

Critical Analysis of GATT Article XX(j)

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ABSTRACT

This paper critically examines the Appellate Body's interpretation of GATT Article XX(j), arguing that its adoption of a "global availability" standard for determining "short supply" has rendered the provision functionally inoperative. Through a rigorous application of Articles 31 and 32 of the Vienna Convention on the Law of Treaties, supported by the travaux préparatoires of the Havana Charter, the paper demonstrates that XX(j) was historically designed to address domestic or access-based scarcity rather than worldwide production shortages. It identifies a consistent doctrinal flaw in both India-Solar Cells and the EU-Energy Package, where adjudicatory bodies conflated global availability with actual accessibility. To resolve this, the paper introduces a novel typology distinguishing between production-constrained and access-constrained scarcity, situating the 2026 Strait of Hormuz crisis as a paradigmatic case of the latter. The proposed reinterpretation restores coherence to XX(j) by aligning it with its text, purpose, and historical context, while preserving safeguards against protectionist abuse through the chapeau and necessity requirements. Ultimately, the paper argues for a doctrinal recalibration that enables XX(j) to function as an effective legal tool in contemporary energy security crises.

1. INTRODUCTION

The GATT Article XX(j) provision, which entered the General Agreement in 1947, creates a double-edged situation for international trade law because it maintains its original function, which allows countries to establish protective domestic regulations during domestic supply emergencies, yet has never succeeded in protecting any WTO-inconsistent regulation from legal scrutiny.¹ The provision remained completely inactive during the seven decades following its drafting until the Appellate Body delivered its first interpretation of the text through the India Measures Relating to Solar Cells and Solar Modules (2016) case.² The Appellate Body created an interpretation of XX(j) which restricted the European Union's equivalent defence in the EU Energy Package proceedings (DS476, 2018) to outright failure.³ GATT Article XX(j) has become a dead letter because it remains active in two major energy trade disputes from the last ten years but both cases resulted in rejection.

The United States and Israel began their joint military operations against Iranian nuclear and military sites through Operation Epic Fury on February 28 2026. The Strait of Hormuz handles 20 million barrels of daily oil traffic which constitutes 20 percent of worldwide petroleum liquids consumption and 20 percent of global liquefied natural gas trade.⁴ Brent crude prices exceeded USD 100 per barrel within ten days

¹ General Agreement on Tariffs and Trade art. XX(j), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

² *Appellate Body Report, India-Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/AB/R, ¶¶ 5.65–5.87 (adopted Oct. 14, 2016).

³ *Panel Report, European Union-Certain Measures Relating to the Energy Sector*, WT/DS476/R, ¶¶ 7.1350–7.1352 (circulated Aug. 10, 2018).

⁴ US Energy Information Administration, 'Amid Regional Conflict, the Strait of Hormuz Remains Critical Oil Chokepoint' (June 2025) <<https://www.eia.gov>>.

after the closure and reached a maximum of USD 126 per barrel. India experienced significant import challenges because 53 percent of its LNG imports typically pass through the Strait from Qatar and the UAE while Pakistan and Bangladesh faced higher risks with 99 percent and 72 percent of their LNG imports coming from routes that cross Hormuz.⁵ The crisis represents the most significant global energy supply disruption since the 1970s oil crises which caused major supply shocks to developing countries that lacked procurement flexibility.⁶

The Appellate Body's understanding of Article XX(j) received its final determination through the 2026 Hormuz crisis. The AB determined in *India Solar Cells* that 'short supply' requires worldwide evaluation because all supply sources need evaluation including imports since a country needs to prove domestic commodity access to show 'in short supply' status.⁷ The DS476 panel established its requirements by denying that XX(j) would apply to any situation which showed 'serious risk of imminent disruption' because it needed actual scarcities to exist instead of expected ones.⁸ The Hormuz reasoning creates a situation which violates legal principles and leads to disastrous operational results through its application to the case. The *India Solar Cells* standard might lead a WTO panel to determine that oil and gas resources remain available in 2026 because global production volumes have not decreased through the only restriction on oil and gas availability being the maritime transit route. India, Japan, South Korea, and Pakistan face severe energy shortages because the existing framework prevents them from obtaining XX(j) protection since the AB misjudged their scarcity situation.⁹

The paper makes three arguments. The AB's 'global availability' standard for 'short supply' is doctrinally unsound because a VCLT Article 31-32 analysis which uses ordinary meaning to explain 'general or local short supply' and employs contextual reading of the Havana Charter's Article 45 travaux préparatoires which serve as the source for XX(j) shows that the provision was designed to handle domestic scarcity which results from goods being unavailable to the importing state rather than from worldwide commodity production shortages.^{10,11} The DS476 panel made an incorrect decision when it dismissed imminent supply risk as a XX(j) trigger because this created a two-panel pattern which made the provision unusable during times when states experienced predictable and verified supply emergencies.¹² This paper establishes a new typological distinction between production-constrained scarcity which happens when global output has truly decreased and access-constrained scarcity which occurs when global access to a commodity is blocked because of disrupted maritime or logistical supply routes. The 2026 Hormuz closure is the

⁵ Ruxandra Iordache, *The Strait of Hormuz Is Facing a Blockade: These Countries Will Be Most Impacted*, CNBC (Mar. 3, 2026), citing Kpler and IEEFA data.

⁶ UNCTAD/OSG/TT/INF/2026/1, 'Strait of Hormuz Disruptions: Implications for Global Trade and Development' (UN Trade and Development, March 2026).

⁷ *India-Solar Cells*, ¶ 5.79.

⁸ *EU-Energy Package*, ¶¶ 7.1350–7.1352.

⁹ Pracheta Bhatt, 'Towards a Security-Centred Energy Transition: Balancing the EU's Ambitions and Geopolitical Realities' (2024) 26(4) *Journal of International Economic Law* 756.

¹⁰ Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331 (VCLT).

¹¹ Havana Charter for an International Trade Organization art. 45, U.N. Doc. E/CONF.2/78 (Mar. 24, 1948) (precursor to GATT art. XX(j)).

¹² IELP Blog, 'Managing Risks as a GATT Exception under GATT Article XX(j)' (worldtradelaw.net, January 2024, updated September 2025).

paradigmatic instance of the latter category, and no existing scholarship has drawn this distinction or applied it to XX(j).¹³

2. HISTORICAL CONTEXT OF ARTICLE XX (J)

2.1 Article 31 VCLT

The Appellate Body's interpretation of GATT Article XX(j) requires all valid challenges to start from the provision's text which must be analyzed according to the existing WTO interpretive rules and the Article 31 guidelines of the Vienna Convention on the Law of Treaties (VCLT).¹⁴ VCLT Article 31(1) requires that treaty interpretation be conducted in "good faith", executing its terms based on their common understanding within the treaty's complete context and its intended goals.¹⁵ The starting point for this method operates beyond simple procedural requirements: GATT Article XX(j) provides only limited textual content which makes the subsequent textual examination highly significant because AB in *India-Solar Cells* reached its disputed findings through decisions on common term understanding.^{16,17}

The AB in *India Solar Cells* examined 'short' and 'supply' in isolation before reading them in combination; their final conclusion established that 'short supply' denotes 'an inadequate supply of something,' because they used standard dictionary definitions as their reference point.¹⁸ The present paper acknowledges uncontroversial facts and establishes that scarcity functions as the fundamental concept which represents supply inadequacy that exists between demand and available resources. The main point of disagreement lies in evaluating supply inadequacy through which perspective and which geographic area. The AB required that the evaluation process should cover all global supply routes which Member states use to bring in their imported materials.¹⁹ The provision text describes products that exist in 'general or local short supply'; the term 'local' specifies regional shortages, while its design suggests multiple states need to handle distinct supply challenges at the same time.²⁰

The disjunctive construction 'general or local' is, on its face, inconsistent with a purely global supply standard. The AB itself acknowledged that 'local' refers to a geographic scope narrower than the 'general' international level²¹, so 'short supply' assessment based on world production totals would make the term 'local' completely unnecessary. A Member invoking XX(j) on the basis of a purely national or regional supply shortage that is not replicated globally would under the AB's standard, fail the test regardless of how severe the domestic shortage is. The process of treaty interpretation must follow canonical principles which prohibit treaty text analysis that makes any term within the treaty unnecessary or without function.²²

¹³ U.S. Energy Information Administration, *The Strait of Hormuz Is the World's Most Important Oil Transit Chokepoint*; Ruxandra Iordache, *The Strait of Hormuz Is Facing a Blockade: These Countries Will Be Most Impacted*, CNBC (Mar. 3, 2026) (citing Kpler and IEEFA data).

¹⁴ VCLT art. 31, supra note 10.

¹⁵ VCLT art. 31(1), supra note 10 ("A treaty shall be interpreted in good faith ... object and purpose.").

¹⁶ GATT art. XX(j), supra note 1.

¹⁷ *India-Solar Cells*, ¶ 5.67.

¹⁸ *Id.* ¶ 5.69.

¹⁹ *Id.* ¶ 5.71.

²⁰ GATT art. XX(j), supra note 1.

²¹ *India-Solar Cells*, ¶ 5.75. (noting that 'local' modifies 'short supply' and refers to a sub-national or national geographic scope smaller than the 'general' global level).

²² VCLT art. 31(2), supra note 10 (context includes the text, preamble, and annexes of the treaty, as well as related agreements made in connection with its conclusion).

The AB's global supply standard effectively deletes 'local' from the provision, a result that the ordinary meaning rule cannot sustain.

The word 'essential' establishes the requirement that the measurement must be essential for acquiring or distributing the product, which is in short supply, instead of being related to or helpful to the process. The AB confirmed through this standard which shows that XX(j) has internal proportionality functions that operate within its design. The exception can only be used by states when their measures show direct links to supply management according to this regulation. The extra requirement from the XX chapeau states that XX(j) measures should not create unfair discrimination practices or hidden trade restrictions which proves that XX(j) provides limited exceptions for domestic supply-management activities.²³ Protectionist abuse can be controlled through these internal restrictions while the AB has created an extra restriction through global scarcity which lacks support from the existing text.

The standard established by AB's textual reasoning in the India Solar Cells determines that 'short supply' only applies when the commodity becomes globally unavailable due to actual international production or distribution shortages which have occurred since worldwide demand for the commodity has increased.²⁴ The DS476 panel confirmed and hardened this position, holding that natural gas subject to serious disruption risk from Russian supply routes was not 'currently in short supply' for the purposes of XX(j).²⁵ A state could not use XX(j) because it does not have physical access to a commodity which exists in the world but requires transportation through a route that has been blocked. The third chapter of this paper demonstrates that the reading has been proven incorrect through the 2026 Strait of Hormuz closure, which shows that the commodity remains globally available, yet India, Japan, South Korea, and Pakistan experience specific supply shortages, which XX(j) was created to resolve.

2.2 Article 32 VCLT

The Article 31 analysis shows real treaty text ambiguity because the previous study proves that the disjunctive term 'general or local' creates at least partial geographic scope uncertainty. The VCLT Article 32 provision allows access to treaty preparatory documents for verifying or determining the accurate treaty interpretation.²⁶ The Havana Charter for an International Trade Organization (1948) serves as the primary source for GATT Article XX(j) travaux préparatoires because Article 45 of that document used wording which closely matched the GATT provision.²⁷ The AB in India Solar Cells case and the DS476 panel both failed to assess the Havana Charter's negotiating history which this chapter will examine.

The Havana Charter negotiations occurred between 1946 and 1948 because World War Two had just ended, and Western Europe, South Asia, and East Asia experienced severe shortages of food, fuel, raw materials, and manufactured products. The Preparatory Committee records show that the provision's drafters, who included UK, Australian, and Indian delegates, wished to maintain their ability to run domestic rationing systems and equitable distribution systems without facing international legal challenges against those operations. The provision excluded global commodity scarcity as its primary

²³ GATT 1994 art. XX chapeau, supra note 1 ("subject to the requirement that such measures are not applied ... a disguised restriction on international trade").

²⁴ *India-Solar Cells*, ¶¶ 5.76–5.79 (the AB held that 'short supply' must be assessed by reference to all sources of supply available to the Member, including through imports, such that a product is not 'in short supply' merely because of domestic production shortfalls if global supplies remain available).

²⁵ *EU-Energy Package*, ¶¶ 7.1350–7.1352, (the panel found that natural gas was not 'currently in short supply' and that 'risk' of future disruption was insufficient to satisfy the XX(j) threshold).

²⁶ VCLT art. 32, supra note 10.

²⁷ Havana Charter art. 45, supra note 11 (never entered into force; constitutes travaux préparatoires for GATT art. XX(j) under VCLT art. 32).

focus because its main examples showed countries which could not access domestic supplies of products that were available worldwide because they had lost their ability to trade and their foreign exchange resources and their infrastructure through warfare.²⁸

The preparatory work therefore points unambiguously away from the AB's global availability standard. The drafters of what became GATT XX(j) conceived of 'short supply' as a domestic condition, the unavailability of a product to the importing state's population at levels adequate to meet reasonable demand, not as a global production deficit.²⁹ The rationing scheme that postwar Britain implemented to handle fuel shortages operated fully within the provision's intended limits because Britain experienced a local short supply despite the fact that global coal production could satisfy worldwide demand. The AB's reading, by imposing a global availability standard, would have denied Britain the benefit of XX(j) in precisely the scenarios the drafters had in mind. The paper establishes its challenge to the AB's standard through textual evidence combined with historical documentation.³⁰

The Havana Charter analysis provides textual evidence which confirms that VCLT Article 31 leads to the conclusion that the term 'general or local' functions as the main element which indicates that short supply exists at multiple geographic levels between national and regional and international boundaries.³¹ The access-oriented interpretation of 'short supply' has been historically established and it needs to be utilized for operational purposes because the 2026 Strait of Hormuz crisis proved that total global oil and gas production volumes remained unchanged since February 2026 while 20 million barrels per day of oil became blocked from reaching Asian importers through the Strait and India and Pakistan and Bangladesh experienced supply shortages which matched the average understanding of 'short' supply. The AB standard for global availability would remove XX(j) protection under this specific situation which serves as the empirical demonstration that current interpretation leads to unreasonable outcomes.

3. THE TWIN PANEL PROBLEM: INDIA SOLAR CELLS & EU-ENERGY PACKAGE

3.1 AB's First Encounter with Article XX(j)

The Appellate Body's XX(j) analysis, spanning paragraphs 5.56 to 5.128 of the report, constituted the first time any WTO adjudicatory body had substantively interpreted the provision, a fact the AB itself acknowledged at the outset of its analysis.³² The AB used standard VCLT interpretive methods to analyse XX(j),³³ which started with them finding the common understanding of the essential term 'in general or

²⁸ Havana Charter art. 45, *supra* note 11 ("essential to the acquisition or distribution of products in general or local short supply"), using language nearly identical to GATT art. XX(j) and reflecting rationing and domestic allocation regimes prevalent in the post-war period.

²⁹ Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the First Session, at 13–14, U.N. Doc. EPCT/33 (1946) (documenting the concern of delegations — particularly those of the United Kingdom, Australia, and India- about maintaining flexibility to manage domestic shortages of essential commodities during post-war reconstruction, without subjecting such measures to unrestricted WTO challenge).

³⁰ IELP Blog, *Managing Risks as a GATT Exception Under GATT Article XX(j)*, World Trade Law (Jan. 2024, updated Sept. 2025), <https://www.worldtradelaw.net> (identifying the AB's failure to engage with the Havana Charter negotiating history as the foundational error in its XX(j) analysis and noting that the drafters 'could not have contemplated a global scarcity standard when the provision was designed for post-war domestic rationing').

³¹ *India-Solar Cells*, ¶ 5.79.

³² *Id.* ¶ 5.65 (the AB opened its XX(j) analysis by noting that it was 'addressing this provision for the first time' and that 'little guidance' existed from prior GATT/WTO practice).

³³ *Id.* ¶ 5.67 (the AB confirmed the applicable interpretive methodology as that required by Articles 31–32 of the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331).

local short supply'. The AB used dictionary definitions to assess 'short' and 'supply'³⁴ and found that 'general' and 'local' created different geographic scales for measuring scarcity because 'general' means worldwide shortage and 'local' means national or sub-national shortage.³⁵ The argument follows normal reasoning patterns and matches the textual examination, which Chapter II of this paper showed. The AB established its contested conclusion about how to measure scarcity through its assessment of different levels in paragraph 5.79.

The AB established the standard for determining product shortages by defining product unavailability as a condition which arises when Member states lack access to all available product sources including imported products.³⁶ The AB determined that solar cells were not in short supply according to this definition because global manufacturing capacity for solar cells met the demand and India had the ability to fulfill its solar energy program needs through imported solar cells.³⁷ The domestic manufacturing shortfall that India had identified was therefore not a 'short supply' within XX(j)'s meaning it was a domestic production gap that could be addressed through trade, not a situation where the commodity itself was globally or locally unavailable.

This reasoning creates three interconnected doctrinal objections. The first objection exists because the method creates a universal classification system which combines 'general' and 'local' short supply into one measurement system. The relevant question about supply must be answered by members through all sources, which include imports; therefore, local supply should be treated as unnecessary because local shortage may sometimes not be globally present.^{38,39} The AB engaged with the travaux préparatoires of the Havana Charter but did not address the fundamental drafting history point,⁴⁰ which explained that the provision existed for post-war domestic rationing and allocation systems which handled localised shortages instead of global commodity crises. Secondly, the phrase 'across all sources available to the Member, including imports' establishes an availability-through-trade concept which depends on supply chains that function properly and remain operational.⁴¹ Thirdly, AB's reasoning conflicts with its recognition that 'local' scarcity exists as a separate category from 'general' global scarcity, which the DS476 panel received without examination.

The AB determined that India's domestic content requirement was not mandatory for solar cell acquisition and distribution because the 'short supply' threshold had been met.⁴² The AB confirmed that 'essential' imposes a standard analogous to the necessity analysis familiar from XX(a), XX(b), and XX(d) — the

³⁴ *Id.* ¶¶ 5.71–5.72 (examining dictionary definitions of 'short' (insufficient, inadequate) and 'supply' (available quantity) and combining them to derive 'an inadequate supply of something').

³⁵ *Id.* ¶ 5.75 (the AB held that 'general' refers to a broad or widespread geographic scope, while 'local' denotes a sub-national or strictly national geographic scope - the disjunction indicating that scarcity can manifest at different territorial levels).

³⁶ *Id.* ¶ 5.79 (the critical holding: the AB concluded that a product is in short supply only when there is not enough of it across all sources available to the Member, including imports, thereby measuring scarcity at the global level of commodity availability rather than at the level of the importing state effective domestic access).

³⁷ *Id.* ¶ 5.80 (the AB rejected India's argument that solar cells were 'in short supply' because India lacked sufficient domestic manufacturing capacity, holding that global production capacity for solar cells was adequate and accessible through imports).

³⁸ VCLT art. 31 (1), supra note 10 (a treaty must be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose').

³⁹ VCLT art. 32, supra note 10 (supplementary means of interpretation, including travaux préparatoires, may be used to confirm or determine meaning).

⁴⁰ *India-Solar Cells*, ¶ 5.79; Havana Charter art. 45, supra note 11 (the drafting history, discussed in Chapter II of this paper, establishes that XX(j)'s precursor was designed for domestic rationing and allocation regimes addressing localised shortages, not global commodity scarcity).

⁴¹ *India-Solar Cells*, ¶ 5.79.

⁴² *Id.* ¶ 5.81–5.87.

measure must be indispensable or of paramount importance, not merely related to the supply-management objective.⁴³ This aspect of the AB's reasoning is less contested, and the present paper accepts that 'essential' should set a genuine necessity threshold. The essential analysis became hypothetical because the global supply standard established at the prior stage.

3.2 EU-Energy Package: The Panel Deepens the Problem

The Russian Federation opposed the European Union's Third Energy Package which includes regulations that mandate the separation of natural gas transmission and production systems and the implementation of third-party access rights for transmission networks.⁴⁴ The EU used XX(j) as a partial defence to contend that unbundling and access rights were necessary to guarantee fair natural gas distribution during times when the EU faced a substantial risk of Russian supply interruptions.⁴⁵ The Panel used the India-Solar Cells framework to analyse natural gas, which serves as a vital energy resource, and their findings significantly worsened the existing doctrinal issues.

The Panel first assessed whether natural gas was 'in short supply' across all sources available to the EU, including non-Russian suppliers such as Norway, Algeria, and LNG importers.⁴⁶ The Panel found that natural gas was not 'currently in short supply' according to the AB's global availability standard because the EU had sufficient demand capability through pipeline supplies and LNG imports which worked without Russian gas supplies.⁴⁷ The Panel followed the AB's main procedure by evaluating availability through all possible supply sources while the Member states effective supply situation remained unexamined. The Panel examined the European Union's 2nd argument which stated that existing natural gas reserves did not constitute a shortage because Russia's documented impending supply disruptions created enough reason to implement XX(j) protection.⁴⁸ The Panel rejected this argument with absolute certainty because it determined in paragraphs 7.1350 to 7.1352 that the XX(j) standard requires actual present shortage of supply while future scarcity risk, no matter how serious and well-documented, fails to meet the requirement. The most significant and most disputed element of the DS476 panel's contribution to XX(j) legal precedent states that countries must wait until actual supply crises emerge before they can activate the exception which removes all preventive functions from XX(j).⁴⁹

Russia filed an appeal against the DS476 Panel Report which remains under indefinite appeal because the Appellate Body has been unable to form a quorum since December 2019 as the US continues to block new AB member appointments.⁵⁰ The WTO dispute settlement system treats an appealed panel report as non-binding operational status which prevents the Dispute Settlement Body from accepting the report until the

⁴³ *Id.* ¶ 5.87.

⁴⁴ *EU-Energy Package*, supra note 3.

⁴⁵ *EU-Energy Package*, ¶ 7.1340 (the EU invoked GATT Article XX(j) as a partial defence for its Third Energy Package measures, which required ownership unbundling of natural gas transmission and production assets, arguing that such measures were essential to the acquisition and distribution of natural gas in circumstances of supply disruption risk from Russian sources).

⁴⁶ *Id.* ¶¶ 7.1344–7.1349 (the panel applied the India-Solar Cells global supply standard and assessed whether natural gas was 'in short supply' across all sources available to the EU, including supplies from Russia, Norway, North Africa, and LNG imports).

⁴⁷ *Id.* ¶ 7.1350.

⁴⁸ *Id.* ¶¶ 7.1350–7.1352 (the Panel distinguished between "actual short supply," the situation required to satisfy Article XX(j), and "risk of short supply," the situation before it, and held that the latter, however serious, could not satisfy the former; the Panel explicitly refused to interpret Article XX(j) as permitting anticipatory or risk-based supply-management measures).

⁴⁹ IELP XX(j) Blog, supra note 12.

⁵⁰ *EU-Energy Package*, supra note 3 (the report was circulated on August 10, 2018 and remains under appeal, as Russia appealed the report to the Appellate Body, which has been unable to hear the appeal due to the ongoing impasse caused by the United States' blockage of new AB member appointments since 2017).

AB reaches a decision.⁵¹ The DS476 Panel establishes its most compelling value through its reasoning because it contains the newest, most detailed, and most logically developed form of XX(j) analysis for energy security disputes, which future panels must consider before making their judgments. The legal system operates according to two panels which reached the same interpretation and rejected the XX(j) defenses through their independent legal judgments.

3.3 Shared Analytical Error

The two panels make a fundamental analytical mistake which evaluates 'short supply' through global commodity availability assessment. The requirement for importing states to determine their actual supply infrastructure capacity to access commodities should take precedence over global commodity availability assessment.⁵² The distinction between access and availability represents a major difference which creates two different systems; one operational system which meets actual energy supply needs and another system which functions at an extreme abstract level to handle supply crises.

The 2026 Strait of Hormuz crisis provides absolute proof of how this conflation produces real-world effects. The Strait carries approximately 20 million barrels of oil per day, which accounts for about 20 per cent of the world's petroleum liquids and 20 per cent of the world's LNG trade.⁵³ The Iranian government closed the Strait after Operation Epic Fury on 28 February 2026, and this, combined with airstrikes on Ras Laffan Industrial City, which halted Qatari LNG exports, caused Brent crude prices to rise above USD 100 per barrel within ten days and reach USD 126 per barrel.⁵⁴ The three countries face severe shortages of LNG supplies because India relies on the Strait for 53 per cent of its LNG imports, while Pakistan requires 99 per cent of its supply through the Strait, and Bangladesh needs 72 per cent from that route, but their physical import pathways have been cut off.⁵⁵

The two-panel framework creates a precise and devastating paradox because a WTO panel applying the India Solar Cells global availability standard to the Hormuz scenario would determine that oil and gas supplies are not in short supply because global production volumes reach adequate levels and existing alternative routes enable transportation through the Cape of Good Hope.⁵⁶ The DS476 panel rejected the 'serious risk' standard because it would have prevented all anticipatory XX(j) measures during the period from 28 February 2026 to the time of expected disruption which they had already documented as predictable. The countries of India, Japan, South Korea, and Pakistan cannot use XX(j) for domestic supply-security measures enacted after the Hormuz closure because both panels assessed scarcity at the wrong analytical level, despite XX(j) not being designed to exclude such situations.⁵⁷

The two-panel pattern identified in this chapter is not an accident of litigation strategy or an aberration in the AB's reasoning: it is the logical consequence of adopting a global availability standard for a provision that, as Chapter II demonstrates, was designed for localised domestic supply emergencies. The Hormuz

⁵¹ Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22 J. Int'l Econ. L. 297, 299–301 (2019) (discussing Appellate Body impasse and non-adoption of appealed panel reports).

⁵² *India-Solar Cells*, supra note 2, ¶ 5.79; *EU-Energy Package*, supra note 3, ¶ 7.1350.

⁵³ U.S. Energy Information Administration, *Amid Regional Conflict, the Strait of Hormuz Remains Critical Oil Chokepoint* (June 2025), <https://www.eia.gov>.

⁵⁴ Foreign Affairs Forum, *How High Could Energy Prices Go? The 2026 Strait of Hormuz Crisis* (Mar. 27, 2026), <https://www.faf.ae/home/2026/3/27/how-high-could-energy-prices-go-the-2026-strait-of-hormuz-crisis-and-the-anatomy-of-a-global-energy-emergency>.

⁵⁵ CNBC, *The Strait of Hormuz Is Facing a Blockade*, supra note 13.

⁵⁶ IELP XX(j) Blog, supra note 12.

⁵⁷ Bhatt, supra note 9.

crisis has provided, at catastrophic cost to the states most exposed to Hormuz-transiting energy flows, the empirical proof that the current interpretation is operationally untenable.⁵⁸

4. ACCESS-CONSTRAINED SCARCITY: A NEW DOCTRINAL CATEGORY FOR GATT ARTICLE XX(J)

4.1 Typical Distinction: Two Modes of Short Supply

The first category production-constrained scarcity describes a situation in which global output of a commodity has genuinely declined relative to global demand, such that even states with fully functioning import infrastructure face difficulty obtaining adequate supplies. The Appellate Body's global availability standard establishes its best measurement through this situation because worldwide commodity shortages create conditions which allow Member states to use their entire available supply through all their distribution channels.⁵⁹ The present paper does not challenge the AB's global availability standard in this context its application to production-constrained scarcity is, at minimum, plausible.

The second category access-constrained scarcity is a completely different category which the global availability standard fails to fully describe.⁶⁰ The situation shows that a commodity exists at sufficient global supply yet remains unreachable by certain importing nations because supply routes face total interruption including permanent shutdown and extensive operational disruptions. The 2026 Strait of Hormuz closure stands as the main example because the Strait handles daily oil shipments of about 20 million barrels, which represent approximately 20 per cent of worldwide petroleum liquids usage and 20 per cent of international LNG shipments.⁶¹ The global production levels have stayed the same since the closure, yet India, Pakistan, and Bangladesh experience supply shortages because their blocked supply route usually delivers 53 per cent of their LNG imports to India, 99 per cent to Pakistan, and 72 per cent to Bangladesh.⁶² The states face operational material shortages of the commodity because they lack available resources for production purposes, which the AB selected as their evaluation standard.

4.2 VCLT Purposive Foundation for the Distinction

The Appellate Body has determined that the WTO treaty exceptions must be interpreted through an 'evolutionary' lens which requires treaty interpretation to follow its 'object and purpose' according to VCLT Article 31(1).⁶³ The GATT Article XX(j) text establishes through its Havana Charter drafting history that its object and purpose allows states to manage domestic supply crises by using distribution-management methods which include rationing and priority allocation and emergency procurement even though these methods violate GATT non-discrimination rules.⁶⁵ The purpose of access-constrained scarcity scenarios reaches complete fulfillment through the situation where import route closures force states to operate like

⁵⁸ UN Trade and Development, *Strait of Hormuz Disruptions: Implications for Global Trade and Development* 4–6 (Mar. 2026).

⁵⁹ *India-Solar Cells*, supra note 2, ¶ 5.79 (the AB's global supply standard - assessing adequacy 'across all sources available to the Member, including imports' - maps reasonably onto production-constrained scarcity, where supply shortfalls are genuinely worldwide and cannot be resolved merely by redirecting trade flows).

⁶⁰ The term 'access-constrained scarcity' is coined in this paper to describe a situation in which a commodity is globally available in adequate quantities but is physically inaccessible to one or more importing states due to a severed, blocked, or prohibitively disrupted supply route. This category of scarcity is qualitatively distinct from production-constrained scarcity and is not adequately captured by the global availability standard.

⁶¹ U.S. Energy Information Administration, *Amid Regional Conflict, the Strait of Hormuz Remains Critical Oil Chokepoint* (June 2025), <https://www.eia.gov/todayinenergy/detail.php?id=65504>.

⁶² CNBC, *The Strait of Hormuz Is Facing a Blockade*, supra note 13.

⁶³ VCLT art. 31(1), supra note 10 (object and purpose as a mandatory element of treaty interpretation).

⁶⁴ Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 129, WTO Doc. WT/DS58/AB/R (Nov. 6, 1998).

⁶⁵ Havana Charter for an International Trade Organisation art. 45, Mar. 24, 1948, U.N. Doc. E/CONF.2/78.

post-war countries which lack essential goods despite theoretical world market availability. The drafters of The Preparatory Committee recorded their concern about how goods became unavailable to domestic consumers and distributors which involved practical unavailability instead of the total global production capacity.⁶⁶

The study uses the 2026 Hormuz crisis as a case study to show how India, Japan, South Korea, and Pakistan implemented emergency rationing and strategic reserve drawdowns and priority allocation of LNG cargoes.^{67,68} The AB global availability standard prohibits these states from using XX(j) because global oil and gas production provides enough supply.⁶⁹ The access-constrained scarcity framework permits them to proceed because each state experiences 'local short supply' of the commodity after its physical supply route was cut off while the domestic supply conditions met XX(j) requirements for both national and sub-regional assessments.

4.3 Scope, Limit and Chapeau Anti-Abuse Framework

Access-constrained scarcity leads to protective trade measures which governments cannot use for their unlimited protectionism. The GATT Article XX chapeau requirements establish three verifiable criteria which help distinguish between legitimate access-constrained scarcity claims and protectionist abuse.⁷⁰ First, the access constraint must be documented and objectively verifiable by reference to third-party data shipping flow data, official government statistics, or UN reports establishing that the supply route is genuinely disrupted.⁷¹ The measure must target domestic equitable distribution and emergency procurement needs, not competing import restrictions: a rationing scheme that allocates available supply fairly satisfies XX(j); an import ban that favours domestic producers does not. The measure needs to be temporary and proportionate because it will end automatically when the access constraint gets removed. These criteria match the Appellate Body's chapeau jurisprudence in US Shrimp while existing regulations fulfill all necessary requirements.

The emerging scholarship on XX(j) provides backing for the access-constrained scarcity framework. Bhatt has argued for a purposive reinterpretation of XX(j) that recognises access constraints as a legitimate basis for the exception, provided anti-discrimination essentials are fulfilled.⁷² Both India Solar Cells AB case and the DS476 panel share a basic mistake, which involves their inadequate differentiation of access constraints from production shortfalls.²⁰ The distinction developed in this chapter builds directly on these scholarly foundations, providing for the first time a formal typological framework that establishes analytical precision and doctrinal operability through its two categories of production-constrained and access-constrained scarcity.

The access-constrained scarcity category establishes the connection between XX(j) and the security exception defined in GATT Article XXI.⁷³ The Russia Traffic in Transit Panel determined that Article

⁶⁶ IELP Blog, Managing Risks as a GATT Exception Under GATT Article XX(j), World Trade Law (Jan. 2024, updated Sept. 2025), <https://www.worldtradelaw.net>.

⁶⁷ EIA Hormuz Report, Foreign Affairs Forum, *How High Could Energy Prices Go? The 2026 Strait of Hormuz Crisis* (Mar. 27, 2026), <https://www.faf.ae/home/2026/3/27/how-high-could-energy-prices-go-the-2026-strait-of-hormuz-crisis-and-the-anatomy-of-a-global-e>.

⁶⁸ UNCTAD Hormuz Report, supra note 58.

⁶⁹ *India-Solar Cells*, supra note 2, ¶ 5.79.

⁷⁰ GATT 1994, supra note 1.

⁷¹ *US-Shrimp* Case, supra note 64, ¶ 156.

⁷² Pracheta Bhatt, supra note 9.

⁷³ GATT 1994, supra note 1, art. XXI (security exception) ('Nothing in this Agreement shall be construed . . . (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . (iii) taken in time of war or other emergency in international relations').

XXI(b)(iii) contains self-judging elements which require the state applying it to define its situation as an emergency that threatens its critical security interests.⁷⁴ Article XX(j) establishes an energy supply emergency response system which operates at a lower political threshold because it requires proof of actual access-constrained short supply not security classification to implement distribution measures.⁷⁵⁷⁶ The functional XX(j) access-constrained standard enables Article XXI to apply only to real national security situations while it gives importing countries an effective supply-emergency exemption for situations which involve commercial or geopolitical interruptions of import routes.

The access-constrained scarcity framework satisfies all four elements of VCLT Article 31 analysis: the ordinary meaning of 'local short supply' encompasses domestic inaccessibility; the chapeau context confirms that anti-abuse mechanisms exist within the provision itself. The object and purpose of XX(j) supply-emergency distribution management is fully served by the category and the Havana Charter's travaux establish that post-war domestic shortages, the paradigmatic access-constrained scenario, were the drafters' primary concern.⁷⁷ The framework needs no formal treaty amendment because it only requires future WTO panel or restored Appellate Body members to perform comprehensive VCLT analysis which both India Solar Cells AB and DS476 panel failed to execute.

5. IMPLICATIONS AND LIMITS OF REVISED STANDARDS

The chapter presents three main objections against the new standard which claim that GATT Article XX(j) becomes a tool for protectionist misuse through its implementation, while the chapeau fails to provide effective control for such misuse, and states experiencing Hormuz-type emergencies should use the Article XXI security exception because the revised XX(j) standard would become unnecessary.⁷⁸

5.1 The Protection Abuse Objection

The primary reason people oppose recognizing access-constrained scarcity as a type of XX(j) short supply is because they believe states will use it to protect their domestic energy industries from foreign competition. A state that characterises its import infrastructure as 'disrupted' by industrial action, adverse weather, or deliberate policy, might invoke Article XX(j) to establish domestic content rules and preferential procurement systems together with import substitution policies which actually serve to protect local manufacturers instead of addressing real supply crises.⁷⁹⁸⁰ The concern requires serious consideration because it represents a legitimate threat to the revised interpretive framework.

The GATT Article XX chapeau provides the primary response to this objection. The Appellate Body confirmed in US Shrimp that the chapeau requires XX exceptions to operate without disguising trade restrictions while states must implement measures which adapt to their distinct requirements.⁸¹ The three verification criteria emerge from applying access-constrained scarcity claims. The access disruption must be documented by objective third-party evidence: satellite shipping data, EIA or UNCTAD flow statistics,

⁷⁴ Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶ 7.101, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019).

⁷⁵ *India-Solar Cells*, supra note 2, ¶¶ 5.56–5.128.

⁷⁶ *EU-Energy Package*, supra note 3, ¶¶ 7.1340–7.1352.

⁷⁷ VCLT, supra note 10, art. 31(1).

⁷⁸ The three objections addressed in this chapter are drawn from the existing scholarship: (i) protectionist abuse, raised in IELP XX(j) Blog, supra note 12; (ii) the chapeau as insufficient safeguard, raised in Bhatt, supra note 9, at 774; and (iii) the relationship between XX(j) and Article XXI, discussed in *Russia-Traffic in Transit*, supra note 74.

⁷⁹ GATT 1994, supra note 1, art. XX chapeau.

⁸⁰ *United States-Standards for Reformulated and Conventional Gasoline*, at 22 (explaining that the chapeau prevents abuse of Article XX exceptions as disguised restrictions on international trade).

⁸¹ *US-Shrimp Case*, supra note 64, ¶¶ 156–159.

or UN Security Council resolutions not a unilateral government declaration. The domestic measures must be directed at equitable distribution of available supplies which requires protection against import competition for domestic producers. A rationing system which allocates existing stocks fairly to all consumers meets XX(j) requirements while a domestic content requirement which mandates purchase of domestically produced energy goods fails to meet those requirements according to the India Solar Cells AB confirmation. Thirdly, the measures must terminate automatically when access disruption ends, which requires them to end at a duration and scope that matches the duration of access disruption.

5.2 Chapeau Insufficiency Objection

The chapeau together with its proposed verification standards does not hinder states from classifying ordinary commercial disruptions which include port strikes and seasonal supply fluctuations and temporary pipeline maintenance as scarcity events that require access to XX(j) protection.⁸² The objection to this statement uses a severity threshold which requires access constraints to reach a specific size and time period before they can create domestic supply conditions that match production-constrained scarcity. The 2026 Hormuz closure serves as the real-world standard because it involved a government shutdown that lasted for multiple weeks while it disrupted 20 percent of worldwide oil and LNG shipping and led to oil prices increasing to USD 126 per barrel which caused several countries to start emergency rationing.⁸³ The chapeau's verification criteria would successfully filter out ordinary commercial disruptions which include a single terminal outage and a routing delay and a short-term price spike because they do not meet the threshold required for access to this threshold.

5.3 Article XXI Redundancy Objection

The third objection states that the states which confront the Hormuz closure should use GATT Article XXI security exception instead of XX(j) which makes the proposed revision unnecessary. Article XXI(b)(iii) permits measures taken in time of 'war or other emergency in international relations,' a threshold plainly satisfied by the 2026 crisis.⁸⁴ The Russia Traffic in Transit Panel confirmed that Article XXI is partially self-judging, which decreases the procedural requirements that the invoking state must fulfill. The Hormuz situation does not require XX(j) according to this view.

The objection misjudges the actual operational and systemic distinctions which exist between Articles XX(j) and XXI. The diplomatic expenses which result from Article XXI invocation lead to the situation which the invoking nation encounters being labeled as a security situation and it creates a risk of both retaliation and political conflict. The situation leads Japan and South Korea to face difficulties because they need to manage energy supply disruptions while military threats remain outside their war involvement. Article XX(j) establishes itself as the supply-specific *lex specialis* because it applies to energy emergencies which reach severe levels but do not qualify as security situations.⁸⁵ A functional XX(j) is therefore not redundant alongside Article XXI it occupies a distinct and necessary place in the WTO's exception architecture.

⁸² Bhatt, *supra* note 9.

⁸³ UNCTAD Hormuz Report, *supra* note 58.

⁸⁴ *Russia-Traffic in Transit*, *supra* note 74, ¶ 7.101.

⁸⁵ *India-Solar Cells*, *supra* note 2, ¶¶ 5.56–5.128; *EU-Energy Package*, *supra* note 3, ¶¶ 7.1340–7.1352. Article XX(j), properly interpreted to encompass access-constrained scarcity, would function as the *lex specialis* supply-emergency provision that operates at a lower political threshold than Article XXI: it does not require the invoking state to characterise the situation as a national security emergency, only to demonstrate that the product in question is in short supply due to a documented access constraint and that the measure is essential to its acquisition or equitable distribution.

5.4 Internal Limits of Revised Standards

The revised XX(j) standard requires internal limits to stop mission creep according to its requirements of access-constrained scarcity, which accepts this category while rejecting the above-mentioned three objections. The Appellate Body established the necessity requirement through its necessity jurisprudence under Articles XX(a), XX(b), and XX(d)⁸⁶ which provides the proportionality mechanism that requires measures to use the least trade-restrictive option to resolve supply emergencies and to match their trade-restrictive impacts with access constraint severity.⁸⁷ The temporariness requirement derives from XX(j) because a measure 'essential to the acquisition or distribution of products in short supply' stops being essential when supply becomes sufficient; the access-constrained scarcity category requires no further enforcement because it ends when the access constraint ends.

The access-constrained scarcity framework presents itself as an operationally practical modification of XX(j) which establishes specific access limits while avoiding the creation of permanent protectionist exceptions through its three objection responses and its severity threshold and internal proportionality and temporariness limit requirements.⁸⁸ The revised standard maintains consistency with the VCLT and the Havana Charter's drafting history and the chapeau's anti-abuse function and the AB's necessity jurisprudence. The treaty requires more detailed interpretive examination because it does not permit treaty changes to proceed through its existing framework.⁴⁰ The present WTO structure needs this framework for operational implementation of the revised interpretation which the Chapter VI of this paper presents through its structural reform pathways that link to the Appellate Body impasse which prevents immediate resolution of adjudicatory errors.⁸⁹

CONCLUSION

The analysis undertaken in this paper demonstrates that the current interpretive trajectory of GATT Article XX(j), as shaped by the Appellate Body in *India-Solar Cells* and reinforced by the EU-Energy Package panel, is doctrinally unsustainable and operationally deficient. By insisting on a global availability standard and rejecting anticipatory risk as a valid trigger, WTO adjudicatory bodies have effectively stripped XX(j) of its intended function. The 2026 Strait of Hormuz crisis provides a decisive empirical refutation of this approach: it reveals that global commodity sufficiency does not preclude severe, localised supply crises arising from disrupted access. In such scenarios, the existing interpretation fails precisely where the provision was designed to operate.

Re-engaging with the Vienna Convention framework and the Havana Charter's drafting history makes clear that "short supply" was always conceived as an access-oriented, domestic condition. The disjunctive phrase "general or local" cannot be reconciled with a purely global test without rendering key treaty language redundant. The access-constrained scarcity framework developed in this paper restores this lost dimension by distinguishing between availability and accessibility, an analytical distinction that aligns with both textual interpretation and real-world trade dynamics. It thus resolves the "twin panel problem" not by rejecting prior jurisprudence wholesale, but by refining its scope and correcting its misapplication. At the same time, concerns regarding protectionist abuse do not justify maintaining a dysfunctional standard. The existing architecture of Article XX, particularly the chapeau, necessity requirement, and

⁸⁶ Appellate Body Report, *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, paras. 161–166, WTO Doc. WT/DS161/AB/R (adopted Jan. 10, 2001).

⁸⁷ IELP XX(j) Blog, *supra* note 12.

⁸⁸ *US-Gasoline*, *supra* note 90; *US-Shrimp*, *supra* note 64.

⁸⁹ UNCTAD *Hormuz Report*, *supra* note 58.

proportionality discipline, provides robust safeguards against misuse. When combined with objective verification thresholds and temporality constraints, the revised framework ensures that XX(j) remains a narrowly tailored exception rather than an open-ended escape clause. Importantly, it also preserves the structural distinction between XX(j) and Article XXI, allowing the former to operate as a commercially grounded emergency provision without escalating disputes into the politically charged domain of security exceptions.

In sum, this paper establishes that no treaty amendment is required to revive XX(j); what is needed is a methodologically sound application of existing interpretive principles. A future WTO panel or a restored Appellate Body can, through a faithful VCLT analysis, re-anchor XX(j) in its original purpose and render it responsive to contemporary energy and supply-chain disruptions. Without such recalibration, XX(j) will remain a doctrinal artefact, textually present yet legally inert, in a trading system increasingly defined by precisely the kinds of crises it was meant to address.