotiations, and over two dozen asked for the same of Taiwan. *Id.* at 1473.

[175] *See id.* at 1473–77.

[176] *See* Report of the Working Party on the Accession of Albania to the World Trade Organization, at 31, 62, WT/ACC/ALB/51 (July 13, 2000); Report of the Working Party on the Accession of Armenia, at 75, WT/ACC/ARM/23 (Nov. 26, 2002); Report of the Working Party on the Accession of Bulgaria, at 19, 41, WT/ACC/BGR/5 (Sept. 20, 1996); Report of the Working Party on the Accession of Cambodia, at 79, WT/ACC/KHM/21 (Aug. 15, 2003); Report of the Working Party on the Accession of Cape Verde, at 22, WT/ACC/CPV/30 (Dec. 6, 2007); Report of the Working Party on the Accession of China, at 23, WT/ACC/CHN/49 (Oct. 1, 2001); Report of the Working Party on the Accession of Croatia, at 13, 19, 55, WT/ACC/HRV/59 (June 29, 2000); Report of the Working Party on the Accession of Ecuador, at 29, WT/L/77 (July 4, 1995); Report of the Working Party on

prohibited goods excluded on the basis of Article XXI.[177] The accession process is the most transparent example of a country denying market access on the basis of the security exception.

In the Working Party Report on Saudi Arabia's accession application, Saudi Arabia identified over three-dozen categories of goods that were subject to licensing or import bans on the basis of Article XXI.[178] Most of these items addressed traditional military concerns, although others were targeted at efforts to restrict terrorism.[179] Items restricted under the security exception included chemical fertilizers, Vaseline, military uniforms and helmets, night vision binoculars, greeting cards with electric circuitry, metal detectors, security cameras, radar detection equipment, satellite internet receivers, remote control airplanes, and real or toy pistols.[180] When asked by a Member State whether "non-automatic licenses were actually required and necessary" on all these products, Saudi Arabia responded that it "had carefully reviewed" the enumerated items and concluded that the "licenses were required and necessary."[181] Saudi Arabia "further confirmed that any discretionary authority . . . to suspend imports and exports or otherwise

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the Accession of Estonia, at 64, WT/ACC/EST/28 (Apr. 9, 1999); Report of the Working Party on the Accession of Georgia, at 18, WT/ACC/GEO/31 (Aug. 31, 1999); Report of the Working Party on the Accession of Jordan, at 42–43, WT/ACC/JOR/33 (Dec. 3, 1999); Report of the Working Party on the Accession of the Kyrgyz Republic, at 27, WT/ACC/KGZ/26 (July 31, 1988); Report of the Working Party on the Accession of Latvia, at 19, WT/ACC/LVA/32 (Sept. 30, 1998); Report of the Working Party on the Accession of Lithuania, at 16–17, WT/ACC/LTU/52 (Nov. 7, 2000); Report of the Working Party on the Accession of Macedonia, at 114–17, 122–23, WT/ACC/807/27 (Sept. 26, 2002); Report of the Working Party on the Accession of Moldova, at 29, WT/ACC/MOL/37 (Jan. 11, 2001); Report of the Working Party on the Accession of Mongolia, at 8, WT/ACC/MNG/9 (June 27, 1996); Report of the Working Party on the Accession of Nepal, at 15–16, WT/ACC/NPL/16 (Aug. 28, 2003); Report of the Working Party on the Accession of Oman, at 33, WT/ACC/OMN/26 (Sept. 28, 2000); Report of the Working Party on the Accession of Panama, 12, 21, WT/ACC/PAN/19 (Sept. 20, 1996); Report of the Working Party on the Accession of Saudi Arabia, at 110–16, WT/ACC/SAU/61 (Nov. 1, 2005); Report of the Working Party on the Accession of Chinese Taipei [Taiwan], at 23–24, WT/ACC/TPKM/18 (Oct. 5, 2001); Report of the Working Party on the Accession of Tonga, at 40, 51, WT/ACC/TON/17 (Dec. 2, 2005); Report of the Working Party on the Accession of Ukraine, at 9, 23–26, 201–02, WT/ACC/UKR/152 (Jan. 25, 2008); Report of the Working Party on the Accession of Vietnam, at 167–69, 177, WT/ACC/VNM/48 (Oct. 27, 2006).

[177] *See supra* note 176; *see, e.g.*, Report of the Working Party on the Accession of Albania to the World Trade Organization, at 31, 62, WT/ACC/ALB/51 (July 13, 2000) (stating that many items, ranging from matches to munitions to nuclear materials, would be subject to licensing or import bans because they pose a risk to Albania's national security).

[178] Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization, at 110–16, WT/ACC/SAU/61 (Nov. 1, 2005).

[179] *Id.*

[180] *Id.*

[181] *Id.* at 47.

restrict the quantity of trade would be applied . . . in conformity with the provisions of the WTO, including Article[] . . . XXI."[182]

The other major security issue was Saudi Arabia's boycott of Israel. In its accession documents, Saudi Arabia confirmed that "the application of secondary and tertiary boycotts had been terminated in practice and in law."[183] But Saudi Arabia made no such formal promises regarding the primary boycott against Israel. When the United States pressed Saudi Arabia about the primary boycott against Israel during accession negotiations, it indicated that it would not invoke the non-application clause,[184] and assured the United States that it would apply WTO rules to all WTO members, including Israel.[185] Such language was strategically ambiguous, allowing Saudi Arabia to apply "all WTO rules" toward Israel, would include the security exception. Six months after Saudi Arabia's accession, the Saudi Ambassador to the United States, Turki Al-Faisal, announced that Saudi Arabia would continue the primary boycott against Israel, stating that the "primary boycott is an issue of national sovereignty guaranteed within the makeup of the WTO and its rules."[186] The U.S. House of Representatives strongly objected to this interpretation, unanimously passing a resolution stating:

> [I]t is the sense of the Congress that . . . (1) Saudi Arabia should maintain and fully live up to its commitments under the World Trade Organization (WTO) and end all aspects of any boycott on Israel; and (2) the President . . . should urge Saudi Arabia to end any boycott on Israel.[187]

The Bush Administration likewise objected to the Saudi's broken promise. "[I]n [USTR's] view, maintaining the primary boycott of Israel is not consistent with Saudi Arabia's obligation to extend full WTO treatment to all WTO Members."[188]

When an Israeli trade official was asked whether Israel would challenge the primary boycott before the WTO, he answered that "we do not wish to politicize the WTO."[189] No doubt Israel was reluctant to bring the Middle East conflict

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[182] *Id.* at 54–56.

[183] *Id.* at 41.

[184] CHRISTOPHER BLANCHARD, CONG. RESEARCH SERV., RL 33533, SAUDI ARABIA: BACKGROUND AND U.S. RELATIONS 38 (2010), *available at* http://www.fas.org/sgp/crs/mideast/RL33533.pdf. For a discussion of the non-application clause, see *infra* text accompanying notes 192–240.

[185] Letter from Robert Portman, U.S. Trade Representative on Saudi Arabia (Aug. 9, 2005), *available at* http://www.insidetrade.com.

[186] Michael Freund, *Saudi Ambassador to US Admits Boycott of Israel Still in Force*, JERUSALEM POST, June 22, 2006, at 17.

[187] H.R. Con. Res. 370, 109th Cong. (2006).

[188] Freund, *supra* note 186; *see* Michael Freund, *'Post' Story Puts U.S. Trade Official Under Fire Over Saudi Flap*, JERUSALEM POST, June 25, 2006, at 2.

[189] Michael Freund, *Israel Not Bringing Arab Boycott to WTO*, JERUSALEM POST, May 5, 2006, at 16.

before the WTO. Israel (and her strongest ally) was also unlikely to argue that the security exception was subject to judicial review. Thus, despite strong opposition to Saudi Arabia's continued boycott of Israel, neither the United States nor Israel has challenged it before the WTO.[190]

III. MITIGATING FACTORS

As the State practice outlined above aptly illustrates, a self-judging security exception raises the specter that a country might engage in WTO-inconsistent behavior without proper justification. If a Member State can avoid WTO obligations through the self-judging security exception, what is to prevent bad faith invocations?

The WTO regime includes a number of devices to address these concerns. These arrangements could be described as "sovereignty safety valves," giving Member States broad discretion to respond to political pressure and take unilateral action to further national interests without violating trade rules.[191] As such, Member States can advance national objectives without the need to invoke the security exception, thereby reserving it for the limited grounds set forth in the exception. The regime's flexibility promotes good faith invocation of Article XXI, diminishing the risks of a self-judging exception.[192]

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[190] This issue likely will arise again with respect to other WTO applicants. For example, eight Arab League countries are currently pursuing WTO membership. Six of these—Algeria, Iraq, Lebanon, Libya, Yemen, and Syria—enforce a primary boycott against Israel, and three—Iraq, Libya, and Syria—employ a secondary boycott against Israel. U.S. TRADE REPRESENTATIVE, 2010 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 11–13 (2010), *available at* http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/NTE_COMPLETE_WITH_APPENDnonameack.pdf.

[191] Such as the opt-in approach, the opt-out approach, discretionary benefits, and nullification and impairment of benefits, each covered in greater detail in Parts III.A–III.D, *infra*.

[192] The four mitigating factors outlined below are not exhaustive. There are other provisions—such as the waiver power and safeguard provisions—that advance the security interests without necessitating invocation of the security exception. For example, the waiver provision of Article IX(3) has been used by numerous states to restrict importation of conflict diamonds. *See* Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests*, 20 EUR. J. INT'L L. 615, 622–25 (2009) (discussing waiver of countries participating in the Kimberley Process Certification Scheme for Rough Diamonds); Joost Pauwelyn, *WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for "Conflict Diamonds,"* 24 MICH. J. INT'L L. 1177, 1182–83 (2003). Similarly, the safeguards provision of Article XIX authorizes Member States to respond to national economic emergencies. The United States' use of safeguard measures to protect the U.S. steel industry represents an example of Member State action taken to protect domestic production that serves national security interests. Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶ 439, WT/DS253/AB/R (Nov. 10, 2003); *see* Alan Sykes, THE WTO AGREEMENT ON SAFEGUARDS: A COMMENTARY 233–34 (2006);

First, certain international relationships are fraught with such tension that the temptation for bad faith invocation of Article XXI may be overwhelming. Trading with the enemy is not something the WTO should require. Fortunately, it does not. The WTO rules offer an effective tool—the non-application clause—to opt-out of the normal trade rules when dealing with political adversaries.[193]

At the opposite extreme are political allies that desire deeper integration and trading relationships governed with greater certainty than what Article XXI affords. The WTO allows for this as well, authorizing Member States to sign preferential trade agreements that guarantee protections beyond those in the WTO.[194] To the extent countries want a security exception with objective standards, they can opt into such an arrangement.

A third mitigating factor is the use of WTO-authorized sanctions and incentives. Under the WTO regime, developed countries are encouraged, but not required, to give preferential tariff benefits to developing countries.[195] These benefits often come with strings attached, allowing Member States to unilaterally condition preferential tariff benefits on a country's behavior. Because there is no WTO violation with the imposition of these carrots and sticks, there is no need to invoke the security exception.

A fourth mitigating factor is the WTO's mechanism to compensate Member States for trade benefits that are nullified or impaired. Even when there is no WTO violation, legitimate expectations arising from tariff concession may be undermined by the imposition of security measures. While a Member State can reasonably anticipate legitimate security measures that protect the national interest or restore international peace and security, the same cannot be said of security measures invoked in bad faith. The non-violation remedy mitigates potential abuse of the security exception.

A. The Opt-Out Approach

In certain circumstances, the relationship between two countries is so strained that Member States do not wish to be subject to the normal trading rules. There is limited room for this, provided exercise of the opt-out provision is invoked at the appropriate time. Article XIII of the WTO Agreement (Article XXXV under GATT 1947) allows any existing Member State, upon the accession of a new Member, to declare that the WTO rules will not apply in their trading relations.[196]

Youngjin Jung & Ellen Jooyeon Kang, *Toward an Ideal WTO Safeguards Regime—Lessons from U.S. Steel*, 38 INT'L LAW. 919, 924 (2004).

[193] *See infra* Part III.A and Part III.B.

[194] *See* Judith L. Goldstein, Douglas Rivers & Michael Tomz, *Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade*, 61 INT'L ORG. 37, 45–47 (2007).

[195] *Id.*

[196] WTO Agreement, *supra* note 64, art. XIII ("This Agreement and the Multilateral Trade Agreements . . . shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such

The same article also allows any new Member to invoke non-application *vis-à-vis* an existing Member.[197] Once both countries are Members, however, non-application is a one-way ratchet: a Member State can withdraw a non-application declaration if the bilateral relationship improves, but it cannot invoke non-application if a relationship deteriorates.

The historical justification for this provision stems from the super-majority accession procedure. Since a two-thirds vote is required to secure membership, those countries that did not wish to trade with a new member could avoid doing so by invoking Article XXXV. Rather than be "bound by a trade arrangement with a country to which it had not given its consent,"[198] the solution was to allow a contracting party to opt out of the normal trading rules with respect to that country. One could impose trade sanctions and other discriminatory measures against an enemy country without the need to rely on the security exception.

The invocation of Article XXXV is a rare event. Of 11,628 possible state-to-state bilateral pairings, or dyads, it has been invoked only eighty-eight times over the life of GATT/WTO.[199] And if one looks at these bilateral relationships across time—each country-pairing for each year as the data points—its frequency is even less, with approximately 2200 invocations out of 381,656 dyads.[200] In other words, non-applications under Article XXXV are relevant in less than one percent of all bilateral relationships under the GATT/WTO umbrella. Moreover, even when the provision has been invoked, it almost always is subsequently withdrawn.

Fifty-eight countries have invoked Article XXXV.[201] Cuba, the United States, and Portugal have led the way with eleven, eight, and four invocations, respectively.[202] Twenty-nine countries have been subject to Article XXXV invocations, with Japan the most frequent recipient, having fifty-one invocations

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application."); *see also* GATT 1947, *supra* note 9, art. XXXV ("This Agreement . . . shall not apply as between any contracting party and any other contracting party if: (a) the two contracting parties have not entered into tariff negotiations with each other, and (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.").

[197] WTO Agreement, *supra* note 64, art. XIII.

[198] ANDREW SHONFIELD & SUSAN STRANGE, INTERNATIONAL ECONOMIC REATIONS IN THE WESTERN WORLD, 1959–1971, 255 (1976).

[199] Raw data available from Judith L. Goldstein, Douglas Rivers & Michael Tomz, *Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade*, 61 INT'L ORG. 37 (2007).

[200] *Id.* at 51–52, 58–59. Their data set counts country-pairs twice each year, once with each country as the importer. *Id.* at 51–52. This number is deceptive because the data measures each year on a time series between dyads, but once a country has entered the GATT/WTO without invoking Article XXXV, it no longer has the option to later invoke it. This is a better measure of both the invocation and longevity of non-applications.

[201] Raw data available from Goldstein, Rivers & Tomz, *supra* note 199.

[202] *Id.* (raw data).

against it.[203] South Africa and Portugal are a distant second and third respectively, with a handful of invocations against each.[204]

While rare, when Article XXXV is invoked, it has the potential to significantly impact the trade relations between the two countries. According to one recent study, if both countries invoke non-application against one another, trade decreased by approximately seventy-five percent.[205] "A double invocation . . . [is] a rare event associated with serious political differences between the two states,"[206] and when it occurs, there is no protection against trade sanctions or other discriminatory behavior.

Quite often the invocation of Article XXXV represents political strategy instead of economic concern. For example, Pakistan invoked non-application against Bangladesh following a bitter civil war and the latter's secession in 1971.[207] The United States invoked non-application against a half-dozen Soviet bloc countries,[208] and Cuba has done the same with countries aligned with the West.[209] At least three Arab League countries have opted out of normal trading relations with Israel.[210] Most recently, Turkey invoked non-application against Armenia as a result of a dispute over Nagorno-Karabakh.[211]

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[203] *See generally id.*

[204] *Id.*

[205] *Id.* at 59.

[206] *Id.*

[207] Accession of Bangladesh, *Invocation of Article XXXV*, L/3784 (Nov. 28, 1972), *available at* http://www.wto.org/gatt_docs/English/SULPDF/90870049.pdf.

[208] Accession of the Republic of Armenia, *Invocation by the United States of Article XIII of the Marrakesh Agreement Establishing the World Trade Organization with Respect to the Republic of Armenia*, WT/L/505 (Dec. 10, 2002); Accession of Georgia, *Invocation by the United States of Article XIII of the Marrakesh Agreement Establishing the World Trade Organization with respect to Georgia*, WT/L/318 (Oct. 1, 1999); Accession of the Kyrgyz Republic, *Invocation by the United States of Article XIII of the WTO Agreement*, WT/L/275 (Oct. 12, 1998); Accession of the Republic of Moldova, *Invocation by the United States of Article XIII of the Marrakesh Agreement Establishing the World Trade Organization with respect to Moldova*, WT/L/395 (May 4, 2001); Marrakesh Agreement Establishing the World Trade Organization, *Invocation of Article XIII, paragraph 1, by the United States*, WT/L/11 (Jan. 27, 1995).

[209] Cuba's invocations included Austria, Germany, Peru, Philippines, and Turkey. *See Invocation of Article XXXV by Cuba*, GATT/CP/111 (Apr. 26, 1951), *available at* http://www.wto.org/gatt_docs/English/SULPDF/90310017.pdf.

[210] The three countries invoking non-application against Israel were Egypt, Tunisia, and Morocco. *See, e.g.*, Article XXXV, *Invocation by Tunisia in Respect of Japan and Israel*, L/1181 (May 2, 1960), *available at* http://www.wto.org/gatt_docs/English/SULPDF/90730112.pdf.

[211] Accession of the Republic of Armenia, *Invocation by the Republic of Turkey of Article XIII of the Marrakesh Agreement Establishing the World Trade Organization with respect to the Republic of Armenia*, WT/L/501 (Dec. 3, 2002). The border between the two countries was closed in 2003 as a result of disagreements over Nagorno-Karabakh, and, but for Article XXXV, Turkey would have had to resort to Article XXI to justify its behavior.

The rarity of non-applications is to the surprise of many, especially where bitter enemies such as China and Taiwan, or Israel and Saudi Arabia have not exercised their opt-out rights.[212] The future may be different. Thirty countries are currently seeking membership in the WTO, and many of these applicants do not want for enemies. They include Afghanistan, Bosnia and Herzegovina, Iran, Iraq, the Lebanese Republic, Libya, the Russian Federation, Serbia, Sudan, the Syrian Arab Republic, and Yemen.[213] Even Palestine has sought observer status at the WTO—a first step toward membership.[214] One can anticipate that various countries will resist WTO membership for these applicants, and if secured by a two-thirds vote, their accession will occasion non-application invocations.

These examples are clear instances where a political calculus has (or may in the future) result in non-application declarations. Two other examples discussed below—involving World War II and colonialism—are historically obscure but aptly illustrate the same point: countries wishing to avoid normal trading relations with current or former enemies can readily do so, obviating the need to invoke the national security exception.

1. Japan in the Aftermath of World War II

As the occupying power in Japan following World War II, the United States was keen to promote Japanese trade and ease its own economic burden in financing Japan's recovery.[215] To achieve this end, in 1949 the United States proposed Japanese membership in GATT.[216] With fresh memories from the war, many Member States greeted this proposal with vigorous opposition. "Several nations in Asia and in Oceania said that the anti-Japanese sentiment in their countries growing out of World War II was still so strong that they were embarrassed by the proposal [and] that it would be politically most unwise to

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[212] For a discussion of Taiwan's and China's decision not to invoke non-application against one another, see Steve Charnovitz, *Taiwan's WTO Membership and its International Implications*, 1 ASIAN J. OF WTO AND INT'L HEALTH L. POL'Y 401, 418–19(2006); Hui-Wan Cho, *China-Taiwan Tug of War in the WTO*, 45 ASIAN SURV. 736, 741–42 (2005); Pasha Hsieh, *The China-Taiwan ECFA, Geopolitical Dimensions and WTO Law*, 14 J. INT'L ECON. L. 121, 128 (2011). For Saudi Arabia's decision not to invoke non-application against Israel, see text and accompanying notes *supra* Part II.B.6. The United States strongly pressured Saudi Arabia not to invoke the non-application clause against Israel. *See* Bhala, *supra* note 166, at 754–55.

[213] WORLD TRADE ORGANIZATION, ANNUAL REPORT 2011, at 7 (2011).

[214] Seventh Session of the Ministerial Conference, *Request for Observer Status by Palestine*, WT/L/775 (Nov. 4, 2009). This is not necessarily a move toward state independence. The WTO authorizes membership by separate customs territories as well as countries. Hong Kong, for example, is a WTO member, even though it is not independent from China.

[215] GARDNER PATTERSON, DISCRIMINATION IN INTERNATIONAL TRADE: THE POLICY ISSUES 1945–1965, at 274 (1966).

[216] *Id.*

pursue the question at that time."[217] These countries even argued that public sentiment against Japan was so inflamed "that the governments might find it difficult to remain in the GATT."[218] Exacerbating these concerns were legitimate economic fears that if Japan became a member, other States would face stiff competition from Japanese goods manufactured with cheap labor.[219] "The nightmarish memory of past Japanese behavior and apprehension about future transgressions might force others to raise their tariffs in self-protection," which would in turn increase tariff rates for all contracting parties.[220]

In September 1955, under severe pressure from the United States, Member States voted to accept Japan's GATT membership.[221] To Japan's dismay, however, an unprecedented fourteen countries invoked the Article XXXV non-application.[222] Almost forty percent of Japanese exports to GATT members were not subject to GATT rules.[223] This arrangement allowed a significant minority of GATT members to discriminate against Japan notwithstanding MFN guarantees. Japan would continue "to be treated as a second-class citizen by nearly half of [the GATT] membership."[224]

Japan spent years trying to convince fellow GATT members to withdraw their Article XXXV reservations.[225] For example, at a GATT Council meeting held on November 18, 1960, the Japanese delegate stated:

> It is almost painful for me to take the floor again on this matter, . . . [which] has been on the agenda of sessions of the CONTRACTING PARTIES since . . . 1953 . . . . Almost everywhere discriminatory measures are applied against trade with Japan whether under the cover of Article XXXV or under other pretexts.[226]

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[217] *Id.*

[218] *Id.* at 280–81.

[219] *Id.* at 281–82.

[220] SAYURI SHIMIZU, CREATING PEOPLE OF PLENTY: THE UNITED STATES AND JAPAN'S ECONOMIC ALTERNATIVES, 1950–1960, at 35 (2001).

[221] Goldstein, Rivers & Tomz, *supra* note 199, at 43.

[222] *Accession of Japan*, at 2–4, L/405 (Sept. 13, 1955) (Article XXXV was invoked by Australia, Austria, Belgium, Brazil, Cuba, France, Haiti, India, Luxemburg, The Netherlands, New Zealand, Rhodesia, and Nyasalang, South Africa, and the United Kingdom). For colonial powers such as France and the United Kingdom, this non-application also applied to Japanese trade with colonies. Goldstein, Rivers, and Tomz, *supra* note 199, at 43.

[223] PATTERSON, *supra* note 215, at 285–86.

[224] SHIMIZU, *supra* note 220, at 47.

[225] *See, e.g.*, *Application of Article XXXV to Japan*, L/1391 (Nov. 29, 1960).

[226] *Id.* at 1–2.

The stated reason for maintaining Article XXXV stemmed from fears that a flood of cheap Japanese products would lead to market disruptions.[227] But that fear, the Japanese delegate surmised, was "less real than psychological or political."[228]

Finally, in 1962, Japan and the United Kingdom signed a bilateral treaty of Friendship, Navigation, and Commerce, with Britain withdrawing its Article XXXV non-application reservation.[229] One price for securing Britain's withdrawal was a Japanese commitment to maintain "voluntary export restraints" (VERs), an arrangement of self-sanction in which Japan imposed quotas on the export of over sixty sensitive goods.[230] The agreement also provided for the settlement of disputes outside the GATT framework, precluding judicial review.[231]

In effect, Britain was able to comply with GATT rules of non-discrimination and still benefit from Japanese self-imposed discriminatory sanctions. Similar bilateral arrangements were signed with at least twenty other GATT contracting parties.[232] The rise of VERs allowed the gradual disappearance of *de jure* discrimination against Japan, while countries still engaged in *de facto* discriminatory trade practices.[233] Throughout this period, non-application invocations were unnecessary in order to discriminate against Japan.

2. *Portugal and the End of Colonialism*

On December 14, 1960, the U.N. General Assembly passed Resolution 1514 declaring that "[i]mmediate steps shall be taken, in . . . all . . . territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations."[234] In Africa alone, twenty-five countries gained independence from 1946 to 1960, and the momentum for self-determination was overwhelming.[235]

Portugal was uncompromising in its attitude toward her colonies. An uprising in Angola in 1961 resulted in brutal Portuguese repression, leading the U.N. Security Council to condemn the large-scale killings and demand Portugal take

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[227] *Id.* at 2–3.

[228] *Id.* at 3.

[229] ROGER STRANGE, JAPANESE MANUFACTURING INVESTMENT IN EUROPE: ITS IMPACT ON THE UK ECONOMY 85 (1993).

[230] *Id.*; NORIKO YOKOI, JAPAN'S POSTWAR ECONOMIC RECOVERY AND ANGLO-JAPANESE RELATIONS, 1948–1962, at 154 (2003).

[231] YOKOI, *supra* note 230, at 154. Voluntary export restraints are now prohibited under the WTO. *See Agreement on Safeguards*, WORLD TRADE ORGANIZATION, at 278, http://www.wto.org/english/docs_e/legal_e/25-safeg.pdf (last visited Aug. 3, 2011).

[232] SHIMIZU, *supra* note 220, at 173.

[233] *Id.*

[234] Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess. Supp. No. 16, U.N. Doc. A/4684, at 66 (Dec. 14, 1960).

[235] AFRICAN INDEPENDENCE, http://exploringafrica.matrix.msu.edu/images/decolinization.jpg (last visited June 28, 2011).

immediate steps to transfer power to Angola.[236] The repression in Angola had a "profound effect" on Indian Prime Minister Jawaharlal Nehru, who recognized that force might be necessary to oust the Portuguese from their remaining possessions in India.[237] On December 18, 1961, Indian troops stormed the Portuguese enclave of Goa, ending "the last vestiges of colonialism on the Indian subcontinent."[238] African leaders praised Nehru's action, stating, "India's take-over of Goa and the other Portuguese enclaves in India confirmed her position as the bulwark of freedom and the bastion of anti-colonialism and anti-imperialism."[239]

That same month, Angola's nationalist leader, Mario de Andrade, called on all African nations to sever diplomatic relations with Portugal and aid Angola's efforts toward independence through an economic boycott of Portugal.[240] Portugal was not a threat to these countries, for its political ambitions were simply to maintain the *status quo*.[241] But when the topic was raised at a GATT Council Meeting in the context of Portugal's membership application, Ghana warned that, if necessary, it would invoke the security exception against Portugal:

> [U]nder this Article each contracting party was the sole judge of what was necessary in its essential security interests. There could therefore be no objection to Ghana regarding the boycott of goods as justified by its security interests. . . . [A] country's security interests may be threatened by a potential as well as an actual danger. . . . [T]he situation in Angola was a constant threat to the peace of the African continent and . . . any action which, by bringing pressure to bear on the Portuguese Government, might lead to a lessening of this danger, was therefore justified in the essential security interests of Ghana.[242]

When Portugal finally became a member in May 1962,[243] Ghana did not rely on Article XXI to justify the boycott. Instead, Ghana, together with Nigeria and India, invoked the Article XXXV opt-out clause against Portugal, and Portugal responded in kind.[244] This approach gave Ghana greater freedom to avoid (and

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[236] S.C. Res. 163, U.N. Doc. S/RES/163 (June 9, 1961).

[237] R.P. RAO, PORTUGUESE RULE IN GOA 1510–1961, at 3 (1963).

[238] *Id.* at 1, 148.

[239] *African Nationalists Praise Indian Action*, N.Y. TIMES, Dec. 20, 1961, at 2.

[240] *Angola Says All-Out Offensive Is Planned Against Portuguese*, N.Y. TIMES, Dec. 12, 1961, at 18.

[241] MELVIN PAGE, COLONIALISM: AN INTERNATIONAL SOCIAL, CULTURAL AND POLITICAL ENCYCLOPEDIA 515—16 (2003). For a detailed discussion of Portugal's colonial policy in the 1960s, see FILIPE RIBEIRO DE MENESES, SALAZAR: A POLITICAL BIOGRAPHY 451–543 (2009).

[242] GATT Council Meeting, *Summary Record of the Twelfth Session*, at 196, SR.19/12 (Dec. 12, 1961).

[243] Accession of Portugal, *Invocation of Article XXXV*, L/1764 (May 10, 1962), *available at* http://www.wto.org/gatt_docs/English/SULPDF/90750286.pdf.

[244] *Id.*

defer) normal trading relations with a country that embodied the colonial policies it abhorred.[245] Normal trading relations between Ghana and Portugal did not resume until 1987, more than a decade after Portugal's colonialism ended.[246]

B. The Opt-In Approach

The previous discussion addressed political adversaries opting out of normal trading relations. At the opposite extreme are political allies that want to be governed by rules that afford greater stability with respect to security exceptions. The WTO allows for this as well, authorizing Member States to sign preferential trade agreements (PTAs) that promote closer integration in trading relations. Article XXIV of GATT 1947 recognizes:

> the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements . . . . Accordingly, the provisions of this Agreement shall not prevent . . . the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free trade area.[247]

In other words, Member States can opt into PTAs with other Member States without violating MFN rules, as long as doing so is not intended to raise barriers for other countries.[248]

Among the many benefits of such arrangements is legal certainty in the realm of national security. If States so choose, they can opt into special trading arrangements that incorporate an objective security exception.[249] This approach allows Member States to retain a self-judging security exception for most trading relationships, but embraces a non-self-judging one for certain relationships. As a result, these PTAs minimize the significance of the WTO's self-judging security exception.

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[245] *Id.*

[246] Invocation of Article XXXV, *Ghana and Portugal*, L/6272 (Nov. 25, 1987), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91330060.pdf. Normal trading relations between Portugal and India and Nigeria began in 1975 and 1988, respectively. Invocation of Article XXXV, *Nigeria and Portugal*, L/6448 (Dec. 23, 1988), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91390199.pdf; Application of Article XXXV, *Withdrawal of Invocation by India and Portugal*, L/4178 (May 22, 1975), *available at* http://www.wto.org/gatt_docs/English/SULPDF/90910259.pdf.

[247] GATT 1947, *supra* note 9, art. XXIV:4–5.

[248] *Id.* art. XXIV:4 ("[T]he purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.").

[249] *Id.* art. XXIV.

Most PTAs are either customs unions, free trade agreements (FTAs), bilateral investment treaties (BITs), or the precursor to modern BITs, Friendship, Commerce and Navigation treaties (FCN treaties). Each type of agreement includes provisions for national security.

1. Customs Unions

A customs union is a trade bloc with a free trade area and a common external tariff.[250] The European Union is the most notable example, but others include the Andean Community, the East African Community, and the Southern Common Market (MERCOSUR). Quite often the security exceptions in customs unions use objective criteria, in sharp contrast to the WTO security exception.[251]

The 1958 Treaty of Rome establishing the European Economic Community severely limits the authority of Member States to take action in furtherance of national security interests. Article 223, now Article 296 of the Treaty of Amsterdam,[252] allows an EU Member State not to disclose information that "it considers contrary to the essential interests of its securities."[253] It also authorizes a Member State to "take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material."[254] But it limits the exercise of that right if doing so adversely affects conditions of competition in the common market for civilian or dual-use goods.[255] It also requires military goods to be on a list approved by the European Council.[256] Notably absent from Article 223 is the right to invoke a security exception in the event of war or other emergencies in international relations, or in furtherance of international obligations under the United Nations Charter. Thus, the self-judging exception in the Treaty of Amsterdam is limited to arms and security intelligence, and even then, the measures taken cannot harm the competitive conditions in Europe. The twenty-seven Member States of the EU have opted into a treaty that severely limits the ambit of their authority to act in furtherance of their security interests.

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[250] Kathryn Cameron Atkinson & Catherine Curtiss, *United States-Latin American Trade Law*, 21 N.C. J. INT'L L. & COM. REG. 111, 139 (1995).

[252] Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts art. 296, Oct. 2, 1997, O.J. (C 340) 1.

[253] Treaty Establishing the European Economic Community art. 223, Mar. 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958).

[254] *Id.*

[255] *Id.* ("[S]uch measures shall not, however, adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.").

[256] *Id.* ("During the first year after the entry into force of this Treaty, the Council shall, acting unanimously, draw up a list of products to which the provisions of paragraph 1(b) shall apply.").

Likewise, the customs union established by the Andean Community between Bolivia, Colombia, Ecuador, Peru, and Venezuela calls for the elimination of all "duties and restrictions of all kinds levied on the importation of products" from Member State territories.[257] Exceptions from this requirement are provided, among other things, to:

> (b) [i]mplement laws and regulations on security; (c) [r]egulate the import or export of weapons, ammunition, and other war materials, and, under special circumstances, all other military articles, provided that this does not interfere with the provisions of treaties in force between Member Countries relating to the freedom of unrestricted transit; . . . and (g) [e]xport, use and consume nuclear materials, radioactive products, or any other material that may be employed for the development and utilization of nuclear energy.[258]

The objective language in this security exception excludes any reference to war or international emergency, and requires limitations on arms control to comply with international obligations. Moreover, a Member State's unilateral action with respect to security measures is subject to review by the Secretary General of the Andean Community.[259] Thus, the five Member States of the Andean Community have eliminated a self-judging standard, and sharply limited the scope of their authority to act inconsistent with the Cartagena Agreement in furtherance of security concerns.

2. Free Trade Agreements

A free trade agreement imposes no duties between the Member States, but does not have a common external tariff.[260] Free trade agreements are normally analyzed in terms of the preferential tariff arrangements provided to signatory countries.[261] But they do much more than that, in many cases limiting the freedom of Member States to invoke a security exception to violate trade obligations.

Most FTAs include security exceptions, and the norm is to follow the language of the WTO. For example, every free trade agreement the United States

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[257] Andean Subregional Integration Agreement (Cartagena Agreement) art. 72, May 26, 1969, http://www.jus.uio.no/english/services/library/treaties/09/9-01/andean_integration_consolidated.xml.

[258] *Id.* art. 73.

[259] *Id.* art. 74 ("[T]he General Secretariat, on its own initiative or at the request of a party, shall determine, when necessary, whether a measure adopted unilaterally by a Member Country constitutes a 'duty' or 'restriction.'").

[260] *See* Atkinson & Curtiss, *supra* note 250; Anne O. Krueger, *Free Trade Agreements Versus Customs Unions*, 54 J. DEV. ECON. 169, 178 (1997).

[261] *See* Krueger, *supra* note 260, at 173.

has signed follows this approach, including NAFTA.[262] But other countries have opted into an objective standard. For example, in December 1999 the European Union and South Africa signed a free trade agreement that provides:

> The Agreement shall not preclude prohibitions or restrictions on imports, exports, goods in transit or trade in used goods justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants . . . . Such prohibitions or restrictions shall not, however, constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on trade between the Parties.[263]

This exception not only utilizes objective language, it precludes security measures taken as "a means of arbitrary or unjustifiable discrimination" or as a "disguised restriction on trade"—conditions embodied in the *chapeau* of the general exceptions of GATT Article XX.[264]

Likewise, Israel's free trade agreement with Canada includes objective language throughout the security exception,[265] as do FTAs that the Caribbean

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[262] *See, e.g.*, North American Free Trade Agreement, U.S.-Can.-Mex., art. 2102, Dec. 17, 1992, 32 I.L.M. 289 (1993) ("[N]othing in this Agreement shall be construed: (a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; (b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment, (ii) taken in time of war or other emergency in international relations, or (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or (c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.").

[263] Agreement on Trade, Development and Cooperation Between the European Community and Its Member States, of the One Part, and the Republic of South Africa, of the Other Part art. 27, L 311/3 (Dec. 4, 1999).

[264] *See supra* text quoted in note 58.

[265] Canada-Israel Free Trade Agreement, Can.-Isr., art. 10.2, July 31, 1996 ("Nothing in this Agreement shall be construed: (a) to require either party to furnish or allow access to any information the disclosure of which would be contrary to its essential security interests; (b) to prevent either Party from taking any actions necessary for the protection of its essential security interests: (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment, (ii) taken in time of war or other emergency in international relations, or (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of biological, chemical, nuclear weapons or other nuclear explosive devices; or (c) to prevent either Party from taking action in pursuance of its obligations

Community has signed with Costa Rica[266] and the Dominican Republic.[267] Israel also has a FTA with Turkey that includes objective language on trade in arms.[268]

3. Bilateral Investment Treaties

In addition to FTAs, Member States have also signed thousands of bilateral investment treaties (BIT), many of which include objective language in their

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under the United Nations Charter for the maintenance of international peace and security.").

[266] CARICOM-Costa Rica Free Trade Agreement, art. XVI.02, Mar. 9, 2004 ("Pursuant to Article XXI (Security Exceptions) of the GATT 1994, nothing in this Agreement shall be construed: (a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; (b) to prevent any Party from taking any actions considered necessary for the protection of its essential security interests: (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment; (ii) adopted in time of war or other emergency in international relations; or (iii) relating to the implementation of national policies or international agreements regarding the non-proliferation of nuclear weapons or other nuclear explosive devices; or (c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the Maintenance of International Peace and Security.").

[267] CARICOM-Dominican Free Trade Agreement, art. VII, Aug. 22, 1998 ("Nothing in this Agreement shall prevent the adoption or enforcement by the Dominican Republic or any Member State of CARICOM of measures: (i) which are necessary (a) to protect public morals; (b) to prevent crime or the maintenance of public order; (c) to protect its essential security interests; (d) to protect human, animal and plant life; (e) to secure compliance with laws or regulations which are not consistent with the provisions of this, Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII of GATT 1994, the protection of patents, trademarks and copyrights and the prevention of deceptive practices; (f) and essential to the acquisition or distribution of products in general or local short supply; provided that any such measure shall be consistent with the principle that the Parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement, shall be discontinued as soon as the conditions giving rise to them have ceased to exist . . . .").

[268] Israel-Turkey Free Trade Agreement, Isr.-Turk., art. 31, May 1, 1997 ("Nothing in this Agreement shall prevent a Party from taking any measures: (a) which it considers necessary to prevent the disclosure of information contrary to its essential security interests; (b) which relate to the production of, or trade in, arms, munitions or war materials or to research, development or production indispensable for defense purposes, provided that such measures do not impair the conditions of competition in respect of products not intended for specifically military purposes; (c) which it considers essential to its own security in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or other serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.").

security exceptions.[269] Such investment guarantees are sometimes incorporated into FTAs, as with NAFTA.[270] More commonly they are stand-alone treaties providing guarantees of compensation for unlawful takings, non-discrimination, fair and equitable treatment, and procedural due process.[271]

As for security exceptions in BITs, the most notable is the Argentina-United States BIT, which, following Argentina's currency crisis, has been the subject of several International Centre for Settlement of Investment Disputes (ICSID) investment arbitrations.[272] The relevant security exception provides: "The Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligation with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."[273] Argentina has invoked this exception in every ICSID case involving an American investor, and each time the ICSID tribunals have concluded that the exception is not self-judging.[274] As the tribunal in *CMS Gas* stated, "when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly. The examples of the

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[269] For a discussion of the substantive guarantees in bilateral investment treaties, see KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION, 189–516 (2010); THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, 227–684 (Peter Muchlinski, Federico Ortino and Christoph Schreuer, eds. 2008).

[270] *See* North American Free Trade Agreement, *supra* note 262, art. 1018.

[271] *See, e.g.*, *infra* note 276.

[272] Cont'l Cas. Co. v. Argentina, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008) [hereinafter Continental Casualty Award]; Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007) [hereinafter Enron Award]; CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Annulment Proceeding (Sept. 25, 2007) [hereinafter CMS Annulment Proceeding]; Sempra Energy Int'l v. Argentina, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007) [hereinafter Sempra Award]; LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006) [hereinafter LG&E Award]; CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005) [hereinafter CMS Award].

[273] Agreement Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, 31 I.L.M. 124, 135.

[274] CMS Annulment Proceeding, *supra* note 272, ¶¶ 119–27 (refusing to annul award based on CMS Award's finding that Article XI is not self-judging); CMS Award, *supra* note 272, ¶¶ 370–73; Continental Casualty Award, *supra* note 272, ¶¶ 182–88; Enron Award, *supra* note 272, ¶ 331; LG&E Award, *supra* note 272, ¶¶ 212–13; Sempra Award, *supra* note 272, ¶¶ 379–83. For a discussion of these cases, see Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and* Force Majeure, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 459, 503–05 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008); Jürgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59 INT'L & COMP. L.Q. 325, 339, 348–49 (2010).

GATT [Article XXI] and bilateral investment treaty provisions offered above are eloquent examples of this approach."[275]

Following these ICSID interpretations, in November 2004 the United States modified its Model BIT to adopt WTO-style self-judging language:

> [n]othing in this Treaty shall be construed: (1) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (2) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[276]

Finally, some BITs have gone to the other extreme—omitting a national security exception altogether. The ICSID tribunal in *BG Group* interpreted the absence of such an exception in the Argentina-United Kingdom BIT[277] to preclude Argentina from invoking a state of emergency on the basis of the BIT.[278] Rather than adopt an objective standard, these treaties make no provision for a security exception, sharply curtailing the freedom of States to act consistent with their security interests without violating their BIT obligations.

4. Freedom, Commerce, and Navigation Treaties

As the precursors to the modern BITs, Freedom, Commerce, and Navigation treaties also included security exceptions, often with objective language. The United States' model FCN treaty provided that:

> The present Treaty shall not preclude the application of measures: . . . (b) relating to fissionable materials, to radioactive by-products . . . or to materials that are the source of fissionable materials; (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace or security or necessary to protect its essential security interests.[279]

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[275] CMS Award, *supra* note 272, ¶ 370.

[276] U.S. Model BIT art. 18 (2004), http://www.state.gov/documents/organization/117601.pdf.

[277] BG Group Plc. v. Argentina, UNCITRAL, Final Award, ¶¶ 381–87 (Dec. 24, 2007).

[278] *Id.* ¶ 387; *see also* Nat'l Grid Plc. v. Argentina, UNCITRAL, Award, ¶ 255 (Nov. 3, 2008).

[279] Charles H. Sullivan. *Report on the Standard Provisions of the Treaty of Friendship, Commerce and Navigation as They Evolved Through Jan. 1, 1962*, *in* 1 U.S. TREATIES OF FRIENDSHIP, COMMERCE AND NAVIGATION: STUDIES 39 (1970).

By 1962, the United States had signed forty-three FCN treaties.[280] The most significant of these were the treaties with Nicaragua and Iran, both of which were the subject of ICJ litigation.[281] In the ICJ's landmark judgment of *Military and Paramilitary Activities In and Against Nicaragua*, it distinguished the objective language in the United States-Nicaragua FCN with the self-judging language in Article XXI of GATT:[282]

> by the terms of the [FCN] Treaty itself, whether a measure is necessary to protect the essential security interests of a party is not . . . purely a question for the subjective judgment of the party; [unlike GATT] the text does not refer to what the party "considers necessary" for that purpose.[283]

This textual distinction led the ICJ to conclude that the FCN security exception was not self-judging, and that the trade embargo against Nicaragua violated the FCN treaty.[284] As José Alvarez has stated, "[t]he ICJ found that the 'it' in this key phrase . . . makes GATT-type language self-judging rather than subject to the judgment of an external decision maker."[285] Notably, the United States trade embargo triggered legal action by Nicaragua before both the ICJ and GATT. The self-judging language led to no action under GATT,[286] and a successful action under the objective language of the FCN.

Likewise in 2003, the ICJ interpreted the security exception in the Iran-United States FCN—with language identical to the United States' FCN with Nicaragua[287]—to incorporate an objective standard subject to judicial review.

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[280] *Id.* at 51–58.

[281] *See* Pieter H.F. Bekker, *The World Court Finds that U.S. Attacks on Iranian Oil Platforms in 1987–1988 Were Not Justifiable as Self-Defense, but the United States Did Not Violated the Applicable Treaty with Iran*, AMERICAN SOCIETY OF INTERNATIONAL LAW (2003) (discussing an ICJ decision regarding an FCN treaty between the United States and Iran), http://www.asil.org/insigh119.cfm; *infra* note 282 (discussing ICJ litigation dealing with the Nicaragua treaty).

[282] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 222 (June 27). The relevant provisions of the FCN stated "the present Treaty shall not preclude the application of measures . . . (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests." *See id.* ¶ 221.

[283] *Id.* ¶ 282.

[284] *Id.*

[285] Opinion of José E. Alvarez, Sempra Energy Int'l & Camuzzi Int'l v. Republic of Argentina, ARB/02/16 and ARB/03/02, at 6 (Sept. 12, 2005), http://ita.law.uvic.ca/documents/Camuzzi_SempraAlvarezOpinion.pdf.

[286] *See supra* text accompanying notes 100–126.

[287] Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, art. XX(1)(d), Aug. 15, 1955, T.I.A.S. No. 3853 ("The present Treaty shall not preclude the application of measures (d) necessary to fulfill the obligations of a High Contracting Party

"[W]hether a given measure is 'necessary' is 'not purely a question for the subjective judgment of the party' and may thus be assessed by the Court."[288] As a result, the Court concluded that the United States had failed to satisfy the necessity criterion.[289]

The exclusion of the self-judging language in these FCN treaties was critical to the ICJ's determinations. The FCN treaties incorporate an objective standard subject to judicial review, while the GATT security exception adopts a subjective standard that is purely for the judgment of the party invoking it.[290]

C. Discretionary Benefits

In addition to the opt-out and the opt-in approaches, discretionary tariff preferences serve as the third major factor that mitigates bad faith applications of the security exception. The WTO rules authorize developed countries to "accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties."[291] These benefits under these so-called "Generalized System of Preferences" (GSP) are subject to "negative conditionality"—conditions that must be satisfied for a developing country to receive the benefit.[292] Because these benefits are discretionary, a Member State can grant, deny, suspend, or remove them if doing so is in the national interest.[293]

Moreover, these benefits may be accorded "notwithstanding the [MFN] provisions of Article 1 of the General Agreement."[294] In other words, preferential treatment for developing countries is not discrimination against developed countries. Granting or denying GSP benefits is not a WTO violation, therefore there is no need to invoke a WTO exception to grant or deny these benefits. Rather than resort to measures that violate WTO rules—such as a trade embargo—the first place developed countries typically turn to punish a misbehaving developing country is to withdraw discretionary tariff preferences.[295]

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for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.").

[288] Oil Platforms (Iran v. U.S.), Judgment on the Merits, 2003 I.C.J. 161, ¶ 43 (Nov. 6).

[289] *Id.* ¶¶ 76–78; *see also* Alvarez, *supra* note 285, at 35–36.

[290] *See* GATT 1947, *supra* note 9, art. XXI.

[291] *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.), at 191 (1980) [hereinafter *Differential Treatment*], *available at* http://www.wto.org/english/docs_e/legal_e/enabling_e.pdf.

[292] *See* Julia Ya Qin, *Defining Nondiscrimination Under the Law of the World Trade Organization*, 23 B.U. INT'L L.J. 215, 293 (2005).

[293] *See id.* at 282.

[294] *Differential Treatment*, *supra* note 291, at 191.

[295] *See* Qin, *supra* note 292, at 293.

Thus far, the WTO Appellate Body has identified only one significant limitation on the granting and withdrawal of GSP benefits: similarly situated developing countries cannot be treated differently.[296] Thus, in reviewing whether the European Union's drug-trafficking condition for GSP eligibility was consistent with the WTO, the Appellate Body concluded that the policy "may be found consistent with the 'non-discriminatory' requirement . . . only if the [EU] proves, at a minimum, that the preferences granted under the Drug Arrangements are available to all GSP beneficiaries that are similarly affected by the drug problem."[297]

The GSP programs of the United States and the European Union illustrate the use of discretionary benefits to sanction Member States without the need to invoke a security exception. Targeted countries have little recourse to challenge the withdrawal of a discretionary benefit.

1. The United States GSP Program

Under its GSP scheme, the United States imposes eligibility criteria that exclude developing countries from benefits if they engage in conduct inconsistent with American interests.[298] The criteria to be a GSP beneficiary exclude countries that: (1) are communist;[299] (2) are members of an international cartel (such as OPEC);[300] (3) aid and abet international terrorism;[301] (4) fail to protect American commercial interests;[302] (5) violate international labor standards;[303] (6) fail to eliminate "the worst forms of child labor";[304] and (7) fail to adequately address drug-trafficking.[305]

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[296] *See* Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 153–62, WT/DS246/AB/R (Apr. 7, 2004).

[297] *Id.* ¶ 180.

[298] *See* Qin, *supra* note 292, at 282.

[299] 19 U.S.C. § 2462(b)(2)(A) (2006) ("The President shall not designate any country a beneficiary developing country if . . . (A) such country is a Communist country, unless . . . (ii) such country is a WTO member . . . and a member of the International Monetary Fund, and (iii) such country is not dominated or controlled by international communism.").

[300] *Id.* § 2462(b)(2)(B).

[301] *Id.* § 2462(b)(2)(F).

[302] *Id.* § 2462(b)(2)(D)–(E) (ineligibility for nationalizing American property or failing to honor arbitral awards).

[303] *Id.* § 2462(b)(2)(G); *see also id.* § 2467(4) (labor standards include the right of association, the right to organize and bargain collectively, prohibition on forced labor, and maintenance of acceptable working conditions).

[304] *Id.* § 2462(b)(2)(H).

[305] *United States Andean Trade Preference Act—Decision of 14 October 1996*, WT/L/184 (Oct. 14, 1996), *available at* http://docsonline.wto.org/DDFDocuments/t/WT/L/184.WPF; *see also, e.g.*, Proclamation No. 8323, 73 Fed. Reg. 72,677 (Nov. 28, 2008) (suspending Bolivia from benefits of the Andean Trade Promotion Act).

Pursuant to these eligibility criteria, approximately twenty-five percent of developing countries do not receive GSP benefits.[306] Among the dozens of countries excluded are WTO members such as Bulgaria, China, Cuba, El Salvador, Guatemala, Honduras, Morocco, Myanmar, Nicaragua, and Vietnam.[307] By placing these countries at a competitive disadvantage relative to other developing countries, the United States can punish countries that act contrary to its interests without violating WTO rules or resorting to the security exception.

To illustrate, on September 15, 2008, President Bush withdrew Bolivia's eligibility for preferential benefits under a special tariff program closely related to its GSP program, the Andean Trade Preference Act.[308] He did so because Bolivia had "failed demonstrably . . . to adhere to its obligations under international counternarcotics (CN) agreements."[309] As a result, imports into the United States from Bolivia decreased thirty-four percent in 2009, from $188 million in 2008 to $124 million in 2009.[310] On June 30, 2009, President Obama affirmed that determination, and ordered that "no duty free treatment or other preferential treatment" should be extended to Bolivia.[311] Among the negative findings were "explicit acceptance and encouragement of coca production at the highest levels of the Bolivian government."[312] Rather than impose trade barriers that violate the WTO, necessitating an Article XXI exception, the United States simply removed trade benefits consistent with its rights under the WTO.[313]

2. The European Union GSP Plus (GSP+) Program

The European Union's approach to preferential tariffs uses both carrots and sticks. Standard GSP preferences are available to 176 developing countries, but preferences may be withdrawn if the beneficiary country: (1) violates core treaties

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[306] DANIEL ANTHONY, UNILATERAL PREFERENTIAL TARIFF PROGRAMS OFFERED BY THE UNITED STATES, THE EUROPEAN UNION, AND CANADA: A COMPARISON 6, 18 (Dec. 2008), *available at* http://www.tradepartnership.com/pdf_files/GSP_Comparison.pdf (noting that the United States grants GSP benefits to 130 countries, compared to more than 170 developing countries that receive European Union and Canadian GSP benefits).

[307] *Information on Countries Eligible for GSP*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/sites/default/files/ATT%20(A)%20-%20090417%20GSP_BDC.pdf (last visited June 19, 2011).

[308] PRESIDENT BARACK OBAMA, WHITE HOUSE, DETERMINATIONS AND REPORT OF THE PRESIDENT CONCERNING THE REVIEW OF ECUADOR AND BOLIVIA UNDER THE ANDEAN TRADE PREFERENCE ACT, AS AMENDED 3 (June 30, 2009) [hereinafter REPORT CONCERNING ECUADOR AND BOLIVIA], *available at* http://www.ustr.gov/webfm_send/1184; *see also* Andean Trade Preference Act (ATPA), 19 U.S.C. § 3202 (2006).

[309] *Id.* at 3.

[310] RON KIRK, U.S. TRADE REPRESENTATIVE, FIFTH REPORT TO THE CONGRESS ON THE OPERATION OF THE ANDEAN TRADE PREFERENCE ACT AS AMENDED 16 (June 30, 2010), *available at* http://www.ustr.gov/node/5979.

[311] REPORT CONCERNING ECUADOR AND BOLIVIA, *supra* note 307, at 1.

[312] *Id.* at 3.

[313] KIRK, *supra* note 310, at 1.

relating to human rights, the environment, drug-trafficking, and corruption; (2) exports goods made from prison labor; (3) fails to effectively control illicit drugs or money-laundering; or (4) engages in systematic and unfair trading practices.[314] Further special incentive preferences under the GSP+ program are granted to developing countries that have ratified and effectively implemented twenty-seven core human rights, labor, environmental, drug-trafficking, and anti-corruption conventions.[315] Thus far, sixteen developing countries have satisfied the eligibility requirements for special incentives.[316]

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[314] Council Regulation 980/2005, art. 16, 2005 O.J. (L169) 1 (EC).

[315] *Id.* art. 9. The sixteen core human and labor rights conventions are (1) International Covenant on Civil and Political Rights; (2) International Convention on Economic, Social and Cultural Rights; (3) International Convention on the Elimination of All Forms of Racial Discrimination; (4) Convention on the Elimination of All Forms of Discrimination Against Women; (5) Convention Against Torture and other Cruel, Inhuman, and Degrading Treatment or Punishment; (6) Convention on the Rights of the Child; (7) Convention on the Prevention and Punishment of the Crime of Genocide; (8) Convention concerning Minimum Age for Admission to Employment; (9) Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; (10) Convention concerning the Abolition of Forced Labour; (11) Convention concerning Forced or Compulsory Labour; (12) Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value; (13) Convention concerning Discrimination in Respect of Employment and Occupation; (14) Convention concerning Freedom of Association and Protection of the Right to Organise; (15) Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively; and (16) International Convention on the Suppression and Punishment of the Crime of Apartheid. *Id.* Annex III. The eleven environmental, drug-trafficking, and anti-corruption conventions are: (1) Montreal Protocol on Substances that Deplete the Ozone Layer; (2) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; (3) Stockholm Convention on Persistent Organic Pollutants; (4) Convention on International Trade in Endangered Species of Wild Fauna and Flora; (5) Convention on Biological Diversity; (6) Cartagena Protocol on Biosafety; (7) Kyoto Protocol to the United Nations Framework Convention on Climate Change; (8) United Nations Single Convention on Narcotic Drugs (1961); (9) United Nations Convention on Psychotropic Substances (1971); (10) United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988); and (11) United Nations Convention against Corruption (Mexico). *See id.* As of January 1, 2012, all twenty-seven conventions must be ratified and effectively implemented for a developing country to be eligible for the GSP+ special incentives. *See Generalised System of Preferences (GSP)*, EUROPEAN COMM'N, http://ec.europa.eu/trade/wider-agenda/development/generalised-system-of-preferences/; *see also* Press Release, European Comm'n, Focusing on needs: the EU reshapes its import scheme for developing countries (May 10, 2011), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=707.

[316] Commission Decision 2008/938, art. 1, 2008 O.J. (L 334) 90 (EC) (the countries meeting the special incentives criteria are Armenia, Azerbaijan, Bolivia, Colombia, Costa Rica, Ecuador, Georgia, Guatemala, Honduras, Sri Lanka, Mongolia, Nicaragua, Peru, Paraguay, El Salvador, and Venezuela).

This arrangement allows the EU to calibrate tariff preferences at two levels: sanctioning bad behavior by withdrawing general GSP preferences, and encouraging good behavior through unusually beneficial GSP+ preferences. To illustrate, in February 2010, the European Commission announced that Sri Lanka would no longer receive GSP+ benefits due to its human rights record.[317] The suspension would take effect on August 15, 2010, "giving Sri Lanka extra time to address the problems identified."[318] An expert report commissioned by the EU concluded that Sri Lanka had failed to effectively implement major human rights conventions.[319] Among the issues of concern were unlawful killings, torture, illegal arrests and detention, disappearances, inadequate access to justice, racial discrimination, and infringement of the freedom of movement, assembly, expression, and religion.[320]

The GSP+ trade benefits—worth over $136 million per year to Sri Lanka—were jeopardized because of civilian deaths in the final phase of the government's war against the Tamil Tigers.[321] In June 2010, the EU identified several changes Sri Lanka had to implement to avoid losing the special preferences.[322] They included repealing emergency regulations, amending the Code of Criminal Procedure, allowing citizens to submit complaints to the U.N. Human Rights Commission, publishing a list of Tamil Tigers in custody, and providing guarantees on freedom of the press.[323]

Sri Lanka did not meet these conditions, and the GSP+ benefits were withdrawn in August 2010.[324] Key sectors of the Sri Lankan economy are now suffering the consequences. Tariffs on textiles have lost a 9.6 percent advantage, and bicycles and frozen fish have lost an 11.5 and 18.5 percent advantage, respectively.[325] One Sri Lankan apparel industry expert stated that "there's a grave

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[317] Press Release, European Comm'n, EU Temporarily Withdraws GSP+ Trade Benefits from Sri Lanka (Feb. 15, 2010), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=515.

[318] *Id.*

[319] FRANÇOISE HAMPSON, LEIF SEVÓN & ROMAN WIERUSZEWSKI, EUROPEAN COMM'N, FINAL REPORT: THE IMPLEMENTATION OF CERTAIN HUMAN RIGHTS CONVENTIONS IN SRI LANKA 118 (2009), *available at* http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/SNAA-7WZ5BY-full_report.pdf/$File/full_report.pdf.

[320] *Id.* at 31–117.

[321] Bate Felix & Susan Fenton, *EU to Halt Sri Lanka Trade Preferences Amid Human Rights Concern*, REUTERS (Feb. 15, 2010), http://www.reuters.com/article/2010/02/15/idUSLDE61E1W0.

[322] Sandun A. Jayasekera, *GSP+ to End Midnight Today*, DAILY MIRROR (Aug. 14, 2010), http://print.dailymirror.lk/news/front-page-news/18479.html.

[323] *Id.*

[324] *EU to Withdraw Sri Lanka Trade Concession Deal*, BBC (July 5, 2010), http://www.bbc.co.uk/news/10514634.

[325] DT Kingsley Bernard, *Ways to Cushion Economic Shock After GSP+ Withdrawal*, DAILY NEWS (Sept. 2, 2010), http://www.dailynews.lk/2010/09/02/bus21.asp.

threat of GSP-related orders moving out of Sri Lanka . . . to countries like India or Bangladesh."[326]

In sum, the European Union advanced its foreign policy objectives in Sri Lanka by withdrawing benefits consistent with its WTO obligations. Rather than resort to draconian measures that violate the WTO—such as a trade embargo or import quota—removing tariff benefits obviated the need to invoke the Article XXI security exception.

D. Nullification and Impairment of Benefits

In rare cases, a Member State may challenge the conduct of another Member State that nullifies or impairs expected trade benefits, even in the absence of a WTO violation.[327] The theory of the "non-violation remedy" is that Member State action that does not violate the WTO may nonetheless undermine the benefits of promises made during tariff negotiations.[328] "The idea underlying [the non-violation remedy] is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement."[329]

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[326] Santhush Fernando & Azhar Razak, *GSP Crisis Prompts Top Apparel Firms to Look Beyond Lanka*, THE BOTTOM LINE (Sept. 5, 2010), http://www.thebottomline.lk/2010/09/05/page1.html (quoting Joint Apparel Association Forum (JAAF) secretary-general Rohan Masakorala).

[327] GATT 1947, *supra* note 9, art. XXIII ("If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of . . . (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement . . . the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned."); *id.* art. XXIII(2) ("If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances.").

[328] James P. Durling & Simon N. Lester, *Original Meanings and the* FILM *Dispute: The Drafting History, Textual Evolution, and Application of Non-Violation Nullification or Impairment Remedy*, 32 GEO. WASH. J. INT'L L. & ECON. 211, 213 (1999).

[329] Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 185, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC—Asbestos (Appellate Body)*] (emphasis and citations omitted), *available at* http://www.wto.org/english/tratop_e/dispu_e/135abr_e.pdf; *see also* Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, ¶¶ 10.79–10.80, WT/DS44/R (Mar. 31, 1998) [hereinafter *Japan—Measures Affecting Consumer Film*], *available at* http://www.wto.org/english/tratop_e/dispu_e/44r00.pdf; Panel Report, *European Economic Community—Payments and Subsidies Paid to Processors and*

The remedy for a successful non-violation claim is unique. Because there is no WTO violation, the Member State is not required to remove the measure that nullifies or impairs the anticipated benefit.[330] As for damages, the WTO's recommendation is for a "mutually satisfactory adjustment,"[331] a standard that is distinct from, and likely lower than, violation cases where the level of authorized suspension of concessions is "equivalent to the level of nullification or impairment."[332]

The drafting history indicates that the non-violation remedy was intended to cover measures invoked under the security exception.[333] The Indian delegation, in particular, considered it critical to provide Member States with the power to challenge abuses of the security exception using the non-violation remedy, because "the knowledge of the possibility of such counter action would serve as a deterrent to any misuse of the [security] exceptions."[334] The drafting committee recognized that this remedy was appropriate for security exception invocations:

> The working party considered that this sub-paragraph [on the NVNI remedy] would apply to the situation of action taken by a Member . . . pursuant to [Article XXI of GATT 1947]. Such action, for example, in the interest of national security in time of war or other international emergency would be entirely consistent with the Charter, but might nevertheless result in the nullification or impairment of benefits accruing to other Members. Such other Members could, under those circumstances, have the right to bring the matter before the Organization, not on the ground that the measure taken was inconsistent with the Charter, but on the ground that the measure so taken effectively nullified benefits accruing to the complaining Member.[335]

Producers of Oilseeds and Related Animal-Feed Proteins, ¶¶ 144–46, GATT/L6627–37S/86 (Dec. 14, 1989) (*adopted* Jan. 25, 1990), *available at* http://www.wto.org/english/tratop_e/dispu_e/88oilsds.pdf; Panel Report, *Treatment By Germany of Imports of Sardines*, ¶ 16, GATT/G/26-IS/53 (Oct. 31, 1952), *available at* http://www.wto.org/english/tratop_e/dispu_e/52sardns.pdf; Panel Report, *The Australian Subsidy on Ammonium Sulphate*, ¶ 12, GATT/CP 4/39 (Apr. 3, 1950), *available at* http://www.wto.org/english/tratop_e/dispu_e/50amosul.pdf.

[330] Dispute Settlement Understanding, *supra* note 152, art. 26:1(b).

[331] *Id.*

[332] *Id.* art. 22:4.

[333] *See* C. O'Neal Taylor, *Impossible Cases: Lessons Learned from the First Decade of WTO Dispute Settlement*, 28 U. PA. J. INT'L ECON. L. 309, 389 (2007); *see also Notes of the Second Meeting*, *infra* note 334, at 1.

[334] Conference on Trade and Employment, Jan. 10, 1948, *Notes of the Second Meeting, Sixth Committee: Organization, Sub-Committee I (Article 94)*, ¶ 3, E/Conf .2/C.6/W.32 (1948), *available at* http://www.wto.org/gatt_docs/English/SULPDF/90200141.pdf.

[335] Conference on Trade and Development, Jan. 9, 1948, *Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII*, at 2, E/Conf .2/C.6/W.30, *available at* http://www.wto.org/gatt_docs/English/SULPDF/90200138.pdf.

Thus, the non-violation remedy addresses security measures that cannot reasonably be anticipated, discouraging unreasonable invocations, and is available to a Member State subject to unforeseeable trade sanctions.

Recourse to the non-violation remedy has been rare, reflecting the fact that it is an "exceptional remedy" that "should be approached with caution."[336] This follows from the fact that Member States "negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules."[337] The infrequent success of a non-violation remedy suggests that this approach may be relevant in only the most controversial national security invocations.

A non-violation claim is available when a concession has been negotiated and a subsequent measure is adopted that could not have been reasonably anticipated, thereby reducing the value of the negotiated concession.[338] A Member State invoking a non-violation claim has the burden of establishing that a benefit has been nullified or impaired as a result of the other Member State's lawful action.[339] In meeting that burden, the key question is whether a trade restriction "could reasonably have been anticipated at the time" the Member States were negotiating tariff concessions.[340] If a future security measure is reasonably foreseeable at the time Member States engage in tariff negotiations, then a benefit has not been nullified or impaired when the subsequent measure is imposed.[341]

Thus, for example, in the case of European Communities-Measures Affecting Asbestos, the WTO panel held that Canada could reasonably anticipate that France might adopt restrictive measures—including an import ban—on the use of asbestos.[342] The accumulated scientific evidence over the course of several decades may not have made a future import ban certain, but it created "a climate which should have led Canada to anticipate a change in the attitude of importing countries."[343] Moreover, public health measures taken by other Member States created "an environment in which the adoption of similar measures by France, is

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[336] *EC—Asbestos (Appellate Body)*, *supra* note 329, ¶ 186.

[337] *Japan—Measures Affecting Consumer Film*, *supra* note 329, ¶ 10.36.

[338] Kyle Bagwell et al., *The Boundaries of the WTO: It's a Question of Market Access*, 96 AM. J. INT'L L. 56, 65 (2002).

[339] Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8.283, WT/DS135/R (Sep. 18, 2000) [hereinafter *EC—Measures Affecting Asbestos*], *available at* http://www.worldtradelaw.net/reports/wto panels/ec-asbestos(panel).pdf.

[340] *Id.* ¶ 8.289; *see also Japan—Measures Affecting Consumer Film*, *supra* note 329, ¶ 10.61 ("[F]or expectations to be legitimate, they must take into account all measures of the party making the concession that could have been reasonably anticipated at the time of the concession.").

[341] *EC—Measures Affecting Asbestos, supra* note 339, ¶ 8.270.

[342] *Id.* ¶ 8.301.

[343] *Id.* ¶ 8.297.

no longer unforeseeable."[344] In light of scientific developments and the actions of other Member States, the Panel concluded that Canada failed to present detailed justifications to support its claim that it could not have anticipated a French import ban on asbestos.[345]

As applied to the security context, the fact that Article XXI is self-judging precludes a finding that security measures violate WTO obligations. But it does not prevent a WTO panel from finding that a benefit has been nullified or impaired because of these measures. In some cases, such as the Arab League boycott of Israel or the United States boycott of Cuba, it will be difficult for a Member State to argue that it had any reasonable expectations of WTO benefits. In such contexts, security measures often pre-date any tariff concessions, and subsequent security measures are to be anticipated in light of past practices.

By contrast, Saudi Arabia's accession commitment to end the secondary boycott against Israel is a trade benefit that gives rise to legitimate expectations.[346] In the event Saudi Arabia reinstates a secondary boycott against Israel, anticipated trade benefits would be nullified or impaired, and a Member State could bring a non-violation claim. Subsequent WTO accession negotiations with other Arab League countries also could create legitimate expectations that they will not impose a primary or secondary boycott against Israel.

Likewise, Member States should anticipate the imposition of trade measures to protect national security interests or to restore international peace and security. If a Member State uses force offensively, it can anticipate that other Member States will respond with trade measures that impair WTO benefits. A belligerent Member State has no legitimate expectation that normal trade relations will continue in a state of war or other international emergency. Similarly, with the rising threat of international terrorism Member States can be expected to impose sanctions against a State sponsoring terrorism. A non-violation claim is unavailable under these circumstances.

On the other hand, a bad faith invocation of the security exception that cannot reasonably be anticipated may give rise to a successful non-violation claim. Member States cannot be expected to anticipate trade barriers imposed because of a purported international emergency that does not in fact exist. Nor can they anticipate export or import controls under Article XXI(b)(ii) on goods that do not have military applications. In such circumstances, there would be no obligation to remove the trade measures, but a non-violation claim could provide an appropriate remedy.

IV. WHY NATIONS OBEY THE SECURITY EXCEPTION

This Article posits that State practice supports a self-judging interpretation of the security exception. Because it is the only self-judging exception in the WTO, it

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[344] *Id.*

[345] *Id.* ¶ 8.301.

[346] *See supra* text accompanying notes 183–190.

poses grave risks for the institution, with the potential to be the loose thread that unravels the entire fabric of compliance. If Member States can invoke a WTO exception to all trade obligations at their sole discretion, the potential for abuse is enormous. But despite the risks, the exception is surprisingly uncontroversial. Member States routinely and voluntarily comply with textual limits of the security exception,[347] or if they do not, their actions are almost never challenged before GATT/WTO adjudicative bodies.[348]

As discussed in the previous section, part of the reason Member States comply with the limits of the security exception may be because the WTO provides other avenues to advance security interests.[349] But these mitigating factors are unlikely to offer a complete answer to sixty years of security crises. There must be more to Member State conduct than simply ease of compliance.

The general and consistent practice of complying with a self-judging rule raises larger issues beyond the WTO. While the self-judging nature of Article XXI remains contested, it is undeniable that it has been invoked at the sole discretion of the Member States. As such, it provides a useful prism through which to consider theories of international law compliance. Unlike almost every other aspect of the WTO, there is no obvious sanction for ignoring its textual limits. So why does a State typically invoke Article XXI(b)(ii) to restrict military and dual-use goods, but not purely civilian products? Why does a State not declare virtually every crisis—economic, political, social, or military—an "emergency in international relations" under Article XXI(b)(iii)? Why does a State not consider virtually any national policy an "essential security interest"? With billions of dollars at stake in WTO litigation,[350] why not invoke the security exception in bad faith? In short, what is to prevent Article XXI from becoming the exception that swallows the rule?

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[347] *See supra* Part I.

[348] *Id.*

[349] *Id.*

[350] Of the nineteen Article 22.6 Arbitration Decisions authorizing the prevailing Member State to suspend concessions (i.e., raise tariffs equal to the harm suffered), over half a dozen have exceeded $100 million per year, and one exceeded $4 billion per year. *See* Panel Report, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/R (Aug. 28, 2000) (awarding C$344 million per year in suspensions against Brazil); Panel Report, *Canada—Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/AB/R (Feb. 17, 2003) (awarding US$248 million per year in suspensions against Canada); Panel Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/ARB (July 12, 1999) (awarding US$117 per year in suspensions against the European Community); Panel Report, *European Communities—Regime for the Importation, Sale, and Distribution of Bananas*, WT/DS27/AB/R (Mar. 24, 2000) (awarding US$202 million per year in suspensions against the European Community); Panel Report, *United States—Subsidies of Upland Cotton*, WT/DS267/AB/R (Aug. 31, 2009) (awarding US$147.4 million per year in suspensions against United States); Panel Report, *United States—Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/R (Aug. 30, 2002) (awarding US $4 billion per year in suspensions against the United States).

For almost fifty years under GATT and fifteen years under the WTO, compliance has not been a cause for significant concern. Since 1995, the general exceptions in Article XX have been the subject of WTO litigation at least twenty-two times—one out of every six cases before the WTO.[351] During that same time the Article XXI security exception has not been invoked in WTO litigation a single time.[352] While there were ample opportunities to do so in bad faith, Member States never sought to justify their behavior before a WTO panel on the grounds that their conduct fell within the terms of the security exception.

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[351] Panel Report, *Argentina—Measures Affecting the Export of Bovine Hides*, WT/DS155/R (Aug. 31, 2001); Panel Report, *Australia—Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R (Aug. 9, 2010); Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007); Panel Report, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/AB/R (June 30, 1997); Panel Report, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R (Aug. 30, 2004); Panel Report, *China—Measures Affecting Imports of Automobile Parts*, WT/DS339, 340, 342/AB/R (Dec. 15, 2008); Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009); Panel Report, *Colombia—Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/AB/R (Apr. 27, 2009); Panel Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R (Apr. 25, 2005); Panel Report, *European Communities—Antidumping Measure on Farmed Salmon from Norway*, WT/DS337/R (Nov. 16, 2007); Panel Report, *European Communities—Conditions for Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004); *EC—Measures Affecting Asbestos*, *supra* note 339; Panel Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26, DS48/AB/R (Jan. 16, 1998); Panel Report, *European Communities—Protection of Trademarks and Geographic Indications*, WT/DS174, DS290/AB/R (Mar. 15, 2004); Panel Report, *Korea—Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, WT/DS161, 169/AB/R (Dec. 11, 2000); Panel Report, *Mexico—Measures Affecting Telecommunications Services*, WT/DS204/R (Apr. 2, 2004); Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 6, 2006); Panel Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217, 234/AB/R (Jan. 16, 2003); Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998); Panel Report, *United States—Measures Relating to Shrimp from Thailand*, WT/DS343/AB/R (Feb. 29, 2008); Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005); Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996).

[352] This is despite obvious opportunities to invoke the national security exception. For example, Colombia could have defended its requirement that certain goods from Ecuador arrive only through one seaport, Barranquilla, and one airport, Bogota, as valid security measures in its ongoing battle against drug trafficking. It did not do so, and lost the case. The WTO panel ruled that the port restrictions violated WTO rules and were not justified under general exception Article XX(d). Panel Report, *Colombia—Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R (Apr. 27, 2009).

Three competing theories to explain why nations obey international law—described here as the coercion theory, normative theory, and the rational choice theory—may help clarify why Member States typically do not invoke the security exception in bad faith.

A. Coercion Theory

The coercion theory assumes that States comply with an international obligation because they are forced to do so. Coercion focuses on threats and force in securing compliance, without regard to the normative content of the rule or complex calculations of self-interest.[353] Coercion may include either institutional sanction or authorized self-help.[354]

At one level, coercion may explain Member States' high rate of compliance with WTO decisions. The institution itself has no method of coercion, but it has an elaborate procedure for self-help. Following the deadline for bringing a measure into compliance, a Member State has the choice of either compensating the injured Member State (which almost never occurs), or facing WTO-authorized suspension of concessions, typically in the form of higher tariffs.[355] The specter of severe economic sanctions may be a key factor inducing compliance in over ninety percent of the cases in which the WTO finds a violation.[356]

As applied to the security exception, the problem with this approach is threefold. First, the sanction of self-help will often be ineffective in dealing with security exception violations. The WTO sanctions regime assumes trade between countries, which often is not the case when the security exception is involved. For example, many Member States expressed concern that the Reagan administration was not acting in good faith in imposing a trade embargo on Nicaragua.[357] So too did other countries when an embargo was imposed in the Falkland War.[358] Assuming that a WTO panel reviewed such trade embargos and found a violation, there would be no sanction for non-compliance. Nicaragua could not suspend concessions (i.e., raise tariffs on U.S. products) because there were no such products entering Nicaragua. A trade embargo banning all imports and exports leaves the WTO impotent to coerce compliance.

Second, a strong majority of Member States interpret the security exception as self-judging, and no judicial interpretation has concluded otherwise. As such, there

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[353] *See, e.g.*, MARKUS BURGSTALLER, THEORIES OF COMPLIANCE WITH INTERNATIONAL LAW 86 (2005); JOHN MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 86–87 (2001); HANS MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 49 (5th ed. 1978); KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS 186 (1979); Stephen D. Krasner, *State Power and the Structure of International Trade*, 28 WORLD POLITICS 317, 322 (1976).

[354] MALCOLM SHAW, INTERNATIONAL LAW 4, 848 (5th ed. 2003).

[355] Dispute Settlement Understanding, *supra* note 152, art. 22.

[356] *See supra* text accompanying notes 4–8.

[357] *See supra* text accompanying notes 97–126.

[358] *See supra* text accompanying notes 80–96.

is no institution or Member State that can impose its will on others to coerce compliance. If good faith compliance is what the Member State says it is, then there will be no violation justifying coercion. An unreviewable rule precludes a formal finding of a violation, which precludes coercion to secure compliance. A non-violation claim is theoretically possible, but it rarely has been invoked and never in the context of the security exception.[359]

Third, to date there has been no instance of a sanction imposed for a security exception violation. If no violation has ever been found, and no sanction ever imposed, it is unlikely that coercion explains compliance. Of course, grave abuse of the security exception could result in a future WTO interpretation that imposes real sanctions, either in the form of good faith review or reliance on an objective standard.[360] No State can simply assume that the security exception will always be unreviewable. As with most domestic sanctions, the mere threat of enforcement, in many circumstances, may be enough to induce compliance. But because a violation of the security exception has never been found, the fear of sanction is unlikely to promote compliance.

B. Normative Theory

Normative understandings of compliance maintain that States honor international law commitments because of a belief that the rules are authoritative and binding. On this theory, States are committed to rules *qua* rules. Sanctions are useful, but not essential to secure compliance. Sanctions do more than coerce, they identify norms as legally binding and play a role in internalizing respect for the legal rules.[361] "The application of sanctions reminds others that sanctions exist, which in turn, supports more voluntary law compliance . . . . Penalties or sanctions . . . [promote] voluntary co-operation in a coercive system."[362] But a rule does not necessarily require sanction for it to be law, for its status as law is recognized through other indicia. These include the process through which a rule is formed; its treatment as law by authoritative bodies; its formal integration within a legal system that expects compliance; and its inherent normative legal validity.

Normative theories help explain compliance with an unreviewable rule. As for sanctions as a signaling function, even if the security exception is self-judging, Member States voluntarily act as if its limits are real. Perhaps they do so because they are acting in the shadow of sanction, with the self-judging rule surrounded by other rules that are subject to sanction.[363] This "sanctions environment" promotes

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[359] *See* Fernando & Razak, *supra* note 326; *see also supra* text accompanying note 326.

[360] *See supra* text accompanying notes 48–49.

[361] MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT 10 (2008).

[362] *Id.* at 11 (quoting H.L.A. HART, THE CONCEPT OF LAW 193 (1961)).

[363] For example, the General Exceptions in Article XX are the subject of extensive WTO litigation. The process of invoking those exceptions assumes that they are binding and subject to WTO sanction for non-compliance. The Article XXI security exception is

the legitimacy of the rule. The possibility of sanction supports an interpretation of the norm as a legal obligation deserving respect.

The process of formation also supports the security exception's legal status. Its incorporation within a formal multilateral treaty enhances its status as law, despite the fact that it is a self-judging rule. As part of a treaty, norms of compliance—*pacta sunt servanda*—are triggered: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[364] A rule embedded within a formal treaty that is supported by a formal institution gives it legitimacy, which exerts a pull toward compliance.[365]

Pronouncements from authoritative bodies further support Member State compliance with the limits of the security exception. During the many debates at GATT Council meetings, there was unanimous agreement that Member States should only invoke the exception in good faith. Likewise, the non-binding GATT Panel report in *United States-Trade Measures Affecting Nicaragua* presumes that Member States will comply with their trade obligations and encourages Member States to adopt a formal interpretation of the security exception. Both diplomatic and judicial pronouncements promote good faith compliance.[366] While not binding, they enhance the normative value of the security exception.

The formal integration of the security exception within the WTO regime strongly reinforces Member State compliance. Despite its status as a self-judging exception, it is surrounded by rules backed with sanctions within a cooperative system, creating a culture of compliance. To use H.L.A. Hart's terminology, the WTO is a "system," not a mere "set of rules,"[367] and that system includes a "rule of recognition"—a standard by which rules are recognized as law.[368] Moreover, because the WTO is a legal system, even unenforceable rules within that regime are given legal significance. The regular meetings of Member States at the GATT and WTO Councils, in particular, illustrate the interactive process of justification, discourse, and persuasion that promotes compliance.[369]

Finally, the limitations on the security exception have inherent legal validity: it stipulates how a State "ought" to act.[370] As Hans Kelsen would put it, what a

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likely interpreted in the shadow of these other general exceptions.

[364] Vienna Convention, *supra* note 55, art. 26.

[365] THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990).

[366] Panel Report, *United States—Trade Measures Affecting Nicaragua*, ¶¶ 5.5, 5.18, L/6053 (Oct. 13, 1986).

[367] H.L.A. HART, CONCEPT OF LAW 213–37 (2d ed. 1994); NEIL MACCORMACK, H.L.A. HART 138 (2d ed. 2008).

[368] HART, *supra* note 367, at 110.

[369] For more on the "managerial model" of compliance, see ABRAM CHAYES & ANTONIA CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 109–11 (1995). For a discussion of the "institutional enmeshment" of the security exception within the WTO framework, see Andrew Emmerson, *supra* note 44, at 149–53.

[370] UTA BINDREITER, WHY GRUNDNORM?: A TREATISE ON THE IMPLICATIONS OF KELSEN'S DOCTRINE 30 (2002).

State "ought" to do reflects not only a command but also an authorization to perform.[371] A State "ought" to carefully balance the competing policies of protecting security needs and promoting stable trading relations.[372] States understand the validity of this compromise and act accordingly. It is a self-judging rule, but it is honored (with a margin of appreciation) because it has internal validity for the Member States.[373] On this theory, States comply in part because they have internalized the rule that the security exception should only be invoked in good faith.[374]

Thus, traditional compliance theories go far toward explaining why the self-judging security exception does not undermine the WTO. It is a self-judging rule surrounded by rules backed by sanctions, giving it legitimacy. Its status as treaty law creates expectations of good faith compliance. Its integration within a formal legal system promotes Member State recognition of the security exception as a legally enforceable rule. The rule is established within an institution that has legitimacy and respect. The limits in the security exception are inherently logical, reflecting a balance of competing interests that Member States understand and internalize.

C. Rational Choice Theory

Rational choice scholars have offered a competing view for international law compliance. Under this theory, States are rational, self-interested actors that do not concern themselves with the welfare of other States or the legitimacy of a rule of law, unless it fits into the States' overall interest-maximization calculus.[375] With rational choice, there is no presumed preference for compliance. What States do care about are their own gains or payoffs: they will comply with international law if it is in their interest to do so.[376] Specifically, States comply with international law because there are costs for non-compliance, particularly in terms of retaliation,

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[371] *Id.*

[372] Panel Report, *United States—Trade Measures Affecting Nicaragua*, ¶ 5.16, L/6053 (Oct. 13, 1986), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91240197.pdf.

[373] For a discussion of internalization of international law norms, see Harold Koh, *Why Do Nations Obey International Law*, 106 YALE L.J. 2599 (1997).

[374] *Id.* at 2602.

[375] *See, e.g.*, ROBERT AXELROD, THE COMPLEXITY OF COOPERATION: AGENT-BASED MODELS OF COMPETITION AND COLLABORATION 57–62 (1997); JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW 39 (2005); ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 17 (2008); Robert Axelrod & Robert Keohane, *Achieving Cooperation Under Anarchy: Strategies and Institutions*, 38 WORLD POL. 226, 229 (1985); Robert Jervis, *Cooperation Under the Security Dilemma*, 30 WORLD POL. 167, 177 (1978).

[376] *See, e.g.*, AXELROD, *supra* note 375; GOLDSMITH & POSNER, *supra* note 375; GUZMAN, *supra* note 375; Axelrod & Keohane, *supra* note 375; Jervis, *supra* note 375.

reciprocity, and reputation.[377]

Rational choice theorists have made generalized predictions as to why nations comply with international law, and the WTO is often a favorite application of their theory.[378] But rational choice theorists have never attempted to explain State behavior with respect to self-judging exceptions. If compliance is all about payoffs, then why do States not abuse an unreviewable rule?

As discussed above, part of the answer could be that States comply with the limits of the security exception because of fear of sanction. Even if there is no sanction, the possibility of sanction may be enough to tip the balance toward compliance. But for rational choice theorists, this answer is insufficient because the threat of sanction is not credible. Unlike almost every other aspect of WTO law, the WTO's response to an Article XXI violation has never been tested. Every time an alleged abuse of Article XXI has been challenged, something prevented a formal institutional response. The WTO has general credibility for punishing violators, but not for punishing alleged Article XXI violators.

Alternatively, reciprocity may explain good faith compliance with the security exception. States do not abuse the security exception because doing so will encourage other States to do the same. This may explain why economically powerful States are careful in how they invoke the security exception against other powerful States. But it does not explain unreasonable invocations against powerless States. Though, as noted above, some weaker States argue that that is precisely what happens.[379]

A broader understanding of reciprocity, however, would say that States enjoy reciprocal benefits from enforceable trade rules. The cost of non-compliance with the security exception—even when invoked against powerless States—is a weakening of the entire system. The genius of the WTO is that it is a system of mutually reciprocal concessions. The State is committed to maintain this system because of the benefits it receives from enforceable trade rules. The cost of non-compliance is the diminished credibility of an institution that provides the State with significant benefits.

Reciprocity also may explain why injured States do not challenge more dubious invocations of the security exception. Almost every State will have an interest in invoking the security exception at one time or another. Perhaps Saudi Arabia cannot justify its primary boycott against Israel on security grounds. But reciprocity motivates Israel to leave the question ambiguous, broadening the scope of its authority to act in its own security interests.

As for reputation, the cost of non-compliance is that a State earns a reputation as an unreliable trading partner. Reputational costs may explain why States will push the envelope on the security exception, but go no further. As detailed above, there are numerous examples in which it is difficult, but not impossible, to argue

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[377] GUZMAN, *supra* note 375, at 33–34.

[378] *Id.* at 7, 163–70; Marc Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L.J. 158, 168 (2000).

[379] *See supra* text accompanying notes 117–118.

that a trade restriction is necessary for essential security interests. What we almost never see are invocations of the security exception where it is impossible that a trade barrier is applied for security reasons. In dozens of cases, States will invoke general exceptions to justify their behavior, but not argue that the security exception applies.[380]

Of course, under a rational choice model, reputation for compliance matters least when the stakes are large.[381] The security exception falls at the intersection of high-stakes benefits for advancing security interests and low-stakes reputational costs of non-compliance with trade obligations. Moreover, this cost may be diminished because the reason for a violation—promoting security concerns—alters the magnitude of reputational cost.[382] Member States will be more forgiving of a WTO violation when the stakes are high, which undermines the argument that reputational costs explain the high rate of security exception compliance.

Finally, rational choice theory may explain compliance with the security exception on the basis of the low cost of compliance. The security exception is broad enough to cover most security concerns, and to the extent it is not, the WTO provides other means for a State to address security concerns. The mitigating factors outlined above afford significant freedom of action, while remaining in compliance with WTO obligations. In other words, the reason for effective compliance with Article XXI is that the standards for compliance are so low.[383] On this theory, bad faith invocations are rare because they are rarely necessary.

Thus, rational choice theory offers a competing, persuasive theory for compliance. Reciprocity and reputation, in particular, go far toward explaining why nations comply with the limits of the security exception.

V. CONCLUSION

In *The Wealth of Nations*, Adam Smith identified only one type of government action that justified a departure from free trade: laws designed to protect national defense.[384] Under the Act of Navigation, Great Britain adopted a trade embargo against Holland, prohibiting Dutch ships from trading with the British settlements or with the British Isles.[385] According to Smith, the effect of these laws was to exclude the Dutch, "the great carriers of Europe . . . from being

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[380] *See supra* text accompanying notes 61–62, 116–17.

[381] Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1883 (2002).

[382] *Id.* at 1862.

[383] On effectiveness versus compliance, see Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations, and Compliance*, *in* HANDBOOK OF INTERNATIONAL RELATIONS 538, 539 (Walter Carlsnaes et al. eds., 2003).

[384] ALBERTO HIRSCHMAN, NATIONAL POWER AND THE STRUCTURE OF FOREIGN TRADE 5 (1945).

[385] ADAM SMITH, THE WEALTH OF NATIONS BOOKS IV–V, at 40 (Andrew Skinner ed., 1999).

the carriers to Great Britain."[386] When these laws were passed, Smith wrote, while "England and Holland were not actually at war, the most violent animosity subsisted between the two nations."[387] Although born of national animosity, these laws were "as wise . . . as if they had all been directed by the most deliberate wisdom . . . which . . . recommended the diminution of the naval power of Holland, the only naval power which could endanger the security of England."[388] Of course, the navigation laws were "not favourable to foreign commerce, or to the growth of that opulence which can arise from it."[389] But "as defense . . . is of much more importance than opulence . . . the act of navigation is, perhaps, the wisest of all commercial regulations of England."[390]

The WTO security exception carries forward Adam Smith's great insight: defense is more important than free trade. The security exception is an anomaly, a unique provision in international trade law that grants the Member States freedom to avoid trade rules to protect national security. In the long history of GATT and the short history of the WTO, that freedom has never been challenged seriously. Member States understand the exception to be self-judging, and presume that it will be exercised with wisdom and in good faith.

Thus far, the record has been impressive. While no doubt there have been departures, the self-judging security exception has worked reasonably well. It certainly has not undermined the effective functioning of the WTO. The overwhelming majority of security measures are unregulated by international trade law, and those few that have been challenged were never reviewed. International trade law, viewed by many as the most effective and intrusive branch of international law, has preserved one enclave of complete national sovereignty. There are many possible explanations for its success. Its ambit is sufficiently broad to cover most security concerns, and it is reinforced by other WTO provisions that facilitate compliance.

A self-judging rule that Member States honor provides helpful insights into broader questions regarding nations obeying other international laws. Any number of theories, including traditional normative theories of compliance, and more controversial rational choice theories that focus on national self-interest, can explain the strong compliance record. The one theory that has little explanatory power is a pure coercion theory. Whatever may be motivating Member States to respect the limits of the security exception, it is not fear of sanction.

Widespread compliance with an unreviewable, self-judging rule suggests international law has moved beyond a primitive state. Fifty years ago, H.L.A. Hart wrote,

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[386] *Id.*
[387] *Id.*
[388] *Id.* at 40–41.
[389] *Id.* at 41.
[390] *Id.*

> perhaps international law is at present in a stage of transition toward acceptance . . . which would bring it nearer in structure to a municipal system. If, and when, this transition is completed the formal analogies, which at present seem thin and even delusive, would acquire substance, and the skeptic's last doubts about the legal 'quality' of international law may then be laid to rest.[391]

At least with respect to international trade law, it appears such a transition has already occurred.

[391] HART, *supra* note 367, at 236–37.