법학 박사 학위논문

A Study of the Conformity of the U.S. Export Controls and Economic Sanctions with WTO Agreements

- Focus on the Review Standards of Article XXI of the GATT -

미국의 수출통제 및 경제제재의 WTO 합치성에 관한 연구

– GATT XXI 조의 심사기준을 중심으로 –

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ABSTRACT

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Since former President of the United States, Donald J. Trump, declared new trade policies based on an ideology of "trade protectionism", the United States has been imposing aggressive unilateral economic sanctions and export controls under the notion of national security protection. While it is not the first time the United States has taken protectionist approaches to international trade, former President Trump's trade policies seem to reflect an extreme version of trade protectionism in the modern world of open trade.

After former President Trump assumed the presidency, economic sanctions and export controls have become the dominant part of the United States' foreign policy. The U.S. economic sanctions have been evolving at an unprecedented pace over the last few years. In particular, the Trump Administration had strengthened sanctions programs to prohibit certain types of non-US entities' dealings towards the targeted states or entities blacklisted by the U.S. Government. Moreover, the U.S. export control is currently in the process of a

major expansion to cover broad categories of emerging and foundational technologies, which ultimately aims to control the release of the U.S. technologies to its rivals, such as China. The United States, under the Biden Administration, has been continuing these aggressive economic sanctions and export controls, and the trade protectionism initiated by the Trump Administration has been maintained as a central part of the U.S. foreign policy to date.

The U.S. export controls and economic sanctions retain broad extraterritorial jurisdiction and have been significantly impacting global trades. In particular, these trade-restrictive measures are often found to be inconsistent with the GATT obligations. Nevertheless, the U.S. Government arguably should be able to invoke the security exception of the GATT by arguing that these measures are implemented for the protection of national security interests and thus should be justified under the security exception. The security exception of the GATT, which is provided under Article XXI of the GATT, has been controversial for a long time and subject to intense discussion due to the unclear scope and lack of clear definitions of key terms therein. There has been a general understanding that Article XXI of the GATT is a self-judging provision, and therefore, potentially abusive employment of the security exception has not been effectively controlled.

However, the Panel in *Russia - Measures Concerning Traffic in Transit* delivered its rulings on Article XXI of the GATT, which is the very first attempt by the WTO to clarify the scope and ambit of the security exception. While such ruling reflects significant developments of the security exception as it confirms the justiciability of the security exception, it still acknowledges a substantial degree of the self-judging component of the security exception.

This dissertation argues that while the review standard for the security exception of the GATT adopted by the Panel in *Russia - Measures Concerning Traffic in Transit* provides a great systemic balance between the member states' interests in protecting their national security interests and their rights to free and open trade, it does not adequately solve the core problem of the security exception, which is the potentially abusive employment of the security exception due to the self-judging component of the exception. This dissertation further argues that the WTO needs to adopt a more reasonable and objective review standard for security exception disputes to effectively prevent the potential abuse of the security exception and proposes an appropriate review standard to that end.

Keywords: Trade Protectionism; US Economic Sanctions; US Export Controls; Unilateral trade-restrictive measures; Security Exception; Article XXI of the GATT; Review Standards; WTO; and GATT.

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PART I. INTRODUCTION

A. Background

Since the end of World War II, the global economy has shifted into a multilateral trade system that promotes free trade and open markets among sovereign nations. The United States, along with the United Kingdom, was at the forefront of the shift, and many of the accepted rules, procedures, and principles of international law, as well as multilateral systems of trade and investment, have been developed under the U.S. leadership.[1] However, there was a historical shift in the United States in 2017 when former President Trump declared new trade policies based on an ideology of "trade protectionism".

Trade protectionism is rooted in mercantilist ideals. Mercantilism is based on the theory that the government should regulate international trade by maintaining the balance of trade and protecting domestic industries.[2] Economic protectionists believe that a country's economy will perform better if its industries and workers are protected from foreign competition.[3] Trade protectionism generally refers to a policy that operates as a trade bloc, creating trade barriers with the specific goal of protecting the national economy from the possible perils of international trading. This is the opposite of free trade which a government allows its citizenry to purchase goods and services from other countries or sell their goods and services to other markets without any governmental restrictions, interference, or hindrances. The objective of trade protectionism is to protect a nation's

[1] Thomas J. Schoenbaum & Daniel C.K. Chow (2019) *The Perils of Economic Nationalism and a Proposed Pathway to Trade Harmony*, Stanford Law & Policy Review, at 115.
[2] Michael Trebilcock, Robert Howse & Antonia Eliason (2013) *The Regulation of International Trade* (4th ed.), at 2.
[3] *See* President Donald J. Trump, Inaugural Address (Jan. 20, 2017) "We must protect our borders from the ravages of other countries making our products, stealing our companies, and destroying our jobs. Protection will lead to great prosperity and strength." (transcript available at https://www.whitehouse.gov/briefings-statements/the-inaugural-address/)

essential economic interests, such as its key industries, commodities, and employment of workers. Theoretically, protectionism can be beneficial. Protectionism can redistribute wealth, offset subsidies provided by foreign governments or other methods of unfair foreign competition, protect the domestic economy, and support emerging industries.[4]

However, the Trump Administration took an extreme version of trade protectionism, which could potentially be inconsistent with the goal of the free trade system.[5] The protectionist approaches employed by the Trump Administration instigated a series of retaliatory protectionist policies, and the trade platform by the Trump Administration demonstrated a substantially increased protectionist stance. The then-presidential candidate, Trump's "America First" policy in trade, was aimed to reach the many Americans who were disillusioned by globalization and the international involvement of the U.S. It was clear from then that former President Trump insisted on trade protectionism to favor the interests of the United States.

In light of the background of former President Trump's election to the U.S. Presidency, the Trump Administration had delivered on former President Trump's campaign promises by adopting unprecedented trade protectionist approaches to international trade, which had not only departed from a broad U.S. consensus supporting open international trade policies with its emphasis on limits to international trade but also created a significant drag on growth that ultimately damaged economies around the world. The underlying logic of trade protectionism, as espoused by former President Trump, was fundamentally in contrast with

[4] Robert W. McGee (1993) *An Economic Analysis of Protectionism in the United States with Implications for International Trade in Europe*, 26 Geo. Wash. J. Int'l L. & Econ. 539, at 542-49. *See* Vivian C. Jones, Cong. Research Serv., RL32371, Trade Remedies: A Primer 2 (2011) (noting that members of Congress "assert that the U.S. use of trade remedies is necessary to protect U.S. firms and workers from unfair international competition").

[5] Sungjoon Cho & Claire R. Kelly (2013) *Are World Trading Rules Passe?* 53 Va. J. Int'l L. 623, at 628-629.

the approaches to international trade that have been pursued by previous U.S. administrations as well as the principal theory of multilateral trading systems such as the General Agreement on Tariffs and Trade (the "GATT") and the World Trade Organization (the "WTO").

The main forms of protectionist measures by the Trump Administration were primarily focused on economic sanctions and export controls. The Trump Administration aggressively imposed economic sanctions against many states. There is no doubt that economic sanctions were the Trump Administration's foreign-policy weapon of choice. In particular, the Trump Administration expanded the use of so-called secondary sanctions, which are designed to coerce non-US persons into stopping business with U.S. adversaries. Unlike previous administrations of the U.S., which generally provided clear regulatory frameworks for secondary sanctions before imposing them, the Trump Administration's measures somewhat blurred the line between primary sanctions and secondary sanctions for a purpose.[6] The Trump Administration had also strengthened the U.S. export controls, especially against exports to China, and begun the process of expanding the scope of covered items under the export controls. Such expansion process is still ongoing, and the primary purpose of the process is to identify and add controls on various emerging and foundational technologies that are not yet subject to the U.S. export controls.

As many experts have expected[7], the Biden Administration is continuing the Trump-era trade protectionism and maintaining most of the export controls and economic sanctions

[6] Peter E. Harrell (2019) *Trump's Use of Sanctions Is Nothing Like Obama's: The White House's aggressive deployment of coercive economic tools has given rise to a growing geopolitical backlash.* (*See* https://foreignpolicy.com/2019/10/05/trump-sanctions-iran-venezuela-russia-north-korea-different-obamas/).
[7] Rory Murphy (Squire Patton Boggs attorney), *Transition 2020 | Biden and Trade: Countering – and Potentially Cooperating with – China* (Nov. 19, 2020), "We expect the Biden Administration to continue

implemented by the Trump Administration. The Biden Administration has not only maintained the aggressive economic sanctions and export controls in place but also imposed additional types of trade-restrictive measures against China. The Biden Administration's China policy includes the hardline on export controls implemented by the Trump Administration as well as various newly imposed restrictions such as blacklisting a large number of Chinese companies in technology sectors, prohibiting imports from and investments into certain major Chinese companies, etc. The Biden Administration made it clear that it would not only continue the protectionist approaches to international trade initiated by the Trump Administration but also take various measures to preserve its interests in ensuring that the U.S. remains as a leader and outcompetes its rivals, such as China, on several fronts, with technology being the utmost importance at this stage.

The U.S. economic sanctions and export control are often found to be inconsistent with various international laws, including the GATT obligations. However, the U.S. Government arguably should be able to rely on the security exception of the GATT, which is provided under Article XXI of the GATT (the "Article XXI"), by arguing that the measures are employed for the protection of national security interests and thus should be justified under the exception (as it did in a recent WTO case, *United States – Steel and Aluminum Products*[8], where the U.S. argued that even if its measures are inconsistent with

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enforcing U.S. sanctions laws against Chinese individuals and entities and better coordinate messaging on human rights across the Executive Branch." (*See* https://www.capitalthinkingblog.com/2020/11/transition-2020-biden-and-trade-countering-and-potentially-cooperating-with-china/#page=1). Also, Steptoe lawyers stated that "We expect the new Biden administration to bring its own priorities and undertake actions in relation to the existing US sanctions and export controls programs; however, we do not expect a wholesale roll back of the current administration's actions. This is especially true for certain regions or countries, such as China, where there is strong bipartisan and public support for the expansive changes to US foreign policy." (*See* https://www.steptoe.com/en/news-publications/sanctions-under-the-biden-administration-a-return-to-smart.html).

[8] *United States – Steel and Aluminum Products*, DS544 (China), DS547 (India), DS548 (EU), DS550 (Canada), DS551 (Mexico), DS552 (Norway), DS554 (Russian Federation), DS556 (Switzerland) and DS564 (Turkey).

the GATT obligations, the WTO adjudicating bodies cannot examine whether the measures violate the GATT due to the security exception of the GATT). There has been a general understanding that the Article XXI is a self-judging provision, and therefore, states have been able to invoke the security exception without much interference from the adjudicating bodies of the GATT/WTO. The security exception, however, has been criticized and subject to intense discussion by international law scholars as it is prone to abuse. The potential abuse of the security exception has been problematic for a long time, and the GATT/WTO has been somewhat intentionally avoiding to rule on such matters until the WTO Panel, for the very first time, provided its rulings on the interpretation of the Article XXI in 2019.

Although the WTO Panel in *Russia - Measures Concerning Traffic in Transit*[9] has determined the justiciability of the Article XXI and ruled on the applicable review standard for the security exception, it still acknowledged substantial discretion of the invoking states regarding the invocation of the security exception. There has not been Appellate Body's decision on the matter, so the review standard could be subject to change. However, with the review standard adopted by the Panel, it is difficult to imagine how the WTO may effectively police and prevent the abusive employment of the security exception (i.e., invocation of the security exception for purposes other than the protection of essential security interests, such as for foreign policy reasons), which has long been the core problem of the security exception of the GATT.

Since there is a large number of pending WTO cases regarding the security exception of the GATT and there is a rapidly increased reliance on export controls and economic sanctions

[9] Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R (adopted 26 April 2019).

by not only the U.S. but globally, there is an urgent need to reexamine the applicable review standard for the security exception. Without a review standard that can effectively control the abusive employment of the security exception, many states would be able to impose trade-restrictive measures under the security exception, which in turn would significantly impact global trades and undermine the stability and predictability of the WTO as a multilateral trading system.

B. Purpose

The author of this dissertation has been practicing in the U.S. export controls and economic sanctions laws over the last several years, having reviewed and advised legal implications from a wide range of relevant statutes, regulations, and foreign policies of the U.S. After years of practicing, especially in the Trump-era, a genuine curiosity has arisen as to whether there are any legislative limits to these broad restrictions at the international level, and how these restrictions despite such significant impacts on international trade are implemented without effective international control.

As discussed in detail later in this dissertation, the U.S. export controls and sanctions laws are often found to be inconsistent with the GATT obligations, such as Article XI(1) that requires the member states not to restrict or prohibit imports from or exports to another state except in certain circumstances.[10] However, the U.S. should arguably be able to invoke the security exception provided under the Article XXI of the GATT to justify its measures despite its inconsistency with the GATT obligations. As all states should be able

[10] Article XI(1) of the GATT, "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

to exercise their sovereign rights to formulate their own policies to protect national security matters, this dissertation does not debate the measures under the U.S. export controls and economic sanctions. It, rather, argues that such measures should be within the ambit of the Article XXI to be justified under the security exception of the GATT.

Nevertheless, due to the ambiguous scope, lack of clear definitions of key terms, and the self-judging component of the security exception under the GATT, there has been a general understanding that the invocation of the security exception is not justiciable by the GATT/WTO adjudicating bodies, which ultimately led to leaving the trade-restrictive measures that are inconsistent with the GATT obligations untouched. Such general understanding remained until the WTO Panel, in 2019, delivered its rulings on the security exception for the very first time.[11] The decision of the Panel is significant as it rejects the long-standing general understanding that the Article XXI is a self-judging provision, thereby subjecting it to the review by the WTO adjudicating bodies and introduced applicable review standards as well.

Nevertheless, the review standard adopted by the Panel in the case acknowledged substantial discretion of the invoking states regarding the invocation of the security exception, which as a result, allows a certain extent of the self-judging component to it. This dissertation attempts to argue that such review standard may be inadequate to effectively police and prevent the potential abuse of the security exception in a balanced manner, and the WTO adjudicating bodies should adopt a more reasonable and objective review standard that reflects the appropriate interpretation of the Article XXI according to the rules of treaty interpretation under Article 31 of the Vienna Convention on the Law of

[11] *See* Panel Report, *Russia – Measures Concerning Traffic in Transit*, *supra* note 9.

Treaties (the "VCLT")[12] to ensure that the invocation of the security exception is limited to essential security interests protection purposes.

The purpose of this dissertation is (A) to review the export controls and economic sanctions laws currently operating by the U.S. to examine how aggressively these measures are imposed under the notion of trade protectionism, (B) to scrutinize the prior studies on the problem of potential abuse of the security exception under the GATT and the WTO Panel's recent decisions on the security exception, and (C) most importantly, to propose that the WTO adopts a more reasonable and objective review standard to effectively prevent the potential abuse of the security exception in a balanced manner.

This dissertation can be distinguished from the prior studies as it not only discusses the issues of the potential abuse of the security exception of the GATT but also includes an analysis of the WTO's recent rulings on the security exception and proposes a more reasonable and objective review standard for the effective prevention of potential abuse of the security exception as well as the systematic balance of member states' interests.

[12] *See* Article 31 of Vienna Convention on the Law of Treaties, "1. A treaty shall be interpreted in good faith 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. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended."

C. Organization and Outline

This dissertation contains three main parts, namely Part II, Part III, and Part IV. The main parts contain subsections, each with a series of capitalized letters, numbers, and roman numerals.

Part II, based on the analysis of the background on the U.S. trade protectionism discussed in Part I, focuses on the export control and economic sanctions currently operating by the U.S. It consists of three sections. Section A relates to the U.S. export controls under the Export Administration Regulations[13]. It provides a detailed analysis of the scope of the export controls, which entails broad extraterritoriality, types of penalties for violations, and some of the major developments of the export controls since the Trump Administration, including the ongoing expansion of export controls regarding emerging and foundational technologies and strengthened export controls against China. Section B provides an overview of the U.S. economic sanctions laws. It provides an explanation of economic sanctions in general, various forms they may take, and provides the list of sanctions programs currently operating by the U.S. It goes further to review some of the main prohibitions and discusses significant developments implemented since the Trump Administration.

Part III focuses on the U.S. export controls and sanctions laws' potential inconsistency with the principles of international law and the possible immunity they arguably may be able to raise under the Article XXI of the GATT. It consists of two sections. Section A reviews the legality of the U.S. export controls and economic sanctions under international laws in

[13] 15 C.F.R. §§730-774.

general. It begins with scholarly criticism that these trade-restrictive measures are largely adopted as a foreign policy tool rather than for national security protection and are often found to be inconsistent with various international laws, including the GATT rules. It then goes deeper to review the legality of the extraterritorial jurisdiction of the U.S. economic sanctions and export controls and raises an ideology that such broad extraterritorial jurisdiction may not be in accordance with the principles of international law governing prescriptive jurisdiction. Section B focuses on the Article XXI of the GATT. It begins with the analysis of how the U.S. trade-restrictive measures may be inconsistent with the GATT obligations and discuss the possible invocation of the Article XXI as a defense for such measures. It then analyzes the problematic issues with the invocation of the Article XXI and discusses the recent decisions of the Panel in *Russia - Measures Concerning Traffic in Transit*[14], which is the very first attempt by the WTO to provide rulings on the Article XXI and in *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*[15], which applied such rulings made in *Russia - Measures Concerning Traffic in Transit*.

Part IV is the final part of this dissertation, and it consists of six sections. Section A provides an overview of Part IV. Section B provides an analysis of the recent WTO Panel's decisions on the Article XXI and argues that the Panel's review standard is inadequate to solve the core problem of the security exception and that the WTO needs to adopt a more reasonable and objective review standard for security exception disputes. Section C discusses the possible alternative review standards for the security exception by examining the review standards applied in other like international institutions and the review standards

[14] Panel Report, *Russia – Measures Concerning Traffic in Transit*, *supra* note 9.
[15] Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R (16 June 2020).

suggested by international law scholars. Section D proposes a more reasonable and objective review standard for the WTO adjudicating bodies to adopt. It argues that the proposed review standard reflects the appropriate interpretation of the Article XXI according to the rules of treaty interpretation under the Vienna Convention on the Law of Treaties and explains that the proposed review standard is more appropriate than other review standards as it attempts to avoid potential difficulties that may arise out of applying purely objective assessments of the security exception while minimize the self-judging component of the security exception to limit the discretion provided to the invoking states and subject the main parts of the security exception to the objective assessments by the WTO adjudicating bodies. Section E argues that the proposed review standard requires the application of the 'Necessity Test' under the WTO's jurisprudence, which involves the weighing and balancing of multiple factors for the determination of the necessity of the trade-restrictive measure at issue, and explains the 'Necessity Test' in detail. Section F attempts to apply the proposed review standard to the U.S. economic sanctions and export controls to demonstrate how the review standard may be used.

PART II. TRADE-RESTRICTIVE MEASURES OF THE U.S.

A. The U.S. Export Controls

1. Overview

Export controls laws and regulations in the United States operate to restrict the access to controlled information, goods, and technology for reasons of national security, protection of trade, foreign policy objectives, etc. Although the U.S. export controls have been around since the 1940s, attention to export control compliance has significantly increased in recent years because of heightened concerns about national security, the proliferation of weapons of mass destruction, terrorism, and, most importantly, leaks of the United States technology to foreign competitors.

The United States restricts the export of various types of items, including defense items, commercial items, so-called "dual-use" goods and technology, certain nuclear materials and technology, and items that would assist in the development of nuclear, chemical, and biological weapons or missile technology used to deliver them. The U.S. export controls are also used to restrict exports of all types of items to certain countries and regions on which the United States imposes economic sanctions, such as Cuba, Iran, Syria, the Crimea region, and North Korea.

2. Export Control Policies and Mechanisms

The U.S. export control policy is enforced through export control laws and regulations administered by several departments of the government, namely the Departments of State,

Commerce, Energy, and Treasury. Each department has its own set of export control laws and regulations. The Department of State has jurisdictional authority over munitions items, including military and space-related items. The Department of Commerce has jurisdictional authority over a broad range of commercial dual-use commodities that are grouped into various categories. The Department of Energy has jurisdictional authority for exports over nuclear reactor technology, nuclear enrichment and reprocessing technology, heavy water production technology, and related areas. Last but not least, the Department of Treasury has jurisdictional authority over financial and tangible items having a destination to embargoed countries. Each department works together to assign specific areas of responsibility and item/technology definitions when commodities or technologies overlap or have dual uses.

	Types of items/services controlled	**Department**	**Relevant law and regulation**
Department of State	Defense articles and services	Directorate of Defense Trade Controls	- Arms Export Control Act of 1976 - International Traffic in Arms Regulations
Department of Commerce	All other items	Bureau of Industry and Security	- Export Control Reform Act of 2018 - Export Administration Regulations
Department of Energy	Commodities for assistance to foreign nuclear activities	National Nuclear Security Administration	- Atomic Energy Act of 1954 - Assistance to Foreign Atomic Energy Activities
Department of Treasury	Constituting embargoes (all items to the specific destination)	Office of Foreign Assets Control	There are separate statutes and regulations for each sanction program.

[Summary table of each department's export controls]

3. Export Administration Regulations

a. Overview

Export Administration Regulations (the "EAR")[16] is administered by the Department of Commerce through its Bureau of Industry and Security (the "BIS") and is the main regulations for the U.S. export control, which covers virtually all types of items except those subject to the exclusive jurisdiction of other export control departments.

The EAR has adopted an expansive interpretation of "exports". It covers not only the physical transmission of an item out of the U.S.[17] but also the transmission of items from one foreign country to another[18]. It is important to note that exportation may also occur as "deemed export". A deemed export is the transmission of protected technology/information to a foreign national within the U.S. territories. [19] Technology and source code may be released for export by visual inspection by foreign nationals or even oral exchanges of information with foreign nationals.[20]

b. Scope of the EAR

One of the main features of the U.S export controls, which makes it so overwhelming, is its extraterritoriality. The EAR has broad extraterritorial jurisdiction, and it covers not only exports of US items but also exports of non-US items from a foreign country to another. Export controls under the EAR are only applicable to the items that are subject to the EAR,

[16] 15 C.F.R. §§730-774.
[17] 15 C.F.R. §734.13(a)(1).
[18] 15 C.F.R. §734.14(a)(1).
[19] Releasing or otherwise transferring of technology or source code to a foreign national in the U.S. is an export under 15 C.F.R. §734.13(a)(2), and commonly called a deemed export. Releasing or otherwise transferring of technology or source code subject to the EAR to a foreign national of a country other than the foreign country where the release or transfer takes place is an export under 15 C.F.R. §734.14(a)(2), and is commonly called a deemed reexport.
[20] 15 C.F.R. §734.15(a).

and therefore it is always the first step to determine whether the item to be exported is subject to the EAR. The relevant provision states that the followings are subject to the EAR:

> "(1) All items in the United States…or moving intransit through the United States from one foreign country to another;
> (2) All U.S. origin items wherever located;
> (3) Foreign-made commodities that incorporate controlled U.S.-origin commodities…in quantities exceeding the *de minimis* levels…;
> (4) Certain foreign-made direct products of U.S. origin technology or software…; and
> (5) Certain commodities produced by any plant or major component of a plant located outside the United States that is a direct product of U.S.-origin technology or software..."[21]

As seen above, the important factor is whether there is a US-nexus (i.e., the involvement of the U.S. territory, the incorporation of the U.S. items, etc.) to the subject item, which provides jurisdiction for the EAR to control the relevant exportation.

Items specified under subsection (1) are those physically located in the U.S., regardless of where the items were manufactured. Although subsection (1) seems straightforward, it is crucial to understand that the items moving in-transit through the U.S. territories are also subject to the EAR (For example, Japanese items exported to Argentina from Japan can be subject to the EAR if the items had moved through the U.S. territories before they arrived in Argentina). Items specified under subsection (2) are those manufactured in the U.S., regardless of the physical location of the items at the time of the export. Thus, any items manufactured in the U.S. would be subject to the EAR.

Items specified under subsection (3) are not as straightforward as the items specified under subsections (1) and (2), and it is one of the main reasons why the EAR is regarded as

[21] 15 C.F.R. §734.3(a).

having the broadest scope of export control. As stated in subsection (3), foreign items with more than *de minimis* level of U.S. origin commodities can be subject to the EAR. The *de minimis* rule provides that a foreign-made item is subject to the EAR if the item contains more than 10% or 25%, depending on the final destination, controlled U.S. origin content by value.[22] There are, however, certain items for which there is no *de minimis* level, meaning that even 1% of controlled U.S. origin content may suffice regardless of the destination.[23] Therefore, even in the export transactions of non-US items between non-US countries, the value of controlled U.S. items must be reviewed to determine the applicability of the EAR. The following table illustrates the application of the *de minims* rule.

Destination	**Applicable *de minimis* level**	**Value of controlled U.S. origin content**	**Subject to the EAR**
E:1 countries	10%	5% - Total value of the item: $100 - Value of controlled U.S. origin content: $5	The foreign item is not subject to the EAR.
		15% - Total value of the item: $100 - Value of controlled U.S. origin content: $15	The foreign item is subject to the EAR.
All other countries	25%	15% - Total value of the item: $100 - Value of controlled U.S. origin content: $15	The foreign item is not subject to the EAR.
		30% - Total value of the item: $100 - Value of controlled U.S. origin content: $30	The foreign item is subject to the EAR.

[Examples of *De Minimis* Rule Calculation]

[22] For destinations classified as E:1 countries, a foreign item is subject to the EAR if the controlled U.S. origin content is valued more than 10% of the item's total value. For all other destinations, a foreign item is subject to the EAR if the controlled U.S. origin content is valued more than 25% of the item's total value. E:1 countries are terrorists supporting countries, and exports to such countries are most controlled under the EAR. The following countries are currently listed as E:1 countries: Iran, Sudan, North Korea, and Syria.

[23] *See* 15 C.F.R. §734.4.

The values of the U.S. origin content (the numerator) and the foreign item (the denominator) must reflect the fair market price of such content in the market, and in most cases, the values would be the actual cost and sale price to the foreign manufacturer.[24]

Items specified under subsection (4) are those considered to be a "direct product" of certain controlled U.S. origin technology or software. The direct product rule provides that a foreign item is subject to the EAR if the following requirements are met: (a) the foreign item is manufactured based on a U.S. technology that is controlled for National Security reason, (b) the foreign item itself is controlled for National Security reason, and (c) the destination of the foreign item is E:1, E:2, or D:1 country[25]. Items specified under subsection (5) are similar to those under subsection (4), but instead, the foreign items are the direct products of a plant that is a direct product of a U.S. technology controlled for National Security reasons.

While it is true that the scope of the EAR is very broad, an export license may not always be required. License requirements are based on the item's technical characteristics, destination, end-user, and end-use. Thus, it is important to review applicable controls, destination, and the intended use of the item. Once the item is determined to be subject to the EAR, the exporter must review the item's Export Control Classification Number (the "ECCN") to determine applicable controls on the item. ECCNs are five character alpha-numeric designations used on the Commerce Control List of the EAR to identify items for export control purposes (e.g., 5A992). Items that are subject to the EAR but are not listed on the Commerce Control List are designated as EAR99. In general, a license is not

[24] 15 C.F.R. §734, Supp. No. 2, (a)(2)-(3).
[25] 15 C.F.R. §736.2(b)(3).

required for exports of EAR99 items. However, if the destination of such items is any of the embargoed country, prohibited end-user, or is being exported in support of a prohibited end-use, a license may be required.

c. Penalties

Penalties for violations of the EAR can be significant. Depending on the seriousness of the conduct and the exporter's level of knowledge, violations of the EAR can result in civil, criminal, and/or administrative penalties.

Civil penalties can be imposed, for each violation, up to $300,000 or twice the value of the transaction that is the basis of the violation with respect to which the penalty is imposed, whichever is greater.[26] There is a general understanding that each shipment is considered a separate transaction. It is important to note that a single export transaction can give rise to multiple violations, thereby increasing the amount of penalty. For example, when an exporter misclassifies an item and exports without the required license as a result of the misclassification, the exporter may have committed at least two violations: one for the unauthorized export and another for the incorrect statements on the relevant export documents. Civil penalties are imposed on strict liability, which means they may be imposed regardless of whether the exporters intended the violation or even knew their conduct might violate the EAR.

Criminal penalties can be imposed up to $1 million or imprisonment for up to twenty years, or both for each violation.[27] Unlike civil penalties that are strict liability-based, criminal

[26] 50 U.S.C. §4819.
[27] 50 U.S.C. §1705(c).

penalties may only be imposed when the exporter "willfully commits" a violation.[28] Thus, it must be proved that the defendant knew his or her actions were illegal. A mere negligent failure to investigate the law would not be sufficient for conviction.[29] Some of the indicia of specific intent may include, *inter alia*, concealing activities, prior experience in similar international trade, and comments or statements indicating knowledge that ones' conduct might lead to trouble.[30] Any activity that may amount to willful blindness may also militate strongly against a finding of specific intent.[31]

Administrative penalties that might potentially be far more damaging than civil or criminal penalties may also be imposed. The main administrative penalty is a denial of export privilege. It prohibits a person from participating in any transaction subject to the EAR (it extends to all destinations and to all exports subject to the EAR). It would also be unlawful for other companies and individuals to participate in an export transaction subject to the EAR with the denied person. All denial of export privileges is published in the Federal Register and is typically imposed for periods ranging from one to twenty years.

4. Major Developments since Trump Administration

a. Export Controls of Emerging and Foundational Technologies

Prior to 2011, the statutory authority for the EAR was the Export Administration Act of 1979. That statute expired in 2001, and the EAR has remained in effect since then pursuant to a series of Executive Orders issued under the International Emergency Economic Powers Act. As of August 13, 2018, however, the Export Control Reform Act of 2018 (the

[28] *Ibid.*
[29] *Tooker*, 957 F.2d at 1214 (citing *United States v. Adames*, 878 F.2d 1374, 1377 (11th Cir. 1989).
[30] *Tooker*, 957 F.2d at 1214; accord *United States v. Macko*, 994 F.2d 1526 (11th Cir. 1993).
[31] *United States v. Frade*, 709 F.2d 1387 (11th Cir. 1983).

"ECRA") became the new statutory authority for the EAR.[32] While the ECRA leaves most of the general EAR principles in place by merely codifying the long-standing policies set forth in the EAR, the statute contemplates a significant change regarding additional export controls on emerging and foundational technologies.

The significant change resulting from the ECRA is the creation of an ongoing, robust process to identify "emerging" and "foundational" technologies that are not yet subject to U.S. export controls. The ECRA requires the BIS to lead an interagency rulemaking process to identify and add controls to the EAR for "emerging" and "foundational" technologies that are essential to the national security of the U.S.[33] The ECRA does not define "emerging" and "foundational" technologies, but instructs to consult and consider multiple sources of information, including *inter alia*, reviews and investigations of transactions by the Committee on Foreign Investment in the United States, the development of emerging and foundational technologies in foreign countries, the effect export controls would have on the development of such technologies in the U.S., and the effectiveness of export controls on limiting the proliferation of emerging and foundational technologies to foreign countries.[34]

On November 19, 2018, the BIS issued an advance notice of proposed rulemaking regarding "emerging" technologies.[35] The advance notice provided some indication of what the BIS is likely to identify as "emerging" technologies. It specifies fourteen representative

[32] Prior to the enactment of the ECRA, it had been almost forty years since Congress passed any laws relating to U.S. export controls, including approximately seventeen years since Congress allowed the main statutory basis for the EAR to lapse.
[33] 50 U.S.C. §4817(a)(1).
[34] 50 U.S.C. §4817(a)(2).
[35] 83 Fed. Reg. 58,201 (Nov. 19, 2018).

categories of technology under consideration as "emerging" technology essential to U.S. national security. The fourteen representative categories include:

1. Biotechnology (i.e., nanobiology, synthetic biology)
2. Artificial Intelligence and Machine Learning Technology
3. Position, Navigation, and Timing Technology
4. Microprocessor Technology (i.e., systems on chip, stacked memory on chip)
5. Advanced Computing Technology (i.e., memory-centric logic)
6. Data Analytics Technology (i.e., visualization, automated analysis algorithms)
7. Quantum Information and Sensing Technology (i.e., quantum computing)
8. Logistics Technology (i.e., mobile electric power)
9. Additive Manufacturing (i.e., 3D printing)
10. Robotics (i.e., micro-drone and micro-robotic systems)
11. Brain-Computer Interfaces (i.e., Neural-controlled interfaces)
12. Hypersonics (i.e., Flight control algorithms)
13. Advanced Materials (i.e., adaptive camouflage, functional textiles, biomaterials)
14. Advanced Surveillance Technologies (i.e., faceprint and voiceprint technologies)

The BIS will publish a proposed rule outlining specific "emerging" technologies. The BIS may then issue a final rule or publish additional rounds of proposed rules. At some point, a similar process will be employed for "foundational" technologies after "emerging" technologies are specified.

Once "emerging" and "foundational" technologies are identified, the BIS will need to determine the level of controls to apply to the export of such technologies. Although the Secretary of Commerce has the discretion to determine the level of controls, the ECRA requires "at a minimum that the EAR contains a licensing requirement for the export…of [emerging and foundational technology] to or in a country subject to an arms embargo…"[36], which includes China.

[36] 50 U.S.C. §4817(b)(2)(C).

The primary reason that the U.S. Congress passed the ECRA was to enhance the U.S. export controls laws to better control the release of U.S. technologies and to ensure that the U.S. remains a leader in emerging technologies, particularly vis-à-vis U.S. strategic rivals, such as China, given the Trump Administration's perception that those rivals might be gaining competitive or security advantage through their access to innovative technologies under development by U.S. businesses.[37] This renewed focus on U.S. export controls is not surprising given the current pace at which major technological developments are being made. Compared to the last time the U.S. Congress considered U.S. export controls, which was about 40 years ago, there are now many new types of technologies that the Trump Administration believed could affect the national security, including but by no means limited to, artificial intelligence, drones and swarm technology, additive manufacturing, and brain-computer interfaces, any of which could, for example, expose the U.S. to foreign espionage. The ECRA was enacted to fill the dearth of regulation over these currently unregulated new and developing technologies.

b. Export Controls against China

There is an ongoing trade conflict between the U.S. and China[38], which has been significantly damaging not only the economies of the U.S. and China but global trades in

[37] The ECRA addresses this concern by attempting to curtail the open-sharing of innovative U.S. technologies with U.S. strategic trade rivals. For example, the ECRA includes a policy section stating: "The national security of the United States requires that the United States maintain its leadership in the science, technology, engineering, and manufacturing sector, including foundational technology that is essential to innovation. Such leadership requires that United States persons are competitive in global markets. The implementation of this part on such leadership and competitiveness must be evaluated on an ongoing basis and applied in imposing controls [pursuant to the EAR] to avoid negatively affecting such leadership."

[38] On May 6, 2019, former President Trump rattled the global markets by hiking tariffs to 25% from 10% on 200 billion USD of Chinese goods in the U.S. exports. In contrast to the market's expectations, the US-China trade conflict deteriorated sharply on August 1, with former President Trump vowing to impose 10% tariffs on the remaining 300 billion USD of imports from China commencing on September 1, 2019. In less than one month, the trade conflict escalated again on August 23 when both countries imposed new tariffs, adding to the anxiety over the state of the global economy. This cast an expanding blight on the already fragile relationship between these two rivals.

general. Since the 1980s, former President Trump frequently advocated tariffs to reduce the U.S. trade deficit and promote domestic manufacturing.[39] After the Trump Administration took place, it began to set tariffs and other trade barriers against China with the goal of forcing it to make changes to what the Trump Administration stated were unfair trade practices.

The US-China trade conflict has been expanding in scope and has recently been primarily focused on export controls. Such a shift of focus began with the Trump Administration's accusations that Huawei Technologies Co., Ltd. ("Huawei") violated the U.S. export controls and sanctions laws. On December 1, 2018, while transferring planes at Vancouver International Airport, Meng Wanzhou, the CFO of Huawei, was arrested at the request of the United States, pursuant to the extradition treaty between Canada and the United States. The warrant was based on allegations that Meng Wanzhou had cleared money using a US bank, which was claimed to be for Huawei but was actually for Skycom, an entity claimed to be entirely controlled by Huawei, which was said to be dealing with Iran, in violations of the U.S. export controls and sanctions laws.

In light of the above, the Trump Administration issued a series of Executive Orders and made significant amendments to the EAR to sanction China's major companies, such as Huawei, and to strengthen export controls for those destined to China in general. The followings are some of the major actions taken by the Trump Administration to that end.

[39] Tankersley and Landler, *Trump's Love for Tariffs Began in Japan's '80s Boom*. N.Y. Times (May 15, 2019) (*See* https://www.nytimes.com/2019/05/15/us/politics/china-trade-donald-trump.html)

i. Designation of Huawei on the Entity List

Following the charges on Meng Wanzhou of Huawei, the BIS designated Huawei and its affiliates to the Entity List of the EAR. The Entity List[40] is a blacklist of foreign entities subject to additional licensing requirements under the EAR. Foreign entities are designated on the Entity List because they have been deemed to pose a significant risk of involvement in activities contrary to the U.S. national security or foreign policy interests. After multiple rounds of designations, the BIS has designated more than 150 Huawei entities in total.[41]

The prohibition on dealings with Huawei is comprehensive. The BIS included the export of all items subject to the EAR within the scope of its prohibition and announced that it would review license applications to export to Huawei with a policy of presumption of denial. No other company as large as Huawei or with operations in as many countries worldwide had ever been designated to the Entity List. Such designations had a significant impact on U.S. businesses as most products and services of the U.S. companies are subject to the EAR and therefore became unable to be exported to Huawei upon the designations.

Although Huawei's designation on the Entity List significantly curtailed Huawei's direct access to U.S. suppliers, Huawei was still able to source certain items, in particular semiconductors, from production facilities outside the U.S. Even if the items contained US-origin content or were produced using U.S. technology, software, or equipment, such

[40] The Entity List is found in Supplement No. 4 to Part 744 of the EAR. On an individual basis, the entities/individuals designated on the Entity List are subject to licensing requirements and policies supplemental to those found elsewhere in the EAR.
(See https://www.bis.doc.gov/index.php/documents/regulations-docs/2326-supplement-no-4-to-part-744-entity-list-4/file)

[41] The BIS designated Huawei and 68 Huawei affiliates to the Entity List on May 16, 2019. Later, on August 21, 2019, the BIS expanded its Huawei designations to include 46 new designations, including Huawei's fabless semiconductor subsidiary, HiSilicon, and on August 17, 2020, designated 38 more Huawei affiliates, pushing the total number of Huawei entities designated to over 150.

foreign-produced items were not subject to the EAR so long as the underlying U.S. technology and foreign-produced item fell outside of the Foreign Direct Product Rule (the "FDPR")[42] and contained less than 25% controlled U.S. origin content.

In order to further restrict Huawei's ability to procure items that are the direct products of US technology or software, the Trump Administration made a significant amendment to the EAR on August 17, 2020, which expands the scope of items that are subject to the EAR under the FDPR. Specifically, the amendment expands the scope of items that will be captured under the FDPR only when the items were destined to Huawei and its affiliates designated on the Entity List.[43] The amendment also specifies a wide range of technology and software that are subject to the amended FDPR.

Many high-tech devices, especially semiconductors and chips nowadays, are designed by US software or manufactured by US equipment. Since semiconductors manufactured by US equipment or non-US equipment that is a direct product of a US technology or software are all captured under the amended FDPR, most of the semiconductors companies such as Samsung Electronics, TSMC, SMIC, SK Hynix, etc. are no longer able to provide Huawei semiconductors without specific export licenses from the BIS even though they are not US companies.

[42] The Foreign Direct Product Rule provides that if a foreign-produced item is a direct product of a NS-controlled US technology or software and the foreign-produced item itself is also a NS-controlled item, such item is subject to the EAR. *See* 15 C.F.R. §734.3(a)(4)-(5) and §736.2(b)(3)(vi).

[43] Under the amended FDPR, foreign-made items would become subject to the EAR and require a license when there is knowledge (including reason to know) that the item: (1) will be incorporated into, or will be used in the "production" or "development" of, any "part," "component" or "equipment" produced, purchased or ordered by Huawei; or (2) Huawei is a party to any transaction involving the above items, including as a purchaser, intermediate consignee, ultimate consignee or end-user.

ii. Strengthened Controls on Exports to/for Military End User/End Use

In response to the concerns regarding the significant overlap between the development of China's military and commercial sectors, the Trump Administration strengthened export controls on 'military end use' or 'military end user' in China, so-called "MEU Licensing Requirements".[44] The amendments, which became effective on June 29, 2020, strengthened the restrictions by (1) expanding the definition of 'military end uses' for which exports must be authorized, (2) adding a new license requirement for exports to Chinese 'military end users'; and (3) expanding the list of items to which the MEU Licensing Requirements apply.

The MEU Licensing Requirements is an existing restriction that requires a license to export certain items to China, Russia, or Venezuela if the exporters knew or had reason to know that the items were intended for a 'military end use' in those countries. The revised rule, however, significantly expands the definition of 'military end use'. Whereas the prior formulation only captures items exported for the purpose of using, developing, or producing military items, the revised rule also captures items that merely "support or contribute to" those functions.[45] For example, a repair part for a military item that might not have required a license under the previous formulation would be subject to the revised MEU Licensing Requirements.

In addition, exports of the covered items to 'military end users' were only restricted when destined to Russia and Venezuela, but not China. However, the revised rule now requires

[44] 15 C.F.R. §744.21.

[45] Under the new definition, 'military end use' will include any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, development, or production, of military items described on the U.S. Munitions List or items classified under ECCNs ending in "A018" or under "600 series" ECCNs

licenses for exports of the covered items to 'military end users' in China. 'Military end users' covered by the MEU Licensing Requirements not only include national armed services, police, and intelligence services but also include any person or entity whose actions or functions are intended to support 'military end uses'. Taken together with the newly broadened definition of 'military end uses', this restriction may apply to a significant number of private entities in China, even if they are engaged mainly in civilian activities, and it makes it extremely difficult for exporters to confirm whether their exports to China are permitted without a license.

The amendments also significantly expand the scope of the covered items. Whereas the previous rules applied to a relatively limited set of highly sensitive items, the revised rule adds many new categories of items, including those relating to materials processing, electronics, telecommunications, information security, sensors and lasers, and propulsion. Many of these items are extremely prevalent in the global supply chain and otherwise subject to very low controls.[46]

Given that applications for licenses to export the covered items under the MEU Licensing Requirements face a presumption of denial, these amendments could have a significant impact on commerce with large swaths of the Chinese economy.

[46] For example, the newly added items include relatively common electronic components, and a vast array of commercial items that use encryption, including many standard consumer mobile devices, modems, routers, etc.

B. The U.S. Economic Sanctions

1. Overview

Economic sanctions are measures that governments impose on transactions with targeted states or persons as a tool to achieve foreign policy or national security objectives. While the breadth and scope of economic sanctions vary depending on the definition, there is a basic consensus on the broad definition, which defines it as "the withdrawal of customary trade and financial relations for foreign and security policy purposes".[47] In general practice, economic sanctions are imposed in an effort to bring about a change with regard to armed conflict, international terrorism, the spread of weapons of mass destruction, narcotics trafficking, violations of international law, or human rights violations. They may take a variety of forms, including the reduction of foreign assistance, the withdrawal of eligibility for competitive export financing, the imposition of direct restrictions on exports, imports, or private investments, the revocation of landing rights and visas, the seizure of assets, etc.[48]

The U.S. Government has a long history of using economic sanctions as a tool to further its foreign policy objectives in countries and regions around the world. The first economic sanction imposed by the U.S. Government dates before the War of 1812, targeting England for the harassment of American sailors.[49] Following the German invasion of Norway in 1940, the U.S. imposed economic sanctions to prevent Nazi usage of occupied countries'

[47] Masters, J. (2017) *What are economic sanctions?* http://www.cfr.org/sanctions/economic-sanctions/p36259.
[48] Barry Carter (1987*) International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 Cal. L. Rev. 1159.
[49] *Id*, at 19. American colonists boycotted English goods. Then-President Thomas Jefferson persuaded Congress to enact unilateral economic sanctions against England and France in 1807. For two years, the U.S. prohibited its ships from departing for foreign ports and prohibited foreign ships from exporting goods from the U.S.

holdings and later extended sanctions to prohibit foreign trade and financial dealings.[50] After World War II, the U.S. began to impose economic sanctions with more frequency to pursue a wider variety of foreign policy objectives.

The Office of Foreign Assets Control (the "OFAC"), an agency within the Department of the Treasury, is the primary entity responsible for administering the U.S. economic sanctions. The scope of economic sanctions varies depending on the type. Economic sanctions may be comprehensive (Comprehensive Sanction) to prohibit all types of economic relations with an entire designated country or region, or they may be targeted specifically against particular groups, entities, individuals, or industries (List-Based Sanction). The OFAC currently operates 36 sanctions programs, five of them being comprehensive sanctions programs (North Korea, Iran, Syria, Crimea region, and Cuba).

Sanction Program	Type
Crimea region[51]	Comprehensive
Cuba Sanctions	Comprehensive
Iran Sanctions	Comprehensive
North Korea Sanctions	Comprehensive
Syria Sanctions	Comprehensive
Balkans Sanctions	List-Based
Belarus Sanctions	List-Based
Burundi Sanctions	List-Based
Burma-Related Sanctions	List-Based
Central African Republic Sanctions	List-Based
Chinese Military Companies Sanctions	List-Based

[50] Rachael Gosnell (2018) *Economic Sanctions: A Political, Economic, and Normative Analysis, International Relations and Diplomacy*, 6(3). doi: 10.17265/2328-2134/2018.03.002, at 153.

[51] Economic relations with Crimea region is regulated as a part of the Ukraine-/Russia-Related Sanctions program, and there is no separate sanction program for Crimea region. However, there is a comprehensive sanction over economic relations with Crimea region under the Executive Order 13685.

Countering America's Adversaries Through Sanctions Act of 2017	List-Based
Counter Narcotics Trafficking Sanctions	List-Based
Counter Terrorism Sanctions	List-Based
Cyber-Related Sanctions	List-Based
Democratic Republic of the Congo-Related Sanctions	List-Based
Foreign Interference in a United States Election Sanctions	List-Based
Global Magnitsky Sanctions	List-Based
Hong Kong-Related Sanctions	List-Based
Iraq-Related Sanctions	List-Based
Lebanon-Related Sanctions	List-Based
Libya Sanctions	List-Based
Magnitsky Sanctions	List-Based
Mali-Related Sanctions	List-Based
Nicaragua-Related Sanctions	List-Based
Non-Proliferation Sanctions	List-Based
Rough Diamond Trade Controls	List-Based
Russian Harmful Foreign Activities Sanctions	List-Based
Somalia Sanctions	List-Based
Sudan and Darfur Sanctions	List-Based
South Sudan-Related Sanctions	List-Based
Syria-Related Sanctions	List-Based
Transnational Criminal Organizations	List-Based
Ukraine-/Russia-Related Sanctions	List-Based
Venezuela-Related Sanctions	List-Based
Yemen-Related Sanctions	List-Based
Zimbabwe Sanctions	List-Based

[List of Active Sanctions Programs by the OFAC] [52]

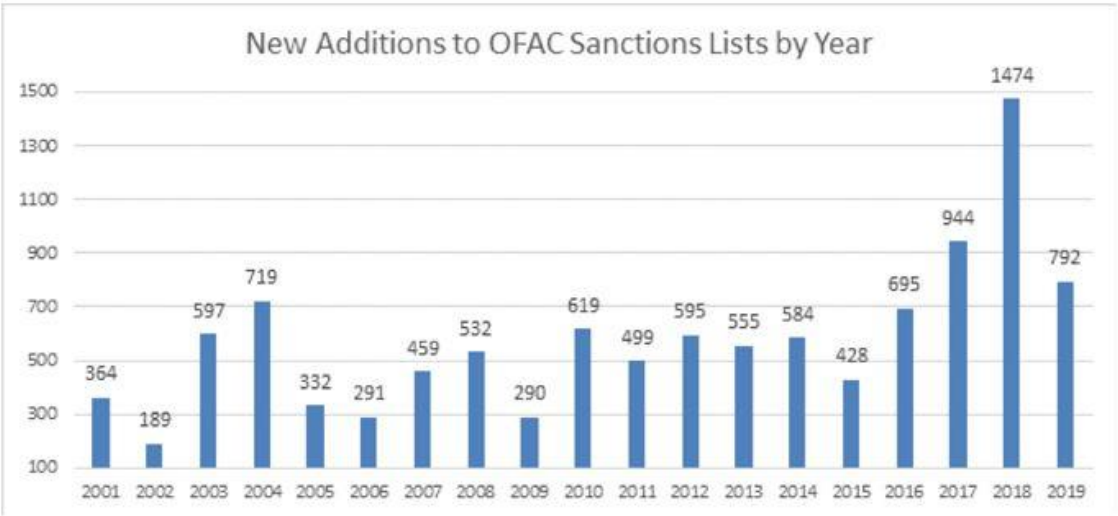
In addition to sanctions programs, the OFAC also maintains what is known as the List of Specially Designated Nationals and Blocked Persons (the "SDN List"), which is updated on

[52] *See* https://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx.

a regular basis and provides an exhaustive collection of individuals, organizations, and companies. Those identified on the SDN List are called Specially Designated Nationals ("SDN"). The U.S. persons are generally prohibited from dealing with SDNs (non-US persons are also prohibited from dealing with certain SDNs[53]), and their assets are blocked within the U.S. Under the OFAC's 50% rule, an entity is regarded as an SDN if it is 50% or more owned by one or more SDNs, regardless of whether the entity itself is an SDN. What makes this prohibition so overwhelming is that there is a general understanding that the prohibition is based on strict civil liability. Thus, even after careful due diligence of the SDN List, a company may be subject to civil liability if it was engaged in a transaction with an SDN regardless of its intention or knowledge.

Economic sanctions have become a dominant part of U.S. foreign policy since the Trump Administration. While the Obama Administration described his sanctions team as his favorite "combatant command", the Trump Administration unleashed the power of economic sanctions, imposing new unilateral sanctions 82 times in 2019 alone.[54] The OFAC, for the third year in a row, has blacklisted more entities than ever, adding an average of 1,000 names to the SDN List each year.

[53] For example, in case of most of Iranian SDNs, the Executive Order 13849 allows the imposition of secondary sanctions on any person – both U.S. and non-U.S. who "has materially assisted, sponsored, provided financial, material, or technological support for, or goods or services to or in support of" any Iranian SDNs except for Iranian depository institution that was designated solely, pursuant to Executive Order 13599.
[54] 2019 Year-End Sanctions Update by Gibson Dunn (*See* https://www.gibsondunn.com/2019-year-end-sanctions-update/).



[SDN Designations by Year][55]

2. Comprehensive Sanctions

Unlike list-based sanctions programs that vary largely in scope, comprehensive sanctions programs share certain similar features. First, comprehensive sanctions generally prohibit all types of transactions, including imports, exports, dealing in items originating in the territories, commercial or financial transactions, etc., involving the targeted states. Second, comprehensive sanctions have blocking or freezing authorities, which have the legal effect of freezing all property in which a targeted state has an interest. Third, comprehensive sanctions prohibit both direct and indirect transactions. For example, if a US company is prohibited from exporting to a targeted state, the company is equally prohibited from exporting to a third party (such as a non-US unrelated distributor or reseller) that reexports into the targeted state.

[55] *Ibid.*

a. Iran Sanctions

The U.S. sanctions against Iran, dated since 1979, have been constantly imposed to adversely affect Iran's economy. Despite the efforts, the sanctions arguably have not, to date, altered Iran's pursuit of core strategic objectives, including its support for regional armed factions and its development of missiles. Nevertheless, the sanctions did contribute to Iran's decision to enter into a 2015 agreement that puts limits on its nuclear program.

Due to the global community's continuous economic pressures against Iran during 2011-2015, Iran's economy shrank as its crude oil exports fell by more than 50%, and Iran was rendered unable to access its foreign exchange assets abroad.[56] Iran accepted the 2015 multilateral nuclear accord (Joint Comprehensive Plan of Action, the "JCPOA") in part because the agreement brought broad sanctions relief. The Obama Administration waived relevant sanctions and revoked relevant Executive Orders to that effect.[57]

On May 8, 2018, however, former President Trump announced that the U.S. would no longer participate in the JCPOA, and all secondary sanctions were re-imposed as of November 6, 2018. The U.S. sanctions against Iran were at the core of the Trump Administration policy to apply maximum pressure against Iran, with the purpose of compelling Iran to negotiate a revised JCPOA that takes into account the U.S. concerns beyond Iran's nuclear program. The policy has caused major companies to exit the Iranian market, and Iran's economy fell into a severe recession. Iran's oil exports decreased dramatically, particularly after the Trump Administration, in May 2019, ended the

[56] Kenneth Katzman (2020) *Iran Sanctions* (updated April 14, 2020). CRS report, RS20871, Congressional Research Service, at 1.
[57] Due to the same reason (Iran's decision to enter the JCPOA), the Iran sanctions imposed by the United Nations and European Union were lifted as well.

significant reduction exemption for the purchase of Iranian oil (this will be discussed in detail in "Major Developments since Trump Administration" section below).

Iran sanctions program is a comprehensive sanction that prohibits virtually all direct and indirect transactions involving Iran. The U.S. presently maintains both (1) "primary sanctions" that prohibit US persons[58] from engaging in transactions with Iran and (2) extraterritorial or "secondary sanctions" that directly penalize non-US persons from engaging in certain types of transactions involving Iran.

i. Primary Sanctions

Primary sanctions generally apply to any transaction involving Iran where there is some US-nexus, such as the involvement of a US person, US territory, US goods, and/or USD involving a US financial institution. The main prohibitions fall into two main categories and are set forth in the Iran Transactions and Sanctions Regulations (the "ITSR")[59]. First, Section 204 of the ITSR sets forth broad prohibitions on nearly all transactions involving Iran by a US person, as follows:

> "the exportation, re-exportation, sale, or supply, directly or indirectly, from the United States, or by a United States person…any goods, technology, or services to Iran… including the exportation, re-exportation, sale, or supply of any goods, technology, or services…to a person in a third country undertaken with knowledge or reason to know that…are intended specifically for…Iran..."[60]

[58] Under the ITSR, a U.S. person includes "any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States." *See* 31 C.F.R. § 560.314.
[59] 31 C.F.R. Part 560.
[60] 31 C.F.R. §560.204.

Another main prohibition of the ITSR is set forth in Section 211(b), which prohibits US persons from engaging in any transactions with individuals or entities designated on the SDN List.[61]

In addition, the primary sanctions may also apply to non-US persons, where the non-US person "causes" a US person to violate the sanctions. Section 560.701 of the ITSR, the penalty section, provides that "civil penalty…may be imposed on any person…causes a violation of any license, order, regulation, or prohibition...."[62] This scenario arises most commonly where a non-US entity routes a USD payment through a US bank, thereby "causing" the US bank to process or clear an Iran-related financial transaction. Similarly, if a transaction relied upon information technology resources from the United States, such as where the back office support for a transaction was lodged in a computer system in the United States, that transaction, even if undertaken by two non-US entities, could nevertheless be subject to the U.S. jurisdiction because of the US resources that supported the transaction.

ii. Secondary Sanctions

Secondary sanctions allow the U.S. Government to impose a menu of sanctions against non-US persons that engage in certain specified activities involving the targeted state. With respect to the Iran sanctions, these activities include, among others, sanctions targeting Iran's support for international terrorism, human rights abuses, and ballistic missiles activities, as well as transactions in certain specified industries such as investment in the oil,

[61] 31 C.F.R. §560.211(d).
[62] 31 C.F.R. §560.701.

gas and petrochemical sectors; the purchase and sale of petroleum and refined petroleum products; shipping, shipbuilding, and ports; and trade in gold and precious metals; etc.

b. Cuba Sanctions

For over 50 years, the U.S. has had many restrictions in place that mainly affected the interaction between the U.S. and Cuba. The U.S. first imposed sanctions on the sale of arms to Cuba on March 14, 1958, during the Fulgencio Batista regime. The sanctions continued to be more restrictive over time, and they were extended to include almost all types of exports by 1962.

Cuba sanctions fall into one of the most restrictive types employed by the U.S. for its broad, territory-based economic embargo, consisting of prohibitions on almost all dealings involving Cuba, which also includes a prohibition for travel to Cuba.[63] The main prohibitions are set forth in the Cuban Assets Control Regulations (the "CACR"). At a high level, the CACR prohibits essentially all dealings involving Cuba in the broadest possible sense.

i. Primary Sanctions

The main prohibitions of the CACR bar all transactions that "involve property in which Cuba, or any national thereof, has…any interest of any nature whatsoever, direct or indirect" limited only by the U.S. jurisdictional requirements.[64]This prohibition is similar to the primary sanctions of the Iran sanctions, which prohibit almost all types of dealings.

[63] It was intended to cut off tourism revenue and access to the U.S. dollar. None of the other territory-based comprehensive sanctions programs contains similar travel bans.
[64] 31 C.F.R. §515.201(b).

In addition to the general prohibitions on dealings involving Cuba, the CACR also contains a prohibition on trading with SDNs. While most of the relevant provisions in the OFAC sanctions regimes are limited to entities on the SDN List, the relevant provision under the CACR is broader. Section 306 of the CACR defines an "SDN of Cuba" to include any person identified as such by the OFAC, as well as any person acting for or on behalf of the Government of Cuba, or any entity "owned or controlled directly or indirectly" by the Government of Cuba.[65]

Moreover, as of November 2017, the CACR also began to restrict transactions involving entities on the U.S. Department of State's "List of Restricted Entities and Subentities Associated With Cuba" (the "Cuba Restricted List"). The Cuba Restricted List identifies entities associated with the Cuban military, intelligence, or security services or personnel, including many hotels, tourist agencies, and stores, where direct financial transactions with those entities would disproportionately benefit such services or personnel at the expense of the Cuban people or private enterprise in Cuba. On November 9, 2017, the OFAC amended the CACR to incorporate and make certain of its prohibitions applicable to the entities on the Cuba Restricted List. Specifically, the OFAC added Section 209 to the CACR, under which persons subject to the U.S. jurisdiction are barred from engaging in direct financial transactions with entities on the Cuba Restricted List.[66]

ii. Secondary Sanctions

Unlike the Iran sanctions, the Cuba sanctions focus on the US persons, and therefore the CACR does not explicitly provide a menu of secondary sanctions against non-US persons.

[65] 31 C.F.R. §515.306.
[66] It is important to note that the Cuba Restricted List is entirely distinct from the SDN List, and therefore, each list must be checked separately in determining the legality of any particular transaction involving Cuba.

However, similar to the Iran sanctions, the primary sanctions of the CACR may apply to non-US persons under the "causing violation" prohibition.

3. Major Developments since Trump Administration

a. Iran Sanctions

i. Re-imposition of Secondary Sanctions

The most significant change of the Iran sanctions since the Trump Administration took place is the re-imposition of the secondary sanctions that had been waived pursuant to the JCPOA entered into by the Obama Administration. As briefly mentioned earlier, the Trump Administration abandoned the JCPOA and fully re-imposed all of the secondary sanctions involving Iran. They were re-imposed on two phases as follows:

Secondary Sanctions Re-Imposed on August 7, 2018	**Secondary Sanctions Re-Imposed on November 5, 2018**
Sanctions on the purchase or acquisition of US dollar banknotes by the Government of Iran	Sanctions on Iran's port operators, and shipping and shipbuilding sectors, including on the Islamic Republic of Iran Shipping Lines, South Shipping Line Iran, or their affiliates
Sanctions on Iran's trade in gold or precious metals	Sanctions on petroleum-related transactions with, among others, the National Iranian Oil Company, Naftiran Intertrade Company, and the National Iranian Tanker Company, including the purchase of petroleum, petroleum products, or petrochemical products from Iran
Sanctions on the direct or indirect sale, supply, or transfer of the following items to or from Iran: graphite, raw or semi-finished metals such as aluminum and steel, coal, and software for integrating industrial processes	Sanctions on transactions by foreign financial institutions with the Central Bank of Iran (CBI) and designated Iranian financial institutions under section 1245 of the National Defense Authorization Act for FY 2012
Sanctions on significant transactions related to the purchase or sale of Iranian rials or the maintenance of significant funds or accounts	Sanctions on the provision of specialized financial messaging services to the CBI and certain Iranian financial institutions

outside the territory of Iran denominated in the Iranian rial	
Sanctions on the purchase, subscription to, or facilitation of the issuance of Iranian sovereign debt	Sanctions on the provision of underwriting services, insurance, or reinsurance
Sanctions on Iran's automotive sector	Sanctions on Iran's energy sector

As a result, non-US companies have been prohibited from engaging in various types of Iran-related transactions, even without any US-nexus. In case of violations, non-US companies may face significant penalties and even be blocked from accessing the U.S. markets or designated on the SDN List.

ii. Expiration of the SRE Waivers

The U.S. Government had previously provided sanctions waivers, known as Significant Reduction Exceptions (the "SRE") to eight countries, specifically, China, India, South Korea, Japan, Italy, Greece, Taiwan, and Turkey, which have pledged to significantly reduce their imports of Iranian crude oil, and has also purportedly waived certain prohibitions under the Iran sanctions. The SRE not only allowed those countries to continue importing Iranian oil but also allowed them to use a setoff payment system with the Central Bank of Iran without being sanctioned by the U.S., provided that they significantly reduced their Iranian oil imports as required under the SRE.

In April 2019, however, the Trump Administration announced that it would not grant any further waivers and warned that those who continued to trade in Iranian crude would be sanctioned. The expiration of the SRE resulted in a significant impact on those states that were previously granted the SRE because they were no longer able to use the setoff payment system for commercial dealings. When the SRE was granted, they were able to

use the setoff payment system for business other than the oil trades with Iran. For example, a Korean company was able to export refrigerators to Iran (as it is not one of the prohibited activities that are subject to secondary sanctions) by using a setoff payment system. However, without the SRE, it is very difficult for a non-US company to trade with Iran, even when the trade activity itself is not in violation of the Iran sanctions, because, in practice, it is extremely hard to avoid engaging a US financial institution in international payment transactions. Even when the transactions only engage non-US banks for processing relevant payments for the trades, there is always a possibility that a US bank may be engaged as an intermediary bank (e.g., clearing bank) since the key currency in international transfers is the USD. Once it is found that a US bank has been engaged in the middle of any trades involving Iran, the non-US export company would be in violation of the Iran sanctions for "causing violation".

iii. Designations of Iranian Banks on the SDN List

On October 8, 2020, the Trump Administration designated eighteen major Iranian banks[67] on the SDN List as subject to secondary sanctions. These banks were already designated on the SDN List before this action, but they were only subject to primary sanctions back then, and therefore non-US persons were able to engage in a business activity with the banks as long as there was no US-nexus.

However, since these banks are now subject to secondary sanctions, anyone, including non-US person, that engages in any transaction with the banks would be in violation of the Iran

[67] Eighteen major Iranian banks include: Amin Investment Bank, Bank Keshavarzi Iran, Bank Maskan, Bank Refah Kargaran, Bank-e Shahr, Eghtesad Novin Bank, Gharzolhasaneh Resalat Bank, Hekmat Iranian Bank, Iran Zamin Bank, Karafarin Bank, Khavarmianeh Bank (also known as Middle East Bank), Mehr Iran Credit Union Bank, Pasargad Bank, Saman Bank, Sarmayeh Bank, Tosee Taavon Bank (also known as Cooperative Development Bank), Tourism Bank, and Islamic Regional Cooperation Bank.

sanctions unless an exception applies (For example, the U.S. Government has issued General License L[68] on the same day, providing that the existing authorizations and exceptions for humanitarian trade are not affected and remain in full force and effect for these banks).[69]

b. Cuba Sanctions

In 2014, the Obama Administration initiated a major policy shift moving away from Cuba sanctions toward engagement and the normalization of relations. Such policy change included restoring diplomatic relations and efforts to increase travel, commerce, etc., through amendments to the CACR and the EAR.[70] The restoration of relations led to the increased government-to-government engagement, with over 20 bilateral agreements negotiated and numerous bilateral dialogues.

However, in 2017, former President Trump unveiled a new policy toward Cuba, introducing new sanctions and rolling back the previous efforts to normalize relations. By 2019, the Trump Administration had largely abandoned engagement by increasing economic sanctions, particularly to pressure the Cuban Government for its human rights record and support for the Government of Nicolás Maduro in Venezuela.

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[68] *See* https://home.treasury.gov/system/files/126/iran_gll.pdf.

[69] The U.S. Treasury explained in the FAQs that there may be further guidance on the scope of transactions and activity by non-US persons involving the banks that may be sanctionable after the wind-down period. As of the date of this writing (November 30, 2020), such guidance has not been issued. *See* FAQ 847 (https://home.treasury.gov/news/press-releases/sm1147) "OFAC continues to analyze whether select types of transactions and activities may, nonetheless...not sanctionable even after the end of the wind-down period. OFAC anticipates issuing additional guidance regarding the scope of transactions and activity by non-US persons involving the Iranian financial sector and Iranian FIs sanctioned pursuant to E.O. 13902 that will become sanctionable after November 22, 2020..."

[70] *Cuba: U.S. Policy Overview* (updated May 29, 2020). CRS Report, IF10045. Congressional Research Service, at 1.

i. Elimination of the "U-Turn" Transaction Authorization

In March 2016, the Obama Administration authorized financial institutions to process certain transactions involving Cuba. Specifically, US financial institutions became permitted to engage in so-called "U-Turn" transactions involving Cuba, where the funds (1) originate and terminate outside of the United States, and (2) neither the originator nor beneficiary is a US person (US banks as an intermediary bank were able to clear USD transactions involving Cuba between non-US persons).[71] The "U-Turn" transaction authorization enabled trades between a Cuban company and a non-US company when the trades occurred entirely outside the United States by allowing transactions to be processed through US financial institutions via correspondent accounts maintained at US intermediary banks.

On September 6, 2019, however, the Trump Administration announced that they were amending the CACR to end the "U-Turn" transaction authorization to further financially isolate the Cuban Government and implement former President Trump's June 2017 National Security Presidential Memorandum Strengthening the Policy of the United States Toward Cuba. The amendments practically terminated the authorization, as the institutions are now required to reject requests for processing the "U-Turn" transactions. Then-Secretary of Treasury Steven Mnuchin stated that the purpose of these additional restrictions is to hold "the Cuban regime accountable for its oppression of the Cuban people and support of other dictatorships..."[72]

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[71] *See* 31 C.F.R. § 515.584(d). Surprisingly, the OFAC's guidance on the implementation of the CACR stated explicitly that a transaction may proceed under the "U-Turn" transaction authorization even if an entity in the transaction is an SDN, so long as the entity is designated under the [Cuba] program only. OFAC updates, FAQ 63 (April 21, 2016). The guidance states, specifically: "Note, however, that transactions meeting the requirements of 31 C.F.R. § 515.584(d) may be processed notwithstanding the involvement of a specially designated national of Cuba, as defined in 31 C.F.R. § 515.306 in the transaction."

[72] *See* https://home.treasury.gov/news/press-releases/sm770.

This amendment resulted in a significant impact on non-US companies. Previously, non-US companies were able to trade with Cuba using a "U-Turn" transaction for their payment structures. With the US financial institutions' inability to process the "U-Turn" transactions, the situation has been similar to Iran. Since US financial institutions are no longer able to process the "U-Turn" transaction, non-US companies must find an international payment structure that does not engage any US financial institution (as discussed above, a non-US company can be subject to a primary violation for "causing violation" when a US bank is engaged in their Cuba-related transaction). However, finding such a payment structure for international trade, which must be capable of completely foreclosing the possibility of a US financial institution's involvement, is very difficult in practice.

ii. Amendments of the EAR to Strengthen Cuba Sanctions

Shortly after, in October 2019, the BIS amended the EAR in a number of ways to further strengthen the Cuba sanctions. First, the existing export licenses to lease aircraft to Cuban state-owned airlines were revoked, and a general policy of denying future applications was instituted. Second, the *de minimis* level was revised downward for Cuba from 25% to 10%, meaning that foreign items with at least 10% controlled content would be subject to the EAR restrictions. Third, the "Support for the Cuban People" license exception was limited, barring donations to organizations controlled by or administered by the Cuban Government or the Cuban Communist Party.

PART III. LEGALITY UNDER PUBLIC INTERNATIONAL LAW AND SECURITY EXCEPTIONS UNDER THE GATT

A. Legality under Public International Law

1. Overview

While it is generally accepted that a state has a right, as a derivative of the principle of sovereignty, to determine and formulate trade policies free from the interference of other states[73], the foreign trade policy, by its very nature, may result in affecting other states of the international community. However, the principle of sovereignty does not allow a state to conduct external relations with impunity[74], but rather, a natural consequence of the equal and sovereign existence of independent states is that international legal obligations are binding upon states, which as a result, concludes that the foreign economic policies of a state, such as unilateral economic sanctions or export controls, should be subject to the limitations of international law.[75]

Unilateral trade-restrictive measures, such as economic sanctions and export controls imposed by the United States, can often be described as tools of foreign policy that a state can use, on its own volition, to bring a state that violates international law principles into consonance with those principles. The difference between the trade-restrictive measures of the old and the modern-day is that previously, they were considered as stopgap answers to a political problem, the precursors of military assault, whereas today, they are considered

[73] Gerald Fitzmaurice (1957) *The General Principles of International Law Considered From the Standpoint of the Rule of Law*, 92 Recueil Des Cours, at 49.
[74] Michael Akehurst (1987) *A Modern Introduction to International Law* (5th Edition), Allen and Unwin, at 15.
[75] Derek Bowett (1976) *International Law and Economic Coercion*, 16 Va. J. Int'l L., at 245.

viable, cost-effective alternatives to getting a particular act done without any military action. Unilateral trade-restrictive measures in common parlance are used to indicate trade-disrupting measures, where the means undertaken to achieve the end are important. The advocates of unilateral trade-restrictive measures perceive them as low-cost solutions to the abhorrent behavior of foreign governments, companies, or individuals. These measures are positioned somewhere between diplomacy and military engagement and are imposed to dissuade military adventures, impair military potential, destabilize foreign governments, and pursue both modest as well as major policy changes in the targeted states.

While there is currently no established prohibition on coercive economic sanctions or export controls under general principles of international law, these trade-restrictive measures are often found to be inconsistent with the principles of international law and attract international responsibility.

2. Inconsistency with the Principles of Public International Laws

As discussed earlier in this dissertation, the U.S. has imposed a large number of economic sanctions that prohibit all or certain types of dealings with the targeted countries or entities/individuals and export controls to restrict (re)exportations to certain selective countries or entities/individuals. These trade-restrictive measures prohibit not only dealings between the U.S. persons and the targets but also non-US persons' dealings with the targets due to the broad extraterritorial jurisdiction of the measures. These types of trade-restrictive measures are often inconsistent with the principles of public international law**.** This section discusses how the U.S. economic sanctions and export controls may be inconsistent with the principles of public international laws.

First, the United States and Cuba are parties to the Charter of the United Nations (the "UN Charter"). Although the UN Charter does not expressly address the area of economic coercion, it has been interpreted that Article 2(4) of the UN Charter implicitly includes economic and political conduct.[76] Article 2(4) of the UN Charter forbids the threat or use of force against any state in any manner that is not consistent with the purposes of the UN Charter.[77] There is uncertainty to the issue of whether "force" in Article 2(4) of the UN Charter includes nonmilitary types of force, particularly economic coercion. If "force" in Article 2(4) of the UN Charter does include economic/political coercion, the trade-restrictive measures of the U.S., especially the comprehensive sanctions, could be found to be inconsistent with the prohibition against force enunciated in Article 2(4) of the UN Charter.

Although there is no decisive consensus regarding the matter, the old view was that "force" in Article 2(4) of the UN Charter does not include economic coercion.[78] In *United States – Trade Measures affecting Nicaragua*[79] involving a dispute between the U.S. and Nicaragua regarding the U.S. economic sanctions against Nicaragua, it was ruled that "force" in Article 2(4) of the UN Charter does not encompass economic coercion as no evidence existed that more than a few member states of the U.N. consider Article 2(4) to embody economic coercion. However, there was an argument against the narrow interpretation of Article 2(4) of the UN Charter. There were comments that the framers of the UN Charter were aware that forms of coercion other than armed force were bound to arise in the future,

[76] H. Brosche (1974) *The Arab Oil Embargo and the United States Pressure against Chile: Economic and Political Coercion and the Charter of the United Nations*, 7 Case W. Res. J. Int'l L. 410, at 417.
[77] Article 2(4) of the UN Charter, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
[78] R. Lillich (1977) *The Status of Economic Coercion Under International Law: United Nations Norms*, 12 Tex. Int'l. J., at 18.
[79] Panel Report, *United States – Trade Measures affecting Nicaragua* (13 October 1986) L/6053 (not adopted).

and the open language of Article 2(4) of the UN Charter would allow that Article to function effectively in response to a changing international community.[80] Considering the rapid increase of economic sanctions and export controls and the severe damages they could bring to the targeted nations, this issue deserves reexamination.

Second, the United States and Cuba are also parties to the GATT. Under Article XI(1) of the GATT[81], a contracting party to the GATT may not restrict or prohibit imports from or exports to another member state except in certain circumstances. If a member state imposes restrictions on another state, Article XIII(1) of the GATT[82] requires that the state taking such measures to apply similar restrictions to third states. As the U.S. sanctions against Cuba prohibits all trades (except certain authorized transactions as discussed above) with Cuba, and the U.S. export controls also prohibit the exportation of most of the items that are subject to the EAR to Cuba, these measures may potentially be inconsistent with Articles XI and XIII of the GATT.

There was an attempt to claim that the U.S. economic sanctions violated the GATT principles in *United States – Trade Measures affecting Nicaragua*. The case involves Nicaragua's claim to the GATT Council, which challenged the economic sanctions imposed by the United States. In 1985, then-President Reagan of the U.S. determined that "the policies and actions of the Government of Nicaragua constitute an unusual and

[80] Editors (1974) *The Use of Nonviolent Coercion: A Study in Legality under Article 2(4) of the Charter of the United Nations*, 122 U. Pa. L. Rev. 983. (Available at https://scholarship.law.upenn.edu/penn_law_review/vol122/iss4/13)
[81] GATT, *supra* note 10, art. XI(1).
[82] Article XIII(1) of the GATT, "No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted."

extraordinary threat to the national security and foreign policy of the U.S."[83] and imposed economic sanctions against Nicaragua. The Nicaragua sanctions program back then was a comprehensive sanction, similar to Iran and Cuba sanctions as explained above, which prohibits all types of dealings between US persons and Nicaragua. The Government of Nicaragua argued that such a trade embargo was inconsistent with the GATT obligations and impeded the achievement of its objectives as well.[84] Specifically, Nicaragua argued that the economic sanctions had deprived Nicaragua of benefits under Articles I[85], II[86], V[87], XI[88], XIII[89], XXIV[90], and XXXVI - XXXVIII[91]. The U.S. did not contend that the sanctions violated the GATT obligations but instead focused on asserting a defense under the security exception of the GATT. The GATT Council neither accepted the U.S. position that the

[83] Communications from the United States, *United States -Trade Measures Affecting Nicaragua* (29 May 1985) L/5803, at 2.
[84] Panel Report, *United States – Trade Measures affecting Nicaragua*, *supra* note 79, para 4.1
[85] Article I(1) of the GATT, "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."
[86] Article II(1)(a) of the GATT, "Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement."
[87] Article V(1) of the GATT, "1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes..."
[88] GATT, *supra* note 10, art. XI(1).
[89] GATT, supra note 82, art. XIII(1).
[90] Article XXIV(1) of the GATT, "The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; Provided that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party."
[91] Articles XXXVI-XXXVIII of the GATT acknowledge the need to give priority to the reduction of trade barriers to less developed states for the promotion of their growth. In particular, the paragraph 3(c) of the article XXXVII provides that the developed contracting parties shall "have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement..."

sanctions were justified under the security exception nor condemned the sanctions. However, the member states of the GATT have recognized the undesirability of trade-restrictive measures taken for political reasons.[92]

Third, inconsistency may also be found in the context of a regional convention. Cuba and the U.S. are parties to the Charter of the Organization of American States (the "OAS Charter"). [93] Article 19 of the OAS Charter prohibits any type of interference into the internal or external affairs of a member state.[94] The U.S. economic sanctions against Cuba appear to fall within the proscription of Article 19 of the OAS Charter because the sanctioning measures served Cuba's economic relations with the U.S., one of Cuba's largest trading partners. In addition, Article 19 of the OAS Charter explicitly prohibits the use of coercive economic measures by which a member state intends to compromise the sovereignty of another member state. Therefore, the U.S. Government's intent in imposing sanctions against Cuba may play an essential role in determining whether the U.S. breached Article 19 of the OAS Charter. The U.S. Government stated that one of the purposes of the Cuban Democracy Act of 1992 (which is the legislative basis for the Cuba sanction program) is to maintain sanctions on Cuba as long as the Cuban Government refuses to move toward "democratization and greater respect for human rights."[95] The attempt to force the Cuban Government to pursue a course of conduct demanded by the U.S. may

[92] J. Curtis Henderson (1986) *Legality of Economic Sanctions under International Law: The Case of Nicaragua*, 42 Wash. & Lee L. Rev. 167, at 185.
[93] The Organization of American States is a regional agency within the framework of the United Nations, formed to promote peace and security among the states of the Western Hemisphere.
[94] Article 19 of the OAS Charter, "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements."
[95] §1703 of the Cuban Democracy Act of 1992.

appear to be an interference with Cuba's sovereign right to dictate the course of its own government.

Fourth, the export controls and economic sanctions operating by the U.S. Government are also inconsistent with several United Nations resolutions. The resolutions of the United Nations, though not legally binding *per se*, represent the expectations of the international community and provide evidence of the norms of customary international law.[96] Important United Nations resolutions condemning coercive economic conducts are "the Declaration on the Inadmissibility of Intervention on the Domestic Affairs of States and the Protection of their Independence and Sovereignty" [97] and "the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations."[98]

Both Declarations prohibit the use of economic or political measures designed to subordinate the will of or obtain advantages from another state. The U.S. may be able to argue that the export controls and economic sanctions were imposed as a part of a comprehensive policy designed to enhance peace and security in the region and did not intend to detract from the sovereignty of the targeted states or acquire any advantage therefrom. However, if the predominant intention of the U.S. Government in imposing those measures appeared to alter the operation of the targeted states and force the states to

[96] Obed Asamoah (1967) *The Legal Significance of the Declarations of the General Assembly of the United Nations*, Martinus Nijhoff, at 42.
[97] The Declaration on the Inadmissibility of Intervention on the Domestic Affairs of States and the Protection of their Independence and Sovereignty (A/2131(xx)) is a declaration adopted by the United Nations General Assembly on 21 December 1981.
[98] The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (resolution 26/25 (XXV)) was adopted by the General Assembly on 24 October 1970, during a commemorative session to celebrate the twenty-fifth anniversary of the United Nations (A/PV.1883).

follow a course of conduct that the U.S. Government desired, then the measures could be found to be inconsistent with the Declarations.

Last but not least, Czechoslovakia brought a complaint before the GATT against the U.S., alleging that the U.S. export control regime violated the U.S. obligations under the GATT.[99] The U.S. argued that the GATT authorized the export control regime as a security measure under the Article XXI. Except for Czechoslovakia, the member states unanimously voted against referring the matter to a Panel for decision[100]. The British delegate (Mr. Shacke) summarized the delicate balance struck any time a member state invokes the Article XXI by stating that "…the United States action would seem to be justified because every country must have the last resort on questions relating to its own security."[101] The GATT Council, however, recognized that member states should not take any action that could undermine the GATT, thus expressing disfavor with the use of the Article XXI exception for political purposes.[102]

3. Extraterritorial Jurisdiction

As briefly mentioned earlier, both export controls and economic sanctions imposed by the U.S. entail extraterritorial jurisdiction. Although the U.S. may argue that they have a right to assert extraterritorial jurisdiction, many international law scholars have been questioning

[99] Statement by the Head of the Czechoslovak Delegation Mr. Zdenk Augenthaler to Item 14 of Agenda, Request of the Government of Czechoslovakia for a Decision Under Article XXHII as to Whether or Not the Government of the United States of America Has Failed to Carry Out Its Obligations Under the Agreement Through Its Administration of the Issue of Export Licenses, at 5, 12, CP.3/33 (May 30, 1949), *Available* at http://www.wto.org/gatt-docs/English/SULPDF/90320183.pdf.
[100] GATT Council, Summary Record of the Twenty-Second Meeting, at 9, CP.3/SR.22 (June 8, 1949), *Available* at http://www.wto.org/gatt docs/English/SULPDF/90060100.pdf.
[101] *Id*, at 7-8.
[102] John Jackson (1969) *World Trade and the Law of GATT*, Bobbs-Merrill, at 28.

the legality of the extraterritorial jurisdiction of the U.S. export controls and economic sanctions under international law.

a. Extraterritorial Jurisdiction of the U.S. Export Controls

Current multilateral cooperation on export controls is based largely on consensus, and unilateralism is hard to restrain.[103] One of the examples of unilateralism in export control measures is the United States' longstanding assertion of extraterritoriality in the U.S. export controls. Since the early 1980s, the U.S. Government has asserted its jurisdiction over foreign transactions, based on the fact that such transactions involve goods, software, or technologies that are of U.S. origin or contain U.S. content (US-nexus). This so-called "item origin-based" jurisdictional approach departs from traditionally accepted forms of prescriptive extraterritorial jurisdiction under customary international law, such as the territoriality principle, which requires a substantial part of the conduct to take place within the territory.[104]

The need to regulate an exported item under the old trade control system depended mainly on the destination of the items, and the primary purpose of the control was to prevent or restrict exports or reexports of the items to various communist countries. The modern trade controls, however, focus on controlling exports depending on the intended use for the items and the parties involved. As a result, the U.S. has been more inclined to assert jurisdiction extraterritorially over activities in many different states, and expansive extraterritoriality has become a prominent and indelible feature of the U.S. export controls.

[103] Gregory W. Bowman (2014) *A Prescription for Curing U.S. Export Controls*, 97 Marq. L. Rev. 599, at 1.
[104] The accepted forms of prescriptive extraterritorial jurisdiction under customary international law will be discussed separately below.

The impact of the extraterritorial jurisdiction of the export controls by the U.S., which has been the world's largest economy as well as exporters for decades, is significant. Such a broad extraterritorial jurisdiction could not only potentially infringe the trading partners' international trades but also limit deeper multilateral consensus in export control matters, which in turn might possibly impair the collective effectiveness of multilateral export controls through various international organizations and agreements.[105]

b. Extraterritorial Jurisdiction of the U.S. Economic Sanctions

The U.S. economic sanctions also entail broad extraterritorial jurisdiction. The legality of such broad reach of the U.S. sanctions has been criticized and analyzed in detail when BNP Paribas ("BNPP") settled for 8.97 billion USD for violations of the U.S. sanctions, which is the largest settlement by far.[106]

BNPP pled guilty to the conspiracy charges after violating the Iran and Cuba sanctions laws of the U.S. BNPP's Paris headquarters and Swiss subsidiary in Geneva had processed USD transactions on behalf of Sudanese, Iranian, and Cuban entities that were subject to the US economic sanctions. BNPP's activities that resulted in violations of the sanctions include banking services such as payment services, letters of credit, and bank accounts in USD. The jurisdictional claim based on the use of the U.S. financial system may comprise of two possible arguments. One argument can be that the USD payments passed through the U.S. territory because they were made possible by using a US correspondent bank account. The other argument is that, by processing the payments, BNPP caused the U.S. correspondent

[105] Bowman, *supra* note 103, at 4.
[106] *See* Press Release, Department of Justice, Office of Public Affairs, BNP Paribas Agrees to Plead Guilty and to Pay $ 8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions (June 30, 2014), http://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial.

banks to engage in activities prohibited under the U.S. sanctions laws, even if the banks did so unknowingly.

Both arguments are rooted in the territoriality principle. However, in the U.S. as well as international law scholarship, the validity of such an expansive reading of the territoriality principle has been questioned. It has been argued that such a broad extraterritorial jurisdiction does not satisfy the conditions set by the subjective territoriality principle, as the principle requires that a substantial part of the conduct take place within the territory.[107] It has been criticized that the fact that the dollar portion of such payments (from an Iranian entity to a Swedish entity) passes through the U.S. territory via the clearing system does not meet the "substantial part" threshold of the territoriality principle, and the fact that money clears through a correspondent account on its way between two foreign accounts is also insufficient to meet the "substantial part" threshold.[108]

There is no other basis in international law for such a far-reaching assumption of jurisdiction. The other territorial aspect is that BNPP caused the U.S. correspondent banks to violate US sanctions laws. This involves jurisdiction based on the effects doctrine, which holds that if foreign conduct produces direct, substantial, and foreseeable effects within the territory, then the territorial state may claim jurisdiction. Although it might be true that that BNPP's conduct has an effect in the United States if, as a consequence of a payment order, the U.S. banks violate domestic sanctions laws, there may still be no sufficient basis for the

[107] Sean D. Murphy (2006) *Principles of International Law*. Thomson West, at 45.
[108] Natasha N. Wilson (2014) *Pushing the Limits of Jurisdiction Over Foreign Actors Under the Foreign Corrupt Practices Act*, 91 Wash U. L. Rev. 1063, at 1077.

U.S. jurisdiction because BNPP's conduct was legal within the EU, French, and Swiss jurisdictions.[109]

c. Extraterritorial Jurisdiction Accepted under Customary International Law

As discussed above, the legality of the exterritorial jurisdictions of the U.S. export controls and economic sanctions have been questioned by many. Considering the divergent views taken under the various legal systems, the most promising way to analyze the question lies in public international law. It was once stated by a scholar that "the legitimacy of domestic jurisdiction depends on international law's jurisdictional principles, which were established to foster cooperative foreign relations by avoiding and resolving conflicting assertions of domestic personal authority."[110] In other words, international law provides the framework for assessing the legality of extraterritorial jurisdiction by reconciling one state's authoritative interest with another's.

In the absence of a specific international treaty, the law of extraterritorial jurisdiction is primarily rooted in customary international law.[111] The conventional wisdom among international law scholars is that customary international law places certain limitations on the authority of states to apply their laws extraterritorially.[112] There was a discussion of the categories of extraterritorial jurisdiction basis in a 1935 Harvard Research Project, which was aimed at summarizing the principles of customary international law in relation to the

[109] Richard G. Alexander (1996) *Iran and Libya Sanctions Act of 1996: Congress Exceeds Its Jurisdiction to Prescribe Law*, 54 Wash. & Lee L. Rev. 1601 (noting that there is no agreement that the effects-based jurisdiction is justified when the regulated conduct complies with the laws of the state where it was carried out.).
[110] Kenneth C. Randall (1988) *Universal Jurisdiction Under International Law*, 66 Tex. L. Rev. 785, at 841.
[111] Cedric Ryngaert (2015) *Jurisdiction in International Law (2nd Edition)*, Oxford University Press, at 6-7.
[112] *See* Christopher L. Blakesley (1999) *Extraterritorial Jurisdiction*, in M. Cherif Bassiouni, ed, International Criminal Law, 36-41 (Transnational 2d ed); Randall, *supra* note 110, at 785-88.

categories of extraterritorial jurisdiction.[113] The project identified five categories, namely, territoriality principle, nationality principle, protective principle, passive personality principle, and universality principle. An international law scholar has argued that, unless a state's extraterritorial law falls within one of the five categories identified above, the state violates international law governing "prescriptive jurisdiction."[114] Thus, the conventional view is that the states are required to justify their jurisdictional assertion under generally accepted rules or principles of international law. It should be noted, however, that these five categories do not represent the only extraterritorial jurisdiction principles accepted under customary international law. However, it is a well-organized list of some of the most used extraterritorial principles by states.[115]

The territoriality principle is the primary basis for jurisdiction in international law and refers to sovereignty's right to exercise its jurisdiction within its territory.[116] The territoriality principle extends to cover foreign conduct that partly occurs within a domestic territory, as long as that part occurred in the domestic territory forms the substantial part of the foreign conduct.[117] This extension requires a subjective assessment of whether the part of the conduct occurred in the domestic territory and an objective assessment of whether that part was substantial enough to justify an extraterritorial jurisdiction. Another extension regards foreign conduct that results in substantial and immediate effects within the domestic territory. This extension, also referred to as the "Effects Doctrine", is based on the

[113] *See* Harvard Research in International Law (1935) *Jurisdiction with Respect to Crime*, 29 Am J Intl L 435.
[114] Curtis A. Bradley (2001) *Universal Jurisdiction and U.S. Law*, U. Chi. Legal F., at 323.
[115] The U.S. has also adopted most of the principles. *See* Restatement (Third) of Foreign Relations Law of the United States (1987).
[116] The Lotus case (S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)) was a key court ruling on the territoriality principle. In 1926, a French vessel collided with a Turkish vessel, causing the death of several Turkish nationals. The Permanent Court of International Justice ruled, by a bare majority, that Turkey had jurisdiction to try the French naval lieutenant for criminal negligence, even though the incident happened beyond Turkey's boundaries.
[117] Murphy, *supra* note 107, at 45.

ideology that any conduct, even occurred outside the domestic territory, may be regulated because of its impact on interests within the territorial state's domain. The doctrine seeks to satisfy the concept of territoriality by treating the impact of the prohibited conduct as much a part of the crime as the conduct itself.[118] Although the doctrine may be regarded as included in the five of the recognized extraterritorial jurisdictions under customary international law, the legality of the principle remains controversial.[119]

The nationality principle is a recognized extraterritorial jurisdiction basis under customary international law, which allows a state to have jurisdiction over its nationals even if they are abroad. [120] The universality principle assumes that certain serious crimes against international are prohibited everywhere and can, therefore, be regulated by any state.[121] The concept of universal jurisdiction is therefore linked to the ideology that some international norms are owed to the entire world, that certain international law obligations are binding on all states.[122] The passive personality principle allows a state to regulate certain foreign conduct that harms or is intended to harm its nationals.[123] The protective principle is the most controversial principle on extraterritorial jurisdiction and is the basis for most of the economic sanctions of the U.S. This principle acknowledges that a state can lawfully assert

[118] Najeeb Samie (1982) *The Doctrine of "Effects" and the Extraterritorial Application of Antitrust Laws*, 14 U. Miami Inter-Am. L. Rev., at 23.
[119] Jennings R. Y. (1957) *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 Brit. Y.B. Int'l L. 146, at 175 (noting that the acceptance of the effects doctrine will lead to a limitless state jurisdiction); Peter L. Fitzgerald (1998) *Pierre Goes Online: Blacklisting and Secondary Boycotts in U.S. Trade Policy*, 31 Va. J. Transnat'l L. 1, at 91 (noting that the effects doctrine is problematic because of disagreements as to how substantial the effects must be in order to suffice as a basis for jurisdiction).
[120] Nationality principle is usually applied when the offender is a national of the state, and it is referred as Passive Personality principle in the event the victim is a national of the state. *See* Abraham Abramovsky (1990) *Extraterritorial Jurisdiction: The United States Unwarranted Attempt to Alter International Law in United States v. Yunis*, 15 Yale J. Int'l L, at 129.
[121] Lyal S. Sunga (1992) *Individual Responsibility in International Law for Serious Human Rights Violations*, Brill | Nijhoff, at 252.
[122] *Ibid*.
[123] The legitimacy of this principle has been debated as it allows a state to apply law, particularly criminal law, to an act committed outside its territory by a person not its national where the victim of the act was its national. This principle, however, has been accepted for certain kinds of conduct, such as terrorism.

jurisdiction when its essential security interests, primarily regarding sovereignty or political objectives otherwise, are concerned.[124]

As explained earlier, the extraterritorial jurisdiction of the U.S. export controls is based on the origin of the item. Under the EAR, as discussed in Part II of this dissertation, any non-US product can be subject to the U.S. export controls even if it is exported from a non-US country to another non-US country if such product falls under the scope of 15 C.F.R. §734.3. The representative cases include when a foreign product incorporates certain US commodity, software, or technology, of which value exceeds the *de minimis* level (10% or 25% of the total value of the product, depending on the destination of the product) (the *de minimis* rule) or when a foreign product is considered a direct product of certain US technology or software (the direct product rule). Such extraterritorial jurisdictions can be argued to have been based on either territoriality principle since a part of the foreign product is a US-origin or protective principle based on an argument that the release of the US commodity, software, or technology incorporated or used in the foreign product is related to a national security concern.

This dissertation believes that the extraterritorial jurisdictions of the U.S. export controls do not entirely accord with both principles. With respect to the territoriality principle, the *de minimus* rule does not satisfy the requirement that a substantial part of the conduct occurred in the domestic territory. Not only the transaction did not take any part in the U.S. territory, but even the incorporation of the U.S. commodity, software, or technology is accepted as "conduct occurred in the U.S.", 10% or 25% of the total value is indeed insufficient to be

[124] Iain Cameron (1994) *The Protective Principle of International Criminal Jurisdiction*, Dartmouth Pub Co, at 35.

regarded as substantial. It is even more difficult for the direct product rule to satisfy the requirement since it does not even have any US-nexus other than the foreign product is manufactured using US technology. As to the protective principle, the *de minimis* rule is unlikely to satisfy the requirement that there is an essential security interest to protect because the scope of controlled items is so broad that it would be unconvincing to claim that every single controlled item is an essential national security concern. It is also more difficult for the direct product rule to satisfy the requirement because, even if there is an essential national security interest to restrict the release of the US technology/software at stake, the foreign product subject to the U.S. export controls under the direct product rule does not release such US technology/software but is merely manufactured using the US technology/software. Thus, according to the conventional view of the international law scholars as addressed above, the extraterritorial jurisdiction of the U.S. export controls would be in violation of the international law governing prescriptive jurisdiction.

On the other hand, the extraterritorial jurisdiction of the U.S. economic sanctions is based on the protective principle as most of the economic sanctions are imposed for the protection of essential national security interests such as human rights violations, terrorism, etc. However, the majority of the newly imposed or strengthened economic sanctions and export controls of the U.S. over the past few years seem to have been imposed for foreign policy reasons rather than to protect essential national security interests. Therefore, it remains questionable whether the extraterritorial jurisdiction of economic sanctions that are imposed as a foreign policy is within the scope of the protective principle.[125]

[125] *Id*, at 345.

4. Multilateral Efforts on Export Controls and Economic Sanctions

Currently, multilateral export control efforts are limited and therefore inadequate to address and resolve the potential jurisdictional challenges of the U.S. export controls. There are several export-related international organizations and agreements, but the effect of such organizations and agreements on jurisdictional reach is indirect. Coordinating Committee for Multilateral Export Controls that was founded in 1949 was replaced by the Wassenaar Arrangement in 1994. The Wassenaar Arrangement's 42 participants cooperate to coordinate their export classification schemes and provide notice to one another regarding the export of certain sensitive items[126], but the regime is less restrictive and more consensus-based than its predecessor because participating states cannot veto other states' exports of sensitive items as they could under Coordinating Committee for Multilateral Export Controls.[127]

Other multilateral export control-related organizations and agreements are even more consensual and are limited to specific types of export activities. The Chemical Weapons Convention is an arms control treaty entered into force on April 29, 1997. The convention is limited to chemical weapons matters, and its primary purpose is to require member states to prohibit the use, development, production, stockpiling, and transfer of chemical weapons.[128] The Australia Group is an informal forum of countries that also seeks to ensure

[126] It is explained at the homepage of the Wassenaar Arrangement that the parties have agreed (1) to maintain national export controls on items included in the WA Control Lists, and these controls are implemented via national legislation, (2) to report on transfers and denials of specified controlled items to destinations outside the Arrangement; and (3) to exchange information on sensitive dual-use goods and technologies. *See* https://www.wassenaar.org/about-us/.

[127] Christopher F. Corr (2003) *The Wall Still Stands! Complying with Export Controls on Technology Transfers in the Post-Cold War, Post-9/11 Era*, 25 Hous. J. Int'l L. 441, at 492.

[128] Article I of the Chemical Weapons Convention provides that "Each State Party to this Convention undertakes never under any circumstances: (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; (b) To use chemical weapons; (c) To engage in any military preparations to use chemical weapons; (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention."

that exports do not contribute to the development of chemical or biological weapons. The purpose of the Australia Group is to encourage member states to use licensing measures to ensure that exports of certain chemicals and equipment do not contribute to the spread of chemical and biological weapons. Due to its informal nature, the member states do not undertake any legally binding obligations. However, the member states meet to discuss the effectiveness of existing controls through "information exchange, the harmonization of national measures and, where necessary, the consideration of the introduction of additional measures".[129]

The Nuclear Suppliers Group is another informal group that seeks to prevent nuclear weapons proliferation. The main purpose is to ensure that nuclear trade for peaceful purposes does not contribute to the proliferation of nuclear weapons. The Nuclear Suppliers Group does not impose any legally binding obligations, but it provides guidelines for nuclear trade to be implemented in a manner consistent with international nuclear non-proliferation norms.[130] The Missile Technology Control Regime is also an informal association for the non-proliferation of missiles and missile technology. The main purpose is to encourage member states to control exports of goods and technologies that could contribute to delivery systems for weapons of mass destruction.[131] As it is an informal association, it does not impose any legally binding obligations on the member states.

[129] The activities of the Australia Group are stated in its homepage.
(See https://www.dfat.gov.au/publications/minisite/theaustraliagroupnet/site/en/activities.html)
[130] The guidelines can be found at https://www.nuclearsuppliersgroup.org/en/guidelines.
[131] There is a short guideline regarding sensitive missile relevant transfers. *See* https://mtcr.info/guidelines-for-sensitive-missile-relevant-transfers/.

Despite the fact that the U.S. participates in all of these export control-related organizations and agreements, they do not address or support to resolve the jurisdictional challenges of the U.S. export controls.

With respect to economic sanctions, there are currently no effective multilateral agreements other than the United Nations that merely impose international sanctions itself. There is a general understanding among scholars that multilateral cooperation among the potential sanctioning states is necessary and important for generating a successful outcome.[132] A scholar has stated that economic sanctions supported by international organizations are apt to be more successful than both unilateral sanctions and multilateral sanctions that lack organizational support.[133] Empirically, however, no statistical test has shown a significant positive correlation between policy success and international cooperation among the sanctioning states.[134]

The problems with multinational cooperation on economic sanctions can be parsed into bargaining and enforcement phases. Multinational cooperation on economic sanctions could be sabotaged by bargaining difficulties and a lack of enforcement. Economic sanctions involving multilateral cooperation involve two separate cooperation dilemmas: one between the sanctioning states and the target, and one between the primary sanctioning state and other sanctioning states. These two dimensions create a typology of explanations for successful and unsuccessful sanctions efforts involving multilateral cooperation.[135] Nevertheless, there is still a need for multilateral cooperation on economic sanctions.

[132] Doxey, Margaret P. (1980) *Economic Sanctions and International Enforcement* (2nd Edition), Mac- Millan, at 18.
[133] Daniel W. Drezner (2000) *Bargaining, Enforcement, and Multilateral Sanctions: When Is Cooperation Counterproductive?* Cambridge University Press, at 1.
[134] *Ibid*.
[135] *Ibid*.

Research has shown that sanctions characterized by greater cooperation among states tend to impose less damage on innocents.[136]

A scholar argued that multilateral cooperation could turn fragile agreements to cooperate into a robust coalition by enforcing a previously agreed upon equilibrium if international organizations act as a coordinating mechanism for reassurance and information, enable governments to resist domestic pressures, and provide benefits to increase the value of continued cooperation.[137]However, such multilateral cooperation is hard to find with regard to states' export control or economic sanctions policies. Compared to domestic trade matters such as customs or trade remedy laws, for which there are considerable multilateral cooperation and enforcement from the WTO, relatively little WTO attention is devoted to export control and economic sanction matters. As the use of unilateral economic sanctions and export controls have been rapidly increasing, a reexamination of the need for multilateral cooperation on these trade-restrictive measures should be considered.

5. Role of the WTO to Review the Security Exception Matters

Despite the fact that states often use unilateral trade-restrictive measures to address national security concerns, the international community perceives the United Nations as the sole governance authority in the security arena. Unfortunately, enforcement difficulties plague the United Nations' governance record. The United Nations' effectiveness is limited when Security Council members such as China stall efforts to bring the targeted state, for example, Iran, into compliance with Security Council Resolutions, or when a Security

[136] Gary Clyde Hufbauer, Jefferey J. Schott, Kimberly Ann Elliott, and Barbara Oegg (2019*) Economics Sanctions Reconsidered*. Peterson Institute for International Economics, at 45.
[137] *Ibid*.

Council member is the aggressor.[138] Also, the international governance system would benefit from an additional governance mechanism in the national security arena.

Although the role in the national security arena appears to have been rather forgotten for a long time, the WTO was designed to be the supplementary governance mechanism the international community needs. Despite the current institutional arrangement for the coexistence of the United Nations and the WTO may blur the scope of authority as to the security exception matters, the security exception disputes arise out mostly of trade disputes, which naturally induces conflicts in trade interests that should be dealt within the WTO.[139]

The WTO governs various international economic treaties that prohibit trade-restrictive measures employed by states in furtherance of their national security objectives. Of particular interest is the GATT, which prohibits embargos and quotas, two of the most frequently used economic tools for protecting national security interests. Even though the member states, especially the developed ones such as the U.S., still claim that because national security issues are so sensitive and so closely related to a state's sovereignty, the DSB must accept invocation of the national security exception without any objective inquiry into the matter, it has been finally determined in *Russia – Measures Concerning Traffic in Transit* that the WTO indeed has the jurisdiction to review such matter.

The United Nations' defective mechanisms for governing economic aspects of international security and the WTO's past failure to assume its role as the primary governor have been straining the legitimacy of the international system on national security issues. In disregard

[138] Carla L. Reyes (2009) *International Governance of Domestic National Security Measures: The Forgotten Role of the World Trade Organization,* 14 UCLA J. Int'L. & For. Aff. 531, at 534.
[139] Ji Yeong Yoo and Dukgeun Ahn (2016) *Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?* Journal of International Economic Law, Vol. 19(2), at 439.

of United Nations processes and without fear of accountability to their GATT obligations, states can act unilaterally. The WTO's past failure to exercise its authority over national security disputes that have entered the economic sphere is an unfortunate result of historical events, none of which should prevent the WTO from assuming its rightful role in the future. The drafters of the GATT believed that they were negotiating an agreement to aid the United Nations and its judicial organ, the International Court of Justice, in maintaining international security.[140] Although the WTO may have alienated WTO practice from its original mission of security governance in the past, its mandate has never changed. Therefore, the WTO can and should exercise its governance authority to create a more effective international security governance regime by addressing the national security issues.[141]

Moreover, not only the GATT obligations, as discussed earlier, may give the WTO direct governance authority over unilateral export controls and economic sanctions, but the WTO also has an effective dispute settlement system to deal with such sensitive matters. The WTO's Dispute Settlement System (the "DSS") has been recognized as the most important and most powerful of any international law tribunal.[142] Several aspects of the DSS that make it unique among international courts may serve as an important reason why the WTO must be the adjudicating body for national security disputes. First, the DSS has compulsory jurisdiction over disputes arising under the WTO-covered agreements, which include the security exception of the GATT. Second, decisions issued by the Panel or the Appellate Body have a high rate of compliance by the member states. Third, even when WTO member states disagree with a Panel or Appellate Body's ruling, member states typically

[140] Reyes, *supra* note 138, at 549.
[141] *Ibid*.
[142] John H. Kackson (2006) *Sovereignty, the WTO, and Changing Fundamentals of International Law*, Cambridge University Press, at 135.

seek redress within the WTO system rather than withdrawing from the WTO altogether. These three aspects of the DSS are of particular importance to the global governance of domestic national security measures because they help avoid the difficulties faced by the International Court of Justice and provide the WTO an opportunity to make an important contribution toward its forgotten role of securing international peace through economic stability and non-discrimination.[143]

Dispute Settlement Understanding (the "DSU"), which contains the binding DSS rules and procedures, provides in Article 23.1 that "when Members seek the redress of a violation of obligations…under the covered agreements…they shall have recourse to, and abide by, the rules and procedures of this Understanding."[144] The U.S.-Section 301 case held that DSU Article 23.1 constitutes a compulsory jurisdiction provision.[145] The Appellate Body has held that its duty to hear a complaint as a result of the compulsory jurisdiction provision cannot be nullified or impaired, even if another international adjudicatory body is seized of the same issue.[146]

One may argue that the compulsory jurisdiction could be meaningless if member states refused to comply with the decisions of the DSS or the DSS lacked enforcement power. A number of studies have shown, however, that there is a high rate of compliance with DSS's

[143] Reyes, *supra* note 138, at 552.
[144] One of the flaws of the GATT system, corrected by the Contracting Parties during the Uruguay Round of negotiations that created the WTO, was that the lack of concrete dispute settlement rules in GATT Article XXIII allowed losing parties to block council decisions and thereby avoid accountability. The Uruguay Round of negotiations resolved this deficiency by providing for compulsory jurisdiction.
[145] Panel Report, *United States-Section 301-310 of the Trade Act of 1974*, WT/DS152/R (adopted 27 January 2000), para 7.43.
[146] Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (adopted 24 March 2006).

decisions by member states.[147] In cases where a member state tries to avoid compliance with a ruling, the DSS possesses the power to enforce its decisions under DSU Articles 21 and 22. Generally speaking, if the DSB's or Appellate Body's recommendations are not implemented, Article 22 allows the winning party to seek compensation from the losing party. If the parties cannot agree to an appropriate level of compensation, the winning party can seek an official finding of non-compliance from the DSS and receive permission to suspend certain WTO obligations with respect to the non-complying member (termed retaliation or cross-retaliation, depending on the obligations suspended).[148] Notably, in one study of 101 completed WTO cases, retaliation was requested in only seven cases and authorized by the DSB in only six cases.[149] This statistic proves that the compensation and retaliation enforcement mechanisms of the DSU are effective in achieving the aim of the WTO dispute settlement: to bring the non-compliant parties into compliance with the WTO obligations.

Furthermore, even when a member state does not wish to implement a panel's or Appellate Body's ruling, the member states seek redress within the DSS, rather than withdrawing from the WTO altogether. Unlike the United Nations or the International Court of Justice, the member states of the WTO cannot remain a party to the covered agreements while simultaneously withdrawing from the DSS. The DSU is a part of the overall WTO agreement framework to which each WTO member state must be a signatory. Thus, for a

[147] Sharyn O'Halloran (2008) *US Implementation of WTO Decisions, in* The WTO: Governance, Dispute Settlement & Developing Countries, at 946 ("WTO members comply with DSS rulings eighty percent of the time".) *See also* Werner Zdouc, *Features of the Appellate Body That Have Defined its Performance, in* The WTO: Governance, Dispute Settlement & Developing Countries, at 369 ("In most cases, the losing party attempts to accomplish what it perceives to be full implementation and takes measures to comply with the DSB recommendations and rulings.").

[148] *See* Article 22.2 for details on retaliation and cross-retaliation.

[149] Reyes, *supra* note 138, at 554. (In one of the six cases, the WTO-inconsistent measure was withdrawn soon after the arbitration was completed, thus obviating the need for final DSB authorization of retaliation. In two of those six cases, the retaliation led to the withdrawal of the contested measure.)

WTO member state to reject the jurisdiction of the DSS, it would have to withdraw entirely from the WTO. While withdrawing from the WTO is possible, such withdrawal would mean the forfeiture of important trade preferences. By inextricably linking the DSS to the trade preferences in the other agreements, the WTO is able to retain its compulsory jurisdiction provision.

These unique features of the DSS perfectly situate the WTO to fill the international security governance gap left by the enforcement difficulties of the United Nations and the International Court of Justice. These also directly mirror the three reasons often cited for the International Court of Justice's enforcement failures: consent-based jurisdiction, lack of enforcement mechanisms, and the tendency of member states to simply withdraw jurisdiction rather than to continue to resolve the dispute in the United Nations system. The fact that these unique features of the DSS fill the gaps left by the International Court of Justice reveals an important reason why the WTO should assume the role for which it was originally designed and act as the primary governor of national security conflicts.

In addition, the application of a more reasonable and objective review standard for future national security matters would legitimize the WTO against the potential adverse actions of leaders of developed states, who may emerge to oppose the international trade institution, like the past actions of former President Trump.[150] Allowing member states to successfully challenge a potentially abusive security exception invocation would also demonstrate that

[150] Benjamin Jordan (2019) *The WTO versus the Donald: Why the WTO Must Adopt a Review Standard for Article XXI(B) of the GATT*, 37 Wis. Int'l L.J. 173, at 188.

the institution functions properly[151] and signal to potential WTO opponents that the international institution is fairly structured and impartially adjudicates disputes.[152]

B. Security Exceptions under Article XXI of the GATT

1. Overview

As briefly mentioned above, the U.S. economic sanctions and export controls are often found to be inconsistent with the GATT obligations, such as Article XI(1) that requires the member states not to restrict or prohibit imports from or exports to another state except in certain circumstances.[153] However, despite the inconsistency, the U.S. Government arguably should be able to, if challenged, invoke the security exception of the GATT by arguing that these measures are implemented for the protection of national security interests and thus should be justified under the exception, as it did in a recent WTO case, *United States – Steel and Aluminum Products*[154].

The security exception of the GATT, provided under the Article XXI, has been controversial and subject to intense discussions due to the unclear scope and the lack of definitions of key terms therein. Besides, many industrialized nations seem to take the position that the security exception is self-judging in nature because the matters regarding national security, foreign policy, and other political disputes should not be placed within

[151] *See* Peter S. Goodman, *Trump Just Pushed the World Trade Organization Toward Irrelevance*, N.Y. Times (Mar. 23, 2018), https://www.nytimes.com/2018/03/23/business/trump-world-trade-organization.html.
[152] *Ibid.*
[153] GATT, *supra* note 10, art. XI(1).
[154] The U.S. argued that the WTO adjudicating bodies cannot examine whether the Section 232 measures violate the GATT because the U.S. considers the measures to be necessary for the protection of its essential security interests under the article XXI of the GATT. *See United States – Steel and Aluminum Products*, DS544 (China), DS547 (India), DS548 (EU), DS550 (Canada), DS551 (Mexico), DS552 (Norway), DS554 (Russian Federation), DS556 (Switzerland) and DS564 (Turkey).

the jurisdictional reach of international trade agreements such as the GATT/WTO[155]. There has been a general understanding that states may exercise the sovereign right to define their own national security interests, and the validity of such actions should be left solely to the discretion of the invoking states without any practical challenges from the GATT/WTO. This general understanding of the security exception's self-judging component has caused the problem of abusive employment of the security exception for reasons other than national security matters, such as political concerns.

However, the position that international trade agreements, such as the GATT/WTO, are limited to trade-related issues, and the GATT/WTO is thereby precluded from intervening in political disputes such as determination of necessary measures to protect national security interests, which entail significant trade-restrictive impacts seems to be somewhat unrealistic and deserves reconsideration. Since power can be used to achieve results in another, it is impossible to insulate international economics from international politics.[156]

In this light, the WTO Panel recently delivered its very first decision on the security exception of the GATT. In *Russia - Measures Concerning Traffic in Transit,* the Panel made it clear that the security exception of the GATT is not a multi-purpose shield and is indeed subject to review by the WTO. This case is significant and requires as it turned down the general understanding that the security exception was self-judging. Nevertheless,

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[155] Wesley A. Cann, Jr. (2001) *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 Yale J. Int'l L. 413, at 416.

[156] E.g., GATT Council, Minutes of Meeting held on May 7, 1982, GATT Doc. C/M/157, at 2, 9 (June 22, 1982) (mentioning comment of the representative of Czechoslovakia on the "difficulty of insulating international economics from politics"); GATT Council, Minutes of Meeting held on May 29, 1985, GATT Doc. C/M/188, at 2, 9 (June 28, 1985) (mentioning comment of the representative of Hungary that "ideally, politics and trade should be kept separate, but a total separation was not realistic"). Professor John H. Jackson has also expressed such sentiments. *See* Jackson, *supra* note 102, at 752 ("International economics is so intimately related to politics that it is impossible to insulate the two from each other.").

it is somewhat questionable whether the Panel's rulings on the interpretation of the security exception were effective enough to solve the fundamental issues with the security exception and whether it would be followed in future disputes.

2. Inconsistency with the GATT Obligations

As discussed earlier in this dissertation, the U.S. export controls and economic sanctions are imposed unilaterally and entail broad extraterritorial jurisdiction. Due to the trade-restrictive nature of these measures, they are often inconsistent with public international law drafted in furtherance of international stability and global trade.

The WTO administers a variety of trade agreements, including the GATT. The GATT contains several provisions that potentially limit member states' ability to adopt trade-restrictive measures for the purpose of furthering national security objectives. Domestic trade-restrictive measures, such as economic sanctions or export controls adopted in the name of national security, could implicate many WTO-covered agreements. Notably, comprehensive economic sanctions and selective export controls imposed during international conflicts can potentially be found to be inconsistent with several GATT obligations.

The Most Favored Nation Treatment rule can be found in Article I of the GATT[157], which requires that customs duties and charges levied on the exports and imports of one member state be no less favorable than those levied on the like exports and imports of any other

[157] *See* GATT, *supra* note 85, art. I(1), "…any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

member states. In other words, member states must not discriminate between their trading partners. This rule limits member states' ability to impose export restrictions on a target member state to further their national security objectives. The U.S. economic sanctions and selective export controls for certain target countries such as China can be facially inconsistent with Article I of the GATT as they inherently discriminate the targeted states from other member states.

Moreover, Article XI(1) of the GATT[158] provides a prohibition on quantitative restrictions, and it applies to all measures, whether affecting imports or exports. Any type of economic sanction, be it comprehensive or list-based, or export controls imposed in furtherance of foreign policy without a justifiable exception under the GATT would be facially inconsistent with this rule. Additionally, suppose a member state does impose certain quantitative export restrictions on another member state, the Non-discriminatory Administration of Quantitative Restriction rule provided under Article XIII(1) of the GATT[159] requires that the state taking such measures to apply similar restrictions to third states. Thus, any economic sanctions or selective export controls imposed against certain target member states could be found to be inconsistent with Article XIII(1) of the GATT.

3. Security Exception of the GATT and Fundamental Issues

One of the main reasons that the U.S. was able to constantly impose unilateral export controls and economic sanctions that may potentially be inconsistent with the GATT Agreements might have been their belief that they were able to claim a defense under the security exception provided under the Article XXI of the GATT to their actions.

[158] GATT, *supra* note 10, art. XI(1).
[159] GATT, *supra* note 82, art. XIII(1).

The Article XXI of the GATT provides as follows,

> "Nothing in this Agreement shall be construed
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) taken in time of war or other emergency in international relations; or
>
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."[160]

The Article XXI still exists in the GATT as it was drafted, and there was no amendment ever been attempted to modify the security exceptions, even after the establishment of the WTO. The nearly same provision was included in the Agreement on Trade-Related Aspects of Intellectual Property Rights in Article 73 and in the General Agreement on Trade in Services as Article XIV *bis*, with small modifications.[161] The multilateral development on the Article XXI has been dormant since 1995; however, with the recent rapid growth in the use of economic sanctions and export controls imposed on a national security basis and the reliance on the Article XXI for such measures, the review standard of the Article XXI and the ability of the WTO to review and police the potential abuse of the Article XXI has never been more important.

[160] Article XXI of the GATT.
[161] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1869 UNTS 299; General Agreement on Trade in Services (GATS), 1869 UNTS 183. Other similar provisions are: Article 3, Agreement on Trade Related Investment Measures, 1868 UNTS 186; Article 24.7, Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, WT/L/940 (27 November 2014); Article 1.10, Agreement on Import Licensing Procedures, 1868 UNTS 436.

In the negotiation of international treaties, member states usually leave a door open for the adoption of measures directed at the protection of their own national security by including a security exception clause within the agreements. These security exceptions, however, have been subject to intense discussions over decades as they can not only allow member states to maintain an arsenal of national security statutes, which allow for unilateral trade-restrictive measures that are potentially inconsistent with international laws, but also unhinge the multilateral rules, norms, and dispute settlement procedures that create the global framework through which governments can ward off narrow sectoral pressures on trade policy-making decisions, focus on rules and renegotiate them, and thrash out their differences on trade issues.

Despite the lack of multilateral developments of the security exception of the GATT, the unilateral imposition of export controls and sanctions on national security basis has been on the rise. The past few years bear witness to the substantially increased use of the security exception as an ultimate means of justification. Examples appear not only in the contexts of export control and economic sanctions but all over the field of international economic law. The Trump Administration invoked the national security exception as justification for its trade-restrictive measures in recent WTO disputes in *United States – Steel and Aluminum Products*[162], in which a large number of third parties have joined, turning the dispute into a question of general interest. The Russian Federation relied on national security exceptions on the controversial economic measures adopted against Ukraine.[163] Japan has restricted the export of certain chemicals crucial to South Korea's electronics industry, citing national

[162] *United States – Steel and Aluminum Products*, DS544 (China), DS547 (India), DS548 (EU), DS550 (Canada), DS551 (Mexico), DS552 (Norway), DS554 (Russian Federation), DS556 (Switzerland) and DS564 (Turkey).
[163] Panel Report, *Russia – Measures Concerning Traffic in Transit*, *supra* note 9.

security risks.[164] Recent tensions over global control of 5G cellular technology by the Chinese company, Huawei Technologies Co. Ltd., have led several states, including the U.S., to take certain trade-restrictive measures on the grounds of national security, raising speculation of future WTO disputes in response.

The abusive employment of the Article XXI could be possible due to many factors, including the unclear scope, the lack of definitions of key terms, etc. The interpretation of the Article XXI has been controversial for many years and subject to intense discussions by many scholars over a number of issues. First, the texts of the Article XXI do not provide the precise scope of the security exception. Second, the lack of clear definitions of key terms in the Article XXI made it ambiguous as to whether the WTO has jurisdiction over the security exception. Third, the question arises as to whether the security exception has a self-judging character. If so, member states would be the final judges of the exception's applicability, and there will be no room for a review of such determination by the WTO. Fourth, there has been a discussion over whether the WTO has jurisdiction to review the member states' foreign policy. Finally, there is a concern that the abuse of the security exception inherently contradicts the purpose of the WTO.

a. Scope of the Security Exception

The Article XXI of the GATT was designed to create a security exception under the GATT. The Article XXI states that nothing in the GATT shall prevent any party from taking any action, "which it considers necessary for the protection of its essential security interests…taken in time of war or other emergency in international relations."[165] It also

[164] *Japan – Measures Related to the Exportation of Products and Technology to Korea*, WT/DS590.
[165] Article XXI(b)(iii) of the GATT.

provides that no party shall be prevented from "taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."[166] Such exceptions are viewed as universal in nature and therefore serve to relieve a member state from virtually all of its substantive obligations under the GATT.[167] The inclusion of the Article XXI in the GATT certainly reflects the fact that all member states have the right to protect their sovereignty from external threats.[168] This exception confers a potentially broad grant of authority because the GATT does not define key terms therein, such as "considers necessary," "essential security interests," "time of war," and "emergency in international relations."

The scope of the security exception was a topic of concern and confusion from the outset. The historical record suggests that there were concerns about potential abuses of the broadly worded security exception since the inception of the GATT. Drafters of the Article XXI, in attempting to weigh the conflicting interests, stated that "we cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose."[169] The Article XXI was meant to be broader or less restrictive than the other exceptions found in the GATT. The "General Exceptions" contained in Article XX of the GATT[170] allows member states to

[166] Article XXI(c) of the GATT.
[167] Jackson, *supra* note 102, at 537.
[168] Michael J. Hahn (1991) *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 Mich. J. Int'l L., at 560.
[169] GATT, Analytical Index: Guide to GATT Law and Practice, at 600, citing Verbatim Report of the Preparatory Committee of the U.N. Conference on Trade and Employment, U.N. ESCOR, 2d Sess., 33rd mtg. at 20, 21, Corr. 3 U.N. Doc. E/PC/T/A/PV/33 (1947).
[170] Article XX of the GATT: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(a) necessary to protect public morals;

adopt measures that are necessary to protect public morals or human, animal, or plant life, relate to the conservation of exhaustible natural resources, or that are essential to the acquisition or distribution of products in short supply. These exceptions are qualified by a restrictive introductory paragraph that prohibits the use of such measures in any manner that would constitute arbitrary or unjustifiable discrimination, or that would constitute a disguised restriction on international trade.[171] It is interesting to note that such paragraph, despite it was initially supposed to apply to the security exception as well since the provisions of both Articles XX and XXI were lumped together in one article, was separated during the Geneva drafting sessions, thereby rendering this qualifying paragraph inapplicable to the security exception.[172] The concerns and confusion of the Article XXI did not diminish with time, and the defenses based on the Article XXI stayed as a true rarity for

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(b) necessary to protect human, animal or plant life or health;
(c) relating to the importations or exportations of gold or silver;
(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
(e) relating to the products of prison labour;
(f) imposed for the protection of national treasures of artistic, historic or archaeological value;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;
(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non discrimination;
(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

[171] The introductory paragraph of the article XX states that these general exceptions can only be invoked "subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade…"

[172] Jackson, *supra* note 102, at 741-742.

decades. Hence, the Article XXI of the GATT, along with security exceptions that can be found in other multilateral agreements, has been largely perceived as a sleeping dog.

b. Self-Judging Provision

The blurred concepts that commingle security, foreign policy, and economic welfare have exacerbated the confusion regarding security exceptions. Compounding the inherent absence of specificity represents that most industrialized states have taken the position that national security is self-judging. As a result, the decision on the validity of trade-restrictive measures allegedly taken for security reasons is often left solely to the discretion of the state taking that action. Motivation becomes irrelevant, and justification and approval are unnecessary. Without a specific mechanism for a review of such actions, each member state is free to define its own national security interests without any interference.

In effect, it is impossible for a member state to violate the Article XXI. Such a position would seem to be supported by the "it considers necessary" language found in the Article XXI, which implies a substantial degree of subjectivity on the part of the state invoking the exception, as well as by the lack of any qualifying paragraph such as that contained in Article XX of the GATT. However, there is an argument that the Article XXI can be invoked only when certain conditions provided for in the article have been met and when there is a bona fide "nexus" between the alleged security interest and the trade restriction being imposed because if it were otherwise, the term "essential" security interests would become meaningless, as would the language "relating" to fissionable materials, "relating"

to the traffic in arms, and "taken in time of war or other emergency in international relations."[173]

If the Article XXI was meant to be free from any review, the drafters could have simply limited the language to "nothing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its security interests." In addition, the member states have never decided whether the Article XXI should be a self-judging provision.[174] The 1982 Decision Concerning Article XXI of the General Agreement[175] did nothing to remove these ambiguities, and the 1982 Ministerial Declaration[176], while certainly supportive of the spirit of multilateralism, stopped short of establishing any legal obligations. In paragraph 7(iii) of the Ministerial Declaration, for example, the contracting parties undertook to "abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the GATT."[177]

Given the ambiguity of the scope of the security exception, invoking states of the security exceptions often conclude that they are right, and indeed invoking member states that are economically and politically powerful have been able to proceed with impunity. This, however, has provoked deep concern and undermined support for the international trade regime. Less developed states have continued to express fear that the Article XXI will be

[173] Antonio F. Perez (1998) *WTO and U.N. Law: Institutional Comity in National Security*, 23 Yale J. Int'l L. 301, at 324.
[174] Hahn, *supra* note 168, at 595.
[175] Decision Concerning Article XXI of the General Agreement, Nov. 30, 1982, GATT B.I.S.D. (29th Supp.) at 23 (1983).
[176] Ministerial Declaration, Nov. 29, 1982, GATT B.I.S.D. (29th Supp.).
[177] *Id*, at 11.

used as a guise for political coercion and domestic industries' protection.[178] Because retaliation may not be an option, these states believe that economic restrictions can be used as a means of punishment, a mechanism for economic aggression, or a creative form of colonialism. Such beliefs have prompted these states to question the self-judging nature of the security exception and to argue that the Article XXI should be interpreted in light of broader international law. To recognize that the security exceptions are an indispensable safety valve is not to admit that essential security interests are absolutely incapable of being defined or that they must be free from objective reviews. Nor does such a recognition address the issue of "who" has the ability to define these interests or to question their validity. Even if one were to admit that security interests should be defined by the invoking member state, such an admission does not address the question as to whether these interests should be self-judging.

The breadth of criteria to be applied in determining the existence of a threat to national security is boundless and often indefensible. They include various industry concerns (such as domestic production levels, domestic capacity, and the potential for maintaining necessary growth of the economy) and equate national security interests with general economic welfare and the potential weakening of the domestic economy.[179] While one may argue that there are some security concerns upon which those laws are based, it is often not clear whether the prohibitions set forth in the laws and regulations are necessary to protect the national security of the U.S. For example, the Helm-Burton Act, which is a part of the

[178] *See* GATT Council, Minutes of Meeting held on Nov. 5, 1986, GATT Doc. C/M/204, at 6-18 (Nov. 19, 1986); GATT Council, Minutes of Meeting held on July 17-19, 1985, GATT Doc. C/M/191, at 41-6 (Sep. 11, 1985); GATT Council, Minutes of Meeting held on May 29, 1985, GATT Doc. C/M/188, at 2-17 (June 28, 1985); GATT Council, Minutes of Meeting held on Jan. 26, 1983, GATT Doc. C/M/165, at 18-19 (Feb. 14, 1983); and Council of Representatives, Report on Work since the Thirty-Seventh Session, GATT Doc. L/5414, at 17-26 (Nov. 12, 1982).
[179] 19 U.S.C. 1862(d).

Cuba sanctions program designed to discourage foreign investment that could be used to a totalitarian government ninety miles from the U.S. shores, requires exclusion from the U.S. of corporate spouses and children envisioning a democratic form of government in Cuba, free and fair elections, an independent judiciary and trade unions, free speech, the holding of private property, the movement toward a market-oriented economy and the unfettered operation of small businesses.[180]

In addition, threats to national security, foreign policy, and the economy are often lumped together in an organized statutory package, such as the IEEPA and the ECRA, which allows the true nature of the threat to remain substantially unidentified. The lack of statutory distinction and the absence of any requirement to designate the specific grounds upon which the relevant trade-restrictive measures are based can lead to politically related sanctions loosely based on various external threats. The issue regarding the self-judging component of the Article XXI will be analyzed in detail later in this dissertation.

c. Review of Foreign Policy

The position that security interests are self-judging is linked to another argument that political disputes lie beyond the jurisdiction of the WTO. The distinction between the protection of an "essential security interest" and the advancement of a particular policy agenda has remained considerably and somewhat intentionally blurred. As a result, although the Article XXI was not designed to create a policy exception or to create a mechanism by which one member state could impose its social, political, or economic ideology on other state members, in an environment where both global competition and global interdependence continue to rise, the Article XXI may be invoked for policy reasons.

[180] 22 U.S.C. 6091(a), 6042(1)(A), 6065(a), 6065(b), 6066(3).

However, the argument that the GATT and the WTO are limited to trade-related issues and that they are thereby precluded from intervening in political disputes is unrealistic.[181] Since power in one area can be used to achieve desired results in another, it is impractical to completely separate international economics from international politics. All states indeed have the sovereign right to develop and implement their own foreign policy free from multilateral interference. Nonetheless, it may be argued that those states that have willingly become signatories to the GATT/WTO Agreements have given up some degree of that sovereignty. In exchange for receiving the benefits envisioned by the agreement, each member state has obligated itself to be bound by its terms, including the mandate to extend the Most-Favored-Nation status to all other member states.

While the GATT/WTO Agreements indeed provide some exceptions, including one for the protection of essential national security interests, it does not provide an exception for the achievement of foreign policy goals or the advancement of a particular ideology. In the absence of such exception, a member state's foreign policy must be developed within the confines of such binding agreements and must be consistent with their basic tenets.[182] Unfortunately, member states, especially the frequent users of the security exception, have somewhat intentionally blurred the distinction between foreign policy and security concerns in order to advance policy agendas under the guise of the security exceptions.

Nevertheless, it is interesting to note that, even the most developed member states, when adversely affected by the foreign policies of another, are in no way reluctant to cry foul. The United States, despite being the most dominant user of unilateral export control and

[181] Cann, *supra* note 155, at 418.
[182] *Id*, at 431.

economic sanctions, was also the most ardent critic of the Arab oil embargo.[183] Jacques Santer, the former President of the European Commission, had characterized the U.S. sanction policies toward Iran, Libya, and Cuba as "illegal and counterproductive,"[184] and the European Union requested the WTO that a panel be appointed to examine the validity of the U.S. Government's policy toward Cuba.

More importantly, even if it is accepted that the WTO lacks jurisdiction to decide political disputes, it does not necessarily mean that the state members have the right to employ unilateral security-based export controls or economic sanctions for political purposes. The Most-Favor-Nation rule, which is the cornerstone principle of the WTO, prohibits discriminatory treatments to member states and requires all member states to accord the most favorable treatment given to another state, which need not be a member of the WTO, to all other Members.[185] What makes it problematic is that while the employment of the unilateral export controls and economic sanctions for political purposes is deplored, the WTO had been avoiding to exercise its jurisdiction to address or remedy their use, and no other institution or process appears to possess the authority to review the decision of signatories to invoke the security exception. Therefore, it can be argued that what actually constitutes a political matter should be subject to review, and the WTO should have the right to determine when a dispute is of a political nature. Additionally, since politically-based export controls and economic sanctions will have economic or commercial consequences, it may be queried as to whether the WTO should have the right to determine whether such export controls or economic sanctions were politically or commercially

[183] Clinton E. Cameron (1991) *Developing a Standard for Politically Related State Economic Action*, 13 Mich. J. Int'l L., at 244.
[184] James Bennet, *To Clear Air with Europe, U.S. Waives Some Sanctions*, N.Y. Times, May 19, 1998, at A6.
[185] GATT, *supra* note 85, art. I(1).

motivated and, if so, whether the WTO should have the ability to address the economic ramifications flowing from them.

d. Sovereignty vs Spirit of Multilateralism

The power to impose non-reviewable security-based economic sanctions or export controls, unintentionally provided by the security exceptions, is especially troublesome in light of general intent, on the part of the international community, to address global problems on a more multilateral basis. The WTO is designed to enhance international trade by creating a variety of reciprocal and mutually advantageous arrangements, encouraging free trade, however, is merely a means to a more comprehensive end. The WTO's true spirit lies in its attempt to create additional global wealth, raise international living standards, and ensure that developing countries share in the benefits that will result.[186]

Despite this spirit of multilateralism, the security exceptions continue to find their most common usage in disputes between "north and south" or "rich and poor" states. It has been observed that it is relatively easy for a developed state to impose economic sanctions or export controls against a country lacking the power to retaliate. For this reason, many states must rely on international institutions to enforce their rights, and they are often willing to forfeit a degree of sovereignty for that protection. Unfortunately, the power disparities between the most developed states and the developing states often lead to inconsistent application of the security exception. Rather than being employed as a safety mechanism to protect essential national security interests, it has mostly been used primarily as a foreign

[186] The preamble of the Marrakesh Agreement Establishing the World Trade Organization includes the following: "The Parties to this Agreement…Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development…" (*See* https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm)

policy tool by powerful member states to support the export controls or economic sanctions that are aimed to influence the social, political, and economic policies of other states. Thus, it may be argued that the security exception is inherently discriminatory in nature as it is available only to those states that have the power to successfully coerce, punish, and intimidate.

It has been argued that there is substantial truth to the accusation that the use of export controls or economic sanctions for purposes of political coercion represents a policy of force, "a means of economic harassment or aggression designed to penalize" states who choose to follow policies that are not agreeable to the state imposing such export controls or economic sanctions.[187] While such intervention in the affairs of another state could be in accordance with the realities of international policy or an array of political justifications, it certainly does not reflect the rules of international law.[188]

The broad discretion of the security exception of the GATT provides a substantial basis for the exercise of power-based diplomacy, and it may even encourage the imposition of export controls or economic sanctions against economically weak targets that may have no effective means to retaliate or too economically inconsequential to muster international support. Unilateral trade-restrictive measures are often more stringent than those imposed by the United Nations (which can only be developed by way of consensus and may be

[187] Cann, *supra* note 155, at 427.

[188] *Military and Paramilitary Activities (Nicar. v. U.S.)* (1986) ICJ Reports 14. ("The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law…The United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level…").

interpreted differently by the various imposing nations)[189] and imposed without identifiable standards and without any accountability or effective retaliatory remedy, which in turn, undermine the cooperative objectives of the international trade regime and also perpetuate a power-based approach to international relations that generates an imbalance between the sovereignty of member states and the spirit of a multilateral form of global economic governance.[190]

In addition to imposing immediate hardship on the targeted states, the unilateral trade-restrictive measures tend to hinder not only the states' future economic and social development but also the international trade regime as a whole. While it may be true that general international law imposes no duty on a state to engage in trade with another, it is equally true that such a duty can be created by way of a treaty or other international agreement to which that state is a signatory to, and the GATT/WTO precisely impose such a duty.[191] This problem is magnified by the fact that the international community has generally condemned the use of unilateral export controls or sanctions. Paragraph 7(iii) of the 1982 Ministerial Declaration indeed represents an attempt to harness the use of restrictive trade measures for non-economic purposes[192], and the use of unilateral security-based export controls and economic sanctions designed to accomplish foreign or domestic policy agendas would arguably fall within its reach. Similarly, despite the fact that the United Nations Declaration Concerning Friendly Relations provides explicitly that "no

[189] The economic sanctions imposed by the Trump Administration, in particular, are far more stringent that those imposed by the United Nations.
[190] Cann, *supra* note 155, at 415.
[191] Pursuant to the Most-Favored-Nation requirement found in article I of the GATT, every signatory state has undertaken a binding obligation to grant equal access to its markets on a non-discriminatory basis. A refusal to trade would be unlawful under the terms of the agreement.
[192] Ministerial Declaration, Nov. 29, 1982, GATT B.I.S.D. (29th Supp.) at 11 (1983). Paragraph 7(iii) provides that the contracting parties undertake "to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement."

State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from its advantages of any kind,"[193] it seems clear that many security-based export controls and economic sanctions do attempt to subordinate the sovereign rights of the targeted states by restricting its freedom to choose its own social, economic, or political policies.

4. Next Generations of Security Exceptions: Post-Article XXI of the GATT

After intense discussions over the issues of the Article XXI of the GATT as explained above, which caused the unintentional abuse of the security exceptions, states had learned lessons about the problems of the Article XXI and took into consideration when like clauses had to be made. As a result, national security exceptions in other international agreements gradually emancipated from the language of the Article XXI of the GATT, particularly by eliminating the most problematic words "it considers" therein. The emancipated, next generation of security exceptions have been determined to be subject to review by the relevant adjudicating bodies. These security exceptions can be found in a multitude of multilateral Friendship, Commerce and Navigation ("FCN") treaties as well as bilateral investment treaties ("BITs"). These security exceptions involve reduced discretion by the invoking states and could be considered as an expression of a growing trust towards international institutions and dispute settlement mechanisms.

[193] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 123, U.N. Doc. A/8028 (1970).

a. Security Exceptions in BITs

Similar to other international treaties, it is common for BITs to include a reference to security exceptions. Many scholars tend to classify the security exceptions in BITs under the broader category of provisions about non-precluded measures.[194] There seems to be an established presumption against the self-judging character of the security exceptions in the BITs. However, similar to the GATT and FCN treaties, the self-judging character of the security exceptions was the main subject of disputes in many investment arbitration proceedings.

Although the language of the security exceptions in the BITs is fairly diverse, most of them do not include the phrase "it considers," as found in the Article XXI of the GATT. One of the most litigated security exceptions in the BITs is Article XI of the Argentina-US BIT of 1991, which reads as follows:

> "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests." [195]

[194] William J. Moon (2012) *Essential Security interests in International Investment Agreements*, Journal of International Economic Law 15(2), Oxford University Press, at 481.

[195] Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (14 November 1991, 20 October 1994) Art. XI. The Argentine Republic invoked the security exception in the following case: *CMS Gas Transmission Company v Argentina*, Award (12 May 2005) ICSID Case No. ARB/01/8, *Continental Casualty Co. v Argentina*, Award (5 September 2008) ICSID Case No. ARB/03/9, *El Paso Energy International Co. v Argentina*, Award (31 October 2011) ICSID Case No. ARB/03/5, *Enron Corp. and Ponderosa Assets L. P. v Argentina*, Award (22 May 2007) ICSID Case No. ARB/01/3, *LG&E Energy Corp. et al. v Argentina*, Decision on Liability (3 October 2006) ICSID Case No. ARB/02/1, *Sempra Energy International v Argentina*, Award (28 September 2007) ICSID Case No. ARB/02/16, *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v Argentina*, Decision on Jurisdiction and Liability (10 April 2013) ICSID Case No. ARB/04/16, *CMS Gas Transmission Company v Argentina*, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007) ICSID Case No. ARB/01/8, *Continental Casualty Co. v Argentina*, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic (15 September 2011) ICSID Case No. ARB/03/9, *El Paso Energy International Co. v Argentina*, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (22 September 2014) ICSID Case No. ARB/03/5, and *Enron Corp. and Ponderosa Assets L. P. v Argentina*, Decision on the Application for Annulment of the Argentine Republic (30 July 2010) ICSID Case No. ARB/01/3.

Another national security exception that was subject to intense discussion is found in the Mauritius–India BIT, which reads as follows:

> "The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interest, or to the protection of public health or the prevention of diseases in pests or animals or plants."[196]

In *Continental Casualty Co. v Argentina*[197], the tribunal explained that, as a consistently held rule, security exception provisions could be considered as self-judging only when the parties of the treaty expressly ascribe such character to them, and therefore great cause must be exercised in allowing a party unilaterally to escape from its treaty obligations in the absence of clear textual or contextual indications.[198] Such argument for the need of express textual indications of self-judging character is backed by the fact that states have been well aware of how to formulate self-judging provisions and would do so by including express texts in the agreement whenever they see fit.[199]

In *El Paso v Argentina*[200], the tribunal decided that the security exceptions were not self-judging because the U.S. negotiators could not have been unaware of the debates, which security exceptions precipitated in the past.[201] The arbitrators gave particular weight to the fact that the Argentina-US BIT (the treaty in question) was concluded just a few years after the *Nicaragua* case, where the U.S. failed to justify its sanctions against Nicaragua under the security exception, and stated that "It is most unlikely that within this short time-span

[196] Agreement between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments (signed 8 September 1998, entered into force 20 June 2000) Art. 11(3).
[197] *Continental Casualty Co. v Argentina*, Award (5 September 2008) ICSID Case No. ARB/03/9.
[198] *Id*, para 183.
[199] *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v Argentina*, Decision on Jurisdiction and Liability (10 April 2013) ICSID Case No. ARB/04/16, para 1033.
[200] *El Paso Energy International Co. v Argentina*, Award (31 October 2011) ICSID Case No. ARB/03/5.
[201] *Id*, para 597.

the U.S. could have forgotten the lesson of the *Nicaragua* case which amounted to saying that if one wishes a treaty clause to be self-judging, one has to say so and to obtain the other Party's assent."[202] The tribunal further noted that the U.S. has been the most dominant user of self-judging provisions and referred to the example of the Connally Reservation of 1946, included in the U.S. declaration accepting the compulsory jurisdiction of the International Court of Justice.[203]

The same reason was raised by the tribunal in *Mobil v Argentina*[204]. The arbitrators in the case, in light of the decisions in *El Paso v Argentina*, indicated that the U.S. had been aware of the need for the clear language of self-judging character in order to introduce a self-judging security exception, especially after their experience in the *Nicaragua* case.[205] The tribunal in *CC/Devas v India* furthered that idea by explaining that the self-judging provisions are "far from being unknown in international law", and, unless a treaty contains specific wording, such as "it considers" or "it determines to be," as found in the Article XXI of the GATT and certain US BITs[206], granting full discretion to the invoking state to determine what it considers security interest to be and the necessary measures for the protection of such security interests, security exceptions are never self-judging.[207] Moreover, the tribunal in *Enron v Argentina* explained that a self-judging security

[202] *Id*, para 594.
[203] *Id*, para 597.
[204] *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v Argentina*, *supra* note 199.
[205] *Id*, para 1041.
[206] Among others, the tribunal referred to the example of the Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment (adopted 4 November 2005, entered into force 31 October 2006) Art. 18.
[207] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Ltd. and Telecom Devas Mauritius Ltd. v India*, Award on Jurisdiction and Merits (25 July 2016) PCA Case No. 2013-09, para 218-219.

exception is a very exceptional and extraordinary clause, which must be expressly drafted to have such an effect.[208]

As discussed in the above cases, there seems to be an established presumption against the self-judging character of the security exceptions in the BITs. The requirement of express language indicating the intention to introduce a self-judging provision into the treaty framework stems from two core principles of treaty interpretation.

First, the determination of an international treaty's meaning must not depart from its text, that is, the actual words used by the parties.[209] As the parties are presumed to know what they are doing and to be capable of expressing their intentions in clear terms, the treaty shall crystalize the common will of the parties, and therefore, the meanings of the treaty cannot be reduced to unilateral determinations by either party.[210] As the wording of the treaty is deemed to express the common intention of the parties, which they agreed to, even though a party may have wished something else, and thus any provision including security exception cannot be self-judging unless the contrary is expressly specified in the texts of the treaty.[211]

Second, as pointed out in *Enron v Argentina*, there is a rule excluding the extensive interpretation of exceptions. The tribunal in the case emphasized the need for a restrictive interpretation of the BIT's security exception. The argument was based on a teleological

[208] *Enron Corp. and Ponderosa Assets L. P. v Argentina*, Award (22 May 2007) ICSID Case No. ARB/01/3, para 335-336.
[209] *Sempra Energy International v Argentina*, Award (28 September 2007) ICSID Case No. ARB/02/16, para 385.
[210] Dorr O. (2018) *General Rule of Interpretation. In: Dorr O, Vienna Convention on the Law of Treaties: a commentary, 2nd edition*, Springer, at 579-580.
[211] *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v Argentina*, *supra* note 199, para 1037.

interpretation of the investment treaty, which would be "to govern the situations of economic difficulty and hardship that require the protection of the internationally guaranteed rights of its beneficiaries."[212] The rationale of teleological interpretation of the treaty also appeared in *El Paso v Argentina*, where the arbitrators considered the purpose of the BIT in question and stated that the purpose of the BIT, which is to create a stable and prosperous investment climate for both parties, could not be attained if the security exceptions allowed were considered self-judging.[213] Also, nothing in the treaty implies that the applicable dispute settlement clauses exclude the national security exception.

b. Security Exceptions in FCN Treaties

Indifferent to BITs, it is an ordinary practice for FCN treaties to include a reference to security exceptions as well. The security exception in the US-Iran FCN Agreement of 1955 was recently discussed in *Certain Iranian Assets.*[214] The court confirmed that the essential security exception does not establish limits on its jurisdiction.[215] Judge Ad Hoc Brower compared the language contained in the security exception of the treaty with the language contained in the Article XXI of the GATT, which he characterized as a "paradigmatic example of a self-judging provision."[216] Judge Brower explained the distinctions between the two security exceptions and noted that self-judging provisions limiting the scope of treaties on economic relations are older than the Treaty of Amity.[217] He went on to further reason that "...in 1955, the United States thus was very well aware of, and capable of drafting, self-judging clauses, which strongly suggests that, had the intention been that of

[212] *Enron Corp. and Ponderosa Assets L. P. v Argentina*, *supra* note 208, para 331-332.
[213] *El Paso Energy International Co. v Argentina*, *supra* note 200, para 600.
[214] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America),* Preliminary Objections, Judgment, ICJ Reports 2019.
[215] *Id*, at 19.
[216] *Id*, Separate Opinion of Judge Ad Hoc Brower, at 4.
[217] *Ibid*.

making Article XX of the Treaty of Amity self-judging, the United States and Iran would have done so."[218] As pointed out by Judge Brower, if the negotiators of a treaty had intended to exclude or limit the review of measures relating to a security interest, they simply could have followed the GATT example. There is a recent study on the history of the U.S. treaty practice, and it shows that, in many cases, the decision not to include the phrase "it considers" was a conscious decision intended for ensuring the effectiveness of the treaty.[219]

Even the security exceptions found in FCN treaties are distinguishable from those found in the GATT, the above decision is significant since the courts clearly expressed the willingness to examine the actual substance of security interests and the merits of invoking a security exception. In doing so, the courts explored the issue of whether the various actions taken could be justified as "necessary" for the protection of the essential security interests of the United States.

On a different note, however, it is somewhat surprising how other international adjudicating bodies draw an absolute parallel between the first generation of the security exception (i.e., the Article XXI of the GATT) and the next generations of the security exceptions over the phrase "it considers", suggesting that the absence of the phrase "it considers" speaks for the justifiability of the latter. Such analysis of the parallel between the security exceptions of

[218] *Ibid.*

[219] Kenneth J. Vandevelde (2017) *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties*, Oxford University Press, at 508. (During the negotiation phase of the FCN treaty between the U.S. and Philippines, the U.S. rejected a suggestion to include a reference to "public necessity" within the clause referring to "national emergencies", and the negotiators of the U.S. side specifically expressed concern about the possible undermining effect such language could have on the treaty.)

the BIT/FCN treaty and the GATT is not absolutely correct, particularly in the view of the Panel's recent findings in *Russia – Measures Concerning Traffic in Transit*[220].

5. The GATT/WTO Decisions on the Security Exception of the GATT

Since the establishment of the GATT, the member states have come to an understanding that it is important to balance trade liberalization with national security interests. To that end, the GATT Agreements, as well as GATS and TRIPS Agreements, have incorporated security exceptions. Nonetheless, none of these agreements have come close to defining key terms of the security exceptions, such as "essential security interest". As a result, the security exception of the GATT has long been prone to abuse and subject to heated debates. Even though there have been various attempts by international law scholars to define the terms, it falls short of a universally accepted definition. Due to the lack of precise definitions and requirements, there was a general understanding or otherwise considered by the developed states that the Article XXI was a self-judging provision and therefore the invoking state may determine the essential security interest and whether the GATT-inconsistent measures are undertaken in accordance with the Article XXI. The lack of precise definitions and requirements may also explain why the member states have remained careful about the invocation of the security exception because they have known that the invocation of the security exception could lead to a subject of dispute in itself.

However, Russia has recently invoked the Article XXI in *Russia – Measures Concerning Traffic in Transit*[221], which is the very first attempt by the WTO to clarify the scope and requirements of the security exception of the GATT. This case is not only significant to the

[220] Panel Report, *Russia – Measures Concerning Traffic in Transit*, *supra* note 9.
[221] *Ibid.*

future disputes in regards to the interpretation of the security exception but also brought in enormous attention because the Panel's decision on the case turned down the long-assumed self-judging character of the security exception and determined that the exception indeed is subject to review by the WTO.

a. Prior Cases – Before *Russia - Measures Concerning Traffic in Transit*

Prior to the establishment of the WTO, there were about nine cases where the Article XXI was argued, and none of the cases delivered a detailed assessment of the content and scope of the security exception. There were, however, some indicators in which the security exception was portrayed as a self-judging provision.

First, as discussed earlier, there was a complaint submitted by Czechoslovakia in 1949 against the U.S. regarding their export licensing control for security reasons, which affected Czechoslovakia. All member states, except Czechoslovakia, agreed with the U.S. that the export licensing control would be justified under the Article XXI as the "goods which were of a nature that could contribute to war potential" came within the scope of the Article XXI.[222]

Second, the suspension of the import of Argentinean products into Australia, Canada, and the European Economic Communities ("ECC") during the Falkland/Malvinas conflict in 1982 was justified under the Article XXI.[223] The representatives of several parties

[222] Summary Record of the Twentieth Meeting, GATT/CP.3/SR20 (14 June 1949), at 3-4, Contracting Parties: Third Session, 2 June 1949.
[223] Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons, L/5319/Rev.1 (18 May 1982), (*See* www.wto.org/gatt_docs/English/SULPDF/90990462.pdf)

considered that the Article XXI was self-judging. The representative of the ECC argued that the exercise of the rights set forth in the Article XXI was a prerogative subject to the sole judgment of each party[224], the representative of the Canadian Government expressed its opinion that the GATT was not the appropriate forum as the subject matter is a political issue,[225] and the representative of the U.S. Government agreed with above and stated that the member states had no power to question the judgment as to what the invoking member state considered to be necessary to protect its own security interest.[226]

Third, another dispute on the self-judging character of the Article XXI arose in 1985, namely, the *United States – Trade Measures affecting Nicaragua*[227], which had become the major case on the interpretation of the Article XXI in the GATT-era. The case involved U.S. economic sanctions against Nicaragua, which prohibited imports from as well as exports to Nicaragua. A Penal was established, but its scope of jurisdiction was defined to the exclusion of the validity or motivation for the invocation of the Article XXI by the U.S. The Panel Report, which was never adopted, clearly stated that it made no assessment of or finding about that specific question.[228]

b. *Russia - Measures Concerning Traffic in Light*

The establishment of the WTO in 1995 coincided with the liberalization of international trade. As most states were optimistic toward the liberalization of international trade in the early years of the WTO, there was hardly any state invoking the security exception. Perhaps the most relevant case before the 2010s would be the EEC's complaint regarding the

[224] WTO, Analytical Index of the GATT (pre-1995), 600.
[225] GATT Council, Minutes of the Meeting of 07 May 1982, C/M/157, 10.
[226] GATT Council, Minutes of the Meeting of 29-30 June 1982, C/M/159, 19.
[227] Panel Report, *United States – Trade Measures affecting Nicaragua*, *supra* note 79.
[228] *Id*, para 5.3.

extension of the U.S. sanctions against Cuba.[229] The Panel was established, but no report was issued at the end. Deliberations and reciprocal concessions led the EEC to request suspension of the proceedings. Many scholars acknowledging some restraint of states regarding the exception proclaimed that the fears of potential abuses of the Article XXI were largely unfounded.[230]

However, in 2019, the Panel delivered its very first detailed assessment of the defense under the Article XXI in the history of the WTO in *Russia – Measures Concerning Traffic in Transit.* The case involved a complaint by the Government of Ukraine regarding an alleged violation of the GATT 1994 and the WTO's Accession Protocol resulting from certain restrictions and bans on the transit of goods by road and rail from Ukraine to Kazakhstan (and subsequently, to the Kyrgyz Republic) implemented by the Russian Federation. The Russian Federation argued that the measures were aimed at countering a threat to its essential security interests and claimed that the Panel lacked jurisdiction to evaluate the security measures challenged by Ukraine. Ukraine submitted that the Article XXI was not intended to grant the invoking member state total discretion and that the Panel was competent to conduct an objective assessment of the article's requirements, including the requirement that the security measures be adopted in good faith.

The Panel provided analysis in the following order. First, the Panel assessed whether it had the jurisdiction to review Russia's invocation of the Article XXI(b)(iii) by clarifying the meaning of the wording "taken in time of war or other emergency in international relations" and determining whether Russia's measures were in fact taken in such times. Second, the

[229] *United States – The Cuban Liberty and Democratic Solidarity Act*, Request for the Establishment of a Panel by the European Communities WT/DS38/2 (3 October 1996)
[230] Roger P. Alford (2011) *The Self-Judging WTO Security Exception*, Utah L. Rev. 697, at 1312.

Panel determined whether the conditions of the chapeau, which is "essential security interests" and "necessary", were satisfied by clarifying whether these conditions should be construed in a subjective or an objective manner and by identifying various qualifying requirements to be assessed along.

> **Article XXI: Security Exceptions**
>
> 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**

[Relevant parts of the provision]

As for the first issue regarding the jurisdiction to review Russia's invocation of the Article XXI(b)(iii), the Panel had to determine whether the phrase in the introductory clause of paragraph (b) "which it considers" should be read together with subparagraph (iii) "taken in time of war or other emergency in international relations".[231] The Panel concluded that such introductory clause of paragraph (b) does not extend to the determination of the circumstances in each of the subparagraphs,[232] and therefore the Panel had jurisdiction to review the circumstances in each subparagraph.

In addition, the Panel established that, for the measures to fall within the scope of the Article XXI(b)(iii), it must be objectively reviewed under the following requirements. First of all, as the wording "taken in time of" describes the connection between the measure and the events of war or other emergency in international relations[233], whether the measure in question was taken in a particular timeline must be objectively determined. Second, the Panel concluded that "war" is an example of the broader category of "emergency in

[231] Panel Report, *Russia – Measures Concerning Traffic in Transit, supra* note 9, para 7.64.
[232] *Id*, para 7.101.
[233] *Id*, para 7.70.

international relations" and the phrase "emergency in international relations" includes all defense and military interests, as well as maintenance of law and public order interests.[234] It is important to note that the Panel excluded political and economic interests from this scope and stated that "political or economic differences between member states are not sufficient, of themselves, to constitute an emergency in international relations for the purposes of subparagraph (iii)…unless they give rise to defense and military interest, or maintenance of law and public order interests."[235] Third, the Panel concluded that subjecting the security exception, including its interpretation to the unilateral will of the invoking state, would seriously undermine the multilateral trading system's security and predictability.[236]

After reviewing the above, the Panel concluded that, since there was indeed an emergency in international relations between Ukraine and Russia as it involved an armed conflict that led to the imposition of sanctions by several nations against Russia[237], and the measures in question were taken in response to such conflict, such measures should be considered to have been taken in times of emergency in international relations for the purposes of the subparagraph (iii).

As for the second issue of whether the conditions of the chapeau were satisfied, the main question was whether the phrase "which it considers" should be read together with the conditions of the chapeau. The Panel decided to take a subjective approach to this matter and concluded that the phrase should be read with the conditions of the chapeau, and therefore the invoking state has the discretion to determine what the essential security interests are and whether the measures taken were necessary for the protection of such

[234] *Id*, para 7.74.
[235] *Id*, para 7.75.
[236] *Id*, para 7.79.
[237] *Id*, para 7.122.

interests, leaving it as self-judging. The Panel reasoned that specific interests in relation to the protection of a state from internal or external threats "will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances".[238]

Nevertheless, the Panel, for the purpose of limiting the self-judging component of the security exception, underlined that the obligation of good faith under the general principle of international law and the plausibility factor should be employed to determine whether there are essential security interests and whether the challenged measures were necessary to protect such interests.[239] The Panel considered the good faith requirement to apply not only to the invoking state's articulation of its essential security interest but also to the connection between the measures adopted for the protection of the interest and the interests. This obligation requires the invoking state to meet "a minimum requirement of plausibility in relation to the proffered essential security interests".[240] Specifically, the Panel must review and determine whether the invoking state has sufficiently articulated the essential security interests and whether "the measures are so remote from, or unrelated to, the … emergency" [241] as to make it implausible that the invoking state implemented the measures for the protection of its essential security interests arising out of the emergency.

The Panel, therefore, explained that even though its decision grants discretion to the invoking state to determine the essential security interests and the measures necessary for the protection of such interests, with the good faith requirement, there is some level of objective review by determining whether the interest at stake can reasonably or plausibly be

[238] *Id*, para 7.131.
[239] *Id*, para 7.137-8.
[240] *Id*, para 7.138.
[241] *Id*, para 7.139.

considered essential security interests and whether the measures taken were necessary to protect such interests.[242]

A total of seventeen member states of the WTO joined the proceedings as third parties, and all of them, except the U.S., sided with Ukraine's argument.[243].The Panel, in its decision, concluded that Russia satisfied the requirements under the Article XXI(b)(iii) of the GATT, and therefore, the Russian measures were justified under the security exception of the GATT. Ukraine decided not to appeal the Panel report, and it was adopted by the WTO Dispute Settlement Body (the "DSB") on April 26, 2019. This decision is very significant because it not only established that the application of the security exception was indeed subject to the scrutiny of WTO adjudicating bodies but also provided official guidance on the interpretation of the security exception of the GATT.

[242] *Id*, para 7.43.
[243] Panel Report, *United States – Trade Measures affecting Nicaragua*, *supra* note 79, para 7.35.

PART IV. REVIEW STANDARDS FOR ARTICLE XXI OF THE GATT

A. Overview

Until very recently, that is, until the Panel delivered its decision regarding the Article XXI of the GATT in *Russia – Measures Concerning Traffic in Transit* in 2019, the lack of clear rules and guidance on the interpretation of the Article XXI of the GATT together with the realities of power-based relations among states and the intentional blurring of national security and foreign policy issues enabled potential abuse of the security exception. As a result, states have been practically free to impose unilateral economic sanctions and export controls without international interference as such measures can arguably be saved by the security exception under the GATT even if found to be inconsistent with the GATT obligations.

Since every state has the sovereign right to develop and implement its own foreign policy, free from external interference, the purpose of this dissertation is not to suggest that there be an international body that could interfere with the state's independent foreign policy. This dissertation, however, does suggest that a fundamental basis exists upon which a more multilateral approach to security-based export controls and economic sanctions can be developed. This could be achieved by subjecting the invocation of the security exception of the GATT and its requirements to the objective review by the WTO through limiting the self-judging component of the security exception. In this way, the WTO would be able to limit the use of the security exception for actual threats to essential security interests and prevent any potential abuse of the exception for other reasons, such as foreign policy.

Despite the recent Panel's rulings in *Russia – Measures Concerning Traffic in Transit* made it clear that the security exception of the GATT is indeed subject to WTO's review, the Panel acknowledged a substantial degree of self-judging component of the security exception so the invoking states could exercise its discretion to determine major parts of the requirements of the exception. It must be noted, however, that the Panel indeed endeavored to find the balance between the sovereign rights of the member states to invoke the security exception for the protection of their national security and other member states' rights to free and open trade. In that regard, the combination of a subjective and an objective approach to the interpretation of the Article XXI adopted by the Panel in the case was a laudable attempt to provide a systemic balance to the two competing interests.

However, this dissertation argues that the Panel's review standard on the Article XXI of the GATT was inadequate to solve the longstanding problems of the security exception, which allows the potential abuse of the security exception. This dissertation further argues that the WTO adjudicating bodies need to apply a more reasonable and objective review standard that reflects the appropriate interpretation of the Article XXI according to the rules of treaty interpretation under Article 31 of the VCLT[244] to effectively limit the potential abuse of the security exception.

Since the system of precedents does not exist in the WTO legal system, the Panel's decision in *Russia – Measures Concerning Traffic in Transit* is not binding on future disputes *per se*. Considering the fact that *Russia – Measures Concerning Traffic in Transit* has not yet been reviewed by the Appellate Body, and there is a series of pending cases involving the invocation of the Article XXI, there is an urgent need for critical examination of the Panel's

[244] Vienna Convention on the Law of Treaties, *supra* note 12, art. 31.

review standard of the security exception and to analyze whether there are more appropriate review standards for future disputes.

Some of the major pending cases include the following. First, The U.S. tariffs on aluminum and steel resulted in the filing of nine WTO complaints[245], in which a large number of third parties have joined[246], turning the dispute into a question of general interest. While the other members argued that the tariffs were in breach of several provisions in the GATT and the Agreement on Safeguards, the United States invoked the security exception and claimed that the measures were necessary for the protection of its essential security interests. Second, there are new and strengthened export controls globally, which are poised to raise security exception disputes and potentially end up in the WTO litigations. In September 2019, South Korea opened a case in the WTO to challenge Japanese export controls of materials that are critical for South Korean technology companies.[247]

The following section of the dissertation will critically examine the review standard adopted by the Panel and argue that the WTO adjudicating bodies should adopt a more reasonable and objective review standard. Section C will then discuss some of the possible alternative review standards that have been adopted in other international settings or suggested by international law scholars. Section D, in contemplation of the review standards discussed in Section C, will propose a more reasonable and objective review standard for the WTO adjudicating bodies to adopt. Section E will argue that the proposed

[245] *United States – Steel and Aluminum Products*, DS544 (China), DS547 (India), DS548 (EU), DS550 (Canada), DS551 (Mexico), DS552 (Norway), DS554 (Russian Federation), DS556 (Switzerland) and DS564 (Turkey).
[246] For instance, China was joined by Bahrain, Brazil, Canada, Columbia, Egypt, the European Union, Guatemala, Hong Kong, Iceland, India, Indonesia, Japan, Kazakhstan, Malaysia, Mexico, New Zealand, Norway, Qatar, Russian Federation, Saudi Arabia, Singapore, South Africa, Switzerland, Chinese Taipei, Thailand, Turkey, Ukraine, and Venezuela.
[247] *Japan – Measures Related to the Exportation of Products and Technology to Korea*, WT/DS590.

review standard requires the application of the 'Necessity Test' under the WTO's jurisprudence and explains the 'Necessity Test' in detail. Finally, in Section F, the proposed review standard will be applied to U.S. economic sanctions and export controls to demonstrate how the review standard may be used.

B. Analysis of the WTO Panel's Decisions on Article XXI of the GATT

1. *Russia – Measures Concerning Traffic in Transit*

The Article XXI will be self-judging if the invoking state has the discretion to decide whether and how the exception can be applied to its measures. The provision would be non-justiciable when the issue cannot be subject to the rulings of the WTO adjudicating bodies. This would be the result of the subjective interpretation approach to the provision, which reads the phrases "it considers" and "necessary" in the Article XXI together and allows the invoking state to determine whether the measures at stake are necessary for the protection of the essential security interest. On the other hand, the provision would be justiciable if the phrases "it considers" and "necessary" are not read together. This view upholds an objective approach to interpretation.

The Panel in *Russia – Measures Concerning Traffic in Transit* adopted a hybrid approach to interpret the Article XXI, which consists of both objective and subjective interpretation approaches. The Panel employed an objective approach to interpret subparagraph (iii) as it concluded that the phrase "it considers" in the chapeau should not be read together with the circumstances provided in the subparagraphs. The Panel then used a subjective approach to interpret the chapeau as it concluded that the phrase "it considers" should be read together

with the terms “essential security interests” and “necessary”. This approach, however, left the definition and scope of both necessity of the measures undertaken and essential security interests to the discretion of the invoking state, thereby leaving a substantial level of the self-judging component. The Panel added that the good faith requirement under the general principle of international law must be applied to identify the key terms of the Article XXI, and therefore, argued that the discretion of the invoking state is not unfettered and can be subject to a certain level of judicial review.

The Panel’s approach seems like a well-balanced solution that adequately addresses the challenge of respecting member states’ sovereign rights to protect their national security interests while also defining certain parameters for a legal review of the security exception which is integral to the WTO’s legal framework. On the one hand, the Panel conferred weight to the chapeau of the Article XXI(b), “it considers necessary”, thereby acknowledging the invoking states’ sovereign determination of essential security interests and assessment of which measures are needed to protect the security interests. On the other hand, the Panel limited the discretion of the invoking states to a certain degree by application of the good faith requirements and an objective review of the subparagraph (iii), “taken in time of war or other emergency in international relations”.

It is understandable how the Panel’s interpretation has come to this hybrid approach. One of the primary tasks, possibly the ultimate task, of the Panel was to find the right balance between two competing interests, which include (1) the invoking state’s interests in protecting their national security and (2) other states’ rights to free and open trade. Employing a purely subjective interpretation approach would respect the invoking state’s interests in protecting their national security as it grants discretion to the invoking state to

apply the security exception as they wish. Nonetheless, it would not only ignore the other member states' rights to free and open trade but, most importantly, would result in leaving the exception self-judging. On the contrary, employing a purely objective interpretation approach would respect the lateral but could be criticized for not adequately respecting the invoking state's interests in protecting their national security. Since both scenarios may have a significant impact, the Panel's decision to employ an objective approach where it can and a subjective approach where it had to due to the textual basis of the chapeau (i.e., "it considers necessary"), but also bringing in the good faith requirement to provide a certain level of objective review was undoubtedly a brilliant solution to fulfill the task. However, there are certain issues to be addressed.

First, the Panel's hybrid approach does not solve the core problem of the security exception of the GATT. The Panel's approach allows the Article XXI to remain as a self-judging provision at a substantial level because it grants discretions to the invoking states to determine the essential security interests as well as necessary measures to protect such interests. The self-judging component was the core problem of the Article XXI, which allows the abusive employment of the security exception. Although it is understandable that the Panel's approach had to be compromised to a certain extent as it must also consider the invoking state's interests in protecting their national security, the Panel's approach is indeed inadequate to solve the core problem of the Article XXI. Moreover, while it might be right that the invoking state should be granted the discretion to determine the necessary measures for the protection of its own national security matters considering the state's proximity to the situation, expertise, and competence, granting such discretion seems dangerous due to the substantial effect the discretion may bring.

Second, it is questionable how the good faith requirement under the general principle of international law is able to effectively limit the potential abuse of the security exception. While the good faith requirement is a well-established principle of international law[248], the definition of good faith in international law has been largely elusive. If one asks what exactly good faith means and how it may limit the acts of states, it would be difficult to provide satisfactory answers to the questions. The lack of clear definitions of good faith and its indefinite boundaries indeed make the good faith requirement vague. There may certainly be difficulties in defining "good faith," and such difficulties would blur the boundaries of the review standards. Also, even if the good faith requirement may have a limiting effect on acts of states, the requirements lack an explicit rule in international law. The relevant adjudicating bodies would have no precise mechanism to review whether the acts of states are in good faith. The principle of good faith under international law, therefore, arguably acts more as a means of guidance rather than as a source of rights or obligations.[249] Hence, as long as the invoking state successfully explains that they have had good faith belief that there were essential security interests and their measures were necessary to protect such interests, the discretions provided to the invoking state would hardly be limited in practice. The only way to define the principle of good faith is for the invoking state to act honestly and reasonably and to refrain from taking unfair advantage of others.[250] Unfortunately, terms such as honesty, reasonableness, and fairness are almost as vague as good faith.

[248] *Certain Norwegian Loans* (France v Norway) (Jurisdiction) (1957) ICJ Reports 9, at 53. "Unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law."
[249] Steven Reinhold (2013) *Good Faith in International Law*, 2 U.C.L. J.L. & Juris. 40, at 49.
[250] M. E. Villiger (2009) *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill-Nijhoff, at 425.

As addressed above, while the Panel's decision on the interpretation of the Article XXI is well thought through and well-balanced between the two competing interests of member states, it does not provide an adequate solution to the core problem of the security exception. The decision certainly made it clear that the security exception is indeed subject to review by the WTO adjudicating bodies. However, the type and scope of the future security exception disputes would not be so much different from the previous ones as the review standard adopted by the Panel still grants substantial discretion to the invoking state to determine the essential security interests and necessary measures to protect such security interests. The Panel explained that the application of the good faith requirement warrants some objective review by the WTO adjudicating bodies, and therefore, the discretion of the invoking states is not unfettered. However, as discussed earlier, the invoking states may easily get away with the good faith requirements by demonstrating that they have had good faith belief that there were essential security interests and their measures were necessary to protect such interests.

2. *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*

Recently in June 2020, the WTO has, for the first time in its history, rejected the invocation of the security exception as a defense in *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*.[251] Although this case concerns the invocation of the security exception in the Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement"), it is worth reviewing as the security exception of the TRIPS Agreement has identical wordings as those found in the Article XXI of the GATT,

[251] Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, *supra* note 15.

and the Panel in the case specifically applied the interpretation approach adopted by the Panel in *Russia – Measures Concerning Traffic in Transit.*

The case is particularly relevant as to the scope of the good faith obligation in the context of the security exception. In applying the interpretation of the security exception adopted in *Russia – Measures Concerning Traffic in Transit*, the Panel conducted a review of the specific requirements of the good faith obligation in the context of the security exception. This case illustrates what the Panel in *Russia – Measures Concerning Traffic in Transit* was trying to say about how its decision, notwithstanding it grants discretion to the invoking states regarding the determination of essential security interest and necessary measures, does not provide for unfettered discretion as there is some level of judicial review due to the good faith obligation.

Despite the fact that the Panel's ruling has been appealed, putting the Panel's decision before the currently dysfunctional Appellate Body, the Panel's assessment of the good faith requirement in the context of the security exception is worth noting as it can be considered in future security exception disputes.

The case involves the infringement of TV rights between a Saudi Arabian company (beoutQ, the infringer) and a Qatari company (beIN). Qatar claimed that the Saudi Arabian's measures, which include (1) preventing beIN from obtaining legal representation in civil and administrative enforcement procedures (the "Anti-Sympathy Measures") and (2) failure to institute criminal procedures against the beoutQ, violate Articles 42[252], 41.1[253],

[252] Article 42 of the TRIPS Agreement, "Members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement.

and 61[254] of the TRIPS Agreement. Saudi Arabia argued that its measures were adopted for the protection of its essential security interest and thus should be justified under the security exception of the TRIPS Agreement provided under Article 73(b)(iii)[255].

With respect to the objective review of subparagraph (iii), 'taken in time of war or other emergency in international relations', the Panel had to determine whether the essential security interest exists and whether the measures were taken in time of war or other emergency in international relations. Saudi Arabia argued that there is essential security interest to protect the country from the threats of terrorism and extremism, and the measures adopted are part of the comprehensive measures against Qatar imposed on 5 June 2017, which is aimed at putting an end to all economic and trade relations between Saudi Arabia and Qatar. The Panel agreed with Saudi Arabia's argument that one state's severance of "all diplomatic and economic ties" with another state could be regarded as "the ultimate State expression of the existence of an emergency in international

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Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

[253] Article 41.1 of the TRIPS Agreement, "Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

[254] Article 61 of the TRIPS Agreement, "Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed willfully and on a commercial scale.

[255] The provision is identical to the Article XXI of the GATT.

relations"[256], and found that "a situation…of heightened tension or crisis' exists" and such situation "is related to Saudi Arabia's defense or military interests, or maintenance of law and public order issues".[257] The Panel concluded that Saudi Arabia's measures were indeed adopted 'in time of war or other emergency in international relations', as required under subparagraph (iii). In delivering the decision, the Panel also noted Article 41 of the United Charter, which includes, among other things, the interruption of economic relations and the severance of diplomatic relations as threats.[258]

Nonetheless, with respect to the second prong of the test, the assessment of the chapeau of the security exception, 'which it considers necessary for the protection of its essential security interest', the Panel reached different decisions for each measure. As explained in *Russia – Measures Concerning Traffic in Transit*, the assessment of the chapeau, despite it grants discretion to the invoking state to determine the essential security interests and the necessary measures to protect such interest, includes the obligation of good faith, and therefore, requires the Panel to assess (1) the invoking state's articulation of its essential security interest and (2) the connection between the measures adopted and the essential security interest.

The Panel concluded that, since the interests identified by Saudi Arabia are those that clearly "relate to the quintessential functions of the state, namely, the protection of its

[256] Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, *supra* note 15, para 7.259.
[257] *Id*, para 7.257.
[258] Article 41 of the UN Charter, located in Chapter VII thereof, entitled "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression", provides that "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

territory and its population from external threats, and the maintenance of law and public order internally"[259], Saudi Arabia's articulation of its essential security interest was sufficient to enable an assessment of the connection between the measures adopted and the essential security interest.[260] However, while the Panel concluded the Anti-Sympathy Measures meets the minimum requirement of plausibility in relation to the proffered essential security interest, the same conclusion cannot be made for Saudi Arabia's failure to institute criminal procedures and penalties against beoutQ.

The Panel explained that considering the fact that Saudi Arabia imposed a travel ban on all Qatari nationals from entering Saudi Arabia as part of the comprehensive measures imposed on 5 June 2017, and the fact that the Anti-Sympathy Measures were announced on 6 June 2017, it is not implausible that Saudi Arabia may have taken the Anti-Sympathy Measures as a part of the comprehensive measures, and therefore it meets the minimum requirement of plausibility under the obligation of good faith.[261] In contrast, the Panel pointed out that there is not only such a temporal connection between the failure to institute criminal procedures and penalties against beoutQ and the comprehensive measures, but there is also no rational connection between the comprehensive measures and such failure.[262] The Panel concluded that the failure to institute criminal procedures and penalties against beoutQ does not have any relationship to the comprehensive measures, which aimed at ending interaction with Qatar, and therefore, such measure does not meet a minimum requirement of plausibility.

[259] Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, *supra* note 15, para 7.280.
[260] *Id*, para 7.282.
[261] *Id*, para 7.286.
[262] *Id*, para 7.292.

This case may prove the assertion made by the Panel in *Russia – Measures Concerning Traffic in Transit* that the good faith requirement in the context of the security exception does provide some level of judicial review by the WTO adjudicating bodies. However, as appropriately highlighted by the United Arab Emirates in its third party statement, the minimum requirement plausibility enunciated by the Panel in *Russia – Measures Concerning Traffic in Transit* "sets a very low bar"[263] and it should not be applied "too mechanically". Even the Panel in *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* acknowledged that such standard is "not an onerous one" and is subject to only limited review by the Panel.[264]

While this case may have proved the possibility of judicial review of the chapeau of the security exception even when the discretion was granted to the invoking states, it has also clearly demonstrated the limits of such judicial review. Although it was a laudable attempt to apply the good faith requirement and it is also rightly applied, it does not come even close to reviewing the necessity of the measures adopted for the protection of the essential security interest. As shown above, all it can provide is to allow the Panel to merely assess whether there is a connection between the measures adopted and the essential security interest. This dissertation argues that with the review standard adopted in *Russia – Measures Concerning Traffic in Transit*, the security exception remains prone to abuse, and therefore the WTO needs to adopt a more reasonable and objective review standard to prevent the potential abuse of the security exception.

[263] United Arab Emirates' third-party statement, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R (16 June 2020), para 19-20.
[264] Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, *supra* note 15, para 7.281.

C. Possible Alternative Review Standards for Article XXI of the GATT

1. Review Standards Applied in BIT/FCN Cases

Considering how other international institutions with similar issues of security exceptions have dealt with it can be helpful to determine a more reasonable and objective review standard for the Article XXI. Unlike the Article XXI, the first-generation security exceptions, of which the justiciability was only ruled recently for the very first time in *Russia – Measures Concerning Traffic in Transit*[265], the main issue for the second-generation security exceptions has always been the applicable review standards rather than justiciability due to the consistent rejection of the self-judging component of the security exceptions. There has been a consensus that the review standard must be objective, but the specific parameters have been debated.

In the cases of BITs, the arbitral tribunals, at first, gave particular importance to the customary notion of necessity, as provided in Article 25 of the International Law Commission's Articles on State Responsibility.[266] The arbitral tribunal in *Enron v Argentina* reasoned that, in the absence of an express definition of "measures necessary for…essential security interests" in the relevant BIT, adjudicators were warranted to look into the customary requirements of the necessity defense.[267] The arbitral tribunal further

[265] Panel Report, *Russia – Measures Concerning Traffic in Transit*, *supra* note 9.
[266] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, II(2) YILC 2001, Article 25 ("1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.
[267] *Enron Corp. and Ponderosa Assets L. P. v Argentina*, *supra* note 208, para 333.

explained that a treaty is "inseparable from the customary standard insofar as the conditions for the operation of state of necessity are concerned,"[268] and the necessity defense is not self-judging and requires objective review.[269]

Nevertheless, the approach of necessity defense has been criticized over time. The arbitrators in *Sempra Energy International v Argentina* found that subjecting the BIT's security exception to customary requirements of a necessity defense is not justified, and doing so would be a fundamental error in identifying and applying the applicable law.[270] Similarly, in *CMS v Argentina*, the annulment committee argued that the mere use of the word "necessity" in the security exception of the BIT, which made no reference whatsoever to the conditions set forth under the International Law Commission's Articles for the state of necessity, is insufficient to justify importing Article 25 of the International Law Commission's Articles on State Responsibility into the security exception of the BIT.[271] Furthermore, in *Mobil v Argentina*, the respondent raised two separate defenses, one being the necessity defense and the other being the security exception in the BIT.[272] Although the arbitrators recognized that the defenses share a similar nature of avoiding responsibility on the grounds of national security, each defense was subject to different requirements.[273] In light of the cases above, the arbitral tribunal in *Deutsche Telekom v India* suggested that the

[268] *Id*, para 334.
[269] *Id*, para 336.
[270] *Sempra Energy International v Argentina*, Decision on the Argentine Republic's Application for Annulment of the Award (20 June 2010) ICSID Case No. ARB/02/16, para 208-209.
[271] *CMS Gas Transmission Company v Argentina*, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007) ICSID Case No. ARB/01/8, para 129.
[272] *Mobil Exploration and Development Argentina In.c Suc. Argentina and Mobil Argentina S.A. v Argentina*, *supra* note 199, para 1014.
[273] *Id*, para 1027 ("Where the essential security clause is applicable, measures covered by such provision are excluded from the scope of the BIT. By contrast, the customary necessity defense follows a 'reverse approach': it must be first established that a breach of the BIT has taken place and, if it has, the necessity defense will come into play.")

conditions for a security exception were lower than the customary requirements of the state of necessity.[274]

After the hard rejection of the necessity defense approach, arbitral tribunals moved on to apply the more autonomous and objective review standard. In *Deutsche Telekom v India*, the arbitral tribunal adopted a moderate approach that safeguards a certain degree of deference for the state's sovereignty while clarifying that deference does not exclude scrutiny.[275] The arbitral tribunal focused on the language of the security exception in the BIT and held that, while a state should enjoy some margin of discretion, the BIT did not provide for unrestricted deference.[276] Although the arbitral tribunal recognized that there needs to be a certain margin of deference to the host state's determination of necessity, which may be justified on the grounds of state organs' proximity to the situation, expertise, and competence, such deference owed to the host state cannot be unlimited for the effectiveness of the treaty to be maintained.[277] The arbitral tribunal went on to postulate clear criteria for the assessment of the necessity requirement, as follows:

> "To assess the necessity of the measures to safeguard the state's essential security interests, the Tribunal will thus determine whether the measure was principally targeted or protect the essential security interests at stake and was objectively required in order to achieve that protection, taking into account whether the state had reasonable alternatives, less in conflict or more compliant with its international obligations."[278]

In the cases of FCNs, the International Court of Justice in *Case Concerning Oil Platforms* has explained that the review standard requires an analysis of self-defense under general

[274] *Deutsche Telekom AG v India*, Interim Award (13 December 2017) PCA Case No. 2014-10, para 229.
[275] *Id*, at 230.
[276] *Ibid.*
[277] *Id, 238.*
[278] *Id*, at 239.

international law.[279] The International Court of Justice discussed the review standard applicable under the security exception in detail and concluded that the question of whether the measures employed were necessary overlaps with the question of their validity as acts of self-defense.[280] Judge Simma, in his Separate Opinion, further explained that the review standard under the notion of self-defense must require that the measures are strictly necessary for the relevant purpose, and the evaluation of the necessity of such measures should require that the measures in question be (1) necessary, not just desirable or useful to protect that state's essential security interests, (2) necessary to actually protect these interests, not just to advance or support them, (3) necessary to protect the security interests of the state taking it, and (4) the security interests destined to be protected must be essential.[281]

2. Review Standards Suggested by Scholars

There are various types of review standards that could be applied to security exception disputes, but the following review standards represent some of the major ones that have been discussed the most by international law scholars.

First, the Self-Judging Clause Review Standard is a review standard that acknowledges the self-judging component of the security exceptions. It considers that the Article XXI of the GATT is entirely self-judging, and therefore the WTO dispute panel cannot review a member state's invocation of the Article XXI. Despite the fact that the history supports this view and it is one of the major review standards that have been discussed by international law scholars, this review standard is not an option at this stage as it would be difficult to

[279] *Case Concerning Oil Platforms*, Judgment (2003), ICJ Reports 161, para 40.
[280] *Id*, para 43.
[281] *Case Concerning Oil Platforms*, Separate Opinion of Judge Simma (2003), ICJ Reports 324, para 11.

apply this review standard after the Panel in *Russia – Measures Concerning Traffic in Transit* established that the invocation of the Article XXI is justiciable.[282]

Second, the Good Faith Review Standard allows the invoking member state to decide whether the Article XXI applies as a justification for its trade-restrictive measures, while a WTO dispute panel conducts a good faith inquiry regarding that invocation.[283] This review standard requires honesty, fairness, and a relatively level playing field between signatories, as the inquiry is a more subjective approach where the relevant Panels consider the context, object, and purpose of the invocation, as well as the "different interests and backgrounds of the... parties involved".[284] Typically, the party invoking the security exception bears the burden of proving that it invoked the exception under a subjective good faith belief. This view is precedented as the Appellate Body consistently places the burden of proof upon the states invoking exceptions.[285]

There is support from general international law on this review standard as the Vienna Convention on the Law of Treaties requires that signatories interpret and apply all treaties in good faith.[286] Also, among the interpretations involving a WTO dispute panel inquiry, this review standard appears to be the least intrusive standard. This review standard, however, may involve the risk of placing the WTO in the center of political disputes, which could delegitimize the WTO by causing the WTO to potentially infringe on member states'

[282] Panel Report, *Russia – Measures Concerning Traffic in Transit, supra* note 9, para 7.61-7.65.
[283] Alford, *supra* note 230, at 698-699.
[284] Hahn, *supra* note 168, at 600.
[285] For example, *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (25 April 1997), at 14. "it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."
[286] *See* Vienna Convention on the Law of Treaties, art. 31(1) "A treaty shall be interpreted in good faith 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." and art. 26 "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

sovereignty.[287] Generally speaking, because the Good Faith Review Standard allows an international body to review a member state's conduct was in good faith, it may have the effect of limiting the sovereignty of the member state within the international body.[288] Additionally, as discussed earlier in this dissertation, the lack of clear definitions of "good faith" would indeed blur the boundaries of the review standard, and the vague boundaries of the review standard would result in the absence of a precise mechanism for the WTO adjudicating bodies to apply when reviewing whether the acts of the invoking state are in good faith.

Third, the Plain Language Review Standard allows the invoking state to determine what "it considers" to be actions "necessary for the protection of its essential security interests," while the WTO dispute panel reviews the plain language of the Article XXI, such as "fissionable materials" and "war".[289] This review standard suggests that when a member state invokes the Article XXI with respect to an unenumerated essential security interest, for example, climate change, such action would fall outside the purview of the WTO dispute panel.[290] On the other hand, when a member state's invocation of the Article XXI involves an enumerated security interest that are within the subparagraphs (i – iii) of the Article XXI(b) (e.g., fissionable materials), the WTO would exercise its authority to decide whether the state's actions fell within the language of the Article XXI.

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[287] Christopher G. Terris (2017) *Iran at the WTO: The Future of the U.S. State Sponsor of Terrorism Sanctions*, 49 N.Y.U. J. Int'l L. & Pol. 891, at 905.
[288] Reinhold, *supra* note 249, at 57.
[289] Hal Shapiro & Riikka Kuoppamaki, *National Security Self-Declaration in the Age of Fake News*, Soc. Int'l Econ. L. (SIEL), Sixth Biennial Global Conference 3 (July 11, 2018), at 8. (Available at https://dx.doi.org/10.2139/ssrn.3209874)
[290] *Id*, at 13.

This review standard seems to be the basis of the review standard adopted by the Panel in *Russia – Measures Concerning Traffic in Transit*, as it allows the invoking state to determine the actions that are "necessary for the protection of its essential security interests" while objectively assesses whether the invoking state's claimed security interests fall within the enumerated security interests provided in the subparagraphs (i – iii) of the Article XXI(b). One notable distinction would be that the review standard adopted by the Panel includes the good faith requirements under the general principle of international law to tighten the review standard with a certain level of judicial review by the WTO adjudicating bodies.

As analyzed earlier in this dissertation, the review standard adopted by the Panel in *Russia – Measures Concerning Traffic in Transit* is inadequate to effectively prevent the potential abuse of the security exception in a balanced manner. The Plain Language Review Standard makes the security exception even more prone to abuse than the review standard adopted by the Panel as it does not include the good faith requirements that may warrant some level of judicial review (as it lacks a good faith review, the invoking member state need only cite the Article XXI(b)(iii) "other emergency" catch-all provision to circumvent WTO review). For that very reason, many scholars have argued that this review standard is ineffective.[291]

Last but not least, the Reasonable Invocation Review Standard requires the WTO adjudicating bodies to conduct objective assessments to determine whether it is reasonable for the invoking state to believe that there is an essential security interest to protect and that

[291] Jordan, *supra* note 150 at 192.

the measures undertaken are necessary to protect such interest.[292] Under this review standard, reviewing Panel or the Appellate Body must objectively review each requirement of the Article XXI, including whether it is reasonable for the invoking state to believe that (1) there is an essential security interest to protect, (2) the measures undertaken are necessary for the protection of such interests, and (3) such measures were taken in time of war or other emergency in international relations.

For the purpose of adopting a more reasonable and objective review standard for the Article XXI than the one adopted by the Panel in *Russia – Measures Concerning Traffic in Transit*, this review standard would be the only viable option among the review standards suggested by international law scholars as it is the only review standard that is more objective than the review standard adopted by the Panel in the case. Thus, this review standard must be carefully analyzed.

Since this review standard requires the WTO adjudicating bodies to objectively review all elements of the Article XXI without any discretion granted to the invoking state, it is arguably the most effective review standard for abuse prevention purposes. Limiting the self-judging component is crucial for the prevention of the abusive employment of the Article XXI. As discussed earlier in this dissertation, the Article XXI has been subject to intense discussion and criticism for being prone to abuse. What makes abusive employment possible is the self-judging component of the Article XXI, which allows the invoking state to determine the essential security interest and necessary measures to take under the Article XXI. Application of this review standard effectively limits such self-judging component

[292] Dapo Akande & Sope Williams (2003) *International Adjudication on National Security Issues: What Role for the WTO?* 43 Va. J. Int'l L. 365, at 386.

because the invoking states' determinations regarding the existence of the essential security interest and the necessity of the measures taken would be objectively reviewed by the WTO adjudicating bodies without any discretion granted to the invoking state. Even though the invoking state may determine the existence of the essential security interest and the necessary measures for the protection of such interest, the WTO adjudicating bodies would review the reasonableness of such determinations of the invoking state and, should the WTO adjudicating bodies decide that determinations of the invoking state are not reasonable in the given circumstances, it may exercise its authority to reject the invocation of the security exception.

The need for objective reviews of the Article XXI is grounded in the jurisprudence of the International Court of Justice, which confirms that a legal question could have both political and legal aspects, and "the Court cannot refuse to respond to the legal elements of a question which invites to discharge an essentially judicial task".[293] To that end, the International Court of Justice has ruled in *Certain Questions of Mutual Assistance in Criminal Matters* that even a self-judging provision should be reviewed by the court.[294] Moreover, Article 11 of the DSU states that a Panel "should make an objective assessment of the matter before it".[295] Although the word "should" is often used rather colloquially to state a preference, it was determined by the Appellate Body that the word "should" in the

[293] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (22 July 2010), para. 27 [Application for Review of Judgment No.158 of the United Nations Administrative Tribunal, Advisory Opinion, 1073, para 14].
[294] *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v France) (2008) ICJ Reports 177, para 135-145.
[295] Dispute Settlement Understanding, art. 11 "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."

context of Article 11 of the DSU may be interpreted as expressing a duty of the Panel.[296] Hence, it can be argued that a reviewing Panel (or Appellate Body) has a duty to conduct objective assessments of all elements of the matter that come before it, that is, in this case, all elements of the Article XXI.

Additionally, it may also be argued that the interpretation of the Article XXI should be subject to objective review because the word "necessary" in the provision requires an objective assessment of whether the challenged measures would be necessary to protect the security interests at stake. An international law scholar, in light of this view, stated that the discretion provided in the Article XXI should be balanced with the trade interests of other WTO members, and such balance can only be achieved "if the measure is reviewable by the WTO adjudicatory mechanism, the absence of which would make the provision prone to abuse without redress".[297] It is interesting to note that the Panel in *Russia – Measures Concerning Traffic in Transit*, when delivering its decision to adopt the review standard that acknowledges the discretion of the invoking state to determine the existence of essential security interests and the necessary measures to protect such interests, expressed that it was mindful that, "should its findings on Russia's invocation of the Article XXI(b)(iii) be reversed in the event of an appeal, it may be necessary for the Appellate Body to complete the analysis".[298] This sounds, in a way, like an indication that the Panel might have been aware that applying the review standard to acknowledge the discretion of the invoking state may not be the most appropriate interpretation of the Article XXI, and

[296] *Canada – Measures Affecting the Export of Civilian Aircraft,* WT/DS70/AB/R (adopted 20 August 1999), para 187; *EC – Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R (adopted 13 February 1998)*, para 133.
[297] P. Bossche and W. Zdouc (2013) *The Law and Policy of the World Trade Organization*, Cambridge University Press, at 596.
[298] Panel Report, *Russia – Measures Concerning Traffic in Transit, supra* note 9, para 7.152.

that the Appellate Body may reverse such decision and subject the matters to a relatively more objective review.

However, while the prevention of the abusive employment of the security exception by limiting the self-judging component may be regarded as of the utmost importance, it is not the only matter to be concerned about. As explained earlier in this dissertation, there are two competing interests in the security exception disputes, which include the invoking state's interest in protecting their national security matters. Taking away the discretion of the invoking states to determine their own essential security interests and subjecting the matter to the objective review by the WTO adjudicating bodies that are consisted of those who may not be competent enough to assess the essential security interests of the invoking states could entail certain difficulties since doing so would inadvertently result in refusal of the invoking states' sovereign rights to determine their own essential security interests.

Suppose country A imposes trade-restrictive measures against country B for the protection of its natural resources within the country and claims the application of the Article XXI of the GATT. Applying the Reasonable Invocation Review Standard requires the WTO adjudicating bodies to review whether it is reasonable for country A to believe that the country's shortage of natural resources is an essential security interest. There can be a hardship on the reviewing Panel or the Appellate Body in assessing such matters because they are unlikely to be competent enough to assess the seriousness of the shortage of the natural resources in country A due to the limited access and knowledge of the particularities of country A's resources, economy, etc. It would also be practically difficult to assess how country A came to conclude that the shortage is an essential security interest, which may be important criteria when assessing the reasonableness of country A's belief. In addition,

even if the reviewing Panel or the Appellate Body determines that it is not reasonable for country A to believe that the shortage of the natural resources is an essential security interest, providing any reasonable grounds for such determination would be challenging unless the situation is too obvious (such as when Sweden invoked the Article XXI to impose a global quota on footwear for the protection of the domestic production based on the argument that soldiers need footwear for performing their services[299]) or there are reliable scientific data to support the determination.

As discussed above, the Reasonable Invocation Review Standard requires the WTO adjudicating bodies to objectively review all elements of the Article XXI, and therefore, would be the most effective means to limit the self-judging component of the Article XXI, which has long been the core problem of the security exception. With this review standard, the WTO should be able to effectively police and prevent the potential abuse of the security exception. However, as pointed out above, due to the fact that this review standard is heavily focused on abuse prevention, it inadvertently entails certain difficulties on the other hand, including the refusal of the sovereign rights of the invoking states to determine their own essential security interests and practical challenges for the reviewing Panel or Appellate Body to assess the reasonableness of the essential security interests of the invoking states. While this review standard is unquestionably a more objective review standard than the one adopted in *Russia – Measures Concerning Traffic in Transit*, such critical difficulties that may arise out of the application of the review standard would arguably disqualify it from being a more reasonable review standard.

[299] *Sweden - Import Restrictions on Certain Footwear*, L/4250 (17 November 1975).

D. Proposed Review Standard for Article XXI of the GATT

This dissertation argues that the review standard adopted by the Panel in *Russia – Measures Concerning Traffic in Transit* may be inadequate to effectively police and prevent the potential abuse of the Article XXI in a balanced manner, and therefore, the WTO needs to adopt a more reasonable and objective review standard that reflects the appropriate interpretation of the Article XXI according to the rules of treaty interpretation under Article 31 of the VCLT.[300]

As discussed in the previous section, there are various types of review standards for security exception matters, and such discussion shows that there is no consensus on the applicable review standard under public international law. For the purpose of adopting a more reasonable and objective review standard for the Article XXI than the one adopted in *Russia – Measures Concerning Traffic in Transit*, the Reasonable Invocation Review Standard would be the only viable option among the review standards suggested by international law scholars. While the review standard might be the most effective means to prevent the abusive employment of the security exception, the critical difficulties it inadvertently entails due to its focus on abuse prevention purposes would prevent the review standard from providing an appropriate balance between the two competing interests in security exception disputes.

Thus, in this section, this dissertation proposes a new review standard that is relatively more reasonable and objective according to the rules of treaty interpretation under Article 31 of the VCLT[301]. Such review standard is reasonably balanced between the two

[300] Vienna Convention on the Law of Treaties, *supra* note 12, art. 31.
[301] Vienna Convention on the Law of Treaties, *supra* note 12, art. 31.

competing interests in security exception disputes as it respects the sovereign rights to determine national security interests while attempts to minimize the self-judging component of the Article XXI.

The proposed review standard (the "Proposed Hybrid Approach Review Standard") is based on the hybrid approach to the interpretation of the Article XXI, similar to the one adopted in *Russia – Measures Concerning Traffic in Transit*, and applies the 'Necessity Test' under the WTO's jurisprudence. Similar to the Panel's approach, the Proposed Hybrid Approach Review Standard consists of a subjective and an objective interpretation approach. Unlike the Panel's approach, however, this review standard employs an objective interpretation approach to the necessity requirement of the Article XXI. Thus, it employs a subjective approach to interpret the chapeau of the Article XXI, but only limited to the existence of the essential security interest part. It then employs an objective interpretation approach to review the necessity of the measures undertaken for the protection of the essential security interests and the subparagraphs of the article. Consequently, it acknowledges the invoking states' sovereign rights to determine their own essential security interests while requires objective assessments of all other elements of the Article XXI, including the necessity of the measures undertaken for the protection of the essential security interests. The Proposed Hybrid Approach Review Standard then applies the 'Necessity Test' under the WTO's jurisprudence to assess the necessity of the measures undertaken to protect the security interest.

This dissertation argues that this review standard is more reasonable and objective than the one adopted in *Russia – Measures Concerning Traffic in Transit* as it requires the WTO adjudicating bodies to conduct an objective review on the necessity of the measures

undertaken, which is the most important matter of the security exception and also respects the sovereign rights of the invoking states to determine their own security interests simultaneously. This dissertation argues that, with this review standard, the WTO adjudicating bodies should be able to effectively police and prevent the potential abuse of the Article XXI in a balanced manner as this review standard minimizes the self-judging component of the security exception without the difficulties that may arise out of the employment of the Reasonable Invocation Review Standard.

The interpretation approach of this review standard is supported by Article 31 of the VCLT. [302] Article 31 of the VCLT provides the general rule regarding the interpretation of international treaties. It requires parties to consider various factors when interpreting international treaties, including the object and purpose of the treaty, other relevant agreements by the parties, the relevant subsequent practice of the parties, etc.[303] The fact that the main object of the GATT/WTO is trade liberalization and one of the central purposes of the WTO's dispute settlement system is "to provide security and predictability to the multilateral trading system" [304] must be taken into account when interpreting the Article XXI. Also, the scope of the phrase "it considers necessary" in the Article XXI, which requires a self-judging component, is unclear whether that phrase applies to all or part of the article. It can be argued that acknowledging the self-judging component of the Article XXI and thereby granting a broad discretion to the invoking states to undertake any

[302] Despite there is lack of a formally established process of interpreting the WTO agreements, the Appellate Body of the WTO has generally relied on the rules for treaty interpretation incorporated into Articles 31-33 of the Vienna Convention on the Law of Treaties to ascertain the intended meaning of the provisions in the WTO agreements.

[303] Vienna Convention on the Law of Treaties, *supra* note 12, art. 31.

[304] *See* Article 3.2 of the Dispute Settlement Understanding, "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

measure it deems necessary would enable member states to freely enact various protectionist measures under the guise of national security protection, which consequently defeat the objective and purpose of the GATT/WTO by limiting trade liberalization as well as undermining the predictability and certainty of the rule-based trading system. Considering the foregoing, the appropriate interpretation of the Article XXI should include some level of the self-judging component due to the phrase "it considers necessary", but that self-judging component must be minimized for the object and purpose of the GATT/WTO.

The Proposed Hybrid Approach Review Standard is based on the argument that the phrases "action which it considers necessary" and "for the protection of its essential security interests" of the chapeau should not be read together. The wordings of the chapeau clearly indicate that the word "necessary", which requires objective assessments of the necessity (as discussed earlier), is directed to the action undertaken. Therefore, the objective assessment of the action undertaken for the protection of the essential security interests must be conducted. On the other hand, the wordings of the chapeau seem to indicate that the essential security interests of the invoking state are existing ones ("…for the protection of its essential security interests").

Given that the interpretation of the Article XXI must include some level of the self-judging component but minimize that self-judging component for the objective and purpose of the GATT/WTO, the Proposed Hybrid Approach Review Standard is based on the interpretation that (1) the phrase "…its essential security interest" indicates that the invoking state has discretion and has already exercised such discretion and determined the essential security interest (thereby respecting the sovereign rights to determine own

essential security interests – some level of self-judging component) and (2) the word "necessary", which requires the objective assessment by the WTO adjudicating bodies, is specifically directed only to the actions undertaken for the protection of the essential security interest, and therefore, the necessity of the actions must be objectively reviewed (thereby warrants objective assessment to minimize the self-judging component for the objective and purpose of the GATT/WTO).

Moreover, Article 32 of the VCLT provides that "Recourse may be had to supplementary means of interpretation…when the interpretation according to Article 31 of the VCLT…leads to a result that is manifestly absurd or unreasonable".[305] Even if one argues that either the Reasonable Invocation Review Standard or the review standard adopted by the Panel in *Russia – Measures Concerning Traffic in Transit* are based on more correct textual interpretations of the Article XXI, the results of such interpretations may arguably be absurd or unreasonable.

First, with respect to the Reasonable Invocation Review Standard, the inadvertent consequences of refusing the invoking states' sovereign rights to determine their own essential security interests would arguably lead to an unreasonable result. Many states would claim that the determination of states' own national security matters is beyond the reach of the WTO's jurisdiction as it directly relates to the sovereign right to dictate the course of the own government. Although it may be the most effective means to prevent the potential abuse of the security exception, its interpretation approach would interfere with

[305] *See* Article 32 of Vienna Convention on the Law of Treaties, "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

member states' sovereignty as the WTO adjudicating bodies could substitute the invoking states' judgments regarding the validity of their own national security.

Second, the Panel's interpretation approach in *Russia – Measures Concerning Traffic in Transit* grants the discretion to the invoking states to determine whether the GATT-inconsistent measures were necessary for the protection of the essential security interests. The necessity requirement is the most important part of the security exception, and granting such discretion in practice is analogous to providing a free pass to invoke the security exception whenever they wish. Any member state would be able to get away with GATT obligations if they have such discretion since all they have to do is argue that they have identified essential security interests and undertaken certain measures that they believe necessary for the protection of the security interests. Although the Panel's approach includes the good faith requirements under the general principle of international law to restrict the discretion of the invoking states, as discussed earlier in this dissertation, the good faith requirements can be easily satisfied by arguing that they have had good faith belief that there were essential security interests, and their measures were necessary for the protection of such interests.

As the Proposed Hybrid Approach Review Standard acknowledges the sovereign rights of the member states and thereby grants the discretion to the invoking states to determine the existence of the essential security interests, it is primarily focused on the review of the necessity requirement of the security exception. The review of whether the trade-restrictive measures are necessary for the protection of essential security interests can be conducted through the 'Necessity Test' developed in the context of interpreting the word "necessary" in Article XX of the GATT (the "Necessity Test"). The landmark case of the Necessity Test

is *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*[306] where the Appellate Body has ruled that the word "necessary" requires the application of the Necessity Test, which requires weighing and balancing a series of factors.[307] Such Necessity Test, however, has been criticized for the fact that the test vests a great deal of discretion in the hands of the WTO adjudicating bodies, which in turn could undermine "the regulatory space of the importing countries".[308] In light of the criticisms, the Appellate Body has, over time in subsequent cases, refined the Necessity Test.

E. Applying the Necessity Test to the Security Exception

As discussed above, the necessity requirement of the Article XXI must be reviewed by the WTO adjudicating bodies when the proposed review standards are applied. The necessity requirement is the most important matter in the review of the invocation of the Article XXI. In order to appropriately assess whether the trade-restrictive measure employed for the protection of essential security interests are indeed necessary and therefore should fall under the security exception of the GATT, the WTO adjudicating bodies should conduct the Necessity Test discussed above.

One may contend, however, that, since the contexts of the necessity test in the Article XXI and Article XX are not identical, the same analysis of the Necessity Test should not be applied. As explained earlier, Article XX of the GATT provides general exceptions to GATT obligations that are not directly related to security matters. Unlike the Article XXI, Article XX of the GATT does not provide an exception for measures that the invoking state

[306] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R (adopted 10 January 2001).
[307] *Id*, para 164.
[308] Neumann J, and Turk E. (2003) *Necessity revisited: proportionality in World Trade Organization law after Korea-Beef, EC-Asbestos and EC-Sardines*. Journal of World Trade 37(1), at 129-130.

subjectively "considers" necessary to protect its interests (it does not include the phrase "it considers" before the word "necessary"). Nevertheless, Article 31 of the VCLT requires that a treaty shall be interpreted in light of its object and purpose.[309] Since Article XX and the Article XXI share the same object and purpose, which is to provide limited exceptions to GATT obligations for measures that are necessary to protect certain essential national interests, this dissertation argues that the analysis of the Necessity Test, that is the interpretation of the word "necessary", established for Article XX could be, bearing mind of the contextual differences, appropriately applied within the context of the Article XXI.

The Appellate Body, through a number of cases, has established that the Necessity Test involves a two-prong analysis which first requires weighing and balancing of a series of factors, and the second prong requires comparison of the measure in question with other less trade-restrictive measures that are reasonably available to achieve the end pursued.[310] Specifically, the Appellate Body in *India – Certain Measures Relating to Solar Cells and Solar Modules,* citing previous cases, established that the Necessity Test requires weighing and balancing of multiple factors, including the followings: (a) contribution of the measure to the realization of the end pursued; (b) the importance of the interest that the measure is intended to protect; and (c) the trade-restrictive impact of the measure.[311] It is important to note that the Appellate Body made it clear that the weighing and balancing test of the Necessity Test "includes" these factors, which means the list of factors is not exhaustive.

[309] Vienna Convention on the Law of Treaties, *supra* note 12, art. 31.
[310] *See Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* WT/DS161/AB/R (adopted 10 January 2001); *EC – Measures Prohibiting the Importation and Marketing of Seal Products,* WT/DS400/AB/R, WT/DS401/AB/R (adopted 18 June 2014); and *India – Certain Measures Relating to Solar Cells and Solar Modules,* WT/DS456/AB/R (adopted 14 October 2016).
[311] *India – Certain Measures Relating to Solar Cells and Solar Modules,* WT/DS456/AB/R (adopted 14 October 2016), para 5.59 (Citing *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear,* WT/DS461/AB/R (adopted 22 June 2016), para 5.71-5.73 and 5.77; and *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* WT/DS161/AB/R (adopted 10 January 2001), para 162-164.)

Moreover, the Appellate Body stated that, in most cases, a comparison between the trade-restrictive measure in question and reasonably available less trade-restrictive alternative measures should be conducted.[312] This refers to the second prong of the Necessity Test, which requires the assessment as to whether there is a reasonably available less trade-restrictive alternative means to achieve the end pursued.

1. Weighing and Balancing Test

The weighing and balancing test is the first prong of the Necessity Test, and it requires the WTO adjudicating bodies to weigh and balance multiple factors to determine whether the trade-restrictive measure is necessary to protect the security interest. As explained above, while the Appellate Body has identified certain factors to consider in the weighing and balancing test, the list of factors is not exhaustive, and therefore, no single or a set of factors should be determinative, and the reviewing Panel or the Appellate Body should consider all other relevant factors they deem necessary.[313]

a. Contribution of the Measure to the Realization of the End Pursued

As highlighted by the Appellate Body in *EC – Measures Affecting Asbestos and Products Containing Asbestos*, the contribution of the measure to the realization of the end pursued is an important factor to consider when assessing the necessity of the measure in question.[314]

[312] *Ibid.*
[313] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (adopted 17 December 2007), para 172.
[314] Appellate Body Report, *EC – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R (adopted 5 April 2001), para 170.

The Appellate Body has established that "the greater the contribution, the more easily a measure might be considered to be necessary".[315]

If the trade-restrictive measure employed for the security interest protection is incapable of alleviating the relevant threat to the security interest or otherwise irrelevant to such threat, there would be no reason for the measure to be employed and granted immunity from the GATT obligations. The Appellate Body in *Brazil – Measures Affecting Imports of Retreaded Tyres* has explained that there must be a genuine relationship between the end pursued and the trade-restrictive measure at issue.[316]

The Appellate Body has also determined that there is no set rule on the methodology in analyzing the contribution of the measure to the realization of the end pursed, and the reviewing Panel may exercise its discretion to determine an appropriate methodology to assess the contribution.[317] The Appellate body did, however, mention that the selection of the methodology is "a function of the nature of the risk, the objective pursued, and the level of protection sought."[318] It is important to note that the Appellate Body has made clear that the contribution may be analyzed in quantitative as well as in qualitative terms[319], which means that the analysis of the contribution should not be limited to actual contribution (i.e., the immediate effect of the measure to the realization of the end pursued) but may also include the evaluation of the capability of making a contribution, especially when the

[315] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, supra* note 306, para 163. (Cited in *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R (adopted 22 June 2016), para 5.72)
[316] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres, supra* note 313, para 145.
[317] *Ibid.*
[318] *Ibid.*
[319] *Id*, para 146.

analysis is conducted at an early stage of the measure.[320] The Appellate Body in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* has affirmed this view and determined that the reviewing Panel may consider the capability of making a contribution and draw its conclusion on the analysis of the contribution of the measure based on the "design and expected operation" of the measure, instead of actual contribution.[321]

The importance of the contribution of the measure to the realization of the end pursued is also supported by the U.S. export controls law. The ECRA demands that export controls be consistently judged in terms of their effectiveness in advancing national security and foreign policy interests.[322] Despite the fact that economic sanctions can be distinguished from export controls in many ways, they are both implemented for the same purpose of protecting national security interests. Therefore, the effectiveness of the trade-restrictive measures should be a consideration for the review of both economic sanctions and export controls for the purpose of the security exception. In general, trade-restrictive measures employed for broad foreign policy concerns or laudable philosophical ideas without a specific end pursued or threat would often mean a low contribution or low capability to contribute because the end pursued or threat itself is either unclear or may change over time,

[320] The Appellate Body found that the impact of the measure was not yet realized, but that it was "apt to" induce changes over time in the behaviour and practices of commercial actors in a manner contributing to the end pursued. *See Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (adopted 17 December 2007), para 154 (The Appellate Body stated: "Over time, this comprehensive regulatory scheme is apt to induce sustainable changes in the practices and behaviour of the domestic retreaders, as well as other actors, and result in an increase in the number of retreadable tyres in Brazil and a higher rate of retreading of domestic casings in Brazil.").

[321] Appellate Body Report, *EC – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R (adopted 18 June 2014), para 5.223.

[322] *See* §105 of the ECRA. In particular, Section 105(b)(1)(A)(ii) provides that "...the purpose of the delegations of authority pursuant to subsection (a) are...to advise the President with respect to...exercising the authority under this title to implement policies, regulations, procedures, and actions that are necessary to effectively counteract those threats". Section 105(b)(1)(C) provides that "...the purpose of the delegations of authority pursuant to subsection (a) are...to obtain independent evaluations, including from Inspectors General of the relevant departments or agencies, on a periodic basis on the effectiveness of the implementation of this title in carrying out the policy..."

so it would be hard to prove the contribution or assess the capability of the measure to contribute.[323]

b. Importance of the Interest that the Measure is Intended to Protect

Taking into account the importance of the interest that the measure is intended to protect has been highlighted by the Appellate Body in *EC – Measures Affecting Asbestos and Products Containing Asbestos.*[324] The Appellate Body emphasized the observations from *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* that "the more vital or important common interests or values" pursued, the easier it would be to accept the measure employed as a necessary measure to protect the relevant interest.[325]

The importance of security interests may be assessed by examination of the nature and/or seriousness of the threat to the particular security interest. Regardless of what the invoking states may argue, the essential security interests on which economic sanctions and export controls are based are often unrelated to national security threats or involve mere foreign policies. Therefore, it would be important that the WTO adjudicating bodies examine the nature and/or seriousness of the threat to the claimed security interest when determining whether the trade-restrictive measure employed for the protection of the security interest is indeed necessary.

[323] Michael P. Malloy (1990) *Effects and Effectiveness of Economic Sanctions*, 84 Am. Soc'y Int'l L. Proc. 203, at 206 – 208.
[324] Appellate Body Report, *EC – Measures Affecting Asbestos and Products Containing Asbestos, supra* note 314, para 172.
[325] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, supra* note 306, para 162.

Threats to national security can take various forms and may differ substantially in the degree of severity. They can apparently range from the protection of footwear manufacturers (i.e., *Sweden – Import Restrictions on Certain Footwear*[326]*)* to a direct nuclear attack. Historical view of the threats to national security includes international terrorism, the presence of a nuclear power facility, human rights violations, and narcotics trafficking. In contrast, the modern view of the threats on which certain measures of the export controls and economic sanctions are based includes the dangers of technology transfer, diversion, re-exportation, and the dual use of goods and services.

In order to examine whether the nature and/or seriousness of the threat to the claimed essential security interest is significant enough to make the relevant security interest important, the WTO adjudicating bodies should assess what exactly constitutes the threat, whether the threat is an actual threat or at least perceived threat, and whether such threat is directed at the invoking state. If a threat is not directed at the invoking state and the invoking state employed the trade-restrictive measure merely in support of another state that the threat is directed to, it would be difficult to conclude that such threat is significant enough to make the relevant security interest important to the invoking state, unless the threat, nonetheless, has a significant impact on the invoking state.[327]

[326] Sweden invoked the article XXI of the GATT to impose a global quota on footwear for the protection of the domestic production based on the argument that soldiers need footwear for performing their services. *See Sweden - Import Restrictions on Certain Footwear*, L/4250 (17 November 1975).

[327] GATT Council, Minutes of Meeting held on May 7, 1982, GATT Doc. C/M/157 (22 June 1982), at 2-6. "...it is difficult to understand how the dispute between the United Kingdom and Argentina concerning the Falkland Islands presented such a substantial threat to the security of Canada and Australia that they felt compelled to join in the sanctions against Argentina."

c. Trade-Restrictive Impact of the Measure

As explained earlier, the weighing and balancing test should include the assessment of the trade-restrictive impact of the measure employed for the protection of essential security interests. The Appellate Body in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* highlighted the importance of the assessment of the trade-restrictive impact of the measure and explained that a measure with a "relatively slight impact…might more easily be considered as necessary than a measure with intense or broader restrictive effects".[328] The Appellate Body did not provide any relevant guidance on how this factor should be assessed but instead left open the list of criteria to be taken into account.

The impact assessment should cover not only an analysis of the immediate effect of the trade-restrictive measure in question but also an examination of the overall effects that such an interruption in social and economic intercourse of the trade-restrictive measure will have on the targeted state's ability to pursue future growth and development.[329] The trade-restrictive impact of the measure can differ significantly depending on the circumstances. Trade-restrictive measures imposed by economically powerful states usually have a greater impact as they are either a major purchaser of the targeted state's exports, a major supplier of needed imports on technology, or a major source of financial aid. In that light, the economic sanctions and export controls imposed by the U.S. may indeed have "costs of a macro-economic nature."[330] In contrast, trade-restrictive measures imposed by a smaller state that engages in limited trade with the targeted state would have a comparably minor impact.

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[328] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, *supra* note 306, para 163.
[329] Michael Reisman (1995) *The Costs and Benefits of Economic Sanctions: The Bottom Line*, 89 Am. Soc'y Int'l L. Proc. 337, at 359.
[330] *Id*, at 359.

Also, the intended timeframe of the trade-restrictive measure may be examined in the impact assessment. Long-term measures such as the comprehensive economic sanctions that are imposed for decades are likely to be considered to have a significant impact as they may possibly create a generation that lacks the needed education, technological expertise, and other skills necessary to compete in a global market. Trade-restrictive measures designed to alter the fundamental political or economic structures of another state often have the tendency to continue for a longer period and likely to result in long-term consequences. Long-term measures may not only result in an adverse effect on the targeted state's economy but also alter the targeted state's fundamental character and its people. Generally, trade-restrictive measures that are specifically directed at tangible or identifiable threats that are supported by the international community are more likely to be successful within a limited time frame and therefore may end in a shorter period of time compared to those designed to alter the fundamental political and economic structures of another state, which tend to run the risk of lengthy imposition.

Moreover, the impact of the trade-restrictive measures on non-target states, whether intended or not, should also be considered. As discussed earlier, the U.S. export controls and economic sanctions have broad extraterritorial jurisdiction, and because of that, the impact of these types of trade-restrictive measures is never limited to the particular targets. Other innocent states, especially those that are major customers or suppliers of the targeted state, are inevitably affected by these trade-restrictive measures. The impacts on the innocent states may include, among other things, substantial loss of business, uncollectable debts, distorted balance of payments, etc.

The impacts on the innocent states can be amplified if there are any third-party states that are coerced into participation through threats of similar measures or threats to reduce foreign aid, etc. Trade-restrictive measures, especially those imposed by a powerful state, often summon reluctant participants. For example, the Trump Administration's designation of Huawei on the Entity List has caused almost all semiconductor companies in the world, including non-US companies, to postpone their businesses with Huawei, and the other U.S. trade restrictions against China, in general, have started other states such as the UK and the EU to consider imposing similar restrictions against China. Since the impact on non-target states can be severe, the trade-restrictive impact on non-target states should also be considered in the assessment of the trade-restrictive impact of the measure at issue.

2. Less Trade-Restrictive Alternative Means

The second prong of the Necessity Test is to review whether there are reasonably available less trade-restrictive alternative means to achieve the end pursued. The analysis should assess (1) whether there are less trade-restrictive means to achieve the end pursued and (2) whether such means are reasonably available to the invoking state.

After this factor was introduced as a part of the Necessity Test in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* the interpretations of the factor have evolved over time. In the beginning, it was established in *United States – Restrictions on Imports of Tuna*[331] that the word "necessary" means that there no alternative existed.[332] The Panel in the case adopted the arguments raised by the European Economic Community that the word "necessary" means "indispensable, requisite, inevitably determined, or

[331] *United States – Restrictions on Imports of Tuna*, GATT Doc. DS29/R (16 June 1994).
[332] *Id,* at 5.35.

unavoidable"[333], which implies that there must be no other alternative means to achieve the desired outcome, other than the measures adopted by the invoking state (known as the "least trade-restrictive requirement").

Nevertheless, the difficulty of scientifically proving or establishing that the measure employed by the invoking state is not the least restrictive means to achieve the desired outcome or determining whether a hypothetical less restrictive alternative is likely to be affordable and effective in the circumstances was acknowledged. As a result, there has been an evolution in the interpretation of the "least trade-restrictive requirement". In light of the foregoing, the Appellate Body, in subsequence cases, has adopted a considerably less burdensome version of the requirement, which requires that there is a reasonably available less trade-restrictive means to achieve the same level of protection.[334] Thus, when the WTO adjudicating bodies consider this factor, they must take into account (1) whether there are less trade-restrictive means to achieve the same level of protection and (2) whether that less trade-restrictive means are reasonably available to the invoking state.

When assessing the existence of less trade-restrictive means to achieve the same level of protection, it is important to assess whether such alternative means are in fact capable of achieving the same level of protection desired by the invoking state. The Appellate Body in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* has established that the alternative means must be that would "preserve for the responding Member its right to achieve its desired level of protection with respect to the

[333] *Id*, at 3.71.
[334] Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R (adopted 22 June 2016), para 5.74.

objective pursued". [335] In terms of the requirement that the alternative means be "reasonably available", the Appellate Body has established that the availability of the alternative means should not be merely theoretical, or the adoption of such alternative means impose an undue burden or cause substantial difficulties to the invoking state[336].

F. Applications of the Proposed Review Standard

In this section, the Proposed Hybrid Approach Review Standard will be applied to examine whether the U.S. trade-restrictive measures discussed in Part II of this dissertation (i.e., export controls and economic sanctions) would be justified under the security exception of the GATT, assuming such dispute arises. It must be noted, however, that this analysis is based upon a preliminary assessment of the measures under the U.S. export control and economic sanctions, in particular being limited to such measures' certain characteristics only, and is primarily presented to demonstrate how in principle the assessments of the trade-restrictive measures for purposes of the security exception of the GATT can be conducted using the Proposed Hybrid Approach Review Standard.

Since the Proposed Hybrid Approach Review Standard acknowledges the discretion of the invoking state to determine the essential security interest and focuses on the review of the necessity of the measures undertaken to protect such interest, the 'Necessity Test' under the WTO's jurisprudence will be applied. First, the weighing and balancing test will be applied to review the necessity of the trade-restrictive measure by weighing and balancing the

[335] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (adopted 20 April 2005), para 308.
[336] *Id*, para 308. The Appellate Body has affirmed the view in *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear* (*See* Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear, supra* note 334, para 5.74).

factors identified above. Then there will be a review of whether there is a less trade-restrictive means reasonably available to the invoking state to achieve the end pursued.

1. The U.S. Export Controls

The export control mechanisms in the U.S. contain selective export licensing requirements, which include classification of countries and goods into different licensing requirements, blacklisting on the Entity List, and complete embargoes on certain countries and regions. Such selective licensing requirements, together with the broad extraterritorial jurisdiction of the "item-origin based", have already been claimed to be inconsistent with the GATT obligations.[337] Due to the ongoing expansion of the controlled items through the enactment of the ECRA and the rapidly increased use of the export controls for foreign policy reasons, it is not impossible to imagine future WTO litigation over the selective licensing requirements of the U.S. export controls.

As explained in Part II of this dissertation, the EAR specifies the reasons for control, which include nuclear non-proliferation reasons, chemical and biological weapons reasons, anti-terrorism, crime control, etc. The purpose of the export controls is based on the protection of potential war, and it attempts to control the exportation of certain highly sensitive dual-use goods that can be used for military purposes. Also, it is common for governments to have certain export control mechanisms, and other countries maintain similar export control mechanisms for the very same purpose. Nevertheless, whether certain selective licensing

[337] Statement by the Head of the Czechoslovak Delegation Mr. Zdenk Augenthaler to Item 14 of Agenda, Request of the Government of Czechoslovakia for a Decision Under Article XXHII as to Whether or Not the Government of the United States of America Has Failed to Carry Out Its Obligations Under the Agreement Through Its Administration of the Issue of Export Licenses, at 5, 12, CP.3/33 (May 30, 1949), Available at http://www.wto.org/gatt-docs/English/SULPDF/90320183.pdf.

requirements of the export control mechanisms are necessary measures for the protection of the security interest requires a case-by-case review.

In general, the U.S. export controls cover a broad range of dual-use items, and the level of controls to each type varies depending on the nature of the items, the intended destinations, and end-uses. Some of the recent enhancements of the export controls, however, seem to be overly restrictive, and therefore, it raises questions as to whether such specific measures are indeed necessary for the protection of the security interest. For instance, as discussed in Part II of this dissertation, the new rule under the MEU Licensing Requirements significantly expanded (1) the scope of the covered items and (2) the destinations to which the MEU Licensing Requirements apply. Despite the underlying purpose of the enhancement is in relation to the concerns regarding the significant overlap between the development of China's military and commercial sectors, the measures undertaken seem excessive for the protection of that particular security interest.

In order to assess the necessity of the measures, the Necessity Test discussed above should be conducted. As explained, the Necessity Test is a two-prong analysis that first requires weighing and balancing of multiple factors and comparison with less trade-restrictive alternative means to achieve the end pursued. The weighing and balancing test requires analysis of (1) the importance of the interest that the measure is intended to protect, (2) the contribution of the measures to the realization of the end pursed, and (3) the trade-restrictive impact of the measure altogether to determine whether the measure in question is a necessary measure to protect the essential security interest.

As mentioned earlier, the purpose of the MEU Licensing Requirements is to restrict exports of U.S. products, technology, and software to military organizations in China, Russia, and Venezuela. Due to the concern related to the potential military-civilian collaboration in the listed countries, the new rule under the MEU Licensing Requirements significantly expanded the scope of the covered items and destinations subject to the MEU Licensing Requirements to restrict not only exports of highly sensitive items to military organizations in the targeted countries but also exports of a broad range of general commercial items to private entities that may have a relationship with the military organizations.

The interest that the measure is intended to protect is quite clear. The U.S. was concerned that the close ties between civilian and military organizations in the listed countries might enable reexportations to the military organizations, which are otherwise prohibited under the EAR, and such reexported items might be used in prohibited activities, such as developments of nuclear weapons or other military purposes. Thus, it can be argued that the interest that the measure is intended to protect is an important security interest as the measure is undertaken to prevent the development of nuclear weapons or the like that are not only prohibited under the U.S. export controls but also prohibited internationally.

The contribution of the measure to the realization of the end pursued, however, is somewhat unclear. The expanded scope of the covered items includes general commercial items, including smartphones, standard modems, routers, and other relatively common commercial goods. While the measure may further restrict the military organizations from sourcing certain items, these types of general commercial items are not directly related to assisting in prohibited activities such as the development of nuclear weapons. Thus, it is difficult to imagine how and to what extent such measure can contribute to the realization

of the end pursued, which is to restrict exports to the military organizations for prohibited activities.

The trade-restrictive impact of the measure is nevertheless significant. The expansion of the covered items under the strengthened MEU Licensing Requirements includes a broad range of commercial goods. Many of these newly covered items are extremely prevalent in the global supply chain and subject to either zero or very low controls. In addition, the expansion of the scope of the destinations led to include a significant number of private entities as destinations subject to the MEU Licensing Requirements; even those entities are engaged primarily in civilian activities. As a result, the strengthened MEU Licensing Requirements made it extremely difficult for exporters of general commercial goods to confirm whether their exports to China, Venezuela, and Russia are permitted without a specific export license from the U.S. Government (for example, the exports of standard modems or routers to a Chinese company would be in violation of the EAR if such company happens to be engaged in providing repair services to the Chinese military organizations).

While the interest that the measure is intended to protect may be an important security interest, considering the unclear extent the measure may contribute to the realization of the end pursued and the significant trade-restrictive impact of the measure, this dissertation argues that an application of the weighing and balancing test would likely fail to pass the Necessity Test, and hence such measure should not be considered necessary for the protection of the security interest. Although it might be true that countries such as China, Venezuela, and Russia might have more military-civilian collaboration than other countries, prohibiting exports of such a broad range of general commercial goods that can hardly be

used for military purposes to civilian companies that might only have some level of relationship with the military organization is difficult to be considered as necessary measures for the protection of the security interest that the measure is intended to protect.

Furthermore, there are reasonably available less trade-restrictive alternative means to achieve the end pursued. Instead of expanding the scope of the MEU Licensing Requirements, which entails significant trade-restrictive impact, the U.S. Government could have (1) determined particular civilian entities that have strong ties with the military organizations, which have assisted or would likely to assist in prohibited activities, and blacklisted them on the Entity List with a clear scope of prohibited items for (re)exportation, or (2) limited the scope of covered items to those that can actually assist in prohibited activities. While the measure (expansion of the covered items and destinations subject to the MEU Licensing Requirements) may have been dressed in terms of protecting the security interest, it may arguably be based more on foreign policy reasons than the security interest that the MEU Licensing Requirements is originally intended to protect.

With the enactment of the ECRA, the U.S. Government is currently in the process of a significant expansion of its controlled items under its export control mechanisms. As explained in Part II of this dissertation, this expansion focuses on identifying and adding controls on the ‘emerging’ and ‘foundational’ technologies that are essential to the national security of the U.S. but are not yet subject to the EAR. Although it has not been determined which technologies would be added as controlled items, the categories of technology identified for ‘emerging technologies’ alone represent extremely broad areas of technology, and it might be an indication that a substantial range of emerging and foundational technologies would be controlled under the EAR. Should the expansion of the controlled

items be overly broad, as initiated by the Trump Administration, the necessity of certain newly added export control measures can possibly be subject to challenge.

2. The U.S. Economic Sanctions

Economic sanctions are probably the most trade-restrictive measures a state can impose against another. The list-based sanctions are comparably less trade-restrictive as they are generally limited to prohibit dealings with certain targeted entities or industries. The comprehensive sanctions, on the other hand, such as Iran sanctions and Cuba sanctions, have a broad scope of restrictions that prohibit not only US persons' dealings with the targeted state but also non-US persons from engaging in certain transactions with the targeted state under secondary sanctions and 'causing violation' prohibition.

Since the comprehensive sanctions of the U.S. are imposed on countries that have been in military conflict with the U.S. or otherwise involved in significant human rights violations, it would not be too difficult to establish that there is an essential security interest to protect. Some of the recent enhancements of the sanctions prohibiting non-US persons' dealings with the targeted state might possibly be considered far-reaching as the relevant sanctions directly prohibit other states' engagement with the targeted state without any US-nexus. For instance, the Trump Administration has designated eighteen major Iranian banks as SDNs subject to secondary sanctions. The main legal implication of such measure is that any persons, including non-US persons, which engage in any types of transactions or dealings with these banks would be in violation of the Iran sanctions. Although the U.S. has been in military conflict with Iran and therefore it may have an essential security interest to protect the country from potential military conflict and to prevent Iran from developing military weapons, prohibiting other states from trading with Iran in non-military transactions

without any US-nexus throughout the entire transactions might be overly restrictive or at least arguably beyond what is necessary to protect the U.S. from potential military conflict.

Concerning the importance of the interest that the measure is intended to protect, it is relatively straightforward to argue that the interest that the measure is intended to protect is an important national security interest of the U.S. Due to the military conflict between the U.S. and Iran, the U.S. has long been concerned with the development of military weapons (i.e., nuclear weapons) by Iran as well as the potential military conflict. There has been constant tension between the U.S. and Iran to date, and it is still considered as one of the important national security interests of the U.S.

The contribution of the measure to the realization of the end pursued is likely to be substantial as well. Before the employment of the measure, despite the Iran sanctions in place, non-US persons were able to trade with Iran if there is no US-nexus in the relevant transactions (i.e., a Korean company was able to export televisions to Iran if the televisions are not subject to the EAR (no US-nexus), and there is no involvement of US person throughout the entire transactions, which means there is no involvement of a US bank to process payments, no US distributor in the supply chain, etc.). After the measure was employed, that is when a non-US person's dealing with the Iranian banks itself has been subject to the prohibitions under the Iran sanctions, no one in the world could trade with Iran without risking violations of the Iran sanctions because they are unable to engage the Iranian banks in the transactions (even if the non-US person does not engage any Iranian bank, the Iranian counterparty's engagement of any of the Iranian banks would be sufficient for the U.S. Government to impose a penalty on the non-US party as the Iran sanctions prohibit indirect engagement and are based on strict liability). As a result, it is likely that

the measure would contribute to the realization of the end pursued by the U.S., which is to prevent the development of military weapons and potential military conflict by way of economic isolation.

The trade-restrictive impact of the measure is unquestionably significant. As discussed earlier in this dissertation, the U.S. trade-restrictive measures have been subject to discussion for their wide extraterritoriality. Some of the examples include the "item origin-based" jurisdiction of the U.S. export controls where a non-US produced item with 1% of US technology incorporated into the item becomes subject to the U.S. export controls, and secondary sanctions of the U.S. economic sanctions, which directly prohibit non-US persons from engaging in certain types of transactions with the targeted states (for example, prohibiting non-US persons from trading with Iran in automotive or energy sectors). This measure at issue (designation of eighteen major Iranian banks as SDNs subject to secondary sanctions), however, has a much broader extraterritorial effect as it results in complete embargoes against Iran for not just the U.S. but also all other countries. Although this measure, on its face, has been deployed to sanction the Iranian banks, the effect of such measure would practically block all international trades of Iran due to the difficulty to process payments for the Iran-related business in compliance with the Iran sanctions.[338]

In addition, the measure at issue has the effect of coercing other states to alter their policies to support the U.S. sanctions and encourages participation by way of regulating non-US persons' dealings with Iran. While the U.S. may be able to argue that the purpose of the measure is to protect essential security interests, the measure inadvertently has the effect of

[338] In order to engage in Iran business without a risk of violating the Iran sanctions, one may obtain a specific license from the U.S. Government or conduct business that are specifically allowed under the Iran sanctions (for example, the General License D-1 allows exports of mobile phones to Iran and relevant payment process).

influencing other states' policies against Iran. Each state is bound by international treaties as well as customary international law to the fundamental principles of sovereignty and nonintervention, which stand for the proposition that a state has the sovereign right to conduct its affairs without external interference and that all states must respect their political integrity. It follows that, in principle, states are prohibited from intervening in the internal or external affairs of another state regarding matters that a sovereign state has sovereign right to decide for itself, including the implementation of political and economic systems, the formation of foreign policy, and the creation of alliances and trading relationships with other states.[339] Within such context, the measure at issue allegedly imposed for security interests protection purposes seems only tangentially aimed at protecting the security interest and instead aimed at influencing other states to alter their trading relationships with Iran.[340] With the direct prohibitions to non-US persons' dealings with Iran, what the Trump Administration intended might have been to coerce other states into supporting the policies of the U.S. Despite the laudable purposes the measure may be claimed to be based on, the element of such coercion might arguably form the very essence of the prohibited intervention of the sovereign rights of other states to dictate the course of their own governments.[341] Although the measure does not force other states to alter their policies *per se*, such strong sanctions imposed by the most powerful state may definitely play a certain role in influencing other states' policies because many would fear that there is always the possibility that a non-compliant state or company can be the next target. Such coercion is not one of the factors directly mentioned in prior WTO cases, but it may well be considered as the trade-restrictive impact on non-targeted states.

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[339] Cameron, *supra* note 183, at 234-238.

[340] The U.S., for example, has admitted in *Nicaragua v U.S.* that it has intervened (under the pretext of protecting its essential security interests) in the affairs of other states for reasons involving the domestic policies of that country, its ideology or the direction of its foreign policy. *See Military and Paramilitary Activities (Nicar. v. U.S.)*, *supra* note 188, at 109.

[341] *Military and Paramilitary Activities (Nicar. v. U.S.)* (1986), *supra* note 188, at 108.

Although the measure at issue may be an effective mean to isolate Iran economically to prevent their development of nuclear weapons, the effect of coercing other states to participate in the sanctions by prohibiting all types of trades between other states and Iran might together with the significant trade-restrictive impact of the measure seem excessive for the protection of the security interest. The U.S. Government could have designated the Iranian banks as SDNs subject to primary sanctions so that they could limit the prohibitions to those dealings with Iran that has at least some US-nexus in the transactions (i.e., reexportations of US items to Iran, indirect financial service by US banks, etc.) to protect the security interest, which would be less trade-restrictive means.

Considering the analysis above, it would be difficult to conclude that the measure designating the eighteen major Iranian banks as SDNs subject to secondary sanctions is a necessary measure for the protection of the security interest of the U.S. Such measure's trade-restrictive impact is not only significant, but the measure also has the broadest scope of prohibitions that practically blocks all international trades of the targeted country. Although the U.S. may have an essential security interest to protect the country from a potential military conflict and to prevent the development of military weapons by Iran, pressing comprehensive embargoes against Iran for all other states seems to entail a massive trade-restrictive impact that outweighs the other factors. It is not clear, at this stage, whether the U.S. Government would strictly enforce these broad secondary sanctions to prohibit any types of dealings between non-US persons and the sanctioned banks. However, the prohibitions under such measure on its face arguably seem beyond what is necessary to protect the security interests of the U.S.

CONCLUSION

Since former President Donald J. Trump declared protectionist approaches to international trades in 2017, the United States has been substantially strengthening export controls and economic sanctions at an unprecedented pace. These trade-restrictive measures have broad extraterritoriality and could potentially have a significant impact on international trades.

What makes it more problematic is that even though these trade-restrictive measures may be found inconsistent with the GATT obligations, the U.S. should arguably be able to rely on the security exception provided under the Article XXI of the GATT and argue that their measures are justified under the security exception. Although the U.S. may exercise its sovereign right to deploy trade control measures to protect its national security interests as it deems necessary, such measures should be within the ambit of the Article XXI to be accorded with the protection from the security exception of the GATT.

Nevertheless, the security exception has been interpreted or otherwise considered by the U.S. and other most developed states as if it allowed the invoking state to determine its own security interests and act as it deems necessary without any interference from the WTO adjudicating bodies. The U.S., in particular, has been the most frequent user of the security exception, relying on the exception for most of its trade-restrictive measures. The increasing and aggressive use of export controls and economic sanctions as foreign policy tools in reliance on the security exception have been amplified over the last several years.

Due to the ambiguous scope and the absence of clear definitions of the key terms of the Article XXI of the GATT, there has been a general understanding that the Article XXI of the GATT is a self-judging provision, which as a result has enabled states to freely impose trade-restrictive measures to preserve their interests in protecting their national security matters in ways they deem necessary. However, after a fierce debate over decades, recent cases (i.e., *Russia – Measures Concerning Traffic in Transit*[342] and *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*[343]) have finally established that the Article XXI of the GATT does not provide a multi-purpose shield and is indeed subject to review by the WTO adjudicating bodies.

The escape clause for national security matters, such as security exceptions, is an essential part of international obligations. Without an escape clause for essential security matters, states are more likely to walk away from an international agreement as the agreement may seem to inadequately appreciate the security interests of sovereign states. However, such exceptions can easily be prone to abuse if there is no effective review system with clear review standards to screen their use. Thus, to strike a balance between state sovereignty and abuse prevention, there must be an appropriate review standard that guarantees adequate judicial review of the invocation of the security exception. Such review standard would be able to not only balance the member states' interests in protecting their national security and the international agreement's interest in preventing abusive norms but also ensure institutional stability and predictability of the WTO as a multilateral trading system.

[342] Panel Report, *Russia – Measures Concerning Traffic in Transit*, *supra* note 9.
[343] Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, *supra* note 15.

This dissertation argues that the review standard for the security exception of the GATT adopted by the Panel in *Russia – Measures Concerning Traffic in Transit* is inadequate to effectively prevent the potential abuse of the security exception in a balanced manner. It, therefore, further argues that the WTO needs to adopt a more reasonable and objective review standard for future security exception disputes.

To that end, the Proposed Hybrid Approach Review Standard is newly proposed in this dissertation. The review standard endeavors to appropriately balance the invoking states' interests in protecting their national security matters and the interests of other member states to open trade. This review standard is similar to the review standard adopted in *Russia – Measures Concerning Traffic in Transit* as it grants discretion to the invoking states to determine the essential security interests, but it employs an objective interpretation approach to the necessity requirement of the Article XXI and requires objective assessments of the necessity of the trade-restrictive measures undertaken. This review standard attempts to avoid the difficulties that might arise out of the application of the Reasonable Invocation Review Standard that is arguably the most effective review standard for abuse prevention purposes while minimizes the self-judging component of the security exception. Since this review standard acknowledges the invoking states' discretion to determine their own security interests, it primarily focuses on the objective assessments of the necessity of the trade-restrictive measures undertaken to protect the security interests. This dissertation argues that the 'Necessity Test' under the WTO's jurisprudence, which requires weighing and balancing of multiple factors, should be applied in the assessment of the necessity of the trade-restrictive measures.

As many experts expected, the Biden Administration has been continuing most of the Trump Administration's aggressive economic sanctions and export controls as well as China policies[344], and these trade-restrictive measures and the trade protectionism initiated by the Trump Administration have been maintained as a central part of the U.S. foreign policy to date. In relation to China policies, in particular, the Biden Administration has gone even further than the Trump Administration and added various further restrictions, including blacklisting a large number of Chinese companies in technology sectors, prohibiting imports from and investments into certain major Chinese companies, etc.

Considering a large number of pending cases on the Article XXI disputes and the strengthened export controls and economic sanctions globally, which are poised to raise security exception disputes, there is an urgent need for the reexamination of the review standards for the Article XXI. Without adopting a more reasonable and objective review standard, such as the one proposed in this dissertation, which is designed to minimize the self-judging component of the Article XXI in a balanced manner, the potential abuse of the Article XXI would not be effectively prevented, and the WTO's role of securing international peace through economic stability and non-discrimination among its member states could be seriously undermined.

[344] Murphy, *supra* note 107.

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국문초록

미국의 수출통제 및 경제제재의 WTO 합치성에 관한 연구

– GATT XXI 조의 심사기준을 중심으로 –

홍준기

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트럼프 前대통령이 “보호무역주의” 이데올로기에 기반한 새로운 무역정책을 선언한 이후, 미국은 국가안보 보호의 목적 下 매우 공격적인 경제제재와 수출통제를 운영하고 있다. 미국이 국제무역에 대하여 보호주의적 접근을 취한 것은 처음이 아니지만, 트럼프 前대통령의 무역정책은 근대 개방 무역 시대에서 볼 수 있는 가장 극단적인 보호무역주의라 할 수 있다.

트럼프의 대통령 취임 이후, 경제제재와 수출통제는 美정부 외교 정책의 지배적인 부분이 되었다. 미국의 경제제재는 지난 몇 년 동안 전례 없는 속도로 강화되었다. 특히, 트럼프 행정부는 美정부가 거래금지대상자로 등재한 국가 또는 기업/개인 관련, 非미국 기업/개인의 거래를 통제하기 위하여 경제제재 프로그램을 강화해왔다. 또한, 美정부는 현재 중국과 같은 경쟁국가向 미국 기술 이전을 통제하기 위하여, 신흥(Emerging) 및 기반(Foundational) 기술을 美수출통제규정 上 통제품목 범주에 포함시키는 수출통제 품목 대규모 확장을 진행 중이다. 바이든행정부 출범 이후에도 美수출통제 및 경제제재는

지속적으로 강화되고 있고, 특히 중국 견제를 위한 무역제한 조치는 더욱더 다양한 방법으로 추가 도입되고 있다.

미국의 수출통제 및 경제제재 관련 법률은 광범위한 역외관할권(Extraterritorial Jurisdiction)을 통해 국제무역에 상당한 영향을 미치고 있다. 특히, 이러한 무역 제한 조치들은 GATT 협정문의 원칙과도 저촉될 수 있다. 그럼에도 불구하고, 美정부는 미국의 무역 제한 조치는 국가안보 보호를 목적으로 시행된 조치이므로, GATT 안보예외(Security Exception)가 적용되어 GATT 협정문 위반이 아님을 주장할 수 있을 것이다. GATT XXI 조에 있는 안보예외는 적용 범위가 불분명하고, 조항 內 핵심 용어에 대한 정의의 부재로 인하여 오랜 시간 동안 논란에 대상이 되어왔다. 일반적으로, GATT 안보예외는 자체판단조항(Self-Judging Provision)이라는 개념이 지배적이었으므로, 안보예외의 남용은 효과적으로 제한되지 못했다.

한편, 2019 년 WTO 패널은 *Russia – Measures Concerning Traffic in Transit* 사건을 통해 GATT 안보예외에 대한 판결을 내렸는데, 이 판결은 GATT 안보예외의 적용 범위 및 해석에 대한 WTO 의 최초 판결이다. 패널의 판결 내용은 GATT 안보예외 관련 분쟁 시 해당 조항 해석 관련 참고 목적으로 사용될 수 있으므로, GATT 안보예외 관련 큰 발전을 의미하기는 하나, WTO 에는 선례구속의 원칙(System of Precedent)이 존재하지 않으므로, 향후 분쟁에 대한 구속력을 갖고 있지는 않다. 해당 판결은 GATT 안보예외가 자체판단조항이 아님을 판시했지만, 해당 예외를 주장하는 국가의 안보예외 적용 요건 관련 상당 부분에 대한 재량권을 인정했다.

본 논문은 GATT 안보예외 관련 패널의 판결이 회원국들의 자국 안보 보호에 대한 권리와 자유/개방 무역에 대한 권리 사이에 체계적인 균형을 제공하고는 있으나, 오랜 기간 동안

논란이 되어온 안보예외의 핵심적인 문제점(자체 판단을 통한 안보예외 남용 가능성)을 해소하기에는 부족한 점이 있다고 주장한다. 본 논문은 GATT 안보예외의 잠재적 남용 가능성을 효과적으로 제한하기 위해, WTO 는 더욱더 엄격한 심사기준을 도입하여야 한다고 주장하며, 심사기준의 대안을 제안한다.

주요어: 보호무역주의; 미국의 경제제재; 미국의 수출통제; 일방적 무역 제한 조치; GATT XXI 조; 안보예외; 심사기준; 세계무역기구; 및 관세 무역 일반 협정

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