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# VITAL INTERESTS AND THE LAW OF GATT: AN ANALYSIS OF GATT'S SECURITY EXCEPTION†

*Michael J. Hahn\**

## I. INTRODUCTION

The General Agreement on Tariffs and Trade ("GATT")<sup>1</sup> "was negotiated on the basis of reciprocity and mutual advantage [and] is characterized by great flexibility in its provisions, especially those relating to exceptions from the general rules, of measures that may be taken in case of extraordinary difficulties and of those for resolving conflicts between the Contracting Parties."<sup>2</sup> Although 40 years of practice and 7 rounds of trade negotiations<sup>3</sup> in particular have added a substantial degree of specificity to its rules, this observation is still a valid description today.

GATT deals with a technical matter — the regulation of transnational trade. It follows that most of its exceptions deal primarily with "technical" problems caused by imports or exports of goods.<sup>4</sup> Articles XX and XXI of GATT deal with a different kind of situation. The former grants the Contracting Parties a reserved area of sovereignty in some core domestic subject-matters, *e.g.*, the protection of public morals, protection of human, animal and plant life, health, and protection of national treasures of artistic, historic or archaeological value.<sup>5</sup>

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1. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

2. *International Fruit Company*, 18 E.C.R. 1240 (1972).

3. See J. JACKSON, *THE WORLD TRADING SYSTEM* 52 (1989).

4. See generally J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 535 (1969). For an excellent study of GATT article XIX, see M. BRONCKERS, *SELECTIVE SAFEGUARD MEASURES IN MULTILATERAL TRADE RELATIONS* (1985).

5. See generally K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970).

Article XXI, the subject-matter of this paper, reads as follows:

Nothing in this Agreement shall be construed

- (a) to require any Contracting Party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any Contracting Party from taking any action which it considers necessary for the protection of its essential security interests
  - (i) relating to fissionable materials or the materials from which they are derived;
  - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly 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.

Even compared to the broadly tailored exceptions of article XX, article XXI, and in particular XXI(b)(iii), strikes the reader as coming rather close to granting a *carte blanche* to the Contracting Parties of the "constitution of world trade"<sup>6</sup> to strip off any legal bonds imposed on them — leaving them free to apply the rules as they wish. By doing so, article XXI is reminiscent of the so-called "vital interests" clause which essentially negates the international legal order in times of distress.<sup>7</sup> For this reason, this paper will focus on article XXI(b)(iii) which is the part of the security exception that has played a considerable role in the practice of GATT. Due attention will also be given to the other provisions of paragraph (b) and to paragraph (a). Because of the particular problems Chapter VII and other pertinent parts of the UN Charter pose, the intriguing intertwining between GATT and the UN Charter must be left out of the analysis in this article.<sup>8</sup> This analysis will examine whether the perception of article XXI as set forth above is correct or whether the other provisions of GATT, the law of treaties and general public international law command a different outcome. In other words, this article will ask to what extent article XXI

6. See J. JACKSON, *supra* note 3, at 30.

7. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 220 (June 22.), (Oda, J., dissenting); Partsch, *Vital Interests* in 10 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 526 (1987).

8. For economic enforcement measures under UN Charter provisions see A. LOWENFELD, *PUBLIC CONTROLS OF INTERNATIONAL TRADE* (1983); von Schenck, *Das Problem der Beteiligung der Bundesrepublik Deutschland an Sanktionen der Vereinten Nationen*, 29 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 257 (1969); see also *Final Act of the United Nations Conference on Trade and Employment*, UN Doc. E/CONF.2/78 (1948) [hereinafter ITO Charter].

allows Contracting Parties to escape obligations of GATT and to what extent it should.

In answering this question, it must be kept in mind that the General Agreement on Tariffs and Trade does not operate in a legal or factual vacuum; it is part of the general system of legal rules governing the relationship between States. Although international economic law, perhaps more than any other area of international law, recognizes the ever-increasing interdependence of States and thus the limited meaning of State sovereignty,<sup>9</sup> it must accept that State sovereignty remains the basis of present-day international law. The security exception, being the Member States' sovereignty safeguard provision,<sup>10</sup> reflects this recognition.

Article XXI has particular relevance in two factual settings: in the first place, it allows Contracting Parties — in certain instances — to use economic measures for political means in a way which would be considered illegal under the regular regime of GATT. Although article XXI has been invoked explicitly on only a very limited scale during the 40 years of GATT application, the use of economic measures for political purposes has been and will continue to be an important option of self-enforcement of what the acting State will consider its right under international law. Moreover, given the prohibition on the use of force and the weakness of international enforcement procedures, the continued use of such measures even seems desirable from the perspective of the effectiveness of international law.<sup>11</sup>

Article XXI might, however, also be used in situations which are the very result of the success of GATT's underlying policies of fostering free trade: the comparative advantage of country A's industry might threaten the existence of the pertinent industry in country B. If country B considers the existence of this industry as essential to its actual or potential security, article XXI might be considered the easiest way out of the discipline of GATT. This approach to article XXI has been recorded at least once in the past.<sup>12</sup> The link between the

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9. See J. JACKSON & W. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 2 (2d ed. 1986).

10. See the pertinent discussions reported in GATT Council, *Minutes of Meeting held May 29, 1985*, GATT Doc. C/M/188 (June 28, 1985) at 4-5 (Restricted) and GATT Council, *Minutes of Meeting held July 17-19, 1985*, GATT Doc. C/M/191 (Sept. 11, 1985) at 41-42 (Restricted). See generally M. VAN MEERHAEGHE, *INTERNATIONAL ECONOMIC INSTITUTIONS* 124 (5th ed. 1987).

11. Doehring, *Die Selbstdurchsetzung völkerrechtlicher Verpflichtungen*, 47 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 44 (1987).

12. GATT Council, *Minutes of Meeting held October 31, 1975*, GATT Doc. C/M/109 (Nov. 10, 1975); Sweden — *Import Restrictions on Certain Footware*, GATT Doc. L/4250 (Nov. 17, 1975), and GATT Doc. L/4250/Add.1 (Mar. 15, 1977).

existence of so called key industries,<sup>13</sup> their competitiveness and national security is a notion which has attracted considerable attention in public debates in the West recently because of the perception of a diminished military threat. For example, during the debates and discussions preceding the passage of the U.S. Omnibus Trade and Competitiveness Act of 1988, influential Congressmen repeatedly stressed the nexus between national security and the viability of certain national industries.<sup>14</sup>

## II. VITAL INTERESTS AND TREATY OBLIGATIONS

### A. *The Need for Escape Clauses*

Clauses allowing treaty-making parties to escape their obligations under certain circumstances are as old as international law. Specifically, many treaties list circumstances in which the content of the obligation is to be altered or not applied at all. The GATT contains several such clauses, among the most specific, articles XVIII and XIX dealing with government assistance in economic development and actions in emergencies respectively.

As a general concept, public international law has adopted the notion that every treaty contains an implied condition that it will become obsolete should a fundamental change of circumstances occur.<sup>15</sup> The *clausula rebus sic stantibus* is still a part of international law, rooted both in customary international law and in the Vienna Convention on the Law of Treaties ("VCLT").<sup>16</sup> Both concepts have in common that they bring flexibility to the legal bonds imposed by a treaty and by so doing encourage sovereigns to submit themselves to the discipline of

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13. After all, the very first of the European Communities is founded upon the idea that taking away the nation-States' (and particularly Germany's) competence to administer those key industries on their own would be a prerequisite of peace in Europe. See J. MONNET, *LES ÉTATS UNIS D'EUROPE ONT COMMENCÉ* 135 (1955).

14. See, e.g., the so-called Gephardt amendment, H.R. 3, 100th Cong., 1st Sess., 133 CONG. REC. H2642, 10,375-484 (1987) and statements of Senator R. Byrd before the Senate Finance Committee, *Impact of Imports and Foreign Investments on National Security: Hearing Before the Senate Comm. on Finance*, 100th Cong., 1st Sess. 36-37, 43, 50-52 (1987); *Threat of Certain Imports to National Security: Hearing Before the Senate Comm. on Finance*, 99th Cong., 2d Sess. 32-44 (1986).

15. See J. BRIERLY, *THE LAW OF NATIONS* 332 (6th ed. 1963); Haraszti, *Treaties and Fundamental Change of Circumstances*, 146 *RECEUIL DES COURS* (1975); see also *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 336 (1987). See *Free Zones of Upper Savoy and the District of Gex*, 1932 P.C.I.J. (ser. A/B) No. 46, at 156 (June 7) for an example of a decision of an international tribunal.

16. In this sense the International Court of Justice perceives article 62 of the Vienna Convention on the Law of Treaties as a codification of this doctrine. Compare *Fisheries Jurisdiction*, (U.K. v. Ice.), 1973 I.C.J. 3, 45 with L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW* 492-493 (2d ed. 1987) where the authors assert that article 62 has a more limited meaning.

an international legal regime which might otherwise appear too burdensome. It is true that the vagueness of the doctrine of the fundamental change of circumstances and article 62 of the Vienna Convention on the Law of Treaties potentially brings an element of uncertainty and instability into the world of international treaty law. However, their general acceptance is a clear indication of their necessity and a reflection of the fact that the law must offer a limited number of options to escape contractual obligations. Without such options, treaties run the danger of being disregarded even more frequently. Clear, albeit difficult to fulfill, escapes provide the necessary "breathing space" for the exercise of State sovereignty. Moreover, the need for a concept like the *clausula* is highlighted by the existence of a similar or comparable concept in almost every major legal system of the world.<sup>17</sup>

#### B. *Vital Interests and Substantive Public International Law*

The concept of vital interests goes beyond the escape clauses set forth above. Like them, it is a function of the sovereignty of States. It goes much further however: by invoking vital interests a State is granted freedom from international legal rules (possibly including *jus in bello*) when a particular set of circumstances touches its honor or (potentially) its existence. The concept of vital interests thus makes the binding force of international obligations subject to a unilateral, discretionary decision of the State and represents, in its most pronounced form, a contradiction to the understanding of international law as law (*i.e.*, a set of binding rules) amendable only by a specific and pre-agreed upon procedure. The ability to change rules whenever they hurt those whom they are to constrain is not the hallmark of a legal order.<sup>18</sup>

In general international law, this extreme notion of vital interests has disappeared. In particular, the use of force, which as set forth, is at the core of this concept, has been subjected more and more to a quite stringent regime. Under the UN Charter, several regional treaty systems and under customary international law, the use of force is *prima facie* illegal;<sup>19</sup> vital interests, or a just cause, are not, under cur-

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17. *E.g.*, the doctrine of *Wegfall der Geschäftsgrundlage* in the German Civil Law, and fundamental change of circumstances in the U.S. law of contracts.

18. Partsch, *supra* note 7, at 527.

19. U.N. CHARTER art. 2, para. 4; see *Military and Paramilitary Activities in and Against Nicaragua*, (Nicar. v. U.S.), 1986 I.C.J. 14, 187 (June 22) concerning the customary law prohibition of the use of force; see also Franck, *Who killed Art. 2(4)*, 64 AM. J. INT'L L. 809 (1970); Reismann, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984); I. BROWNIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963);

rent international law, valid justifications for the suspension of treaty norms. The use of force is legal, however, when employed for self-defense in the case of an armed attack.<sup>20</sup> As can be seen from this, the underlying concept of the "inherent right" to self-defense is similar to the theory underlying the notion of vital interests. However, the use of force is a substantially tamed instrument of sovereignty and takes due notice of the inherent limitations sovereignty faces in a way that the vital interests clause does not.

### C. *Vital Interests and Dispute Settlement*

Besides its role in substantive international law, the concept of vital interests substantially fashioned the procedural aspects of international contractual relations. The "well known reservation in the 1903 Anglo-French treaty concerning vital interests, independence, honor and third-party interest"<sup>21</sup> became a model for more than a hundred treaty clauses which excluded from arbitration sensitive issues and, as a practical effect, left it to the State to determine unilaterally if a particular dispute was fit to be submitted to final and binding arbitration.<sup>22</sup> In this pure form, again, those clauses have by and large disappeared today. However, the concept of vital interests seems to have experienced a renaissance in several proceedings before the International Court of Justice ("ICJ"). Several States, otherwise known for their commitment to the rule of law, have clearly violated their treaty obligations under the Statute of the International Court of Justice by retreating from pending proceedings before the Court by invoking vital interests either expressly or impliedly.<sup>23</sup> Some commentators also point to the domestic jurisdiction clause attached to several declarations under Article 36 of the Statute of the International Court of Justice as an example of the continuing reluctance of States to submit themselves to a rule of law administered by independent third parties.<sup>24</sup>

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Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455 (1952); W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW (1961); M. McDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961); see also ILC Draft Articles on State Responsibility, 2(2) Y.B. INT'L COMM'N 32 (1980).

20. See, e.g., Schindler & Hailbonner, *Die Grenzen des völkerrechtlichen Gewaltverbots*, in 26 BERICHT DER DEUTSCHEN GESSELLSCHAFT FÜR VÖLKERRECHT (1986); see also Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984).

21. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 31-32, para. 43 (June 22) (Oda, J., dissenting).

22. Partsch, *supra* note 7, at 527.

23. See Statement of Iceland in the Fisheries Jurisdiction case (U.K. v. Ice.), 1973 I.C.J. 3, 7 (Feb. 2); for the events in the Nicaragua case see 24 I.L.M. 246 (1985); see also Nuclear Tests (Aus. v. Fr.) 1974 I.C.J. 253 (Dec. 20).

24. The United States and the Soviet Union have proposed that all permanent members of

### III. THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND ITS SECURITY EXCEPTION

The General Agreement is the first and only global and comprehensive international treaty dealing effectively with transnational trade.<sup>25</sup> In principle, it covers trade in every category of goods and its membership is not limited to a geographically close or economically homogeneous group of States. It is obvious that a treaty system, in which almost two-thirds of all States take part,<sup>26</sup> has a need for a provision like article XXI, which allows escape from treaty obligations for non-economic reasons.

When interpreting this provision, one has to keep in mind that it is part of an international agreement governed by the law of international treaties. Although the Vienna Convention on the Law of Treaties<sup>27</sup> does not directly apply to the GATT,<sup>28</sup> its provisions reflect to a large extent the well-established rules of customary public international law relating to the interpretation of treaties.<sup>29</sup> Thus, an analysis of a treaty provision may begin with an overview of the pertinent preparatory work<sup>30</sup> and the history of its application,<sup>31</sup> GATT practice

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the UN Security Council should adhere to the jurisdiction of the International Court of Justice on the condition that whenever a State felt that questions of vital interests would be touched, it could withdraw from jurisdiction. Only the United Kingdom spoke against this proposal which, according to its view, was a step backwards. *World Court Plan Meets Difficulties*, N.Y. Times, June 24, 1990, at 9, col. 1.

25. For possible forerunners, including the Treaty of Utrecht, see J. JACKSON, *supra* note 3, at 30.

26. On January 11, 1991, Macao became the 101st Contracting Party to the GATT. 78 GATT NEWSLETTER 1, 8 (1991).

27. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, *entered into force* Jan. 27, 1980 [hereinafter VCLT].

28. VCLT, art. 4 contains the principle of non-retroactivity in the law of treaties.

29. VCLT, arts. 31-33 were accepted without any opposing vote or abstention, U.N. Doc. A/Conf. 39/11/Add.1, at 57-59. For pertinent international decisions see, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16*, at para. 94 ("in many respects be considered as a codification of existing customary law on the subject."); *Beagle Channel Arbitration, [Argentina v. Chile]*, 17 I.L.M. 634, 646 (1978) ("In accordance with the traditional canons of treaty interpretation now enshrined in the [VCLT]. . ."). Cf. Bernhardt, *Interpretation in International Law*, in 7 *ENCYCLOPEDIA OF INTERNATIONAL LAW* 318 (1984); A. VERDROSS & B. SIMMA, *UNIVERSELLES VÖLKERRECHT* 490 (3d ed. 1984); I. SINCLAIR, *THE VIENNA CONVENTION ON TREATIES* 114 (1984); Ress, *Wechselwirkungen zwischen Völkerrecht und Verfassung bei der Auslegung völkerrechtlicher Verträge*, 23 *BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT* 1 (1982).

30. See J. JACKSON, *supra* note 4, at 20-22 for the particular relevance of the preparatory work in the interpretation of GATT.

31. It is undisputed that, even under a strict article 32 VCLT approach, the structure of VCLT section 3 (Interpretation of Treaties) does not command a canon-like approach, beginning with textual interpretation and followed by the various other methods of interpretation as listed in the VCLT. See de Arechaga, *International Law in the Past Third of a Century*, 159 *RECEUIL DES COURS* 1, 43 (1978); see J. JACKSON, *supra* note 4, at 35 n.2, for the relationship between the ITO drafting history and GATT.

also strongly suggests this approach.<sup>32</sup>

### A. *Preparatory Materials*

The very first drafts of a Charter for an International Trade Organization ("ITO") recognized that the proposed far-reaching regulations needed exceptions for times of emergency in order to be acceptable to potential signatory States. As the subsequent drafts of this Charter are the direct historical precursors to the GATT,<sup>33</sup> their record constitutes an important part of the General Agreement's preparatory work.

Besides a specific security exception relating to commodity arrangements, the London draft<sup>34</sup> contained emergency provisions primarily dealing with injuries caused by increased imports. Article 66 provided, *inter alia*, that "[t]he conference may, by the affirmative votes of two-thirds of its Members determine criteria and set up procedures, for waiving, in exceptional circumstances, obligations of Members undertaken pursuant to this Charter."<sup>35</sup> Any question or difference of opinion concerning the interpretation of the Charter or arising out of its operation were to be referred to the Executive Board in accordance with article 86(2). The Executive Board, then, had the choice of either deciding the matter on its own, or referring it to arbitration.<sup>36</sup> It was also established that any ruling of the Executive Board was to be referred to the Conference at the request of an immediately affected party, or, in cases of general relevance, by any Member.

Rulings of the Conference were to be appealed to the International Court of Justice if they related to commercial policy or the specific security exception of chapter VII (dealing with inter-governmental Commodity Arrangements) and then only insofar as they presented a justiciable issue.<sup>37</sup> During the deliberations of the first report,<sup>38</sup> several delegates expressed the opinion that the jurisdiction of the Organization should be final in administrative matters coming within its province "and that only legal issues should be referred to the courts,

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32. See E. CANAL-FORGUES, *L'INSTITUTION DE LA CONCILIATION DANS LE CADRE DU GATT* 495 (1990).

33. See J. JACKSON, *supra* note 4, at 20-22.

34. *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, October 1946, at 33, UN Doc. E/PC/T/33 [hereinafter *London Draft*].

35. *Id.* at 38.

36. *Id.* at 41.

37. *Id.*

38. *Id.* at 26.

politico-economic decisions being recognized as the Organization's own responsibility."<sup>39</sup>

At the London meeting of the drafting committee its members saw a close relationship between a substantial security exception and its provisions relating to a dispute settlement procedure. Considerable discussion took place on whether appeals to the International Court of Justice from rulings of the Conference on justiciable issues should be subject to the consent of the Conference. The prevailing view was that an affirmative vote of one-third of the Members of the Conference should be the prerequisite for an appeal to the ICJ in most matters; however, the U.S. position to allow appeal in any matter concerning security was unanimously endorsed.<sup>40</sup>

By the New York meeting of the drafting committee, the text already contained provisions serving the purpose of what is now GATT article XXI, scattered in article 37(c)-(e), article 45 and article 59.<sup>41</sup> Article 37 read as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination where the same conditions prevail, or a disguised restriction on international trade, nothing in Chapter V shall be construed to prevent the adoption or enforcement by any Member of measures: . . . .

(c) Relating to fissionable materials;

(d) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;

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

The preparatory Conference delegates recognized that "some latitude must be granted for security as opposed to commercial purposes" and that "the spirit in which members of the Organization would interpret these provisions was the only guarantee against abuse."<sup>42</sup>

Then, one year after the initial proposals for an ITO Charter, article 94 of the Geneva draft contained an equivalent to article XXI.<sup>43</sup> It

39. Although it was generally agreed that the Executive Board should be able to refer disputes to specific commissions for preliminary reports, disapproval was voiced at the idea of commissions being formally regarded as courts of first instance. See *supra* note 37 and accompanying text.

40. *Id.*

41. *Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment*, January 20-February 25, 1947, U.N. Doc. E/PC/T/34/Rev.1.

42. U.N. Doc. E/PC/T/A/SR.33 (1947) at 33 (*quoted in* J. JACKSON, *supra* note 4, at 749).

43. *Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, U.N. Doc. E/PC/T/186 (1947) [hereinafter Geneva Draft].

is clear that the consolidation of the various security exceptions was intended to, and indeed did, broaden its application; the exceptions contained in the former drafts had been applicable only to specific and limited parts of the ITO Charter. Also, by separating the security exception from what is today GATT article XX, the initial clause of article XX could not be used to protect against possible discriminatory abuse since it required that actions not be a "means of arbitrary or unjustifiable discrimination."<sup>44</sup> A commentary of the United States Tariff Commission noted what it called the "complete freedom of action" that existed under article 94.<sup>45</sup> The Commentary then went on:

This article contains no provisions requiring Members to obtain the approval of the Organization for any action they take or refuse to take under these exceptions, although it appears likely that charges that the exception were being abused for protective or other purposes would require consultation under Article 89 and decision by the Organization under Article 90 if the consultation should not result in satisfactory settlement.<sup>46</sup>

Indeed, articles 89 and 90 were supposed to apply to all operations under or related to the charter. They were supposed to

constitute an overriding authorization for sanctions in any case even though other particular articles of the Charter do not provide for them. Apparently, moreover, sanctions could be imposed under article 90 in addition to those specifically provided in other articles of the Charter. These articles are a recognition that the Charter can be successful only if all members cooperate in carrying out its spirit or objective as well as in adhering to its detailed terms. They are recognition that various devices are available or can be readily established to accomplish restrictions on trade which would not be in conflict with the exact letter of the charter.<sup>47</sup>

Thus, even in this late phase of the negotiations, which were leaning toward strengthening the "security exception," its use was by no means supposed to be excluded from review under the regular dispute settlement procedure, then based on articles 89 and 90 of the ITO Charter, now articles XXII and XXIII of GATT.

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44. See J. JACKSON, *supra* note 4, at 742.

45. UNITED STATES TARIFF COMMISSION, ANALYSIS: GENEVA DRAFT OF THE CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION 85 (1947).

46. *Id.* at 96. It will be recalled that articles 89 and 90 of the ITO Charter are the predecessors of GATT articles XXII and XXIII, *i.e.*, the GATT dispute settlement procedure. See art. 90(1) Geneva Draft, *supra* note 43, at 53. The commentary went on to stress that article 89 of the ITO Charter required Members to give sympathetic consideration to representations made by other Members, not only regarding alleged failure to carry out specific obligations of the charter, but also regarding any measure which might impede the attainment of the objectives of the charter, even if they literally did not violate any substantive regulation. Only if these matters were not satisfactorily adjusted in consultations were they supposed to be dealt with under article 90; see UNITED STATES TARIFF COMMISSION, *supra* note 45, at 89.

47. UNITED STATES TARIFF COMMISSION, *supra* note 45, at 89-90.

Article 99 of the final ITO Charter ("Havana Charter") contains a security exception largely identical to article XXI of GATT. It had first been introduced at the Havana Conference by the U.S. delegation<sup>48</sup> and is even broader than the analogous provision of the Geneva draft. The Cold War had broken out and the United States pressed for acceptance of the provision, which it considered a prerequisite for ratification<sup>49</sup> of the Charter.<sup>50</sup> In the view of a contemporary observer, the wording of article 99 "in effect was so broad, as to permit a member to take almost any action it desired in the name of national security and it provided therefore one of the broadest of all escapes in the Charter. That it was readily accepted by the Conference is a commentary on the times."<sup>51</sup>

Despite the strengthening of GATT's security exception during its development,<sup>52</sup> it is worth noting that those deliberations did not affect the understanding that the security exception, susceptible to abuse, was to be subject to consultation, decision and control of legality under the future dispute settlement procedure. Moreover, such a procedure only makes sense if there is something worth submitting to legal assessment. This is not to underestimate the importance of political arguments in consultations under what is now article XXII of the GATT. While such arguments are often very important, considerable lawyering is indispensable to the resolution of what is, after all, a legal as well as a political issue. This is even more the case in a regular dispute settlement procedure — even without the current quasi-judicial function served by the panels now in place in the GATT — which clearly involves the application of legal principles.<sup>53</sup> The drafters of GATT must have therefore presumed that within such a procedure the objective prerequisites for the invocation of a security exception would be subject to review in principle. This perception was shared by the dominant economic power of the day (*i.e.*, the United States) which was also the major protagonist behind the security exception.

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48. See W. BROWN, *THE UNITED STATES AND THE RESTORATION OF WORLD TRADE: AN ANALYSIS AND APPRAISAL OF THE I.T.O. CHARTER AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE* 141 (1950).

49. Ratification did not ultimately occur because of Congressional resistance. J. JACKSON, *supra* note 4, at 32.

50. C. WILCOX, *A CHARTER FOR WORLD TRADE* 183 (1949). Wilcox served as director of the Office of International Trade Policy in the U.S. Department of State during the elaborations of the U.S. position for the negotiations of the ITO Charter.

51. W. BROWN, *supra* note 48, at 142, 351-52.

52. J. JACKSON, *supra* note 3, at 299.

53. Moreover, this has never been questioned in principle, not even by the United States while trying to prevent a substantive review of its action taken under article XXI in the Nicaragua dispute. GATT Council, *Minutes of Meeting held July 17-19, 1985*, GATT Doc. C/M/191 (Sept. 11, 1985), at 41 (Restricted).

Furthermore, the U.S. analysis suggests the understanding that cases might arise in which invocation of the security exception was legally unjustified.

These notions underlying the development of GATT's national security exception are only partially reflected in the history of its application. An analysis of the pertinent statements concerning article XXI, in particular article XXI(b)(iii), shows the tendency of the Contracting Parties to declare the provision to be an unqualified escape clause. In substance, though, article XXI has been applied with reluctance and only in reaction to what was perceived to be an internationally wrongful act. The following section presents an overview of the more important documented cases<sup>54</sup> in which article XXI was invoked.

## B. Article XXI Applied

### 1. United States — Czechoslovakia

The first opportunity to test the scope and application of article XXI arose as early as 1949. The United States had employed export control licenses which prevented the export of certain goods from the United States to Czechoslovakia which it justified as, among other things, falling under article XXI. During the consideration of Czechoslovakia's complaint, the statements of the Contracting Parties' representatives to the CONTRACTING PARTIES<sup>55</sup> follow two basic lines of reasoning.<sup>56</sup> The United States and its allies interpreted article XXI as a virtually unlimited escape clause, controlled only by the general policy notion that the GATT system should not be undermined through the use of the security exception. On the other side, the representative of Czechoslovakia stressed the fact that article XXI was part of a legal instrument subject to interpretation within the usual procedure and was not a *carte blanche* for a Contracting Party to escape its

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54. After consultations under Article XXII(1), the import embargo introduced by Peru against Czechoslovakia in 1954 and the Peruvian decree which restricted trade with countries having centrally planned economies were abrogated in 1967. *Peruvian Import Restrictions, Modification of 1 August 1967*, GATT Doc. L/2844 (Sept. 13, 1967) (Restricted); see also GATT, Analytical Index, Art. XXI-5 GATT Doc. Leg/2 (1989).

55. In accordance with GATT article XXV(1), the use of the term "CONTRACTING PARTIES" in all capital letters refers to the group of Contracting Parties acting jointly.

56. CONTRACTING PARTIES TO THE GATT, Third Session; GATT/CP.3/33 (May 30, 1949) (Statement by the Head of the Czechoslovak Delegation); GATT/CP.3/38 (June 2, 1949) (Reply by the Vice Chairman of the U.S. Delegation); GATT/CP.3/39 (June 8, 1949) (Reply of the Head of the Czechoslovak Delegation); see also J. JACKSON, *supra* note 4, at 749. Despite the extensive discussions over article XXI in this matter, it is not clear which part of the provision was invoked. The GATT Analytical Index refers to article XXI(b)(iii), although the original documents do not. The more appropriate provision would be article XXI(b)(ii).

obligations. Thus, for example, the Czechoslovak delegate stressed that the interpretation of the term "war materials" (used in article XXI(b)(ii)) by the United States had been "so [extensive] that no one knew what it really covered."<sup>57</sup> To this the U.K. delegate replied that "since the question clearly concerned article XXI the United States action would seem to be justified because every country must have the last resort relating to its own security."<sup>58</sup>

Though it may have been appropriate for the U.S. to have used the security exception in this case, the formulations used are evocative of the broadest meaning of the vital interests clause. In summing up the discussions, the Canadian Chairman described the position of the United States as follows: "The United States justified any discrimination which might have occurred on the basis of articles XX and XXI and particularly on the ground of security covered by the latter."<sup>59</sup> This singular focus on the term "security (interest)" and the rather complete disregard of the requirements set forth in article XXI(b)(i)-(iii) is also reflected in another statement of the British delegate,<sup>60</sup> in which he first discussed the legal relevance of the prerequisites under article XXI(b)(iii), and in particular the extent to which certain goods could serve both military and civilian purposes. Despite the fact that he started his analysis from a legal, rules-oriented position, he later turned back to extra-textual (and contra-textual) arguments, indicating that the self-judgment of a State acting under article XXI(b)(iii) was the only relevant element of the analysis.<sup>61</sup> This opinion contradicts the provision of article XXI which leaves the Contracting Parties no such unlimited right, but rather grants competence to act only in the cases listed under article XXI(b)(i)-(iii).<sup>62</sup> This is not to say that those prerequisites were not present in this case, and it is clearly arguable that such a position would be legally sustainable. The point worth noting is less that article XXI(b) had been invoked but rather that it had been presented to the CONTRACTING PARTIES as being unfettered by preconditions in much the same way as article

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57. CONTRACTING PARTIES TO THE GATT, Third Session, GATT/CP.3/SR.22 (June 8, 1949), at 6 (request of Czechoslovakia for decision under Article XXIII).

58. *Id.* at 7.

59. *Id.* at 8.

60. CONTRACTING PARTIES TO THE GATT, Third Session, GATT/CP.3/SR.20 (June 14, 1949), at 3 (request of Czechoslovakia for decision under article XXIII).

61. "No country could deny, or be expected to deny, the right to exercise such control where matters of national security were concerned." *Id.*

62. On June 8, 1949 the CONTRACTING PARTIES rejected the complaint of Czechoslovakia. CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS Vol. II, at 28 (1952).

XXI(a).<sup>63</sup>

## 2. Ghana — Portugal

Twelve years later, Ghana followed the interpretation given by the United States and the United Kingdom to article XXI when it explained its reasons for restricting trade with the new Member Portugal. However, in addition, Ghana made an effort to bring its action in line with the text of article XXI by referring not only to the notion of security interests but also to the objective prerequisites listed in article XXI(a). It stated that the policy followed by the Government of Portugal concerning its African territories had led to an emergency in international relations under article XXI(b)(iii).

The thrust of Ghana's argument rested on the statement that "[i]t should be noted that under . . . Article [XXI] each Contracting Party was the sole judge of what was necessary in its essential security interests." Under this view, there could be no objections to Ghana's decision regarding the boycott of goods as justified by its security interests. Ghana also argued that a country's security interest may be threatened by a potential as well as an actual danger, and that the situation in Angola was a constant threat to the peace of the African continent. By bringing pressure to bear on the Portuguese Government, the actions of Ghana might lead to a lessening of this danger and was therefore justified by its essential security interest.<sup>64</sup>

## 3. United States — Cuba

Without expressly invoking article XXI, the United States in 1962 imposed a complete embargo on all trade in goods, which the Government of Cuba notified to the GATT.<sup>65</sup> The embargo is still in place.<sup>66</sup>

63. Presumably on the basis of article XXV, the CONTRACTING PARTIES adopted, on September 27, 1951, a Declaration freeing both the U.S. and the CSSR from their respective GATT obligations towards each other, CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, Vol. II, at 36 (1952).

64. CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, Supp. No. 12, at 196 (1961) (Accession of Portugal).

65. *Committee on Industrial Products, Inventory of Non-Tariff Barriers*, GATT Doc. COM.IND/6/Add. 4 (Dec. 12, 1968) at 2-3 (addendum on specific limitations on exports and imports).

66. See Food Security Act of 1985, Publ. L. 99-198, 99 Stat. 1354, which specifies that the President will not grant any cane or beet sugar import quota unless the country concerned certifies that it does not import sugar produced in Cuba for re-export to the United States. See also the statement of the American delegate to the Forty-Second session of the CONTRACTING PARTIES, stating that the embargo was maintained for national security reason, GATT Doc. SR.42/1 (Nov. 1986) at 12.

#### 4. Federal Republic of Germany — Iceland

On November 29, 1974, the governments of four German coastal states put into force a ban on direct landing of fresh fish by Icelandic trawlers.<sup>67</sup> The Federal Government had approved these measures, which foreclosed Icelandic fresh fish exporters from a market which up to then had accounted for a substantial share of Iceland's overall exports to the Federal Republic.<sup>68</sup> While Iceland claimed that these actions violated the GATT, the Federal Republic pointed out that Iceland's unilateral decision to enforce its claim to extend its fisheries zone from 12 to 50 nautical miles and its clearly illegal disobedience with regard to an unfavorable ruling of the International Court of Justice in the matter gave the Federal Republic the power to take such action.<sup>69</sup> In its opinion, therefore, "the ban on direct landings was a justified counter-measure fully in line with the general principles and rules of international law. There was therefore nothing to support the Icelandic Government's assertion that GATT provisions were *applicable* and that they had been violated by the German Government."<sup>70</sup>

Iceland replied that it did not agree with the German and ICJ legal evaluation of its measures; furthermore, it questioned the view that the German measures were in line with general international law: these questions were in any event, "irrelevant, as the GATT could only be concerned with the application or functioning of the General Agreement and not with any other international principles."<sup>71</sup> Therefore, "even if the extension of the fishery limits was contrary to international law, the measures which had been taken against Iceland constituted a breach of obligations under the General Agreement which was a law in itself."<sup>72</sup>

In a counter-reply, the German delegate took the position that if a measure was a legally justified counter-measure under general public international law, it could not be illegal under GATT. Focusing on the relation between GATT and general international law, Germany took the position that "[t]he General Agreement did not represent an isolated legal system. Rather, it was embedded in the general rules of international law. Otherwise, any State could constantly violate the economic interests of its neighboring State which would be forced to

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67. GATT Council, *Minutes of Meeting held February 18, 1975*, GATT Doc. C/M/103 (Feb. 18, 1975) at 14.

68. *Id.* at 13.

69. Fisheries Jurisdiction (F.R.G. v. Ice.), 1974 I.C.J. 175 (July 25).

70. GATT Council, *supra* note 67, at 15 (emphasis added).

71. *Id.* at 16.

72. *Id.*

renounce any counter-measure it wanted to take."<sup>73</sup>

The case is particularly interesting on at least two grounds. First, it highlights the relationship and the possible tension between general public international law and the law of GATT. Second, it is surprising that the Federal Republic went so far as to decline to accept the application of GATT rules to a highly political dispute, thus even refusing to use the possibilities offered by article XXI. One notes the reluctance to discuss political disputes of such caliber in the technical world of tariffs and trade.

### 5. European Community — Argentina

Between April 10 and 26, 1982 the European Community ("EC"), Canada and Australia took measures suspending imports from Argentina<sup>74</sup> as a reaction to Argentina's armed attack on the Falkland Islands.<sup>75</sup> In a joint communication to the members of the GATT Council, the European Community and its Member States, along with Australia and Canada, stated that

- (a) they have taken certain measures in the light of Security Council Resolution 502;
- (b) they have taken these measures on the basis of their inherent rights of which Article XXI of the General Agreement is a reflection. . . .<sup>76</sup>

Again, it is striking that countries using economic measures for political purposes showed a great reluctance to base their claim of legality on GATT. Article XXI is mentioned as a reflection of unspecified inherent rights, quoting not coincidentally the formulation of article 51 of the UN Charter. It is on these inherent rights that the EC based its action, and not on article XXI, which was mentioned almost as an afterthought.

During the pertinent discussions of the CONTRACTING PARTIES, several countries raised objections to the EC's refusal to substantiate its claim that the actions were covered by article XXI. In particular, the Brazilian delegate criticized the EC as setting a dangerous precedent by not demonstrating that the requirements of article

73. *Id.*

74. See *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, GATT Doc. L/5336 (June 15, 1982) for a detailed listing of measures submitted by Argentina. See Kuyper, *Community Sanctions Against Argentina: Lawfulness Under Community and International Law*, in *ESSAYS IN EUROPEAN LAW AND INTEGRATION*, 141, 151 (D. O'Keefe & H. Schermers eds. 1982) for a comprehensive study of the legality of the actions; however, article XXI(b)(iii) again gets little attention.

75. See R. DOLZER, *DER VÖLKERRECHTLICHE STATUS DER FALKLAND-INSELN (MALVINAS) IM WANDEL DER ZEIT* (1986) for a concise and in-depth analysis.

76. *Trade Restrictions Affecting Argentina Applied for Non-economic Reasons*, GATT Doc. L/5319/Rev.1 (May 5, 1982).

XXI were fulfilled; at the same time, he agreed with the position of the EC that the definition of essential security interests, as a matter of principle, was to be defined by the State invoking them.<sup>77</sup> Other countries demanded that, as a minimum requirement for the invocation of article XXI, a State should notify the Contracting Parties of the measures taken, according to the regular GATT procedures.<sup>78</sup> Still others claimed that article XXI had an implied limitation of applying only in cases of extreme urgency.<sup>79</sup> The United States emphasized that the General Agreement left to each Contracting Party the right to judge what was necessary to protect its essential security interests "in times of an international crisis."<sup>80</sup> In the view of the United States, this was wise since no country would have participated in the GATT if in doing so it would have given up the possibility of using any measures, other than military, to protect its security interests.

As in the initial communication of the EC, its representative repeated that the actions against Argentina were based on inherent rights,<sup>81</sup> thus implying that the proper foundation for the measures taken were not in the General Agreement. The exercise of these rights constituted a general exception to the GATT and "required neither notification, justification, nor approval." The United States, the European Community and Canada stated over and over again that GATT was not the appropriate forum for the discussion taking place. Various other countries criticized this, especially the notion of natural rights as invoked by the EC. Argentina stressed that, in its opinion, "no Article of the General Agreement could be applied in such a manner that it would be divorced from the General Agreement" and that "there were no trade restrictions which could be applied without their being notified, discussed and justified."<sup>82</sup>

As a consequence of these discussions, the CONTRACTING PARTIES adopted a "Decision Concerning Article XXI of the General Agreement," in which some of the most extreme positions articulated by the EC and its allies were rejected. In its operative part, the Decision stated that

1. Subject to the exception in Article XXI:a, contracting parties should

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77. GATT Council, *Minutes of Meeting held on May 7, 1982*, GATT Doc. C/M/157 (June 22, 1982).

78. *Id.* at 11-12.

79. *Id.* at 7.

80. *Id.* at 8.

81. *Id.* at 10.

82. GATT Council, *Minutes of Meeting held on June 29-30, 1982*, GATT Doc. C/M/159 (Aug. 10, 1982) at 15.

be informed to the fullest extent possible of trade measures taken under Article XXI.

2. When action is taken under Article XXI, all contracting parties affected by such actions retain their full rights under the General Agreement.
3. The Council may be requested to give further consideration to this matter in due course.<sup>83</sup>

It is worth noting that the Decision, in its preamble, expressly states that recourse to article XXI might "affect benefits accruing to Contracting Parties under the General Agreement." This is the wording of article XXIII, which is the basis for the GATT dispute settlement procedure.<sup>84</sup> At the same time, the Decision recalls the importance of article XXI as constituting "an important element for safeguarding the rights of Contracting Parties *when they consider that reasons of security are involved . . .*"<sup>85</sup> It is equally important to notice that the decision contains no remark concerning the interpretation of article XXI, the two-fold structure of article XXI(b) and the objective prerequisites listed therein. Besides noting that article XXIII applies to actions under article XXI and that notification is required, the decision leaves almost everything as obscure as it was before.

## 6. United States — Nicaragua

Beginning on May 1, 1985, the most recent, and in many ways the most interesting case under article XXI arose. On that date, President Reagan promulgated an Executive Order in which he found "that the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and . . . declare[d] a national emergency to deal with that threat."<sup>86</sup> To cope with this situation, the President prohibited all imports and exports to and from Nicaragua as well as the provision of all related services. Nicaragua claimed that the U.S. measures violated both the general principles and various specific provisions of the GATT.<sup>87</sup>

Other delegates noted that it "was not plausible that a small country with small resources could constitute an extraordinary threat to

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83. CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS Supp. No. 29, at 23 (1981-82) (Decision of Nov. 30, 1982) [hereinafter 1982 Decision].

84. Cf. Meng, *Streitbeilegung im GATT*, 41 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 69 (1981).

85. 1982 Decision, *supra* 83, at 23 (emphasis added).

86. *United States - Trade Measures Affecting Nicaragua - Communications from the United States*, GATT Doc. L/5803 (May 29, 1985) at 2 (Restricted).

87. GATT Council, *Minutes of Meeting held May 29, 1985*, GATT Doc. C/M/188 (June 28, 1985) at 2, 4 (Restricted).

the national security of the United States.”<sup>88</sup> Some other Contracting Parties also felt that the measure was “disproportionate;”<sup>89</sup> they stated that article XXI should only be exercised in light of other international obligations such as those assumed under the UN Charter.<sup>90</sup> More importantly, the view was again voiced that resort to article XXI should be qualified by the party invoking it. If the U.S. interpretation of article XXI were to be accepted, any Contracting Party wanting to justify the introduction of certain trade measures against another Contracting Party could simply refer to article XXI and declare that its security was threatened in order to remain within the bounds of legality.<sup>91</sup> The representative of India stated:

Under [Article XXI] only actions in time of war or other emergency in international relations could be given the benefit of this exception. Clearly, the two Contracting Parties in this case could not be said to be in a state of belligerency. The scope of the term ‘other emergency in international relations’ was very wide. [A] Contracting Party having recourse to Article XXI(b)(iii) should be able to demonstrate a genuine nexus between its security interests and the trade action taken.<sup>92</sup>

The representative of the EC stated, on the other hand, that article XXI left to each Contracting Party the task of judging what was necessary to protect its essential security interest.<sup>93</sup> He added, however, that this discretion would not mean that the Contracting Party would have the ability to apply the security exception arbitrarily; the representative did not elaborate on what the legal devices were to respond to such arbitrary application.<sup>94</sup> The United States maintained that the measures taken fell squarely within the national security exception of GATT. Quoting the *first* part of article XXI(b)(iii), its delegate emphasized that there was no basis for discussing the issue within the framework of GATT since the Contracting Parties had no right to question, approve or disapprove of the judgment of each Contracting Parties regarding what is necessary to protect its essential security interest.

After the initial discussions on the substance of the United States claim that its actions were justified by article XXI, Nicaragua advanced on the procedural track. It formally requested consultations

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88. *Id.* at 7.

89. *Id.* at 6-7.

90. In this connection, attention was drawn to UN Security Council Resolution 562, which calls on all States to refrain, *inter alia*, from carrying out, supporting or promoting economic actions which might impede the peaceful objectives of the so-called Contadora Group. *Id.* at 7-8.

91. See *id.* at 10, for the pertinent statements of the Czechoslovak delegation.

92. *Id.* at 11.

93. *Id.* at 13.

94. See *id.* at 14, for the remarks of the Icelandic delegate.

with the United States under article XXII(1)<sup>95</sup> and asked for the establishment of a panel to hear the dispute.<sup>96</sup> The United States initially opposed both requests. While recognizing that the right to article XXIII dispute settlement proceedings was not necessarily lost in all cases in which article XXI was invoked, the United States asserted that a panel had no power to address the validity of, or motivation for, invocation of article XXI(b)(iii).<sup>97</sup> After long negotiations, the Council finally established a panel to examine the complaint made by Nicaragua<sup>98</sup> and agreed to the following terms of reference:

To examine, in the light of the relevant GATT provisions, of the understanding reached at the Council on 10 October 1985 that the panel cannot examine or judge the validity of or motivation for the invocation of Article XXI:(b)(3) by the United States, of the relevant provisions of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance and of the agreed Dispute Settlement Procedures contained in the 1982 Ministerial Declaration, the measures taken by the United States on 7 May 1985 and their trade effects in order to establish to what extent benefits accruing to Nicaragua under the General Agreement have been nullified or impaired, and to make such findings as will assist the CONTRACTING PARTIES in further action in this matter.<sup>99</sup>

The Report of the Panel, which was presented in October 1986, will be analyzed in greater detail later; here it is of interest that the Contracting Parties acknowledged again,<sup>100</sup> albeit in a very tortured way, that article XXI could not be read in isolation, and is part of a legal text with which it must be reconciled. This principle of interpretation is so well established both in the domestic legal systems of the world<sup>101</sup> and in public international law<sup>102</sup> that it is somewhat striking that this implied acknowledgement took so much effort to work out in spite of its political importance for all players.

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95. *United States — Trade Measures Affecting Nicaragua*, GATT Doc. L/5847 (July 15, 1985).

96. GATT Council, *supra* note 53, at 41.

97. *Id.*

98. GATT Council, *Minutes of Meeting held October 10, 1985*, GATT Doc. C/M/192 (Oct. 24, 1985) at 5-6 (Restricted). The delegate of Nicaragua mentioned five months of difficult work to reach agreement on the terms of reference; the American counterpart said that the terms of reference had been "crafted" specifically for this case. GATT Council, *Minutes of Meeting held March 12, 1986*, GATT Doc. C/M/196 (Apr 2, 1986) at 8 (Restricted).

99. GATT Council, *Minutes of Meeting held March 12, 1986*, GATT Doc. C/M/196 (Apr. 2, 1986) at 7 (Restricted) (citations omitted).

100. *See* 1982 Decision, *supra* note 83.

101. *E.g.*, Federal Republic of Germany, *Grundsatz der praktischen Konkordanz*. The U.S. Supreme Court has consistently held that different provisions of a legal text have to be reconciled.

102. *See* Bernhardt, *supra* note 29, at 322; 1 D. O'CONNELL, *INTERNATIONAL LAW* 251-256 (1970).

## 7. Application for Economic Reasons: Swedish Shoe Quotas

While all of these cases involved action that was politically motivated, there is at least one incident in which economic overtones did play an important role.<sup>103</sup> This is not to say that "economic" and "political" can be viewed as two distinct categories. Obviously, the opposite is the case; thus the distinction is employed here solely to demonstrate that the security exception might be used (or abused) for purposes which have more to do with economic effects on the side of the State invoking article XXI than with security considerations in the conventional sense. This brings up questions as to what extent other escape clauses of GATT limit the scope of article XXI.

In November 1975, the Kingdom of Sweden introduced a quota system for certain footwear.<sup>104</sup> The Swedish Government declared that the measure was taken in conformity with the spirit of article XXI, stating that "the decrease in domestic production has become a threat to the planning of Sweden's economic defence in situations of emergency as an integral part of its security policy. This policy required the maintenance of a minimum domestic production capacity in vital industries."<sup>105</sup> Many Contracting Parties expressed doubts as to the justification of these measures under the General Agreement. Sweden ended its measures regarding leather and plastic shoes as of July 1, 1977.<sup>106</sup>

## IV. ESSENTIAL SECURITY INTERESTS

It should be recalled that the parts of article XXI primarily relevant for this study read as follows:

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103. While only the Swedish action relating to the import of shoes was raised in GATT fora, the Arab oil embargo also clearly falls under this rubric. The main goal of the embargo was to facilitate the pan-Arab policy at the time of destroying the state of Israel. Paust & Blaustein, *The Arab Oil Weapon: A Threat to International Peace*, 68 AM. J. INT'L L. 410, 427 (1974). However, there were also clearly economic motives behind the actions of the Arab states. See the comments of Ibrahim F.I. Shihata (the then Legal Advisor of the Kuwait Fund for Arab Economic Development) in Shihata, *Destination Embargo of Arab Oil: Its Legality Under International Law*, 68 AM. J. INT'L L. 591, 592 (1974) ("It was time . . . to act on the basis of economic rationality only and to cutback their production to the limits justified by their economic needs.") Kuwait, one of the primary actors in the embargo, was a Contracting Party to the GATT, and Algeria, Bahrain and Qatar had accepted its *de facto* application. See TREATIES IN FORCE ON JANUARY 1, 1974, at 33 (1974) (U.S. Dep't of State, Office of the Legal Advisor, Pub. No. 8755). While the issue was never formally addressed in an official GATT body, the legality of the action under GATT was discussed in scholarly publications quoted above.

104. Sweden — *Import Restrictions on Certain Footwear*, GATT Doc. L/4250 (Nov. 17, 1975) at 1.

105. GATT Council, *Minutes of Meeting held October 31, 1975*, GATT Doc. C/M/109 (Nov. 10, 1975) at 8.

106. Sweden — *Import Restrictions on Certain Footwear*, GATT Doc. L/4250/Add.1 (Mar. 15, 1977) at 1.

Nothing in this agreement shall be construed

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

(b) to prevent any Contracting Party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for supplying a military establishment;

(iii) taken in time of war or other emergency in international relations. . . .

Hence, while both article XXI(a) and article XXI(b) grant broad competence to the Contracting Parties acting for security purposes, only article XXI(b) sets forth particular prerequisites which must be met. Both paragraphs, however, require that "essential security interests" be at stake: article XXI(a) allows abstention from action in order to avoid acting contrary to these interests; article XXI(b) allows action which *prima facie* violates GATT in order to actively protect them. For this reason, we will first turn to an analysis of this common element of both article XXI(a) and (b) before examining the additional prerequisites for legality under article XXI(a) and (b).

What are essential security interests? The answer which first comes to mind is that this phrase is irrelevant: articles XXI(a) and (b) concern certain actions which the Contracting Party invoking it "considers contrary to" or "necessary for" these interests and thus brings in such a broad discretionary element that the task of defining essential security interests may be a fruitless and purely academic exercise. However, such a view would not pay due consideration to the need to read article XXI as part of a legal text, especially as an exception to the general rules of the GATT. It is well established in State practice and in international adjudication,<sup>107</sup> that exceptions to legal texts must be interpreted narrowly. Thus, any exception can only apply as far as its wording read in context provides. Therefore, even if there is broad discretion to determine if in fact an action is necessary for the protection of essential security interests, we first have to examine what the parameters are which define the outer limits of the term "essential security interest."

As already set forth, the GATT is a technical instrument, and or-

107. See *Japan — Restrictions on Imports of Certain Agricultural Products*, GATT Doc. L/6253 (Nov. 18, 1987) at 64-65, para. 5.1.3.7; *European Economic Community — Restrictions on Imports of Apples — Complaint of the United States*, GATT Doc. L/6513 (June 9, 1989) for examples of GATT Panel decisions repeating this generally accepted rule.

dinarily not a political instrument providing a framework covering State activities in general. One key to the success of GATT lies in the very limitation of its task. Article XXI is alien to this: it brings the politics of international disputes into the legal world of trade and business and commands that — in some circumstances — the latter must cede to the former. It is this background that must be kept in mind when turning to the question set forth at the outset concerning whether the essential security interests addressed in articles XXI(a) and (b) cover the interests of States to keep and maintain viable important industries and/or to save natural wealth for future generations. Both pursuits are clearly within the core of a sovereign State's competence and governments that do not appropriately take care of these issues fail to protect the long-term security interests of their States. Indeed, in today's world every economic crisis beyond a *de minimis* level entails political consequences which can affect the security and welfare of the State and its population.<sup>108</sup>

The "essential security interests" covered by article XXI, however, focus on a different situation. They address the immediate political-military conditions that a State deems important for its position in the world which are *outside the regular scope of GATT*. The preparatory materials provide overwhelming evidence that the structure of the GATT and the wording "security" used in article XXI reflect the intention of the drafters, who saw in article XXI(b)(iii) an antithesis to "commercial" escape clauses.<sup>109</sup> Thus, it would be wrong to read article XXI as coping with dire socioeconomic consequences ensuing from the operation of GATT principles and policies.

The Swedish government in the Swedish shoe case,<sup>110</sup> however, argued that the destruction of pertinent domestic industries caused by consumer preference for cheaper foreign imports endangered Sweden's capability to provide a credible military deterrent to potential aggressors. While shoes are not likely to be a key factor in the battlefields of the future, certain high-tech products<sup>111</sup> and military basics like steel, heavy machinery and food might be.<sup>112</sup> Is this to say that these "security-relevant" interests are covered by the security exception? The

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108. For extensive references to GATT's "economic" escape clauses see Jackson, *The Puzzle of GATT: Legal Aspects of a Surprising Institution*, 1 J. WORLD TRADE L. 131, 151-57 (1967); V. MUHAMMAD, *THE LEGAL FRAMEWORK OF WORLD TRADE 170-92* (1958); R. HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* (1987).

109. U.N. Doc. E/PC/T/A/SR.33, at 33 (1947).

110. GATT Council, *supra* note 105, at 8.

111. See the Toshiba case in 1987, Hahn, *Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1987*, 49 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 520, 584 (1989).

112. See, e.g., CONTRACTING PARTIES TO THE GATT, *BASIC INSTRUMENTS AND SE-*

answer to this question has to be negative: the GATT does not prevent the Contracting Parties from buying purely military goods exclusively, or nearly exclusively, from domestic producers.<sup>113</sup> This is how the United States and other States maintain their domestic national producers of weapons. However, it is beyond the scope of article XXI to ensure the viability of industries producing either "dual purpose" high technology goods or goods, which, like shoes, are needed by the military in times of emergency. The security exception stands in the tradition of vital interests clauses insofar as it covers only cases of actual dispute between Contracting Parties and not the unwanted and perhaps unforeseen security-relevant consequences of a liberalized world trade. Having briefly reviewed the preparatory work of article XXI, we know that the drafters intended to provide relief for only *actual* and "political" security problems. This conclusion follows from GATT's specific escape and emergency clauses dealing with economic emergency situations which implicate pertinent specific long-term security issues. It would be flawed reasoning to apply article XXI to those emergency situations already covered by other provisions and thereby neglect the distinct purpose the security exception is supposed to serve.

Finally, viewing the problem with appropriate regard to GATT's overall goal and purpose, it might be argued that economic interdependence makes a country *per se* more vulnerable in its security status. This vulnerability, though, is supposed to be, and in practice generally is, mutual although discrepancies concerning its extent and depth exist. Viewed from a military perspective, this strategic vulnerability is the price for increased economic prosperity. At the same time such interdependence appears as one of the most important peace-keeping functions of transnational trade. Having regard to GATT's bouquet of exceptions, security for the purposes of article XXI cannot be understood as encompassing the safeguard of "vital" or "key" industries if GATT is to offer stability and predictability. The 1982 Decision of the CONTRACTING PARTIES concerning article XXI<sup>114</sup> impliedly confirms these conclusions; the context in which this decision had been taken (*i.e.*, the armed conflict between the U.K. and Argentina) indicates strongly that military/political security was meant. Otherwise there would have been the possibility of indicating the departure from the explicit wording of the text.

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LECTED DOCUMENTS Supp. No. 14, at 6 (1966) for Switzerland's reservation concerning agricultural goods in its Protocol of Accession.

113. GATT, art. III, sec. 8.

114. 1982 Decision, *supra* note 83.

The term "security interests" thus excludes the use of article XXI for protectionist measures. The next question is how to separate those cases from cases in which article XXI has been used appropriately. Should the *purpose* of the measures taken be the test or should a more objective test determine the "non-economic" nature of the measures in question? A comparable task of differentiating "economic behavior" from actions relating to essential State functions arises in the context of State immunity. While it has been suggested that the purpose of a State activity should determine its character as an act *jure gestionis*, the modern restrictive approach to State immunity favors an objective test. Only such acts which are not commercial by nature will benefit from the privilege of immunity of *acta jure imperii*. Thus, for example, section 1603 of the Foreign Sovereign Immunities Act determines that the commercial character of an activity is determined "by reference to the nature of the course of conduct or particular transactions or acts, rather than by reference to its purpose."<sup>115</sup>

It is suggested that a comparable approach should be applied to determine whether a trade-restricting measure is *a priori* excluded from the benefit of article XXI. However, the element whose objective character is supposed to be determinant cannot be the pertinent trade measure as such. Rather, the context in which the measure in question was taken should be considered. If, from the perspective of a neutral observer, the *prima facie* violation of GATT fits into the ordinary scheme of a "normal" protectionist measure, it cannot be covered by article XXI. An "easy case" to illustrate this objective method of assessment would be a complete embargo against another Contracting Party, say, in the context of allegations of illegal behavior under article 2(4) of the UN Charter, as opposed to a selective embargo of certain goods, where the pertinent domestic industry is declining.

## V. INTERPRETATION OF GATT ARTICLE XXI(a)

Article XXI (a) uses truly all-embracing language.<sup>116</sup> According to it, the obligation to furnish information — be it via the GATT secretariat or directly — proscribed in several GATT provisions<sup>117</sup> is made subject to the judgment of the Contracting Party if the disclosure of certain information is contrary to its essential security interests.

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115. 27 U.S.C. § 1603(d) (1988).

116. See J. JACKSON, *supra* note 4, at 748

117. As also ordinarily required by the principle of good faith application of an international treaty.

### A. Consideration

The text of article XXI(a) contains certain limitations. The word "considers" makes clear that a State acts illegally if it withholds information on a whim and without appropriate consideration of the effect of its action (*i.e.*, by failing to meet its general treaty obligation to apply the provisions of GATT in good faith).<sup>118</sup> Absent a "smoking gun,"<sup>119</sup> however, it will be nearly impossible to show that a State acted other than in good faith when it claims its action was necessary in order to protect its essential security interests. Any normal governmental decision-making process will meet that lenient standard.

Otherwise, the text poses virtually no limits to the discretion of the party invoking it. The power to determine unilaterally if the forwarding of information is contrary to security interests is clearly vested in the Contracting Party; the text does not provide an objective standard of necessity. A Contracting Party thus has vast discretion to determine if an act affects its essential security interests. As long as these interests are not in fact economic interests, and as long as there is some factual basis for a *bona fide*<sup>120</sup> perception of a pertinent threat, the prerequisites for article XXI(a) would be met. A narrower interpretation, desirable as it may seem from the perspective of protecting GATT's overall stability, cannot be reconciled with the extremely open-ended wording of article XXI.<sup>121</sup>

### B. Information

The plain language of the text states that information can be withheld only under the standards elaborated above. As remarkably broad as this exception might seem, it is worth remembering that the duties to inform under GATT clearly have the character of auxiliary duties, being linked to primary and more important obligations.<sup>122</sup> The ex-

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118. V. MUHAMMAD, *supra* note 108, at 176-79.

119. For example, through unauthorized publication of cabinet protocols or other rather specious circumstances.

120. As to the applicability of the concept of *bona fide*, see *infra* note 172, and accompanying text.

121. However, de Guttry, *Some Recent Cases of Unilateral Counter-measures and the Problem of Their Lawfulness in International Law*, 7 ITALIAN Y.B. INT'L L. 169 (1986-87), impliedly takes a different view without giving any reasons. He expresses the opinion that some of the U.S. measures against Nicaragua were not "absolutely necessary." Such an objective standard cannot be derived from the unambiguous language of article XXI. Nor can the principle of good faith provide such an objective additional standard for action under the security exception. The principle of good faith can only provide a limitation to the discretionary power of the Contracting Party acting. It is beyond its reach to impose, contrary to the text, an objective standard.

122. GATT, articles VI(6)(c), VII(1), X, XI(c), XII(4)(a), XVI(A)(1), XVII(4)(a)-(c) and XIX(2). See also CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS Supp. No. 26, at 210 (1978-79) (Understanding Regarding Notification, Consulta-

tremely loose standard of article XXI(a) (*i.e.*, the self-judgment of a Contracting Party whether the fulfillment of treaty obligations might be contrary to essential security interests) applies to those secondary duties, and those alone.<sup>123</sup>

## VI. INTERPRETATION OF GATT ARTICLE XXI(b)

### A. *The Concept of Article XXI(b)*

While article XXI(a) deals only with the auxiliary duty to provide information, paragraph (b) does not aim just at secondary duties but is a potential escape from even the most fundamental GATT obligations, including MFN and national treatment. In particular, the introductory sentence of article XXI(b) contains all-embracing language similar to that in article XXI(a).<sup>124</sup> However, the exceptionally broad possibilities of article XXI(b) are not granted without qualification. Not surprisingly, viewing the potential for unilateral and complete escape from GATT, article XXI(b)'s use is restricted to three distinct objective factual settings listed under (i) to (iii).

The scheme presented in article XXI(b)'s introductory sentence goes further than article XXI(a) does: GATT takes back its jurisdiction and stops governing relationships of the Contracting Parties normally within its province. It is a matter of course that such an exclusion can only take place within strict parameters: otherwise, GATT could not be understood as legally binding by any normal usage of the term. It will be shown that article XXI(b) indeed lists objective prerequisites considerably limiting its scope. Once these prerequisites are met, though, article XXI(b) does not further restrict the options available to Contracting Parties who choose to apply economic measures for political purposes.

### B. *Article XXI(b)(i) — Fissionable Materials*

Article XXI(b)(i) allows Contracting Parties to take actions relating to fissionable materials in order to protect their essential security that would otherwise violate GATT. Fissionable materials are at the same time ultra-hazardous and of great military and civil importance. They form the basis of some of the most dangerous weapons<sup>125</sup> and

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tion, Dispute Settlement and Surveillance, adopted Nov. 28, 1979) [hereinafter 1979 Understanding].

123. See V. MUHAMMAD, *supra* note 108, at 176.

124. Refer to the preceding analysis for the definition of the two prerequisites "essential security interests" and (*bona fide*) "consideration."

125. See Schwartz, *Controlling Nuclear Proliferation: Legal Strategies of the United States*, 20 LAW & POL'Y INT'L BUS. 1 (1988).

are an important element for the supply of electric energy in many countries of the world. Several legal documents deal with fissionable materials and their use.<sup>126</sup> While GATT does not go as far as to exclude the whole group of goods and raw materials *ab initio* from its application, it grants the Contracting Parties the possibility to restrict pertinent trade whenever they feel their security requires them to do so.<sup>127</sup>

### C. Article XXI(b)(ii) — Traffic in Arms

As with fissionable materials, the ultra-hazardous quality of military products does not suffice to exclude them completely from the application of GATT. Still, in the same vein, article XXI(b) allows a broad escape from GATT principles. Although one might already see an interpretative problem concerning the meaning of the term “arms,” this kind of difficulty is certainly more pernicious in the similar coverage of “traffic in goods and materials . . . carried on directly or indirectly for the purpose of supplying a military establishment.”<sup>128</sup> Almost any good offered on the markets of the world might be used for such a purpose. The discussions in COCOM<sup>129</sup> about the specific status of some “dual-purpose goods” prove the difficulty of establishing clear-cut, bright lines in this field. However, taking into account GATT’s overall purpose, a fair reading of this language requires that the goods covered be a necessary element of a war-related activity and have some sort of military character.

Most importantly, since article XXI(b) addresses the *trade* in these goods, the markets, *i.e.*, potential buyers and producers, must regard these goods as possessing such attributes. This definition, rather brief due to the secondary attention paid here to the issue, provides a suitable rule for recognizing goods mentioned in article XXI(b)(ii). Be-

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126. See Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161. Protection from the various dangers of fissionable materials is one of the main tasks of the International Atomic Energy Agency. See Statute of the International Atomic Energy Agency, Oct. 26, 1956, 8 U.S.T. 1093, T.I.A.S. No. 3873. For US legislation, see The Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120 (1978) (codified at 22 U.S.C. §§ 3201-3232 (1988)).

127. See generally Wilch, *GATT and the Half-Life of Uranium Industry Protection*, 10 Nw. J. INT’L L. & BUS. 150 (1989).

128. GATT, art. XXI(b)(ii)

129. COCOM is the acronym for the Consultative Group and Coordinating Committee for Multilateral Export Controls which was created in 1949. See Berman & Garson, *United States Export Controls: Past, Present and Future*, 67 COLUM. L. REV. 791, 834-42 (1967); Hunt, *Multilateral Cooperation in Export Control: The Role of COCOM*, 14 U. TOL. L. REV. 1285 (1983); Murphey & Downey, *National Security, Foreign Policy and Individual Rights: The Quandary of United States Export Controls*, 30 INT’L & COMP. L.Q. 791, 805 (1981). See also B. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME 65 (1988).

cause of this, measures taken by Contracting Parties to enforce their right under that article have only rarely been attacked.<sup>130</sup> For example, no serious legal arguments seem to have been advanced against the practice of COCOM or the 1987 pact of industrialized countries to prevent the spread of rocket technology usable both for civil and for military purposes.<sup>131</sup>

#### D. Article XXI(b)(iii) — Actions Taken in Time of War

The third subsection, article XXI(b)(iii), which covers action “taken in time of war or other emergency in international relations,” is the part of the security exception which has been of the greatest practical importance so far and has the greatest potential for future use and abuse. As shown above, it has been invoked a number of times in the past as the justification for actions violating *prima facie* provisions of GATT. A key question for the understanding of this provision is how its first and second part relate to each other. As has been shown, the introductory sentence of article XXI(b) (which is the same for the cases listed under (i)-(iii) grants wide discretion. It is evident from the above discussion that in the cases of article XXI(b)(i)-(ii) this discretion is only triggered if certain objective prerequisites are fulfilled. The question then is whether the same is true for article XXI(b)(iii), *i.e.*, are “war” and “other emergency in international relations” *objective* standards or are they as open-ended as the first part of the provision, thus allowing unrestrained escape?

##### 1. War

Obviously the term “war” lends itself to manifold uses. Legal scholars and State practice since ancient times have had difficulty formulating a proper definition.<sup>132</sup> The search for its meaning in our context, however, must not neglect that the term appears in an international treaty dealing with inter-State relationships. Therefore the term “war” is by definition a term of public international law, not of domestic law. It is well established today that not every armed conflict is a “war” in the legal sense. Typically, war can be described as a contention between States through armed force for the purpose of

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130. See GATT Analytical Index, Art. XXI(2), GATT Doc. Leg/2 (1989) (concerning the challenge by Czechoslovakia in 1949 of the use of the article XXI security exception by the United States).

131. See Hahn, *supra* note 111, at 599.

132. See Y. DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 1-31 (1988) for a recent attempt to do so.

overpowering each other.<sup>133</sup> In order to distinguish war unequivocally from peace, the definition of war must have recourse to the intentions of the parties involved.<sup>134</sup> This intention might be derived from a formal declaration of war, but it also can be deduced from the nature and extent of the hostilities.

Does GATT then grant a Contracting Party who violates the prohibition on the use of force a benefit by allowing it to escape from pertinent treaty obligations? Such a construction, as convincing as it may seem at first glance, would attribute to GATT a role which this technical instrument does not have: rather, when inter-State relations have regressed to the law of the jungle (apart from the *minimalia* of the *jus in bello*), the niceties of GATT have no role of their own. Put differently, the GATT does not even pretend that it has any force in an armed conflict, thus recognizing the limited role of international economic law once States have decided to go to war.

## 2. Position of Third Parties

Although the preceding discussion focused on the relations of Contracting Parties at war with each other, the more frequent scenario, where a Contracting Party wishes to exercise economic coercion on one or more parties to an armed conflict, does not differ in principle. Article XXI(b)(iii) is no obstacle to economic coercion; the security exception limits GATT's applicability to non-belligerent times, regardless of who is primarily involved in the conflict.

The previous sub-section of this article might not have produced an exhaustive definition of the term "war," but such an attempt could prove unnecessary in the face of the wording of article XXI. Escape from GATT is legal in times of war and other emergencies in international relations. The text thus makes clear that the use of the security exception is not limited by a more or less narrow interpretation of the term "war." Instead, every "other emergency" will entail the special consequences of article XXI.

### E. *Article XXI(b)(iii)—Actions Taken in Times of "Other Emergency in International Relations"*

"Emergency" clearly is not a term of art commonly used in international law. The text of article XXI(b)(iii) suggests a preliminary answer: "emergency in international relations" is not used as a stand-

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133. See generally 2 L. OPPENHEIM, *INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY* 202-16 (H. Lauterpacht 7th ed. 1952).

134. Meng, *War*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 282 (1982).

alone term but as an annex to the term war. Thus we can assume that at least one meaning of this term is "taken over" from the former. The term "emergency in international relations" certainly then must cover those hostile interactions between States which, although short of being a "war," constitute an armed conflict.<sup>135</sup> One has to keep in mind that at the time the GATT was drafted, the era of "undeclared wars" had not yet fully begun.

Read more liberally, however, the text might leave us with another option: the term "emergency in international relations" could have a meaning going beyond the function of a terminological safety net catching those hostile encounters which are not "war" for the purposes of the law of GATT, making any malfunction or problem in international relations a reason to escape GATT obligations.

An even more expansive interpretation might focus on the subjective element in the introductory half-sentence which allows the pertinent Contracting Party to judge what is necessary. If this subjective element was seen as carried over in the next half-sentence, this would entail a completely different view of the term we are analyzing: it would then become a device for granting the Contracting Party invoking the security exception the authority to define the notion unilaterally. This would distinguish "other emergency in international relations" from the further provisions set forth under (i)-(iii). The term would then not spell out an objective prerequisite, but an unlimited discretionary margin, and thus transform article XXI(b)(iii) into a "negative enabling clause," permitting any Contracting Party to escape the application of GATT. This position deserves particularly careful examination because it is to some extent reflected in several statements of Contracting Parties in pertinent discussions in the Council or in deliberations of the CONTRACTING PARTIES. None of these parties has gone as far as explicitly stating that it is up to the State invoking the security exception to determine what "emergency in international relations" means. However, the position of not addressing that point, while at the same time focusing exclusively on the "right to determine oneself when questions of security are involved" is sustainable only if one of the two extensive interpretative approaches set forth above prevails.<sup>136</sup>

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135. As already indicated, different international treaties define war differently according to their respective purposes. See the four Geneva Conventions of 1949 for the Protection of War Victims, Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces on the Field, 75 U.N.T.S. 31; see generally the documentation in A. ROBERTS & R. GUELFF, *DOCUMENTS ON THE LAW OF WAR* (2d ed. 1989).

136. A number of authors refer to article XXI as a self-judging provision: obviously this is an adequate description of article XXI(a); insofar as article XXI(b) is concerned this statement

## 1. Text

If one takes seriously the textual approach to a treaty as a starting point for its interpretation — and article 31 of the VCLT suggests one should — the broadest reading of the security exception set forth above seems unsustainable. On the contrary, the text strongly suggests that “other emergency in international relations” sets a standard which the Contracting Party invoking article XXI(b)(iii) has to meet and not to define unilaterally. This understanding would be parallel to that of the other sub-sections of article XXI(b) which are all structured such that they grant (extraordinarily broad) discretion only if certain *objective prerequisites* are met. The term “emergency” excludes from its scope ordinary strained relations between States; it implies some sort of extreme conflict between States. Thus, a preliminary interpretation reveals that “emergency in international relations” encompasses every hostile interaction between States involving the use of force. In addition, it must be understood as covering every situation in which the use of force would be legal. This result follows *a maiore* from the express permission to vacate GATT obligations in case of war. If even an aggressor could escape GATT in this case, then a State having *the right* to act in self-defense must be freed from having to grant trade benefits to its attacker. However, “emergency in international relations” might cover additional situations not necessarily involving the use of force.

The security exception’s “legislative history” does not provide further insight into its scope. As the earlier discussion has demonstrated, this provision has been regarded as an extremely broad escape clause. Regrettably, the history of the provision does not reveal exactly *how* broad the escape-valve made available by article XXI was supposed to be. It is clear, though, that the possibility of abuse was perceived but was meant to be dealt with by the future dispute settlement procedure.<sup>137</sup> This indicates that the drafters did see *legal* limits to the use of the security exception. The list under article XXI(b)(i)-(iii) makes it clear that this broad discretion was only supposed to exist in a spe-

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reflects the extraordinary competencies of the Contracting Party acting under the security exception. The most thorough analysis of article XXI can be found in J. JACKSON, *supra* note 4, at 748, where he points to the dangerous possibility that article XXI(b) may be abused as a loophole. The security exception is regularly described without any reservation as a self-judging provision, citing as reference Jackson’s analysis, although it is much more cautious than the statements it is supposed to support. See Whitt, *The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua*, 19 LAW & POL’Y INT’L BUS. 603 (1987). See also J. FAWCETT, *INTERNATIONAL ECONOMIC CONFLICTS: PREVENTION AND RESOLUTION* 19 (1977) where he asserts that “[t]he Contracting Party is the sole judge of the use of exceptions under Article XXI.”

137. See *supra* note 43 and accompanying text.

cific set of enumerated circumstances. It would follow that "emergency in international relations" is a term with a limited meaning and not a norm granting, even *de facto*, unlimited competence to the State invoking article XXI(b)(iii).

This dichotomy between discretion and safeguarding the GATT legal system, reflected by the combination of objectified prerequisites and discretionary competencies, would not fit with a reading of the term "emergency in international relations" which would give the invoking party the power to define the term according to its own views with basically unfettered discretion. This result would be achieved, though, if "emergency in international relations" were to encompass any kind of political tension between two Contracting Parties.

Furthermore, in the absence of persuasive indications to the contrary, it cannot be assumed that "emergency in international relations" is the only term listed under (i) to (iii) which does not describe an objective factual setting. "Fissionable materials," "materials derived therefrom," "traffic in arms, ammunition and implements of war," or "traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment," to provide some examples, are objective terms of treaty law not alien to the rest of the GATT. True, serious legal debate about the meaning of the term "fissionable materials" or whether goods are supposed to supply military establishments might arise. Such questions, however, do not seem more complicated than determining what "like products" are,<sup>138</sup> or when "nullification and impairment"<sup>139</sup> occur.

Most importantly, the term would lose any real purpose if it allowed any Contracting Party to define an "emergency in international relations" on its own whim.<sup>140</sup> In the absence of any strong exegetic argument to the contrary, the wording indicates that the prerequisites listed under (i) to (iii) have a distinct meaning of their own; that no such qualifying terms are listed under article XXI(a) implies that the list under (i) to (iii) was supposed to restrict the broad discretion granted by the introductory sentence. This makes good sense: the

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138. See, e.g., the Panel reports in CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS Supp. No. 28, at 102 (1980-81) (Spain — Tariff Treatment of Unroasted Coffee, adopted June 11, 1981) and Supp. No. 25, at 49 (1977-78) (EEC — Measures on Animal Feed Proteins, adopted Mar. 14, 1978).

139. See the references in GATT, Analytical Index, Art. XXXIII-19 - XXXIII-34, GATT Doc. Leg/2 (1989).

140. For a pertinent example, see the interpretation of the term "unforeseen development" (GATT article XIX) in the Hatter's Fur Case, CONTRACTING PARTIES TO THE GATT, REPORT ON THE WITHDRAWAL BY THE UNITED STATES OF A TARIFF CONCESSION UNDER ARTICLE XIX OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 9-13 (1951) and J. JACKSON, *supra* note 4, at 561.

*prima facie* GATT violations addressed in article XXI(a) are of less importance for the functioning of the GATT system and thus were put in the unfettered discretion of the Contracting Party acting for security purposes. The contrary is true for the primary obligations from which escape is possible under article XXI(b)(iii). Also, the observation that article XXI does not just speak of deteriorating political relations or necessity in international relations — terms which would definitely imply a much larger extent of discretion — supports this understanding.

Thus, the wording of article XXI, read with due regard to its genesis and purpose, does not allow interpretations of the terms “war” and “emergency in international relations” as terms *not* subject to the ordinary, *i.e.*, norm-oriented and objective, meaning which are a hallmark of the international treaty interpreted here.

## 2. The Systematic Environment of the Security Exception

Three elements buttress the preliminary result that the security exception is by far not the unrestricted way out of the system some Contracting Parties have claimed.

### a. *System of GATT Escape Clauses*

“No international agreement . . . can long exist without some provision, formal or informal, for relaxing legal norms in certain circumstances.”<sup>141</sup> The GATT contains an elaborate network of exceptions which have led some distinguished observers to believe that “a lawyer could drive a four-horse team through any obligation” it contains.<sup>142</sup> As broad as some of the exceptions may be, they are the only means that GATT provides to individual Contracting Parties for escaping obligations without approval of the CONTRACTING PARTIES.<sup>143</sup> Together with some specific exceptions,<sup>144</sup> like those relating to developing countries,<sup>145</sup> they allow the necessary flexibility in individual cases to ensure the stability of the overall system. Except for the object of this study,<sup>146</sup> none of these provisions grants the unilateral departure of a Contracting Party from an unspecified number of rules.

141. J. JACKSON, *supra* note 4, at 535.

142. *Extension of Reciprocal Trade Act: Hearings on H.R. 1211 Before the Comm. on Finance*, 81st Cong., 1st Sess. 1263 (1949).

143. A different issue is involved when some of the vague provisions of GATT do not always clearly define the extent of eventual obligations and thus offer well-advised Contracting Parties the possibility to “avoid” the burden free trade can mean for a national economy.

144. See J. JACKSON, *supra* note 4, at 536 for a good overview.

145. K. DAM, *supra* note 5, at 225; J. JACKSON, *supra* note 3, at 275.

146. And the singular provision of article XXXV, which allows the unilateral determination

Rather, they allow unilateral departure from obligations only in very specifically circumscribed factual settings. Article XXI(a) is not in line with this general rule of exceptions within GATT, and it expressly states so; article XXI(b), however, does not.

b. *Waiver under GATT Article XXV(5)*

By and large, article XXV(5) allows the CONTRACTING PARTIES to waive any obligation of GATT. Provided that a two-thirds majority consents to the waiver, it may be granted either for an individual case or for a specific category of "exceptional circumstances."<sup>147</sup> This provision would be senseless if the meaning of "emergency in international relations" were so vague as to encompass any tension between States. It is true that there would still be the filter of the "essential security interests" requirement. As demonstrated, though, this is an extremely broad concept and even more difficult to review *post factum*. As a practical matter, an exceptional circumstance for the purposes of article XXV(5) would always entail or be the consequence of tightened relations between the Contracting Parties involved.

c. *The GATT Dispute Settlement Procedure*

Another factor which must be considered is the relationship between the security exception and the GATT dispute settlement procedure which will be examined later in more detail. Here, it suffices to acknowledge that article XXIII applies to actions under article XXI. This is, in principle, undisputed<sup>148</sup> and put beyond practical doubt by the Decision of the CONTRACTING PARTIES of 1982.<sup>149</sup> A characterization of article XXI(b)(iii) as being a truly self-judging provision, then, would be a *contradicto in adjecto*.

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of a Contracting Party not to apply GATT to a new Contracting Party. See J. JACKSON & W. DAVEY, *supra* note 9, at 322 with references to U.S. practice.

147. The pertinent text of article XXV(5) states that the CONTRACTING PARTIES may "define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations." *A majore*, then, the CONTRACTING PARTIES may define such categories without changing the voting rules provided for in article XXV(5).

148. See GATT Council, *Minutes of Meeting held May 7, 1982*, GATT Doc. C/M/157 (June 22, 1982) at 9; GATT Council, *supra* note 82, at 14; GATT Council, *Minutes of Meeting held January 26, 1983*, GATT Doc. C/M/165 (Feb. 14, 1983) at 18 (Restricted); GATT Council, *supra* note 53, at 41-46; see also J. JACKSON, *supra* note 4, at 748.

149. 1982 Decision, *supra* note 83, at 23. Other than that, however, almost every relevant detail determining the scope and substance of the relationship of the two provisions is unsettled, in particular with regard to the quarrels relating to the installment of the Panel in the Nicaragua Trade Measures case. As will be shown later, a correct understanding of GATT allows Panels to review article XXI actions in substance, albeit according to the remarkably loose standard prescribed by article XXI. Already now, though, we have to acknowledge that a text has to be read in its entirety and that there is a reciprocal relationship between provisions.

### 3. The Linkage to the Law of Reprisals

The examination of article XXI(b)(iii), based on the text, the context, the overall purpose and the goals of the GATT reveals that the term "other emergency in international relations" is a phrase with a meaning of its own and not simply an extension of the first half-sentence which grants largely unfettered discretion to the Contracting Party acting under the security exception. Thus far, the analysis of this article has delineated two parameters which describe the outer limit of any possible interpretation: at one extreme, "other emergency in international relations" certainly covers situations which include military confrontation between Contracting Parties, without being "war" in the classical sense. At the other, the security exception requires that there be "something more" than purely strained relations between Contracting Parties as a prerequisite of invocation.

This analysis raises substantial reasons for a narrower interpretation of the pertinent requirements for the exercise of article XXI, while at the same time making clear that it was the very purpose of the security exception to grant the Contracting Party invoking it a considerable choice of action. Because article XXI(b)(iii) points at the term "war," one has to conclude that "emergency in international relations" also refers to concepts of general international law. The phrase "other emergency in international relations" clearly covers any factual situation where, under general international law, the use of economic sanctions would be possible despite any conflicting contractual obligations to the contrary. It can thus be assumed that this represents a reference to the law of reprisals.<sup>150</sup>

It is a well established maxim of treaty-interpretation that any provision must be read so that it is not superfluous and fits into the overall structure of the treaty as a whole. An understanding of "emergency in international relations" as referring to the general international law definition of situations in which economic sanctions are legal, despite conflicting treaty obligations, would refer to *legal* concepts outside of GATT — a technique already utilized by the first alternative of article XXI(b)(iii).

This interpretation of the term "other emergency in international relations"<sup>151</sup> does not alter the result that article XXI(b) grants an

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150. See 2 L. OPPENHEIM, *supra* note 133, at 138, for the definition of reprisal; see generally Leben, *Les Contre-Mesures Inter-Étatiques et les Reactions à l'Illicite dans la Société Internationale*, 28 ANNUAIRE FRANÇAISE DE DROIT INTERNATIONALE 9 (1982); E. COLBERT, *RETALIATION IN INTERNATIONAL LAW* (1948); A. DAVID, *THE STRATEGY OF TREATY TERMINATION: LAWFUL BREACHES AND RETALIATIONS* (1975); M. DOXEY, *ECONOMIC SANCTIONS AND INTERNATIONAL ENFORCEMENT* (1980).

151. See generally White, *Legal Consequences of Wrongful Acts in International Economic*

amount of discretion as to both necessity and proportionality beyond the rules of ordinary treaty-law. Because the purpose of the security exception is to leave Contracting Parties considerable room for action in "security matters," such leeway is necessary to avoid the legal constraints ordinarily imposed by GATT.

The important limitation which that interpretation entails is that an action under article XXI(b)(iii) is only compatible with GATT if the Contracting Party against which the action is directed has committed an international delict, *i.e.*, either a violation of a treaty or a customary law obligation. This limitation, however, is reconciled with the purpose of the security exception. By establishing a qualitative minimum threshold for a situation which triggers article XXI(b)(iii) rights, the limitation fits with the overall function of the treaty-system to provide stability. Indeed, the wording of article XXI(a) is evidence of GATT's ability to spell out clearly when a function of GATT has to cede completely to a Contracting Party's sovereignty claims.<sup>152</sup>

The thrust of the security exception is to allow reaction to internationally wrongful acts in times of "international crisis" through economic means unrestrained by non-discrimination principles. It should be recalled that one of the major changes in the Geneva draft was to eliminate the non-discrimination clause still found in article XX, which reflects the fundamental principle of GATT not to discriminate even in times of economic emergency. Article XXI(b)(iii) is designed to exclude this usually peremptory principle.<sup>153</sup> Such a substantial departure from a core GATT rule clearly shows the purpose of the security exception to ensure the Contracting Parties the possibility to take effective counter-measures in security matters.

#### 4. The Impact of GATT Practice

Article 31 of the Vienna Convention on the Law of Treaties, in line with customary international law,<sup>154</sup> commands that the interpretation of a treaty take into account "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions and any subsequent practice in the application of the

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Law, 16 NETH. Y.B. INT'L L. 137 (1985); Akehurst, *Reprisals by Third States*, 44 BRITISH Y.B. INT'L L. 1 (1970); see G. HUFBAUER & J. SCHOTT, *ECONOMIC SANCTIONS RECONSIDERED* (1985) for a comprehensive study of the effect (and success) of economic sanctions.

152. See *supra* note 140, and accompanying text.

153. See Koulen, *The Non-Discriminatory Interpretation of GATT Article XIX(1): A Reply*, 1983/2 LEGAL ISSUES OF EUROPEAN INTEGRATION 87, 89; J. JACKSON & W. DAVEY, *supra* note 9, at 604; but see Bronckers, *The Non-discriminatory Application of Article XIX GATT: Fact or Fiction?*, 1981/82 LEGAL ISSUES OF EUROPEAN INTEGRATION 35, 39.

154. See I. SINCLAIR, *supra* note 29, at 115.

treaty which establishes the agreement of the parties regarding its interpretation.”<sup>155</sup> The practice of the Contracting Parties does not reveal a pattern which would contradict the interpretation of that provision set forth above. Rather, the practice seems to support the notion that the security exception in article XXI(b)(iii) is subject to specific and objective limitations despite some statements of the Contracting Parties to the contrary. It is important to remember that these contrary statements were made in a politically charged atmosphere; one would probably expect too much by requiring government representatives to elaborate on whether the legal prerequisites of a provision have been met, in particular because their statements have no immediate consequence. Be that as it may, whenever delegates have expressed the opinion that article XXI leaves it completely to the decision of each Contracting Party to determine when it is proper to act under article XXI(b)(iii), the CONTRACTING PARTIES have expressed neither tacit nor express consent.

An examination of the relevant cases<sup>156</sup> shows that in every case but the Swedish shoe case the party acting under article XXI(b)(iii) was acting in retaliation to what it perceived to be illegal actions committed by the targeted State, most often the illegal use of force or violation of human rights. In each case, the claim was materially substantiated. This has not always been stated in such terms in the pertinent GATT fora, due to questions about the competence to deal with the matter. Thus, it can be seen that the Contracting Parties' actions have all been in conformity with the restrictive interpretation of article XXI(b)(iii) as set forth above. It is the substantive content of the Contracting Parties' behavior which forms the relevant State practice for the purpose of interpreting the security exception's *material* content.<sup>157</sup> This clearly supports a restrictive interpretation of the term “emergency in international relations”<sup>158</sup> and not the completely open-ended and discretionary approach occasionally put forth by some States. The decision of 1982 relating to the dispute between the

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155. See VCLT, *supra* note 27, at art. 31.

156. To the extent it relates to article XXI(b)(iii), the first Czechoslovak case reported deals in effect with article XXI(b)(ii); see sources cited *supra* notes 56 and 57.

157. I. SINCLAIR, *supra* note 29, at 137.

158. This includes the Nicaragua case. The United States has consistently contended that Nicaragua was violating the law of nations by threatening its neighbors and by not observing minimum standards of international human rights in treating its own citizens. Although the International Court of Justice (“ICJ”) held otherwise, it came to its conclusion without the aid of the presentation of evidence by the United States which, in violation of article 36 of the ICJ statute, walked out of the procedure. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)* 1984 I.C.J. 392 (Decision of Nov. 26 on Jurisdiction). Thus it cannot be denied, to say the least, that the allegations of the United States were in fact pertinent.

EC and Argentina also points in the direction of a somewhat more restrictive interpretation of article XXI(b)(iii).<sup>159</sup> Although the Declaration contains no clear statement concerning the substantive law of the security exception, the spirit of the Decision favors a cautious approach to the use of this potential Pandora's box. Although the plain text may not show this, when viewed in the context of the EC-Argentina case, there is rather little doubt that the position of the EC (unrestricted use of article XXI(b)(iii)) had not been accepted. The same is true for the Ministerial Declaration of 1982,<sup>160</sup> which, while far from being an example of extreme clarity, states that, "the Contracting Parties undertake, individually and jointly . . . to abstain from taking restrictive trade measures for reasons of a non-economic character not consistent with the General Agreement." Despite this tortured language, the text implies a considerable degree of support for a more restrictive interpretation of article XXI(b)(iii): otherwise, the sentence quoted would hardly make sense at all.

### 5. Position of Third Parties

Again the question arises whether and to what extent third parties not being victim of an international wrongful act can escape GATT obligations. This time, though, the solution is less obvious than in the case of war. An international wrongful act (short of an armed attack) committed against a friendly nation might certainly represent an "emergency" for the purposes of an article XXI(b)(iii) analysis and, accordingly, be perceived as contrary to a State's essential security interests. However, the nexus between essential security interests and the international wrongful act committed is less evident. The tacit assumption that such a nexus exists, as applied in a two-party constellation, seems hardly appropriate. Rather, it is necessary to require some material factual element establishing the link.

### 6. Conclusion

The GATT security exception is not a totally open-ended provision permitting Contracting Parties to evade the legal bonds imposed by the General Agreement. Rather, it strikes a balance between granting States broad discretion to act when they feel their security is at stake and objective prerequisites which have to be met to trigger that

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159. CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS Supp. No. 29, at 23 (1983) (Decision Concerning Article XXI of the General Agreement).

160. CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS Supp. No. 29, at 9 (1983) (Ministerial Declaration).

extra-ordinary competence. These objective prerequisites are subject to ordinary methods of treaty interpretation. An application of ordinary methods of treaty interpretation demonstrates that the phrase "essential security interests" is to be read as excluding the Contracting Parties' interest in protecting what they perceive to be "vital industries." For these situations GATT offers several other possibilities, including waivers granted under article XXV. Apart from this limitation, the acting State is not limited by article XXI(b)(iii) in its discretionary choice to determine whether a measure, *prima facie* illegal under GATT, is required by its essential security interests. However, this discretionary power only comes to bear if the objective prerequisites listed under article XXI(b)(i)-(iii) are met. In particular, "other emergency in international relations" describes situations which are grave enough to allow States under general international law to resort to the use of economic reprisals. Thus, a State may only act under the umbrella of the security exception when the State against which it is acting is either at war or has taken such action as to warrant the use of economic reprisals under general public international law.

## VII. ARTICLE XXI AND GENERAL PUBLIC INTERNATIONAL LAW

Having discussed the substantive law of article XXI(b)(iii), the question arises as to what extent general public international law applies in situations in which a Contracting Party to the General Agreement intends to use economic measures for political purposes. The issue remains of eminent practical importance. As will be recalled, several Contracting Parties used general public international law to justify their use of economic measures for political purposes<sup>161</sup> and stated that article XXI(b)(iii) was merely a declaratory provision, "reflecting" the pertinent rules of general public international law.<sup>162</sup> From a different perspective, the States against which such measures have been taken have frequently claimed that the acting States had not only violated GATT but general international law as well.<sup>163</sup>

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161. *E.g.*, the EEC, Canada and Australia (acting against Argentina), the Federal Republic of Germany when acting against Iceland, the United States when justifying its action against Nicaragua.

162. *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, GATT Doc. L/5319/Rev.1 (May 5, 1982).

163. GATT Council, *supra* note 67, at 15.

### A. GATT as a Self-Contained Regime?

General public international law can only influence the analysis if it is applicable in the first place. It is not applicable if GATT constitutes a "self-contained regime." This concept, introduced by the International Court of Justice in the *Teheran-Hostage-Case*,<sup>164</sup> describes a sub-system of international law embracing a complete and exhaustive set of "primary and secondary rules."<sup>165</sup> Thus, in principle it entirely excludes the application of general legal rules and principles, particularly the application of counter-measures normally at the disposal of an injured party.<sup>166</sup> Most treaty systems, including those with an institutionalized dispute-settlement procedure of their own,<sup>167</sup> do not meet those requirements. At some point (especially the unsuccessful exhaustion of a specialized dispute-settlement procedure) the party to a treaty-based sub-system can usually fall back on counter-measures available under general international law. The influence of general international law on "primary" rules is, generally speaking, even more obvious.<sup>168</sup> However, the ICJ<sup>169</sup> and some scholars see exceptions to the general rule — as did the Icelandic delegate with regard to GATT when he rejected Germany's claim that its partial ban on Icelandic fish was a justified counter-measure under international law. Iceland thought this question to be irrelevant, as "GATT could only be concerned with the application or functioning of the General Agreement and not with any other international principles."<sup>170</sup>

Some aspects of GATT practice seem to sustain Iceland's position. To some extent, organs of GATT take their distance from general international law. No Panel report has so far referred to a decision of an international arbitral award or to decisions of the PCIJ or the ICJ. General principles of international law, including procedural law, are only mentioned to the extent they have been applied by previous panels or practice of the Contracting Parties or as being required by logic and necessity. They have not been introduced as universally rec-

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164. United States Diplomatic and Consular Staff in Teheran (U.S. v. Iran), 1980 I.C.J. 3, 41 (Decision of May 24).

165. See *ILC Draft Articles on State Responsibility*, *supra* note 19, at 30-63.

166. Simma, *Self-Contained Regimes*, 16 NETH. Y.B. INT'L L. 111, 115 (1985).

167. See generally K. OELLERS-FRAHM & N. WÜHLER, *DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW* (1984).

168. See VCLT, *supra* note 27, at art. 31(3)(c).

169. According to the ICJ, "[t]he rules of diplomatic law constitute a self-contained regime." United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 40 (Decision of May 24).

170. GATT Council, *supra* note 67, at 15.

ognized international legal principles, able, at least, to buttress a legal claim within the GATT system.

These elements, however, do not suffice to overcome the presumption *against* a closed system.<sup>171</sup> GATT, obviously, does not contain an explicit exclusion of "secondary" rules derived from general international law; nor can the position that the rules contained in the General Agreement are exhaustive by implication be established by a pronounced *esprit de corps*. These are mere indications that GATT is a specialized sub-system of international law, whose more specific rules will often prevail over general rules and principles.

Although the GATT is not a self-contained regime, the application of general international law rules and principles could be excluded specifically by article XXI(b)(iii). This would imply an understanding of the security exception as not only being an escape clause, but as being the "final word" on economic measures for political purposes between Contracting Parties to the General Agreement. However, such a reading would not reflect the will of the parties as expressed in the text of article XXI(b)(iii). Analysis has revealed that the security exception was not supposed to "govern" the use of economic measures for political ends; rather, its function is to limit the jurisdiction of the General Agreement in extraordinary times. This systemic self-restraint excludes an understanding of article XXI(b)(iii) as an exhaustive provision which would have left no room for the application of general international law.

## B. Possible Limitations for the Application of Article XXI(b)(iii)

### 1. The Principle of Good Faith

The principle of good faith has its primary field of application in contract and treaty relations.<sup>172</sup> It requires parties who are in a special legal relationship to refrain from dishonesty, unfairness and conduct that takes undue advantage of one another. It also underlies the most fundamental treaty law norm, namely the principle of *pacta sunt servanda*.<sup>173</sup> The principle of "good faith" is closely related to the civil

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171. Simma, *supra* note 166, at 115. A self-contained regime, being the exception from the general rule, can only be assumed once it is established that general international law does not influence the secondary rules of the sub-system. Thus, the party claiming the existence of a self-contained regime has to overcome an assumption to the contrary.

172. *But see* Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 473 (Judgment of Dec. 20) ("One of the basic principles governing the . . . performance of legal obligations, whatever their source, is the principle of good faith.")

173. I. SINCLAIR, *supra* note 29, at 83; see 2 Y.B. INT'L L. COMM'N 211 (1966) for further references.

law concept of *abus de droit*, which stands for the equally well established principle of customary international law that the exercise of a right for the sole purpose of evading an obligation or of causing injury is unlawful.<sup>174</sup> Thus, the interpretation of treaties has to be performed in good faith, taking into account the context, the object, the purpose and the different interests and backgrounds of the various parties involved. Article 18 of the VCLT offers another example of the principle as it requires signatory States to refrain from acts which would defeat the object and purpose of a treaty before ratification. Even apart from treaties, though, it is well-established law<sup>175</sup> that States have to fulfill in good faith their obligations "under the generally recognized principles and rules of international law."<sup>176</sup> Yet, it is clear that the "standard of care" a State has to meet in its relations with another State depends largely on the "closeness" of the mutual relationship: prototypical examples of circumstances giving rise to such closeness are geographical or topical proximity (common border),<sup>177</sup> previous behavior<sup>178</sup> or inter-governmental arrangements.

Article XXI(b)(iii) waives to a large degree the benefit of this GATT-specific "rule-of-reason" limitation. Where economic countermeasures are used for non-economic purposes, the appropriateness of an action is determined by the pertinent State's self-judgment of necessity for the protection of its essential security interests and not by an objective evaluation of the various treaty obligations under GATT.

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174. See Kiss, *Abuse of Rights*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1, 4 (1984) for examples of state practice; See also Zoller, *La Bonne Foi en Droit International Public* in 28 PUBLICATIONS DE LA REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC (1977); Ilyomade, *The Scope and Content of a Complaint of Abuse of Right in International Law*, 16 HARV. INT'L L.J. 47 (1975); Paul, *The Abuse of Rights and Bona Fides in International Law*, 28 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT UND VÖLKERRECHT 107 (1977); Politis, *Le Problème des Limitations de la Souveraineté et la Théorie de l'Abus des Droits dans les Rapports Internationaux*, 6 RECUEIL DES COURS 1 (1925). See Franck, *At Arm's Length: The Coming Law of Collective Bargaining in International Relations*, 15 VA. J. INT'L L. 579 (1975) for the application of the principle of good faith in international economic law.

175. See *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2624, U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1971).

176. *Id.*

177. Randelzhofer & Simma, *Das Kernkraftwerk an der Grenze. Eine "Ultra-Hazardous Activity" im Schnittpunkt von internationalem Nachbarrecht und Umweltschutz*, in Festschrift für Friedrich Berber 389 (1973); Dupuy, *La Responsabilité Internationale des Etats pour les Dommages d'Origine Technologique et Industrielle*, in PUBLICATIONS DE LA REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC No. 27 33-34, 158-169 (1976).

178. For examples of liability for ultra-hazardous previous activities see the several pertinent ILC Reports by R. Ago. U.N. Docs. A/CN.4/217, A/CN.4/233, A/CN.4/246/Add. 1-3, A/CN.4/264, A/CN.4/291, A/CN.4/302/Add. 1-3, A/CN.4/307, A/CN.4/318 and A/CN.4/Add. 1-7.

Thus, the treaty-based notion of reasonableness does not apply to actions under article XXI(b)(iii).

This renunciation, however, does not apply to general international law in which the principle of *bona fide* is enshrined. Hence, the notion of good faith in its more general meaning still comes into play; only the specific protection which normally is the hallmark of a treaty relationship has been derogated by article XXI(b)(iii). The exclusion of considering *specific* rights and duties under GATT in evaluating the "standard of care" does not mean that the existence of a treaty relationship between the Contracting Parties concerned is completely irrelevant. The standard of good faith set forth above is loose, not easy to apply or administer. However, the principle of *bona fide* is never defined by clear-cut lines, and yet it is routinely applied by courts and honored by the subjects of law.

## 2. Proportionality

That a legally relevant reaction has to show due relation to the conduct provoking it, amounts, in a nutshell, to the content of the principle of proportionality.<sup>179</sup> In the domestic sphere, particularly in constitutional law, this principle has become a sophisticated tool for balancing conflicting positions. It is part of the international law of self-defense and reprisal, at the latest since the *Caroline* Case.<sup>180</sup> There has been (and still is) some dispute concerning the proper criteria for measuring the scope of the allowed harm. Some believe that the harm done by a retaliation should never be greater than the original wrong. Others reject the idea of an absolute determinant link between these two positions. State practice leaves rather little doubt that the latter position is the correct — if not necessarily the desirable — description of international law. As a matter of practical concern it seems unreasonable to ask the victim to invest too much effort in keeping the exact balance between wrong received and wrong done. However, even in time of quick decisions, it is possible and required by law to keep the reaction to a wrong somewhat proportionate. Thus, the requirement of proportionality in article XXI(b)(iii) may place some

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179. G. BRAIBANT, *LE PRINCIPE DE LA PROPORTIONALITÉ* 297 (1974).

180. While accepting the concept of self-defense as justification for the violation of international obligations, the United States claimed that such actions could only escape the odium of illegality if the dangers against which they had been directed were "instant, overwhelming, leaving no choice of means, and no moment of deliberation;" any *prima facie* illegal act, justified by the necessity of self-defense, had to be "limited by that necessity, and kept clearly within it." Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938); 26 BRITISH AND FOREIGN STATE PAPERS 1372 (1837-38); 29 BRITISH AND FOREIGN STATE PAPERS 1126 (1840-41); 30 BRITISH AND FOREIGN STATE PAPERS 193 (1841-42).

limit on the amount of derogation a Contracting Party may take from GATT.

### 3. Prohibition of Intervention in Internal Affairs

As has been stated at the outset, one of the fundamental tenets of international law is the notion of sovereignty of States. As a corollary, the prohibition of intervention serves to protect this status of the subjects of international law.<sup>181</sup> This principle seems, however, to be of diminished practical relevance for a scenario in which article XXI(b)(iii) plays a role. Under the interpretation developed here, the security exception covers only cases in which the object of economic coercion has committed an international wrongful act. In this circumstance, the other State is legally entitled to enforce its rights under international law, provided the counter-measure meets the other standards of legality, *e.g.*, proportionality.<sup>182</sup>

#### C. Possible Escapes from GATT for Political Purposes under General International Law

##### 1. Fundamental Change of Circumstances

As already mentioned above, general public international law recognizes that a party may be exempt from certain treaty obligations upon a fundamental change of circumstances. The room left for a general exemption from any GATT obligation for political purposes via the *clausula* seems small indeed. Not only is article XXI(b)(iii) an extremely broad, and more specific, escape clause, but even complete withdrawal from GATT is possible with 6 months notice.<sup>183</sup> Therefore, it can be assumed that the more specific provisions of articles XXI(b)(iii) and XXXI have hardly left room for the application of the more general notion of fundamental change in circumstances.

##### 2. General Law of Reprisal and Self-Defense

Before further examining to what extent States may have recourse

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181. See 22 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT (Economic Coercion in Public and Private International Law); K. BOCKSLAFF, DAS VÖLKERRECHTLICHE INTERVENTIONSVERBOT ALS SCHRÄNKE AUSSENPOLITISCH MOTIVIERTER HANDELSBESCHRÄNKUNGEN (1987).

182. This list of possible limits to state action under article XXI(b)(iii) is by no means intended to be complete; rather, the notions mentioned here would deserve attention in almost every pertinent case. Thus, every case requires an analysis to what extent the law of GATT is addressing the issue and to what extent it prevails as *lex specialis*. Where those concepts pay tribute to contractual relations, however, article XXI denies the use of the *specific* GATT contractual link for determining the legality of pertinent actions.

183. GATT, art. XXXI.

to general rules of international law, it seems appropriate to consider in what situations article XXI(b)(iii) and general international law may give conflicting answers. In the situation of war and of any armed attack which allows the lawful use of force, it is clear from the above that whenever "war" or the (even potential) use of force are involved, article XXI(b)(iii) poses no barriers whatsoever. There is thus no collision with general international law. In situations in which other matters affect State "essential security interests," article XXI(b)(iii) supersedes (and partly incorporates) the general law of economic coercion for political purposes.

Where security interests are not involved, however, GATT does not supply a clear answer. Thus, the question arises whether GATT limits *prima facie* violations of its rules only to the extent set forth in the General Agreement itself (e.g., article XXI(b)(iii)) or whether the law of reprisal allows a Contracting Party to use economic measures (*prima facie* violating GATT) to enforce other treaty or customary law obligations.<sup>184</sup> An elaborate discussion of this question would leave the scope of this study. Because of the potential practical relevance, however, an attempt will be made to offer the sketchy outline of an answer. It is well-established, for instance, that the violation of a treaty obligation represents one of the prototypes of an internationally wrongful act.<sup>185</sup> Under general principles of international law,<sup>186</sup> a State can counteract with a *per se* illegal act to enforce its right to compliance with treaty obligations. Thus, it can be assumed that it is legal to violate obligations arising out of a treaty after the breach of an obligation rooted in another treaty relationship between the same partners.<sup>187</sup>

The question remains whether this general rule is applicable to GATT. Put differently, does article XXI(b)(iii), read in context with the other escape clauses of the General Agreement impliedly exclude the unilateral use of economic measures for the self-enforcement of

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184. The following case might serve as example. Country A (a developed country) and country B (a less developed country) have concluded a loan agreement to which public international law applies. B has received the money. B now thinks that the repayment constitutes an "unjust enrichment of the haves to the detriment of the have-nots." It stops payment, although payments would be required according to all relevant standards. Can A suspend Article I and II of GATT?

185. I. BROWNLIE, *SYSTEM OF THE LAW OF NATIONS, STATE RESPONSIBILITY* 59 (1983); I. VON MÜNCH, *DAS VÖLKERRECHTLICHE DELIKT* 134 (1963).

186. These principles are not derogated by the principle enshrined in article 60 of the VCLT, *supra* note 27; see generally A. VERDROSS & B. SIMMA, *supra* note 29, at 512.

187. White, *Legal Consequences of Wrongful Acts in International Economic Law*, 16 NETH. Y.B. INT'L L. 137 (1985) does not mention that possibility; see also B. SINHA, *UNILATERAL DENUNCIATIONS OF TREATIES BECAUSE OF PRIOR VIOLATIONS BY OTHER PARTIES* (1966).

international law?<sup>188</sup> A good case can be made that the answer has to be affirmative. The wealth of exceptions in GATT, the various possibilities of the CONTRACTING PARTIES to suspend the application of certain provisions and the short notice necessary before complete withdrawal suggest that there is no other possibility to evade the obligations incurred as a reaction to a preceding violation of international law. Deciding otherwise implies great potential for instability of the multilateral trading system and thus endangers the General Agreement's purpose of ensuring stability in international economic relations. It must be left open for further discussion, however, if overriding interests and principles might require that that price be paid in certain instances.

### VIII. PROCEDURAL ASPECTS OF THE APPLICATION OF ARTICLE XXI

Absent a central authority, international law has to be self-enforced by the parties concerned. In contrast, more sophisticated legal sub-systems like GATT tend to have some sort of institutionalized dispute settlement procedure.<sup>189</sup> The following section of the article will examine the relationship between the GATT dispute settlement procedure and the security exception.

#### A. *Duty to Inform*

The 1982 Decision of the CONTRACTING PARTIES concerning article XXI spells out the duty of Contracting Parties acting under the security exception to inform the other Contracting Parties of the measures taken; this duty is, of course, subject to the provision of article XXI(a). Given that the targeted Contracting Party will be the first to notice the actions taken under article XXI(b), the real issue is whether the State acting under article XXI must notify the CONTRACTING PARTIES. Although it was not expressly stated in the Decision, it appears that this had been the intent of its drafters.<sup>190</sup>

188. See Gornig, *Die Völkerrechtliche Zulässigkeit eines Handelsembargos*, 45 JURISTEN ZEITUNG 113, 122 (1990) for current examples of such treaty-based exclusions.

189. See generally D. CARREAU, P. JUILLARD & T. FLORY, *DRIT INTERNATIONAL ÉCONOMIQUE* (1980); SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL, *COLLOQUE D'ORLEANS 1972, ASPECTS DU DROIT INTERNATIONAL ÉCONOMIQUE* (1972); Beirlaen, *La Distinction entre les Différends Juridiques et les Différends Politiques dans la Pratique des Organisations Internationales*, 11 REVUE BELGE DE DROIT INTERNATIONAL 405 (1975); G. MALINVERNI, *LE REGLEMENT DES DIFFÉRENDS DANS LES ORGANISATIONS INTERNATIONALES ÉCONOMIQUES* (1974); Jackson, *Dispute Settlement Techniques between Nations Concerning Economic Relations—with Special Emphasis on GATT*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* 39 (T. Carbonneau ed. 1984).

190. The question concerning whether notification was necessary had been discussed in the

Moreover, this outcome is also required by the acting State's duty to act in good faith within its multilateral treaty relationship. The possibility of exercising unilateral suspension of a multilateral agreement with now more than 100 Contracting Parties without providing some sort of notice to the group as a whole would bring so much instability to the treaty framework as to compel notification to the decision-making bodies of the GATT.<sup>191</sup>

### B. *Duty to Justify*

Is it enough merely to inform the CONTRACTING PARTIES and the target of the measures in question or is the acting State required to articulate and demonstrate the basis for its claim that the security exception is applicable? GATT allows an early involvement of the CONTRACTING PARTIES in efforts to find solutions for contentious matters under article XXII(2). This conciliation and mediation effort would be turned into a farce if the CONTRACTING PARTIES were required to undertake their efforts without knowing the relevant facts and legal arguments. It therefore seems indispensable that the acting State supply sufficient facts to exclude improper motivation (*i.e.*, economic reasons) and to show that the objective standards under (i)-(iii) are met. The principle of good faith equally requires the pertinent Contracting Party to make available the material permitting the assessment of the matter by the CONTRACTING PARTIES.

### C. *Application of the GATT Dispute Settlement Procedure to Actions under Article XXI*

The procedure embodied in article XXIII of GATT is the core of the rather unique way in which the General Agreement has provided for the settlement of disputes between Contracting Parties. More than this text alone though, the practice of the CONTRACTING PARTIES and of the Council has fashioned the dispute settlement procedure we know today and which is likely to play an even more

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Council. In particular, the EEC delegate had initially rather strongly rejected such a duty. GATT Council, *Minutes of Meeting held May 7, 1982*, GATT Doc. C/M/157 (June 22, 1982) at 10. The Decision, although being obviously a compromise, does not follow this initial position when stating that the "contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI." 1982 Decision, *supra* note 83, at 23.

191. "[I]t is clear that the effective supervision of the operation of a multilateral trade treaty like the GATT requires transparency in . . . measures adopted by member countries. For there to be this transparency, they have to be notified by governments." O. LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM* 74 (1985).

important role after the conclusion of the Uruguay Round.<sup>192</sup> The dispute settlement procedure, having gained a great deal of attention in the scholarly literature, needs no particular introduction.<sup>193</sup> For present purposes it suffices to remind the reader that GATT is not equipped with an institutionalized judicial organ; rather the CONTRACTING PARTIES, *i.e.*, the "Member States" of GATT acting jointly (article XXV(1)), are supposed to "make appropriate recommendations" to the Contracting Parties concerned or "give a ruling" (article XXIII). During the 40 years of GATT, a highly successful adjudicative system has emerged which does not resemble the rather scarce relevant passages of the GATT in every detail. As a matter of fact<sup>194</sup> — and now as a matter of law<sup>195</sup> — the CONTRACTING PARTIES will establish a panel for legal analysis of the dispute on the request of any involved Contracting Party after certain prerequisites are met. This will be on the basis of so-called Terms of Reference which until 1989 had not been standardized but were subject to sometimes extensive negotiations.<sup>196</sup> In the words of the new standardized Terms, the panels' task is "to examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by [the complaining Contracting Party] . . . and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in article XX-III:2."<sup>197</sup> Panels apply the relevant provisions of GATT to the facts of the case in a quasi-judicial fashion. However, in order to become a

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192. See Petersmann, *Mid-Term Review Agreements of the Uruguay Round and the 1989 Improvements to the GATT Dispute Settlements Procedures*, 32 GER. Y.B. INT'L L. 280 (1989).

193. See generally J. JACKSON, *supra* note 3, at 83; Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 57 (1987); Hudec, *Reforming the GATT Adjudication Procedures: The Lessons of the DISC Case*, 72 MINN. L. REV. 1443 (1988); Hudec, *GATT Dispute Settlement after the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145 (1980).

194. Since 1948, GATT Panels have decided more than 138 cases. GATT, Analytical Index, art. XXIII-89, GATT Doc. Leg/2. For the various "blessings of the CONTRACTING PARTIES" in the past, see, *e.g.*, 1979 Understanding, *supra* note 122. See also CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND DOCUMENTS Supp. No. 36, at 61 (1988-89) (Improvements to the GATT Dispute Settlement Rules and Procedures—Decision of April 12, 1989) [hereinafter 1989 Decision].

195. A right to a Panel is recognized in several of the 1979 codes. Nothing in the GATT requires the Contracting Parties to establish a GATT Panel. Because of the *de facto* consensus voting rule, any party to a dispute can effectively block a Panel. That this is done so rarely might indicate that a new internal GATT rule has been formed through the practice of the CONTRACTING PARTIES, a question too far-reaching to be examined further here. Moreover, the 1989 Decision, *supra* note 194, seems to grant a pertinent right to a Panel.

196. The 1979 Understanding, *supra* note 122, mentions the practice of furnishing terms of reference. The 1989 Decision of the CONTRACTING PARTIES, *supra* note 194, establishes standard terms which apply unless the parties to a dispute agree otherwise within 20 days of establishment of the panel; see *id.* at 63-4.

197. *Id.*

legally binding ruling, GATT practice requires that a panel report must be accepted without objection by the CONTRACTING PARTIES.<sup>198</sup>

Although the outlined procedure is not specified in detail in the General Agreement itself, it is solidly founded upon article XXIII, which clearly supports the development of the GATT dispute settlement procedure into an institutionalized quasi-judicial system. Paragraph 1 of article XXIII places the "failure . . . to carry out . . . obligations under this Agreement" prominently in the first rank of reasons for which a Contracting Party may initiate the consultation and dispute settlement procedure of GATT. Also, article XXIII(2), by giving the CONTRACTING PARTIES the competence to give "rulings," envisages as one option for a possible response to the complaint under article XXIII a decision based on the rule of law. As an alternative, article XXIII provides the possibility of handing down "recommendations," which clearly implies a more political kind of decision-making. Thus, without unduly disregarding the considerable and genuine evolution of the GATT dispute settlement into an institution even more pronouncedly dedicated to the rule of law, it is fair to state that article XXIII already contains the notion of review of actions of Contracting Parties and determines as one possible standard of review the compatibility with the law of GATT.

#### D. *Panel Reports Dealing with the Security Exception*

The only two Panel Reports dealing with article XXI concerned actions by the United States against Nicaragua in the midst of the last decade.

##### 1. United States — Import of Sugar from Nicaragua<sup>199</sup>

Between 1982 and 1983, the United States considerably reduced the quota for sugar imports coming from Nicaragua. President Reagan stated that by denying Nicaragua that benefit, he hoped to diminish the resources available to that country for financing its military build-up and its support for subversion and extremist violence in the region. Nicaragua claimed that the U.S. action violated the ministerial Declaration of November 1982,<sup>200</sup> particularly several core provi-

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198. This gives the parties involved a de facto veto, contrary to GATT article XXV(4). See J. JACKSON, *supra* note 3, at 94.

199. CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS Supp. No. 31, at 67 (1983-84) (Report of the Panel adopted on March 13, 1984) [hereinafter *Nicaraguan Sugar*].

200. 1982 Decision, *supra* note 83, at 23.

sions of the GATT (articles II, XI, XIII). In the course of the procedure, the United States gave notice to the Panel that:

[I]t was neither invoking any exception under the provisions of the General Agreement nor intended to defend its actions in GATT terms. . . . The action of the United States did of course affect trade but was not taken for trade policy reasons. . . .

[I]ts action . . . was fully justified in the context in which it was taken. . . . [The United States] did not believe that the review and resolution of that broader dispute was within the ambit of the GATT.<sup>201</sup>

The Panel took this as an occasion to avoid addressing the issue whether the U.S. action was covered by Article XXI.

The panel noted that the United States had not invoked any of the exceptions provided for in the General Agreement permitting discriminatory quantitative restrictions contrary to Article XIII. The Panel therefore did not examine whether the reduction in Nicaragua's quota could be justified under any such provision.

Thus, article XXI was treated as a defense of the Contracting Party acting *prima facie* illegally, which would come into play only when specifically invoked by the acting State. This understanding of the Panel's reasoning is unavoidable because the United States had made it very clear that it had taken this measure for political-military reasons. There were enough facts known to the Panel that would have allowed it to start an inquiry into the U.S. measures' coverage by article XXI. Despite this, the Panel did not explain how this method was to be reconciled with the text of the security exception, that "nothing in this Agreement" — thus presumably also article XIII (which in the Panel's opinion the United States had violated) — "shall be construed to prevent any Contracting Party to take the action it considers necessary for the protection of its essential security interests in time of emergency in international relations."

## 2. United States — Trade Measures Affecting Nicaragua<sup>202</sup>

Like the first report, the second report dealing with the security exception neither states prerequisites nor consequences of its findings.

201. See *Nicaraguan Sugar*, *supra* note 199, at 72.

202. *United States — Trade Measures Affecting Nicaragua — Report by the Panel*, GATT Doc. L/6053 (Oct. 13, 1986) (Restricted) [hereinafter *Nicaraguan Trade Measures*]. The report has so far not been accepted by the CONTRACTING PARTIES due to the refusal of the United States to proceed. See GATT Council, *Minutes of Meeting held November 5-6, 1986*, GATT Doc. C/M/204 (Nov. 19, 1986) at 6-18 (Restricted); *Minutes of Meeting held April 15, 1987*, GATT Doc. C/M/208 (May 11, 1987) at 17-18; *Minutes of Meeting held July 15, 1987*, GATT Doc. C/M/212 (Aug. 6, 1987) at 24-29; *Minutes of Meeting held June 21-22, 1989*, GATT Doc. C/M/234 (July 31, 1989) at 37-42; *Minutes of Meeting held April 13, 1990*, GATT Doc. C/M/240 (May 4, 1990). See also *United States-Trade Measures Affecting Nicaragua*, GATT Doc. L/6661 (Mar. 23, 1990) (communications from Nicaragua), by which Nicaragua informed the CONTRACTING PARTIES of the lifting of all U.S. measures.

This time though, the deficit was not a self-inflicted constraint, but was instead forced upon it by the terms of reference<sup>203</sup> which stated in their pertinent parts that "the Panel cannot examine or judge the validity or motivation for the invocation of article XXI(b)(iii) by the United States." Appropriately, therefore, the Panel stressed that it considered itself not limited by the text of article XXI itself but by the terms of reference which would not allow an examination of the role of article XXI in the matter. Therefore, the report concluded that "it could find the United States neither to be complying with its obligations under the Agreement nor to be failing to carry out its obligations under that Agreement."<sup>204</sup>

This being the case, the Panel noted that the CONTRACTING PARTIES had, generally speaking, two options if the Panel were to find that the measures of the United States had nullified or impaired benefits to Nicaragua under GATT. It could recommend that the United States withdraw the measures taken or authorize Nicaragua to suspend the application of obligations under GATT toward the United States. In the opinion of the panelists, none of these possible alternatives would be effective. According to the drafting history and Panel caselaw, the United States would not be obliged to follow any recommendation of the CONTRACTING PARTIES as long as its action was not found to be illegal. As to the second alternative, the panel recalled that the United States had enacted a two-way embargo. Thus there was no realistic possibility of the CONTRACTING PARTIES taking a decision that would reestablish the balance of advantages which had accrued to Nicaragua under GATT within the framework of article XXIII.

Two further issues taken up by the report deserve to be mentioned for the purposes of this article. The first is of general interest for any GATT dispute in which a Panel is involved. Was it possible for the Panel to decide to grant a general waiver to *third parties*, not actually involved in the matter, to permit Contracting Parties which so desire to compensate for the effects of the embargo by giving, notwithstanding the general MFN treatment, differential and more favorable treatment to goods from Nicaragua?<sup>205</sup> Referring to GATT practice,<sup>206</sup> in particular the 1979 Understanding on dispute settlement, which states

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203. GATT Council, *Minutes of Meeting, March 12, 1986*, GATT Doc. C/M/196 (Apr. 2, 1986) at 7 (Restricted); for the preceding history see *supra* notes 86-102 and accompanying text.

204. Nicaraguan Trade Measures, *supra* note 202, at 14.

205. *Id.* at 17.

206. See CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS Supp. No. 18, at 3, 183-188 (1973-74) (Report of the Panel Adopted Feb. 2, 1974) (the only panel report recommending a waiver).

in its pertinent part that “[t]he function of panels is to assist the CONTRACTING PARTIES in discharging their responsibilities under article XXIII:2,”<sup>207</sup> the Panel answered the question in the negative.

The second point deals with the relationship between general international law and GATT. Nicaragua had argued that the Panel had to take into account the principles of international law when interpreting GATT. To this, the Panel replied that it could not take up this question as its task was limited to examining the matter “in the light of the relevant GATT provisions.” Without explaining this quite remarkable opinion, the Panel implied that the law of GATT and general public international law were separate bodies of law, rather than the GATT being a specialized sub-system which generally, but not necessarily, prevails over the general rules of international law.<sup>208</sup>

#### E. Review of Legality under Article XXIII

A Contracting Party who feels that any benefit accruing to it directly or indirectly under GATT is being nullified and impaired because of the failure of another Contracting Party to carry out its GATT obligations is encouraged to “make written representations or proposals to the other Contracting Party or parties it considers to be concerned”<sup>209</sup> in order to “adjust the matter” and eventually gain access to the CONTRACTING PARTIES under article XXIII. However, illegality of the pertinent action leading to nullification and

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207. 1979 Understanding, *supra* note 122, at 23.

208. At the end of its report in Nicaraguan Trade Measures, the Panel asked the CONTRACTING PARTIES to consider the following questions:

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

If the CONTRACTING PARTIES give a panel the task of examining a case involving an Article XXI invocation without authorizing it to examine the justification of that invocation, do they limit the adversely affected contracting party's right to have its complaint investigated in accordance with Article XXIII:2? Are the powers of the CONTRACTING PARTIES under Article XXIII:2 sufficient to provide redress to contracting parties subjected to a two-way embargo?

Nicaraguan Trade Measures, *supra* note 202, at 18-19.

The first question raised has already been dealt with: it is not reconcilable with the law of article XXI(b)(iii) to grant to the party invoking the exception sole authority to determine its interpretation and scope. The third question is an interesting issue *de lege ferenda*, but is beyond the scope of this analysis of the security exception *de lege lata*. The reports themselves raise further questions. The first report did not explain how it could assume a violation of GATT by the United States without having recourse to article XXI in the interpreting of the articles the United States allegedly had violated. The second Panel did not explain how it could interpret the security exception without acknowledging the well established principle that an international treaty provision has to be read with due regard to pertinent rules of international law, an issue already dealt with above.

209. GATT, art. XXIII.

impairment is not a necessary prerequisite for the specific redress granted by article XXIII. Under GATT caselaw, a complaint will eventually be successful if the "damaged" party could reasonably expect the other Contracting Party not to take the damaging measure.<sup>210</sup>

Article XXIII does not contain a presumption or command of non-application to "political" disputes. To the contrary, the extremely broad conceptual framework drawn by it (*inter alia*, "any other situation" may give rise to a successful article XXIII complaint) entails a strong presumption for applying the GATT dispute settlement procedure to *any* dispute in which the obedience to GATT rules and principles is at issue. During the preparatory deliberations of the GATT and the ITO Charter, the application of the Dispute Settlement procedure to the security exception was never put into question. It seems to have been clear to all participants that article XXI would not be exempted from review by the CONTRACTING PARTIES.<sup>211</sup> Several statements made apparent that this was seen as the only possible way to avoid abuse of such a vast exception,<sup>212</sup> other than the "spirit" in which that provision would be applied.<sup>213</sup> Moreover, article XXI itself does not exclude article XXIII(2) procedures; as set forth above, it is not within the exclusive competence of the State acting for political purposes to define the security exception.

However, the formula that "nothing in this agreement shall be construed to prevent" a State from action protecting its security interests under the conditions set forth in (i)-(iii) could be understood as not only excluding "prevention" in a strict sense, but also *ex posterior* review of actions under the standard of legality. There is no merit to this position. The reason for such a rule foreclosing review of the "validity or . . . the motivation for the invocation of article XXI(b)(3)"<sup>214</sup> to be examined or judged is founded upon the desire to preserve a high level of flexibility for the Contracting Party acting under Article XXI. As valid as this motivation might be, it cannot sustain the exclusion of article XXI from investigation under article XXIII(2). However, because article XXI grants the State broad discretion to act whenever it feels that its essential security interests are at stake, the CONTRACTING PARTIES (and for that purpose a panel) can only ex-

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210. See CONTRACTING PARTIES TO THE GATT, Fourth Session, GATT/CP.4/39 (Mar. 31, 1950) (Report of Working Party on the Australian Subsidy on Ammonium Sulphate).

211. U.N. Doc E/PC/T/A/SR.33, at 4-5 (1947).

212. *Id.*

213. See *id.* at 3.

214. This was expressed by the terms of reference for the Nicaraguan Trade Measures Panel Report. Nicaraguan Trade Measures, *supra* note 202, at 2.

amine (a) whether the objective prerequisites under article XXI(b)(iii) have been met, (b) whether no other violation of applicable principles had taken place and (c) whether the State acted for what it was entitled to understand as its essential security interests. The latter point is probably the most prone to examine the "general appropriateness" of an action under article XXI. This clearly would not be within the province of the CONTRACTING PARTIES and procedural devices have to take care of this point.

F. *The Political Nature of Actions under Article XXI as Reason to Exclude a Review of Legality by a Panel?*

Another basis that several States have suggested as precluding review of actions under article XXI is that their political nature makes them unsuitable for review by the CONTRACTING PARTIES and in particular for a Panel procedure. Under this view, questions touching the very core of a State's political interest are at most suited for discussions in an international political forum like the UN Security Council or the General Assembly; a quasi-judicial review of such State action by an arbiter not self-selected by the State concerned is, according to that opinion, not reconcilable with the notion of sovereignty.

Already in 1951 Czechoslovakia had advanced a similar argument and had made an effort to base it on article 86(3) of the ITO Charter which provided with regard to "essentially political matters" that

[I]n order to avoid conflict of responsibility between the United Nations and the [International Trade] Organization with respect to such matters, any measure taken by a member directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapter IV or VI of the United Nations Charter shall be deemed to fall within the scope of the United Nations, and shall not be subject to the provisions of this Charter.<sup>215</sup>

The argument against a review of legality under article XXIII derived from the specific relationship between GATT and ITO Charter is hardly sustainable. Article 86(3) of the ITO Charter is not applicable to GATT. As is well known, the former never became binding treaty-law. Furthermore, even if one were to overcome that obstacle, it remains undeniable that GATT expressly did not refer to Chapter VII of the ITO Charter and hence to Article 86(3). This follows from the express reference to other chapters of the Charter; *e contrario*, other parts of the Charter were not supposed to have immediate legal relevance.<sup>216</sup>

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215. ITO Charter, *supra* note 8, at 48.

216. Article 86 is part of chapter VII of the ITO Charter, to which the text of GATT ex-

These technical arguments serve as camouflage for the real issue at stake. The reluctance of States to submit the use of economic measures for security purposes to examination under the regular dispute settlement procedure reflects a general attitude of States toward arbitration in politically sensitive matters. Several concepts, developed both by international arbitral awards and by scholarly writers, have tried to reconcile the notion of compulsory adjudication with the interest of States to maintain a reserved domain of action free from interference by third-party arbiters. The "political question doctrine," "justiciability of a dispute," "legal vs. political dispute" and our earlier example of the "vital interests clause" have all been used in this sense.

These doctrines recognize that some disputes, although possibly justiciable as such, cannot be *settled* by judicial decision.<sup>217</sup> Without taking a position as to the theoretical merits of these doctrines, one has to acknowledge that they have the advantage of some empirical conclusiveness. States do walk away from international judicial proceedings when they perceive that their vital interests are not sufficiently appreciated. Moreover, while the ICJ has — some think in a rather cavalier fashion — never accepted those concepts in its case law, it has, perhaps not coincidentally, lost much of its importance as a "World Court." Be that as it may, obviously, serious people have serious differences as to the role of adjudication in politically charged disputes, and few of the arguments advanced by either side can be rejected out of hand. As stimulating as some might perceive this debate to be, it is of little importance for present purposes. What has been called in previous sections of this article a "review" of actions under article XXI is not at all claimed to be a tool for the solution or settlement of politically charged disputes. The only and quite limited purpose of a "review" of economic measures for political ends under the GATT dispute settlement procedure is (a) whether the dispute is of a "political" character (which would in ICJ procedures, for example, give occasion to discuss questions of "justiciability") and (b) whether the dispute has reached a certain magnitude or, more specifically, whether a breach of law was involved. When, and only when,

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pressly does not refer, while chapters I to VI and IX of the ITO Charter are referred to by article XXIX of GATT. Even if one were to apply article 86(3), one would have to take into consideration that it was presupposing a UN Dispute Settlement Practice quite different from the actual one; the very purposes of the provision, to facilitate effective solutions based on the rule of law, would probably force a reading not excluding disputes from the only review of legality available in practical terms.

217. See Steinberger, *The International Court of Justice*, in JUDICIAL SETTLEMENT OF DISPUTES 202 (H. Mosler & R. Bernhardt eds. 1974).

those preconditions are met, GATT's "jurisdiction to prescribe" ends. Thus, an analysis under article XXIII has to solve the question of *whether* there is a "political dispute" and not *how* to solve it. The concepts aiming at limiting the role of international arbitration do not oppose this type of an analysis of a dispute; to the contrary, they imply that international adjudicatory bodies called upon to decide an international dispute undertake this very exercise in order to abstain from *further* action if a dispute turns out to be of political character. Thus, there is no ground for claiming that article XXI could not be subject to the regular dispute settlement procedure of GATT: a Panel report would simply determine whether a situation was of such importance for GATT to self-restrain its applicability. Even such a determination might be not free from political overtones. This, however, is not enough to make its procedure "political" and thus not within the reach of GATT's dispute settlement.<sup>218</sup>

#### G. *The "Right to a Panel" and the Review of Article XXI Cases*

At the time the second Nicaragua report was drafted, it was questionable whether a Contracting Party to GATT had a "right to a Panel" under articles XXII and XXIII. The doctrine tended to answer the question in the negative, despite the recognition of a "standing practice" by the CONTRACTING PARTIES in 1979 and the possible implications of this acknowledgment under the well-established rule of treaty interpretation incorporated in Article 31 of the VCLT. Today, the 1989 "Improvements to the GATT dispute settlements rules and procedures"<sup>219</sup> have put a right to a Panel beyond doubt,<sup>220</sup> and thus impliedly the right to a procedure in which the impartiality of the panelists, the procedural equality of the parties and a full and fair hearing is guaranteed, at least if so required by one of

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218. It is no proof to the contrary that the Contracting Parties have always moved very cautiously in politically charged disputes. In several such controversies, none of the parties involved have attempted to initiate a formal dispute settlement procedure. This is certainly an indication that in those and other circumstances Contracting Parties might deem it wiser to refrain from the particular "judicial process" provided by GATT; it should not be assumed, however, that the GATT dispute settlement procedure is not suited for "political disputes." See O. LONG, *supra* note 191, at 82. In 1982, for example, the United States suspended MFN treatment with Poland. The United States took the position that while political motivation of its actions could not be excluded, it had only taken advantage of its rights under Poland's Protocol of Accession. The protocol's § 7 allows a Contracting Party to suspend the application of concessions or other GATT obligations if Poland did not honor certain commitments, which Poland subsequently failed to meet. No attempt was made to examine the legality of U.S. actions in an article XXIII proceeding.

219. 1989 Decision, *supra* note 194.

220. "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 . . . on the Council's regular agenda. . . ." *Id.* at 63 (emphasis added).

the parties concerned. These minimum requirements would not be met if an adversely affected party's claim of a GATT violation or nullification and impairment of benefits under GATT could be blocked by simply invoking article XXI. The only proper way to reconcile the right to a Panel and article XXI is to review actions allegedly covered by the security exception according to the lenient standard described.

#### H. *Articles XXIII and XXI Applied*

A persistent theme of the first and second reports dealing with article XXI was the "invocation" of this provision as a prerequisite for its being considered in the legal evaluation of a case. However, by refusing to find the U.S. embargo compatible with GATT, the second pertinent report revealed the appropriate understanding that article XXI is a substantive parameter to be observed in any matter in which compliance with GATT is an issue.

The text of article XXI(b)(iii) makes clear that it provides not just an "exception" in the literal sense, but demands that due account be taken of its content when "construing" all GATT provisions relevant to a specific case. Thus, a Panel would have to examine *ex officio*, and not only after invocation, the impact of the security exception on any GATT provision possibly violated by a Contracting Party. There are a few Panel reports which state a contrary view. A recent Panel<sup>221</sup> tried to base its pertinent handling of a case on GATT precedents. It will be recalled that there is no such thing as precedent in a technical sense in international law and certainly not in GATT. These reports in question give no reason whatsoever for their reading of the text and have no persuasive value. This is not to say that a party to a GATT dispute when answering an alleged violation should not have the burden of invoking the particular exception on which it wants to base its argument in order to facilitate prompt and accurate assessment of the dispute. But it should not be the case that its failure to argue the point forecloses the right of the Panel to consider it in its decision. This is particularly true for "exceptions" like article XXI which constitute material exemptions from a more general rule.

#### I. *Burden of Proof and of Production*

In both Nicaragua Panel reports, the pertinent facts for starting an evaluation of article XXI(b)(iii) were known to the Panel. This is doubtlessly so in the second case; in the first case too, the United

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221. *EEC — Regulation on Imports of Parts and Components*, GATT Doc. L/6657 (Mar. 22, 1990), at 71.

States had left no doubt that it had taken the measures in question for noneconomic reasons and for political purposes. This set of circumstances should be enough to trigger an examination of article XXI(b)(iii). However, what if a party complained against in a Panel procedure would refuse to provide further information — how would a Panel have to proceed?

The proper answer to this question depends on the different stages of Panel examination. In order to trigger article XXI(b)(iii) analysis, it suffices that political and security reasons are involved. For the actual legal evaluation by the Panel, of course, a higher degree of information is required. It has been set forth above that the security exception grants the State acting for security purposes vast discretion. Thus the Panel initially needs little additional information; only the factual foundation for the objective prerequisites listed under (i)-(iii) would have to be presented. In case of article XXI(b)(iii), this requires obviously more than in the case of, say, article XXI(b)(i). In addition, the State complained against would have to show that it acted for the protection of its essential security interests. The complaining party would then have the burden of producing and eventually proving facts supporting the contrary view. If a State claimed the benefit of article XXI(b)(iii) without giving any further information, the Panel and the CONTRACTING PARTIES would have to make every effort to fulfill their duty to obtain a suitable factual basis for the determination of legality. In case these efforts would prove fruitless, the State refusing full participation would have to bear the disadvantage arising out of such omission and lose its protection provided by article XXI.

*J. Nullification and Impairment Despite Coverage  
by Article XXI(b)(iii)?*

Finally, the question arises whether a Panel would be entitled to continue its examination of article XXIII if it had found that the State against whom the complaint had been brought had acted duly under the coverage of article XXI(b)(iii). Ordinarily the legality of a measure is not an indication that a procedure under article XXIII will not lead to the success of the complaint for other reasons; as will be recalled, several Panel reports have based their conclusions on the concept of protection of reasonable expectations of the complaining party. There is no room for such an approach when article XXI is involved; nothing in the General Agreement is supposed to prevent a State from taking measures which meet the standard of article XXI(b)(iii). The threat of possible compensation interferes with the enjoyment of freedom from limitations specific to GATT if (and only if) the standard of

article XXI is met. More importantly, an examination of the "reasonable expectations" of the Contracting Parties almost necessarily leads to the examination of the "appropriateness" of the measures in question. The security exception, however, serves the very purpose of exempting a Contracting Party from that kind of scrutiny. The full scope of an article XXIII examination would disregard this purpose. For the same reasons, it is not compatible with article XXI(b) for a panel to start *sua sponte* with a review of nullification and impairment of benefits accrued under GATT, notwithstanding a legal assessment of the complaint, whenever the facts suggesting an article XXI case are manifest. Therefore, the broad concept of "nullification and impairment" under article XXIII cannot apply in disputes where an action under article XXI is at stake.

#### IX. PROPOSED CHANGES FOR THE SUBSTANTIVE LAW OF ARTICLE XXI(B)(III)

Obviously, the Contracting Parties to GATT do want a security exception which allows them to keep an effective tool for enforcing their legal position in times of political and military tensions. At the same time, efforts like the Uruguay Round demonstrate the will, in particular of the United States and the European Community, to strengthen the legal basis of the GATT System. The analysis of this article suggests that the law of the existing article XXI(b)(iii), properly interpreted, provides a workable solution for reconciling these two conflicting goals: it would allow considerable flexibility, while putting up some barriers to the unrestricted use of economic coercion for political purposes.

In times of war or breach of any international obligation endangering the political-military security of a country, that State may in essence act as if it were only subject to general international law, in particular, without being restrained by MFN obligations. In all other situations, where a State not bound by GATT could use economic coercion basically at will without acting illegally, a Contracting Party has to pay a price for its rights under the Agreement: the limited choice of action to respond to political challenges *not* touching essential security interests and *not* constituting an international wrongful act. These cases have to be handled with the use of counter-measures not infringing the General Agreement. Given GATT's status as "the constitution of world trade," this restraint on State action seems not too high a price. For it is self-evident that even the temporary neglect of basic rules in times of distress leads to a substantially diminished credibility of the overall framework.

## X. PROPOSED CHANGES FOR THE PROCEDURAL LAW OF ARTICLE XXI(B)(III)

One of the prime goals of the Uruguay Round is a strengthening of the GATT dispute settlement procedure. That there is indeed a considerable political push behind this declared goal is demonstrated by the provisional changes initiated by the Montreal Midterm Review. The procedural administration of article XXI(b)(iii) could demonstrate the extent to which major players in GATT like the European Community and the United States are prepared to accept legal bonds necessary for the GATT system to change its character from an interstate framework for facilitating trade to a true "constitution" for the participants in world trade, *i.e.*, both States and individual economic entities.<sup>222</sup> In many aspects international economic law is moving in that direction. Article XXI(b)(iii) might be, as of now, of limited acute significance to this strengthening of the rule of law in international trade relations. But in many aspects it is a philosophical litmus test of how the Contracting Parties are prepared to fashion the General Agreement. If one takes their publicly expressed commitment to a progressive development seriously, the following changes from the recent practice seem necessary.

### A. *Duty to State Reasons for Unilateral Departure from GATT Rules*

Although it has been stated above that under the present legal situation a duty already exists to state reasons for an unilateral departure from normal GATT rules for political purposes, this duty has not been adequately reflected in State practice so far. Therefore, it is desirable that this duty be expressly stated either by decision of the CONTRACTING PARTIES or through other means. The proposition of this study — that the interest of States in having a varied arsenal of options for self-enforcement of international law must be balanced with the need for stability in treaty relationships — determines how far this duty goes. The following scheme might thus state this legal appraisal: (1) a State acting under Article XXI(b)(iii) has the duty to notify the CONTRACTING PARTIES and every State concerned, in particular the State targeted by the pertinent action, of its reliance on that provision; (2) the notification must substantiate that the State acting has done so for security purposes, and not for economic reasons;

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222. See Hilf, *International Trade Disputes and the Individual: Private Party Involvement in National and International Procedures Regarding Unfair Foreign Trade Practices*, in 41 *AUSSENWIRTSCHAFT (SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALE HANDELSBEZIEHUNGEN)* 441 (1985); see also J. JACKSON, *supra* note 3, at 109.

and (3) the notification has to comprise such factual elements as may be required to show that the State acting either is at war or has a reasonable belief that it is at war; is supporting a party at war; or that the State targeted with the action has committed an international wrongful act either against the Contracting Party acting or against another party which the acting State is supporting.

### B. *Dispute Settlement Procedure*

Under the present (permanent)<sup>223</sup> system, Panels may only examine the legality of a measure to the extent the terms of reference allow them to do so. Although in practice the wording has been standardized, terms of reference set forth in each case are a veritable “*compromis*” which needs the blessing of both of the parties involved in the dispute. On the other hand, it is a matter of fact that the GATT dispute settlement procedure has developed into one of, if not *the* most successful international dispute settlement procedure.<sup>224</sup> A very good case for this success can be attributed to the “voluntary” character of the procedure: political peer pressure has convinced many reluctant States to submit themselves to the burden of a participation in the process, allowing them to save face due to the true or pretended voluntary character of their submission; chances are that they would have walked away if pushed by a mandatory system.

Yet, in the second case concerning Nicaragua the terms of reference made the whole procedure turn into a farce. In effect the Panel itself alluded to the fact that in so doing the “adversely affected contracting party’s right to have its complaint investigated in accordance with Article XXIII:2” had been effectively reduced to the political process of discussing the matter in the Council to the CONTRACTING PARTIES. In fact, the formulation chosen by the Report implies somewhat that a Contracting Party has a right to an effective Panel; a position which at the time of decision was still not accepted, although even then the practice of almost 40 years of referring contentious matters to Panels<sup>225</sup> might have created such a legal

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223. The changes outlined in the 1989 Decision, *supra* note 194, are *de jure* of a provisional character.

224. Save of course the European Court of Justice, which is, however, not a completely fitting object of comparison because of its structure and legal foundation.

225. The first Panel delivered its report in the Belgian Family Allowance case. CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, Supp. No. 1 (1953), at 59 (Report of Nov. 7, 1952); Supp. No. 2 (1954), at 18 (Recommendation of Nov. 7, 1952); Supp. No. 7 (1959), at 68 (Outcome of earlier complaints); and *Final Report by the Government of Belgium* GATT Doc. L/187 (Mar. 22, 1954). From the beginning of the 1960s on, almost every matter was referred to a Panel, if so requested.

right.<sup>226</sup> In fact, the development initiated by the Montreal Midterm Review points in that direction when it fosters "institutionalized justice" by "standard terms of reference" and other devices.<sup>227</sup>

An effective procedural administration of article XXI(b)(iii) would require that the terms of reference for Panels be standardized along these lines and subject only to change by agreement of the parties involved.<sup>228</sup> Furthermore, the interpretation of article XXI is not, as has been set forth above, "reserved entirely to the contracting party invoking it." The Panel itself would have to examine this provision, *sua sponte* if necessary, in every matter, in order "to ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purpose other than those set out in this provision."<sup>229</sup>

In a matter in which article XXI turns out to be relevant, the CONTRACTING PARTIES should make clear that it is up to the party acting under that provision to show initially that it has not abused its right. This process of clarification would be particularly helpful with a dispute settlement procedure having developed more "judicial" characteristics; however, even if the presently existing system remains in place, it would be useful to remind the Contracting Parties of the general principle that a party who relies upon an exception to a general rule has the burden of showing that its prerequisites are met.

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226. See the 1989 Decision, *supra* note 194.

227. See Canal-Forgues & Ostrihansky, *New Developments in the GATT Dispute Settlement Procedures*, 24 J. WORLD TRADE L. 67 (1990).

228. The 1989 Decision of the CONTRACTING PARTIES, *supra* note 194, adopts that solution on a provisional basis.

229. *Id.*