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

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I. INTRODUCTION

Article XXI of the General Agreement on Tariffs and Trade (GATT) was designed to create a “security exception.” Pursuant to this exception, a contracting party can escape its obligations under the Agreement and take any action that it considers necessary for the protection of its essential security interests “in time of war or other emergency in international relations.” However, the distinction between the protection of an “essential security interest” and the advancement of a particular policy agenda has remained substantially, and quite intentionally, blurred. As a result, although article XXI was not designed to create a “policy” exception, or to create a mechanism by which one nation could impose its social, political, or economic ideology on another, in an environment where both global competition and global interdependence continue to rise, it is conceivable that article XXI will be invoked for the wrong reasons. More significantly, article XXI will continue to serve as a generally unspoken basis for the unilateral imposition of restrictive trade measures for non-economic purposes. These measures, often imposed without identifiable standards and without any accountability or effective retaliatory remedy, undermine the cooperative integrative purposes of the world trade system. These kinds of trade restrictions perpetuate a power-based approach to international relations that generates an unacceptable imbalance between the realities of national sovereignty and the spirit of a more multilateral form of global economic governance.


2. Article XXI of GATT, supra note 1, states that:

(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.

A substantially similar provision is contained in article XIV bis of the General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, Annex 1B, LEGAL TEXTS, supra note 1, at 284 [hereinafter GATS Agreement].

3. Professor John H. Jackson, the leading authority on GATT, has noted that the exceptions found in article XXI “provide a dangerous loophole to the obligations” contained in the Agreement. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 748 (1969). While recognizing that article XXI has a legitimate role to play, Professor Jackson expressed concern regarding its potential for abuse and the possibility for the “arbitrary exercise of economic power.” Id. at 752. He went on to note that “[i]n addition to possible abuse for international political reasons, Article XXI may also shelter some measures that, although ostensibly imposed for security reasons, may actually be protectionist-oriented.” Id. at 752.

4. Renato Ruggiero, Director-General of the World Trade Organization, stated:
The lack of clarity surrounding article XXI and other security-based restrictions is quite understandable. The term "security" or "essential security interest" is, after all, subject to broad interpretation. While one might recognize the security threat to the United Kingdom during the Falkland Conflict,\(^5\) it is somewhat more difficult to recognize the threat posed to Canada and Australia during that crisis\(^6\) or the threat to the security of Sweden resulting from a decrease in the domestic production of footwear.\(^7\) The commingling of the concepts of security, foreign policy, and economic welfare have exacerbated this confusion.\(^8\)

Compounding the inherent absence of specificity is the fact that most industrialized nations have taken the position that "security interests" are indeed self-defining. As a result, the decision regarding the validity of an action allegedly taken for security reasons is left solely to the discretion of the party taking that action. Motivation becomes irrelevant, justification and approval unnecessary. Without a mechanism for a review of such actions, each nation has the sovereign right to define its own national security interests


\(^7\) Sweden—Import Restrictions on Certain Footwear, GATT Doc. L/4250, at 1-4 (Nov. 17, 1975).

\(^8\) Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (codified in scattered sections of 19 and 26 U.S.C.), for example, specifically links the concept of national security to domestic production, capacity, and growth in defense-related industries, as well as to levels of foreign competition, levels of unemployment, losses in governmental revenues, and the general "economic welfare of the Nation." 19 U.S.C. § 1862(d) (1994). The International Emergency Economic Powers Act, Pub. L. No. 95-223, § 201, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §§ 1701-1706 (1994)), grants authority to the U.S. President to deal with "any unusual and extraordinary threat" to the national security, foreign policy, or economy of the United States which has as its source outside U.S. borders. 50 U.S.C. § 1701(a). It is interesting to note, however, that the Trade Sanctions Reform and Export Enhancement Act of 2000, H.R. 5426, 106th Cong. §§ 901-911 (enacted), places new limitations on the President in regard to the imposition of unilateral "agricultural" and "medical" sanctions. While not without exceptions, the Act provides that the President may not impose a unilateral "agricultural" or "medical" sanction against a foreign country without the prior approval of Congress. Id. §§ 903-904. It also provides that the President shall terminate any such sanction that is in effect as of the date of enactment. Id. § 903.
without foreign interference. In effect, it is impossible for a nation to violate article XXI.9

Given the ambiguity of the scope of “security interests,” invokers of the security exception conclude that they are always right, and indeed invoking nations that are economically and politically powerful have been able to proceed with impunity. However, this has provoked deep concern and undermined support for the trade regime. Less developed nations have continued to express fear that article XXI will be used as a guise for both political coercion and the protection of domestic industries. Because meaningful retaliation is not an option, these countries believe that economic restrictions can be used as a means of punishment, as a mechanism for economic aggression, and as a creative form of colonialism. Such beliefs have prompted these nations to question the self-defining nature of the security exception and to argue that article XXI should be interpreted in light of broader international law.10


10. In regard to the position of less-developed countries regarding the self-defining nature of article XXI, its potential for misuse, and the need for an interpretation, see, for example, 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).

Professor Jackson has noted that “a problem inherent in the national-security argument is that of determining its limits.” JOHN H. JACKSON, THE WORLD TRADING SYSTEM 18 (1989). The language of article XXI is “so broad, self-judging, and ambiguous that it obviously can be abused. . . . In general, the GATT approach to article XXI is to defer almost completely to the judgment of an invoking contracting party.” Id. at 204-05.

The security exception represents an indispensable escape mechanism or safety valve without which the General Agreement on Tariffs and Trade would cease to exist. Nations are unwilling to participate in such agreements without the assurance that they have retained the right to protect their sovereignty from external threat. Absent the ability to weigh the benefits of an open trade regime and the risks to national security, the requisite flexibility of the agreement would be lost. Additionally, most industrialized nations have adopted the view that because the General Agreement is a “trade” agreement (and the World Trade Organization is a “trade” organization), matters concerning national security, foreign policy, and other political disputes should not be placed within its reach. To allow a trade organization to intervene in these forms of controversies, or to allow it to require justification for the actions of a sovereign, would not only introduce an element of


11. See Decision Concerning Article XXI of the General Agreement, Nov. 30, 1982, GATT B.I.S.D. (29th Supp.) at 23 (1983) ("[T]he exceptions envisaged in Article XXI . . . constitute an important element for safeguarding the right of contracting parties when they consider that reasons of security are involved."); GATT Council, Minutes of Meeting held on May 7, 1982, GATT Doc. C/M/157, at 2, 8 (June 22, 1982) ("[N]o country could participate in GATT if in doing so it gave up the possibility of using any measures . . . to protect its security interests."); GATT Council, Minutes of Meeting held on Nov. 5, 1986, GATT Doc. C/M/204, at 6, 9 (Nov. 19, 1986) ("[T]o limit a party’s national security rights or enable GATT to examine any party’s national security justification for trade sanctions . . . could severely undermine the value and even threaten the existence of GATT . . . ."); Jackson, *World Trade and the Law of GATT*, supra note 3, at 536 ("The escape clauses and exceptions provide the necessary flexibility without which the General Agreement might never have been concluded or might never have endured . . . ."); Jackson, *The World Trading System*, supra note 10, at 203 ("One of the exceptions to liberal-trade policies which has always been recognized by economic theorists and statesmen is that of national security."); Hahn, *supra* note 10, at 561-62 (National security escape clauses "bring flexibility to the legal bonds imposed by a treaty and by so doing encourage sovereigns to submit themselves to the discipline of an international legal regime which might otherwise appear too burdensome . . . . [such clauses also] provide the necessary ‘breathing space’ for the exercise of State sovereignty."); and Wilch, *supra* note 10, at 181-82 ("Nations assert the exception because the welfare loss generated by trade controls protecting industries deemed vital to national security is outweighed by the incalculable benefit of preservation of the state.").

12. See, e.g., Giesze, *supra* note 10, at 82 ("[A] WTO or NAFTA panel should be hard-pressed to substitute its own judgment for that of the U.S. Government and conclude that the United States, as a sovereign nation, had erroneously defined its national security interests . . . .").
unpredictability but would redefine and politicize the nature of the GATT in a way that would be unacceptable to many contracting parties.\textsuperscript{13}

To recognize that article XXI is 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 all objective parameters. 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 self-defined by the invoking party, such an admission does not inherently address the question as to whether these interests \textit{should} be self-defining.\textsuperscript{14} Furthermore, the argument that the GATT is limited to trade-related issues and that the World Trade Organization (WTO) is thereby precluded from intervening in political disputes is unrealistic. Since power in one area can be used to achieve results in another, it is impossible to insulate international economics from international politics.\textsuperscript{15} Finally, the need-for-predictability argument is lacking in merit. Reduced to its basic tenet, it stands for the proposition that total ambiguity will result in the totally predictable recognition of the validity of every invocation of the security exception.

The power to impose non-reviewable security-based sanctions is especially troublesome in light of a general intent, on the part of the international community, to address global problems on a more multilateral basis. The WTO Agreement is designed to enhance international trade by creating a variety of “reciprocal and mutually advantageous arrangements.”\textsuperscript{16} Encouraging free trade, however, is merely a means to a more comprehensive end. The true spirit of the WTO Agreement lies in its attempt to create additional global wealth, to raise global standards of living, and to “ensure

\begin{itemize}
\item[13.] GATT Council, Minutes of Meeting held on May 7, 1982, GATT Doc. C/M/157, at 2, 8 (June 22, 1982) (“[T]he GATT had never been the forum for resolution of any disputes whose essence was security and not trade . . . .”); id. at 9 (“[T]he interjection of political elements into GATT activities would not facilitate the carrying out of its entrusted tasks.”); id. at 10 (“It should therefore be the main wish of the Council to avoid political discussions, which could risk the non-political character of the General Agreement . . . .”); id. (“GATT had neither the competence nor the responsibility to deal with the political issue . . . .”); \textit{see also} GATT Council, Minutes of Meeting held on Nov. 5, 1986, GATT Doc. C/M/204, at 8-10 (Nov. 19, 1986) (“GATT was not a forum for examining or judging national security disputes.”). \textit{But see} Unpublished Panel Report on United States—Trade Measures Affecting Nicaragua, 1986 WL 363154, L/6053, ¶ 5.16 (Oct. 13, 1986) (unadopted) (embargoes create uncertainty).
\item[14.] For a comprehensive analysis questioning the self-defining and non-reviewable nature of article XXI (in particular, article XXI(b)(iii)), see Hahn, \textit{supra} note 10. For example, Hahn notes that “it is not reconcilable with the law of article XXI(b)(iii) to grant to the party invoking the exception sole authority to determine its interpretation and scope.” \textit{Id.} at 610 n.208. For another perspective regarding the issue of whether article XXI is self-judging, see Perez, \textit{supra} note 10, at 324-51.
\item[15.] \textit{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 “[i]deally, politics and trade should be kept separate, but a total separation was not realistic”). Professor Jackson has also expressed such sentiments. \textit{Jackson, WORLD TRADE AND THE LAW OF GATT, supra} note 3, at 752 (“[I]nternational economics is so intimately related to politics that it is impossible to insulate the two from each other.” (citation omitted)).
\item[16.] WTO Agreement pmbl., \textit{LEGAL TEXTS, supra} note 1, at 4.
\end{itemize}
that developing countries, and especially the least developed among them,” share in the benefits that will result.17

Despite this spirit of multilateralism, and despite the explicit recognition of the special needs of developing countries,18 the security exception continues to find its most common usage in disputes between “north and south” or “rich and poor” nations. It has often been observed that it is quite easy for a developed nation to impose economic sanctions on a country lacking the power to retaliate.19 For this reason, poorer countries must rely on international institutions to enforce their rights,20 and they are often willing to forfeit a degree of “sovereignty” for that protection. Since over three-quarters of WTO members are developing countries or transition economies21 and approximately one-fifth of the developing world’s population still lives on incomes of less than one dollar a day,22 it is understandable that “interpretation” of the security exception is a topic of dispute between blocs of nations at varying levels of economic development.23 Unfortunately, the power disparities between developed and developing countries often lead to inconsistent application of the security exception; when governments have to choose between profit and principle, they often opt for the former.24

This absence of standards perpetuated by a minority of nations poses an increasing threat to the stability of the international trade system. Poorer nations are concerned by the trend toward using economic sanctions for non-

17. Id.; see also Wesley A. Cann, Jr., Internationalizing Our Views Toward Recoupment and Market Power: Attacking the Antidumping/Antitrust Dichotomy Through WTO-Consistent Global Welfare Theory, 17 U. PA. J. INT’L ECON. L. 69, 80 (“The true spirit of the WTO Agreement lies in its attempt to: (1) create additional global wealth; (2) raise global standards of living; (3) encourage the optimal use of resources; and (4) ‘ensure that developing countries, and especially the least developed among them’ share in the benefits resulting from the WTO Agreement.”). New agreements regarding trade in services, investment measures, intellectual property, safeguards, and sanitary and phytosanitary measures as well as important changes in the manner in which Panel Reports will become binding on contracting parties all reflect an effort to establish a multilateral framework. See, e.g., General Agreement on Trade in Services, WTO Agreement, Annex 1B, LEGAL TEXTS, supra note 1, at 284; Multilateral Agreements on Trade in Goods, WTO Agreement, Annex 1A, LEGAL TEXTS, supra note 1, at 16; Agreement on Trade-Related Aspects of Intellectual Property Rights, WTO Agreement, Annex 1C, LEGAL TEXTS, supra note 1, at 321. Prior to the new Agreement, a dispute resolution panel report would in effect be adopted by way of a unanimous consensus. In other words, a Report would be adopted unless any GATT member (including one of the parties to the dispute) objected to its adoption. Under the new WTO Agreement this process is reversed, and a report will be adopted unless there is a consensus not to adopt the report. Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Agreement, Annex 2, art. 16, para. 4, LEGAL TEXTS, supra note 1, at 365.18. GATT, supra note 1, arts. XXXVI, XXXVII, and XXXVIII.
19. E.g., GATT Council, Minutes of Meeting held on May 29, 1985, GATT Doc. C/M/188, at 2, 3 (June 28, 1985) (referring to comments of the representative of Nicaragua); GATT Council, Minutes of Meeting held on May 7, 1982, GATT Doc. C/M/157, at 2 (June 22, 1982) (referring to comments of the representative of Argentina).
20. E.g., GATT Council, Minutes of Meeting held on May 29, 1985, GATT Doc. C/M/188, at 3 (June 28, 1985) (referring to comments of the representative of Nicaragua).
22. Ruggiero, supra note 4, at 14.
23. See, for example, the contrasting positions of different groups of nations in GATT Council, Minutes of Meeting held on May 29, 1985, GATT Doc. C/M/188, at 2-17 (June 28, 1985) and 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 7, 1982, GATT Doc. C/M/157, at 2-13 (June 22, 1982).
economic purposes.\textsuperscript{25} As formal barriers to trade continue to fall, they fear that the security rationale will rise in their stead.\textsuperscript{26}

Additionally, changes in the global political environment have increased both the incentive and the capacity for some countries to engage in supposedly security-based economic coercion. The end of the cold war, the fall of communism, and the transition to market economies present a myriad of new opportunities and freedoms for citizens around the world. At the same time, however, the resulting vacuum may allow the most powerful nations to exercise unfettered strength in advancing particular ideological positions. While such power can be wielded to obtain a variety of beneficial and humanitarian ends, it can also be used as a guise for protectionism and as a mechanism for invaders the sovereignty of other nations. As a result, determining the role of multilateral institutions in a world of extreme economic diversity and imbalances of power will be an issue of increasing importance.

This Article highlights the socio-economic consequences flowing from an uneducated and unfettered use of security-based sanctions. In an attempt to prevent improper application of article XXI, the Article defines the actual nature of an essential security interest in terms of a variety of legal, economic and political factors that fall within or go beyond the current scope of article XXI or prevailing norms. The Article tests the conceptual boundaries of legality, sovereignty and self-interest and suggests a number of potential remedies ranging from voluntary guidelines to the use of review procedures outside the current WTO framework.

In Part II, this Article provides a brief overview of the nature and implementation of article XXI and explores the blurring of the line between security and foreign/domestic policy interests. Part III presents a variety of standards to be employed when considering the invocation of security-based sanctions. These standards break down into three groups: (1) those requiring that countries comply with certain duties, such as the exhaustion of remedies, the use of least restrictive alternatives, consistency in application, and non-intervention; (2) those aimed at the nature of the threat and the developmental stage of the target country; (3) those encouraging nations to quantify their security interests in light of their objectives and their likelihood of success while accounting for the effects on economic and political stability, effects on third (non-target) parties, and potential reactions of those third parties to the imposition of the sanction. Part IV proposes a variety of mechanisms to increase multilateral accountability by exploring questions of jurisdiction and accountability, the willingness to examine security issues, the broadening of remedies, and the expansion of the concept of waivers.

\textsuperscript{25} See, e.g., Comments of the Representative of Poland, GATT Council, Minutes of Meeting held on May 7, 1982, GATT Doc. C/M/157, at 9 (June 22, 1982).

II. POWER, DISCRETION, AND ABUSE

A. A Starting Point: Article XXI of the General Agreement

Article XXI states that nothing in the Agreement 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."27 It also 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."28 Such exceptions are viewed as "universal" in nature and thus serve to relieve a party from virtually all of its substantive obligations under the GATT Agreement.29

The inclusion of article XXI within the General Agreement certainly reflects the fact that all States have the right to protect their sovereignty from external threat.30 The concept of sovereignty, however, cannot be viewed one-dimensionally. The International Court of Justice has recognized that "[e]very State possesses a fundamental right to choose and implement its own political, economic and social systems."31 The fundamental principle of sovereignty, upon which the whole of international law is based, recognizes this freedom of choice and allows for various foreign policies, conflicting alliances, and varying cultures and ideologies to coexist.32 As a result, the applicability of article XXI must be viewed not only in light of "protecting" the sovereignty of one nation, but also in light of "respecting" that sovereignty.

As its drafting history shows, the scope of the article XXI security exception was a topic of concern and confusion from the outset. In response to a question regarding the meaning of "essential security interests," one of the drafters of the original Draft Charter indicated that "there was a great danger of having too wide an exception . . . that would permit anything under the sun," but that a provision was necessary to protect "real security interests."33 In attempting to weigh conflicting interests, the drafter noted that "[w]e 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."34 While such a provision is an attempt to strike a balance between competing interests, a characteristic quite common to many forms of statutory authority, it should nevertheless create some form of binding obligation. Yet, the Chairman of the Commission felt it necessary to add that "the spirit in which Members of the Organization would interpret

27. GATT, supra note 1, art. XXI(b)(iii). For a complete text of article XXI, see supra note 2.
28. GATT, supra note 1, art. XXI(c).
30. Hahn, supra note 10, at 560.
32. Id. at 133.
34. Id.
these provisions was the only guarantee against abuses of this kind.\textsuperscript{35} Such a position would seem to transform this provision from a binding (albeit balanced) obligation to a mere aspirational guideline.

Article XXI was meant to be broader or less restrictive than the other exceptions found in the agreement. The "General Exceptions" contained in article XX, for example, allow contracting parties to adopt measures that are necessary to protect public morals or human, animal, or plant life. They also allow for the adoption of measures that relate to the conservation of exhaustible natural resources or that are essential to the acquisition or distribution of products in short supply.\textsuperscript{36} These exceptions, however, are all 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.\textsuperscript{37} It is interesting to note that this paragraph was originally supposed to apply to the security exception as well since the provisions of both articles XX and XXI "were lumped together in one article."\textsuperscript{38} The two were later separated during the Geneva drafting sessions, thereby rendering this qualifying paragraph inapplicable to the security exception.\textsuperscript{39}

Additionally, in setting parameters for the use of these exceptions, article XX often employs the term "necessary\textsuperscript{40}" rather than the language contained in article XXI allowing a nation to take actions that "it considers necessary."\textsuperscript{41} While it could be argued that the latter envisions a subjective decision-making process on the part of the invoker, the former would seem to imply that a more objective, measurable, and reviewable standard should be applied.

The distinction between "necessary" and "it considers necessary" has previously been discussed by the ICJ. In \textit{Military and Paramilitary Activities In and Against Nicaragua},\textsuperscript{42} the ICJ had the opportunity to compare the language found in article XXI of the General Agreement with the language contained in article XXI of the 1956 Treaty of Friendship, Commerce, and Navigation between the United States and Nicaragua.\textsuperscript{43} Under the treaty, a State could take measures "necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."\textsuperscript{44} The Court was quick to recognize the "necessary" and "it considers necessary" distinction, and held that the issue of "whether a measure is necessary to protect the essential

\begin{itemize}
  \item \textsuperscript{35} \textit{Id.} (emphasis added).
  \item \textsuperscript{36} GATT, supra note 1, art. XX(a),(b),(g),(j).
  \item \textsuperscript{37} The introductory paragraph of article XX states that these general exceptions can only be invoked "[s]ubject 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 . . . ."
  \item \textsuperscript{38} JACKSON, \textit{WORLD TRADE AND THE LAW OF GATT}, supra note 3, at 741.
  \item \textsuperscript{39} \textit{Id.} at 742; Hahn, supra note 10, at 566-67.
  \item \textsuperscript{40} GATT, supra note 1, art. XX(a),(b),(d),(f).
  \item \textsuperscript{41} \textit{Id.}, art. XXI (b).
  \item \textsuperscript{42} 1986 I.C.J. 14 (June 27).
  \item \textsuperscript{44} \textit{Id.} at 465.
\end{itemize}
security interests of a party is not... purely a question for the subjective judgment of the party; the text [of the Treaty] does not refer to what the party 'considers necessary' for that purpose." As a result, the Court found that it did indeed have jurisdiction to determine whether the measures taken by the United States fell within the purview of the security exception, whether the risks run by these security interests were "reasonable," and whether the measures designed to protect those interests were "not merely useful but 'necessary.'" After applying such an analysis, the Court determined that the mining of Nicaraguan ports, the attack on oil installations, and the embargo by the United States could not be "justified." Similarly in the Case Concerning Oil Platforms, the ICJ had occasion to comment on an identical provision found in a treaty between the United States and Iran. The Court noted that such a provision "could be interpreted as excluding certain measures from the actual scope of the Treaty and... as excluding the jurisdiction of the Court to test the lawfulness of such measures. It could also be understood as affording only a defence on the merits." The Court, after citing Nicaragua, adopted the latter interpretation and indicated that this provision did not restrict its jurisdiction and was confined to affording the Parties a possible defense on the merits should the occasion arise.

Despite the very vocal positions expressed by various nations, the Contracting Parties never decided whether article XXI is self-defining. References to "inherent" rights, "essential" security interests, "emergencies in international relations" and "war materials" leave substantial room for subjectivity, and the issue regarding the need for prior U.N. authorization before invoking article XXI(c) remains unanswered. The 1982 Decision Concerning Article XXI of the General Agreement did nothing to remove these ambiguities, and the 1982 Ministerial Declaration, while certainly supportive of the spirit of multilateralism, stopped short of establishing any real obligations. In paragraph 7(iii) of the 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 General Agreement." Although this paragraph has often been cited by poorer nations subject to sanctions, it could be argued that if article XXI is indeed self-defining, any trade measure taken pursuant to that article would automatically be "consistent" with the General Agreement.

45. 1986 I.C.J. 14, 141 (June 27).
46. Id. at 117.
47. Id. at 141.
50. 1996 I.C.J. at 811 (emphasis added).
51. Id.
52. See Hahn, supra note 10, at 595.
56. Id. at 11 (emphasis added).
While article XXI has only rarely been *formally* invoked, its use can serve to demonstrate the potential scope of the security exception. Sweden chose to invoke article XXI in order to establish a global import system that was primarily designed to protect its inefficient footwear industry and to give the industry time to remedy its difficulties. In citing increased imports and high domestic production costs, Sweden indicated that the decrease in domestic production "has become a critical threat to the emergency planning of Sweden's economic defense," and the maintenance of a minimum production capacity in vital industries is indispensable "in case of war or other emergency in international relations." While many nations expressed serious doubts regarding the justification of these measures (and reserved their rights under the GATT), it may be argued that if article XXI is self-defining, such doubts and reservations would be largely irrelevant.

Article XXI has also been used to support, at least in part, the import and export restrictions applied by Thailand (without any independent explanation) and the suspension of imports from Argentina by the EU, Canada, and Australia. The European Union has also invoked article XXI to suspend concessions to Yugoslavia and to remove that nation from its list of beneficiaries, citing the "political instability" in the region and the "potentially destabilizing consequences elsewhere." Similarly, the boycott of Portuguese goods by Ghana was based upon the "potential" danger arising out of a situation in Angola that posed a "constant threat to the peace of the African continent." It was believed that any action that would bring pressure to bear on the Portuguese Government, and that might lead to a lessening of this danger, "was therefore justified in the essential security interests of Ghana."

The United States has chosen to *formally* invoke article XXI on at least two occasions. Its export licensing control system, which discriminated among different destination countries regarding goods that could be used for military purposes, was in fact based on the article XXI security exception. In response to the imposition of this system, the Czechoslovakian government noted that the U.S. had "interpreted the expression 'war material' so

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57. For a discussion regarding the instances in which article XXI has been formally invoked, see GATT ANALYTICAL INDEX, supra note 10, at 600-06. See also Hahn, supra note 10, at 569-78; Knoll, supra note 10, at 590-97; Laing, supra note 10, at 333-39; and Wilch, supra note 10, at 182-85.
59. Id. at 3.
60. GATT Council, Minutes of Meeting held October 31, 1975, GATT Doc. C/M/109, at 9 (Nov. 10, 1975).
64. GATT ANALYTICAL INDEX, supra note 10, at 600 (citing Summary Record of the Twelfth Session held at the Palais des Nations, Geneva, GATT Doc. SR.19/12, at 196 (Dec. 21, 1961)).
65. Id.
66. In addition to the Czechoslovakia and Nicaragua cases, the embargo of Cuba was certainly based on U.S. security interests. While the United States did not formally raise article XXI before the Contracting Parties, the GATT ANALYTICAL INDEX, supra note 10, at 605, indicates that "[t]he United States invoked Article XXI as justification for its action."
In imposing the total embargo on Nicaragua, President Reagan took the position that the policies and actions of the Nicaraguan government constituted "an unusual and extraordinary threat to the national security and foreign policy of the United States" and thereby declared "a national emergency to deal with that threat." In bolstering its use of the security exception, the U.S. also relied heavily upon the inherent right of "collective self-defense." As will be discussed shortly, the United States has invoked the security exception on numerous other occasions as well, but has found it politically expedient to allow article XXI to remain an unspoken authority.

In light of the above, one could argue that article XXI encompasses substantially more than actual threats to a nation's essential security interests. For example, article XXI could be construed as including "potential" threats to those interests, as well as actual and potential threats to the security interests of another nation. It also could be interpreted as covering threats to regional political stability, to foreign policy, to fundamental ideology, or to a vital domestic industry.

Yet such a broad interpretation of article XXI is not necessarily justified. Michael Hahn has written that article XXI was not designed to encompass the "socio-economic consequences" resulting from the operation of GATT principles, nor was it designed to provide safeguards for "vital industries" or to allow for the use of other protectionist measures. Instead, Hahn argues that article XXI is not an unrestricted or open-ended provision allowing nations to escape their GATT obligations. He notes that both XXI(a) and XXI(b) have a common prerequisite (namely that essential security interests be at stake) and that XXI(b) has distinct prerequisites limiting its scope to three objective factual settings. An "emergency in international relations," for example, is a term with limited meaning and that meaning would be lost if a nation could define such an emergency at its own whim. Hahn also believes that GATT Panels do indeed have the power to review article XXI actions in substance, though such a review would be conducted pursuant to the very loose standard prescribed by the article. Since article XXI is not totally self-defining, Hahn suggests that States should be required to demonstrate that they acted for the protection of their essential security interests and to supply sufficient facts to exclude improper motivation and show that the objective prerequisites under XXI(b)(i)-(iii) have been met.

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68. Id. at 4.
71. Hahn, supra note 10, at 580.
72. Id. at 581-82, 597.
73. Id. at 579.
74. Id. at 584. Hahn notes, however, that "once these prerequisites are met, though, Article XXI(b) does not further restrict the options available to Contracting Parties who choose to apply economic measures for political purposes." Id.
75. Id. at 589-91, 593.
76. Id. at 592 n.149.
77. Id. at 605, 616. Hahn notes, however, that "because article XXI grants the State broad
B. The Existence of Power and the Existence of Frustration

1. An Overview

The actual use of the security exception, whether or not formally exercised under article XXI, has failed to reflect the spirit of good faith commitment to free trade upon which it is based. Rather than being employed as a safety mechanism to protect essential security interests, it has been used primarily as a foreign policy tool by powerful States to influence the social, political and economic policies of weaker nations. Sanctions tend to be most effective when (among other variables) the target is much smaller than the nation imposing the sanction.\(^7\)

The security exception is an inherently discriminatory remedy. It is available only to those nations that have the power to successfully coerce, to successfully punish, and to successfully intimidate. As a result, there is substantial truth to the accusation that the use of sanctions for purposes of “political coercion” represents a “policy of force”—a means of economic harassment or aggression—designed to penalize nations who choose to follow policies that are “not agreeable” to their stronger neighbors.\(^7\) Such coercion represents “the very essence of” unlawful intervention,\(^8\) and while the process of intervention may reflect the realities of international policy and an array of political justifications, it certainly does not reflect the “rules of existing international law.”\(^8\)
Despite the lack of a credible "legal" foundation, the unilateral use of sanctions has been on the rise. These sanctions, often based on the security rationale, can be more stringent than those imposed by the United Nations (which must be developed by way of consensus and may be interpreted differently by the various imposing nations), and can cause substantial collateral damage. In addition to imposing immediate hardship on the people of the target nation, these sanctions tend to retard the nation’s future economic and social development. Future trade will be lost as traditional customers seek out more stable sources of supply. Advances in such areas as housing, health care, and education will be interrupted as money-flows and political stability wane and the infrastructure necessary to attract foreign investment deteriorates. As is often the case, such effects will not be limited to the target of the sanction but will be felt collaterally throughout the region.

The frustration experienced by weaker nations has been substantial. While it can be rightfully argued that general international law imposes no duty on a nation 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 nation is a party. The General Agreement on Tariffs and Trade, barring the applicability of one of its exceptions, imposes precisely such a duty. Pursuant to the Most-Favored-Nation requirement found in article I, every signatory nation has undertaken a binding obligation to grant equal access to its markets on a non-discriminatory basis. A refusal to trade (at least in the form of denying market access to another contracting party) would be unlawful under the terms of the agreement unless justified by the valid use of an exception.

The sense of frustration is magnified by the fact that the use of unilateral sanctions has generally been condemned by the international community. Paragraph 7(iii) of the 1982 Ministerial Declaration, while somewhat ambiguous, certainly represents an attempt to harness the use of restrictive 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."

82. See, e.g., Cameron, supra note 10, at 220, 248-49; Panel, Effects and Effectiveness, supra note 10, at 203-04 (remarks by Michael P. Malloy); Henderson, supra note 10, at 175-76.
87. See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 138 (June 27) (“A State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation; but where there exists such a commitment... such an abrupt act of termination of commercial intercourse as the general embargo... will normally constitute a violation of the obligation not to defeat the object or purpose of the treaty.”); see also id. at 253 (Oda, J., dissenting) (“Trade is not a duty of a State under general international law but may only be a duty imposed by a treaty...”).
88. GATT, supra note 1, art. I, para. 1.
trade measures for non-economic purposes and the use of unilateral security-based 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 specifically provides that "no 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 it advantages of any kind," it seems clear that many security-based sanctions do attempt to subordinate the sovereign rights of the target by restricting its freedom to choose its own social, economic, or political policies. While one could argue that a State does not have a sovereign right to gain access to the market of another nation, it can also be argued that a State does have the right to demand contractual performance from other parties to such agreements.

Adding to the frustration experienced by these nations is the fact that heightened expectations have not been met. Part IV of the General Agreement, for example, is specifically directed toward the plight of less developed nations. This part of the agreement recognizes that the expansion of international trade as a means for achieving economic and social advancement is particularly urgent for these States. In this vein, it addresses the need to raise the standard of living in these nations, to expand their export earnings, to provide them with essential imports, and to ensure that they share in international growth. Furthermore, Part IV provides that developed countries "accord high priority" to reducing trade barriers on products that are of particular export interest to less developed countries and to taking appropriate action to provide improved conditions of access to world markets for those products.

From a somewhat broader perspective, these same sentiments are reflected in the U.N. Charter as well. One of the primary goals of the United Nations is to create the "conditions of stability and well-being" that are necessary for securing international peace, including higher standards of living, increased employment, and economic and social development. In pursuing these goals, however, power-based relations will be discouraged. Instead, the United Nations will seek to protect the fundamental principle of "sovereign equality" among nations and to promote the resolution of international disputes through multilateral means.

89. Ministerial Declaration, Nov. 29, 1982, GATT B.L.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."
91. See Cameron, supra note 10, at 235-36.
92. GATT, supra note 1, arts. XXXVI-XXXVIII.
93. Id., art. XXXVI.
94. Id., art. XXXVII, para. 1.
95. Id., art. XXXVIII, para. 2.
96. U.N. CHARTER art. 55.
97. Id., art. 2, para. 1.
98. Id., arts. 33-38.
Despite the pleas by weaker nations to examine the security exception in light of this broader international law, the use of the security exception has either been judged in light of a very constrictive set of parameters or it has not been judged at all. A major exception to this observation, however, involved the U.S. sanctions imposed against the nation of Nicaragua.

The GATT Panel in United States — Trade Measures Affecting Nicaragua decided little of any import. While expressing substantial frustration regarding its inability to address substantive issues, the Panel chose to honor its restrictive terms of reference. In contrast, the International Court of Justice did in fact take the opportunity to examine the use of the security rationale (albeit in the context of a Treaty of Friendship, Commerce, and Navigation (FCN)) in Military and Paramilitary Activities in and against Nicaragua. While this case involved a variety of military actions taken by the United States, it also dealt with the economic embargo imposed on Nicaragua for security purposes. Although the security exception found in article XXI of the Treaty of FCN was distinguishable from that found in article XXI of the GATT (regarding the “necessary” vs. “it considers necessary” language), the case was extremely significant since the court clearly expressed its willingness to examine the actual substance of security interests and the merits of invoking a security exception. In doing so, the court 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. After pointing out that what is “necessary” was not a question for the “subjective judgment” of the invoking party, the court held that while the trade embargo did not constitute a breach of the principle of non-intervention, it did constitute a violation of the terms of the Treaty and was not necessary for the protection of the essential security interests of the United States. As a result, the court found that the security exception provided no defense to the U.S. embargo.

100. Id.
101. Having been strictly limited by the terms of reference imposed by the United States, the Panel was prevented from considering the issue of whether article XXI precluded an examination into the validity of the invocation of the article or the motivation behind its use. Unpublished Panel Report on United States—Trade Measures Affecting Nicaragua, 1986 WL 363154, L/6053, ¶ 5.3 (Oct. 13, 1986) (unadopted). The Panel clearly expressed its frustration by posing the question: if article XXI was self-defining, by what means could the Contracting Parties ensure that it would not be used excessively or for purposes other than those contained in the provision? Id. ¶ 5.17. The Panel also expressed its concern regarding the fact that a panel had the task of examining an article XXI invocation, but lacked the authority to examine its justification, the right of an aggrieved party to have its complaint investigated and remedied being limited. Id.
104. See supra notes 42-47 and accompanying text.
106. Id. at 141.
107. Id. at 126.
108. Id. at 140-42. In regard to the fact that a provision employing the “necessary” language does not restrict the Court’s jurisdiction but rather merely affords the parties a possible defense on the merits, see Case Concerning Oil Platforms, 1996 I.C.J. 903, 811-12 (Dec. 12).
It is quite telling that the United States, while filing pleadings regarding the issue of jurisdiction, refused to plead on the merits or participate in the proceedings. Despite article 94 of the U.N. Charter, the United States also chose to ignore absolutely the decision of the International Court of Justice and continued the embargo for almost four more years.

Such a stance reflects the position of more powerful States that disputes of this nature, being overwhelmingly political in character, are basically non-justiciable. In specific regard to the GATT, such nations as the United States, Canada, Japan, New Zealand, Australia, and the European Union, have been unified in their belief that political, foreign policy, and national security issues are beyond the auspices of the agreement and that the GATT has no power, competence, or experience to resolve such disputes. According to this view, trade and non-trade issues must be kept separate in order for the GATT to survive, and political issues must be left to the political arena. To do otherwise would be to “politicize” an agreement that was designed to be commercial in nature and would thereby threaten its very existence.

While it is true that the GATT was not designed to resolve foreign policy or other political disputes, it is impossible to completely delink trade from politics. First, even the most developed of nations, when adversely affected by the political policies of another, are in no way reluctant to cry foul. The United States, despite being “the most dominant user of economic sanctions,” was also the most ardent critic of the Arab oil embargo. Similarly, Jacques Santer, President of the European Commission, characterized the U.S. sanctions policy toward Iran, Libya, and Cuba as “illegal and counterproductive.” British Prime Minister Tony Blair noted “that what the United States called sanctions policy, the Europeans called

109. U.N. CHARTER art. 94, para. 1 (“Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.”).
112. Stuart E. Eizenstat, Statement by the Department of Commerce and Office of the United States Trade Representative Concerning the EU’s WTO Challenge to the LIBERTAD Act (February 20, 1997), in U.S. Department of Commerce News, Feb. 20, 1997, at 1-2 (“The WTO is not an appropriate forum for resolving differences over what is essentially a disagreement over foreign policy. ... The WTO was not created to decide foreign policy and national security issues. ... [The Panel] has no competence to proceed ... bringing noncommercial matters into the WTO ... may well jeopardize what we and others have worked so hard to achieve.”). See also Accession of the United Arab Republic, Feb. 27, 1970, GATT B.I.S.D. (17th Supp.) at 39-40 (1970); Council of Representatives, Report on Work since the Thirty-Seven Session, GATT Doc. L/5414, at 20, 21, 24 (Nov. 12, 1982); GATT Council, Minutes of Meeting held on Nov. 5, 1986, GATT Doc. C/M/204, at 9 (Nov. 19, 1986); GATT Council, Minutes of Meeting held on May 29, 1985, GATT Doc. C/M/188, at 5, 14, 17 (June 28, 1985); GATT Council, Minutes of Meeting held on June 29-30, 1982, GATT Doc. C/M/159, at 19-20 (Aug. 10, 1982); GATT Council, Minutes of Meeting held on May 7, 1982, GATT Doc. C/M/157, at 8, 10 (June 22, 1982); Unpublished Panel Report on United States—Trade Measures Affecting Nicaragua, 1986 WL 363154, L/6053, ¶¶ 4.6, 4.9, 4.13 (Oct. 13, 1986) (unadopted).
114. Cameron, supra note 10, at 244.
interfering with the internal affairs of other nations." In expressing its anger, the European Union actually turned to the WTO and requested that a panel be appointed to examine the validity of U.S. policy toward Cuba.

Second, the foreign policy of a nation (often pursued by means of security-based sanctions) can sometimes reflect nothing more than the politically expedient calculations of those running for office. Despite the obvious ineffectiveness of many sanctions, they are often supported by those in office or by those seeking office in an attempt to take a moral high ground regarding unacceptable foreign conduct. Such a stance may be vehemently adopted despite the fact that a different policy approach might be more successful in actually achieving the desired results. Some current and former Pentagon officials, for example, have accused politicians of misrepresenting the security threat posed by Cuba, and at least one commentator has suggested that the adoption of the Helms-Burton Act was a reflection of the need for President Clinton to carry Florida and New Jersey in the 1996 election.

Third, to admit the fact that the WTO lacks jurisdiction to decide political disputes does not necessarily mean that States have the right to employ security-based sanctions for political purposes. The GATT requires Most-Favored-Nation treatment for all signatories, subject only to the exceptions contained therein and to international agreements such as the 1982 Ministerial Declaration and the United Nations Declaration Concerning Friendly Relations, which attempt to limit, if not condemn, restrictions for non-economic purposes. The problem here is that while the employment of sanctions for political purposes is deplored, the WTO lacks 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.

It could also be argued that what actually constitutes a "political" matter is subject to debate, and that therefore the WTO should have the right to determine when a dispute is of a political nature and thus beyond its jurisdiction. Additionally, since politically-based sanctions (often based upon the security rationale) will have economic or commercial consequences, it may be queried as to whether the WTO should have the right to determine whether the sanctions were politically or commercially motivated and, if politically motivated, whether the WTO should have the ability to address the economic ramifications flowing from those sanctions. One might also ask whether the WTO should have the right to determine whether a trade measure,

116. Id.
117. Panel, The Gulf War, supra note 10, at 186 (remarks by Newcomb) (describing sanctions as a "device to appear to their constituents . . . to be doing something about an outrageous foreign situation").
120. Segall, Export Controls, supra note 10, at 394-95.
121. Hahn, supra note 10, at 613-14.
122. GATT Council, Minutes of Meeting held on May 7, 1982, GATT Doc. C/M/157, at 12-13 (June 22, 1982).
allegedly imposed pursuant to the security rationale, would be better classified under article XIX or XX (with the accompanying procedures and safeguards), or whether the measure (and the dispute upon which it is based) should be referred to the U.N. Security Council.

Finally, the argument that political disputes lie beyond the jurisdiction of the WTO is inherently linked to the position that essential security interests are indeed self-defining. Such a position would seem to be supported by the "it considers necessary" language found in article XXI, which implies a substantial degree of subjectivity on the part of the nation invoking the exception, as well as by the lack of any qualifying paragraph such as that contained in article XX. As a result, it has often been stated that every nation "must have the last resort," or must be the "sole judge" regarding issues involving its national security interests. On the other hand, there are nations which believe that article XXI can be invoked only when the specific 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. 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." If article XXI was meant to be unbridled, 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." Since the drafters chose not to do so, some deference must be accorded to their decision.

2. The Blurring of National Security and Foreign Policy

Barring a breach of international law, all States have the sovereign right to develop and implement their own foreign policy free from multilateral interference. However, those nations that have willingly become signatories to the WTO Agreement (or its GATT predecessor) have in fact given up a degree of that sovereignty. In exchange for receiving the benefits envisioned

125. GATT Council, Minutes of Meeting held on Nov. 5, 1986, GATT Doc. C/M/204, at 14 (Nov. 19, 1986); GATT Council, Minutes of Meeting held on May 29, 1985, GATT Doc. C/M/188, at 5, 8, 13 (June 28, 1985).
126. For a discussion regarding the fact that article XXI is not unlimited in its scope, see comments by Hahn, supra notes 71-77 and accompanying text and Perez, supra note 10, at 324-51.
by the agreement, each member has obligated itself to be bound by its terms, including the mandate to extend MFN status to all other members. While the agreement does indeed provide some exceptions, including one for the protection of essential security interests, it does not provide an exception for the achievement of foreign policy goals or for the advancement of a particular ideology. In the absence of such an exception, the foreign policy of a signatory nation must in fact be developed within the confines of such a binding agreement and must be consistent with its basic tenets. Unfortunately, nations have often blurred the distinction between foreign policy and security concerns in order to advance policy agendas under the guise of the WTO exception. While such a strategy is not unique to the United States, a brief examination of the U.S. approach serves to highlight the “convenience” of merging these issues.

The Helms-Burton Act, for example, is allegedly based upon existing threats to U.S. security posed by Cuba and the Castro regime. While one could argue that there are some security concerns upon which the Act is based, it is not clear that the creation of a civil cause of action against European and Canadian defendants—or the exclusion from the United States of corporate spouses and children—is really necessary to protect U.S. security. In light of the fact that many experts believe that Cuba no longer poses a realistic security threat, the Act basically represents a foreign policy “wish list” and establishes a punishment/reward system for accomplishing its goals. It envisions 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. Additionally, by viewing the operation of an unsafe nuclear power plant as “an act of aggression,” the

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128. 22 U.S.C. § 6021(28) (“For the past 36 years, the Cuban government has posed and continues to pose a national security threat to the United States.”).

129. For example, the Helms-Burton Act is designed to discourage foreign investment that could be used to support a totalitarian government ninety miles from U.S. shores. The shooting down of two Brothers To the Rescue planes could be viewed as an act of terrorism and as a violation of international law. Id., § 6046(a). In fact, the mere act of training and supplying groups dedicated to international violence is also a violation of international law. Id., § 6021(14).

130. George Kleinfield & Deborah Wengel, Foreign Investment, 31 INT’L LAW. 403, at 404 (1997) (observing that the United States “has yet to explain how lawsuits to recover damages from foreign defendants over disputed property confiscated by Cuba over thirty years ago would enhance America’s national security in 1997 and the years ahead.”).


134. 22 U.S.C. §§ 6042(1)(A), 6065(a), 6065(b), 6066(3).

135. Id. § 6031(4); see also id. § 6041(a)(1).
Act provides a rationale for applying the security exception against nations reducing the world's rainforest acreage or contributing to the pollution of the atmosphere.

Similarly, a variety of other U.S. statutes reflect the failure to differentiate between those restrictions necessary to protect national security and those employed for foreign and domestic policy purposes. The breadth of criteria to be applied in determining the existence of a threat to security is boundless and often indefensible. They include a variety of "vital industry" concerns (such as domestic production levels, domestic capacity, and the potential for maintaining necessary growth) and equate national security interests with general economic welfare and the potential weakening of the domestic economy. 137

Additionally, threats to national security, foreign policy, and the economy are often lumped together in a tidy statutory package that allows the true nature of the threat to remain substantially unidentified. 138 The lack of statutory differentiation and the absence of any requirement to designate the precise grounds upon which an action is based can lead to a variety of politically-related sanctions loosely based on a potpourri of external threats. The existence of such broad discretion, 139 of course, provides a substantial basis for the exercise of power-based diplomacy and may actually encourage the discriminatory application of trade sanctions against targets too weak to retaliate and too economically "inconsequential" to muster international support. 140

The fact that some nations have substantially more power than others does not imply that powerful nations should not vigorously combat threats to their security, nor does it imply that attempts to address deplorable human conditions are anything but laudable. 141 What is being argued, however, is that the "security" exception, whether exercised pursuant to article XXI of the GATT or pursuant to customary international law, should be limited to actual or potential threats to essential security interests. The total lack of procedural safeguards and effective forms of relief dictates that the security exception be excluded as a tool for accomplishing other domestic and foreign policy goals.


137. 19 U.S.C. § 1862(d).


139. For a broader discussion regarding the discretion bestowed on the President by sanctions laws, see Cleveland, supra note 10, at 77-82.

140. See, e.g., 50 U.S.C. app. §§ 2402(2)(B), 2402(7), 2402(10), 2405 (1994 & Supp. III 1997) (regarding power-based diplomacy); 50 U.S.C. app. §§ 2401(4), 2405(b)(1)(A), 2405(b)(1)(E), 2405(b)(1)(C) (regarding discriminatory application and the fact that trade restrictions are more likely to be "enforceable" or capable of "achieving their intended purpose" when directed at a target without power).

141. For an in-depth discussion regarding the use of unilateral measures to promote human rights, see Cleveland, supra note 10. In this regard, Cleveland argues that "while some U.S. unilateral measures are problematic and subject to abuse, those that are consistent with international law and that promote recognized human rights standards play an important and legitimate part in transnational legal process and the promulgation and internalization of fundamental human rights." Id. at 7.
Instead, those goals should be pursued within the construct of the WTO Agreement and other binding international contracts.

III. THE CREATION OF STANDARDS FOR THE USE OF THE SECURITY EXCEPTION

A. An Introduction: The Spirit of Multilateralism

It is not the purpose of this Article to suggest that some form of multilateral Utopia is at hand. The realities of power-based relations, the intentional blurring of national security and foreign policy issues, and the need to satisfy political constituencies would seem to defy such an argument. Nevertheless, this Article does suggest that a fundamental basis exists upon which a more multilateral approach to security-based sanctions can be developed.

The U.N. Charter, which prevails over all other international agreements,\(^1\) indicates that the United Nations was created to maintain international peace and security through “collective measures.”\(^2\) It is designed to achieve “international co-operation” in addressing global problems\(^3\) and to act as a center “for harmonizing the actions of nations” in the attainment of these goals.\(^4\) In carrying out these commitments to multilateralism, parties to any dispute that is “likely to endanger” international peace and security are required to seek a solution through such mechanisms as negotiation, mediation, arbitration or judicial settlement.\(^5\) In the event that the parties fail to arrive at a satisfactory solution, the dispute “shall” be referred to the Security Council\(^6\) for its recommendations regarding appropriate procedures and methods of adjustment.\(^7\) Additionally, when an actual “threat to the peace” may conceivably be involved, the Security Council has the duty to determine whether such a threat exists and what measures, including the imposition of sanctions,\(^8\) should be taken to maintain or restore the peace.\(^9\) If sanctions are in fact imposed, all Member States are bound to implement that Security Council decision.\(^10\)

The ability of the United Nations to impose economic sanctions is potentially quite broad in scope. The criteria listed in article 39—threat to the peace, breach of the peace, and acts of aggression—defy precise definition and vest substantial discretion in the Security Council.\(^11\) It has been held, for example, that “massive and systematic violations of human rights may

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142. U.N. CHARTER art. 103.
143. Id., art. 1, para. 1.
144. Id., art. 1, para. 3.
145. Id., art. 1, para. 4.
146. Id., art. 33.
147. Id., art. 37.
148. Id., art. 36.
149. Id., art. 41.
150. Id., art. 39.
151. Id., art. 48.
152. Article 39 states that “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” Id., art. 39; see also Panel, The Costs and Benefits, supra note 10, at 345 (remarks by Shigeo Kawagishi).
constitute a ‘threat to peace’ under Article 39” that justify the imposition of economic sanctions.\textsuperscript{153} Under such a rationale, it could be argued that deplorable standards of living, massive unemployment, suppression of political and religious freedoms, and other extreme social, economic, and cultural disadvantages also pose a “threat to peace” by endangering the “stability and well-being which are necessary for peaceful and friendly relations among nations.”\textsuperscript{154}

It may also be posited that security-based sanctions imposed unilaterally, which are inherently designed to create social and economic hardship, violate the provisions of the U.N. Charter. Such sanctions may pose a “threat to peace” by way of jeopardizing the conditions of stability and well-being that are necessary to maintain that peace. Additionally, article 2 of the Charter states that Member States shall settle their disputes “by peaceful means \textit{in such a manner that international peace and security, and justice, are not endangered},”\textsuperscript{155} and that Members shall refrain from the threat or use “of force” in their international relations.\textsuperscript{156} Even if it is admitted, as is generally the case,\textsuperscript{157} that economic sanctions are “peaceful means” and do not constitute the use of “force,” it might nevertheless be argued that they can “endanger” international peace and security. Such an argument would recognize that article 2(3) does not merely require that disputes be settled “peacefully,” but that they be settled in a manner that does not endanger the peace. Severe and coercive economic sanctions, which tend to impose substantial collateral damage on both the target state and the surrounding states in a region and which often pit one nation or ideology against another, would seem to fail the second prong of this dispute settlement requirement.

In recognizing the spirit of these Charter provisions and the desire to address global problems on a more multilateral basis, several attempts have been made to limit the use of unilateral sanctions in general and the discretion upon which they are based. The United Nations Declaration Concerning Friendly Relations provides that no State may use economic measures to coerce another nation in order to obtain a subordination of that nation’s sovereign rights and to secure an advantage of any kind.\textsuperscript{158} Similarly, in the 1982 Ministerial Declaration, the GATT Contracting Parties agreed “to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement.”\textsuperscript{159}

The new WTO Agreement, however, represents the most notable effort to multilateralize commercial intercourse and to limit the exercise of unilateral discretion ever undertaken. The original GATT was in fact a set of rules applied only on a provisional basis with a very limited institutional foundation.\textsuperscript{160} The WTO, in contrast, is a permanent institution, with its own

\textsuperscript{154} U.N. CHARTER art. 55.
\textsuperscript{155} Id., art. 2, para. 3 (emphasis added).
\textsuperscript{156} Id., art. 2, para. 4.
\textsuperscript{157} Cameron, supra note 10, at 223-34.
\textsuperscript{158} See supra notes 90-91 and accompanying text.
\textsuperscript{160} WTO, TRADING INTO THE FUTURE, supra note 21, at 11.
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secretariat, and with a character that is substantially different than that of the GATT. Under the GATT dispute settlement mechanism, nations were quite free to act unilaterally regarding the imposition of trade restrictions, since they had the power to simply block any adverse dispute resolution panel decision that might result from their actions. Under the new WTO framework, unilateral actions in violation of the Agreement can indeed be subject to relief since the power to block Panel Reports has been removed.

In attempting to promote international trade and limit the exercise of potentially abusive discretion, the WTO framework incorporates a variety of other agreements as well. In regard to the former, new agreements were established regarding trade in services, investment measures, and the protection of intellectual property. In regard to the latter, the WTO Agreement contains such provisions as those regulating the application of sanitary and phytosanitary measures and other technical barriers to trade. These provisions prohibit arbitrary or unjustifiable discrimination or disguised restrictions on trade, and they require (when relevant) evidence of scientific justification. Similarly, the Agreement on Safeguards is designed "to re-establish multilateral control" by establishing conditions and procedures for invoking the escape mechanism under article XIX.

In addition to this general spirit of multilateralism, the GATT agreement arguably places limitations on security-based measures taken outside the auspices of article XXI. Article XIX, for example, deals with the suspension of GATT obligations when products are being imported under such circumstances as to cause or threaten "serious injury to domestic producers." Such a threat to domestic industry or economic welfare could clearly be classified as a "national security" issue under some legislation. Similarly, escape provisions under article XX relating to the conservation of exhaustible natural resources, the ensuring of availability of essential

161. Id.
163. General Agreement on Trade in Services, WTO Agreement, Annex 1B, LEGAL TEXTS, supra note 1, at 284 (Services); Agreement on Trade-Related Investment Measures, WTO Agreement, Annex 1A, LEGAL TEXTS, supra note 1, at 143 (Investment measures); Agreement on Trade-Related Aspects of Intellectual Property Rights, WTO Agreement, Annex 1 C, LEGAL TEXTS, supra note 1, at 321 (intellectual property).
165. Agreement on Technical Barriers to Trade, WTO Agreement, Apr. 15, 1994, Annex 1 A, LEGAL TEXTS, supra note 1, at 121.
166. See, e.g., Agreement on the Application of Sanitary and Phytosanitary Measures, WTO Agreement, Apr. 15, 1994, Annex 1 A, art. 2(2), LEGAL TEXTS, supra note 1, at 60.
167. Agreement on Safeguards, WTO Agreement, Apr. 15, 1994, Annex 1A, LEGAL TEXTS, supra note 1, at 275.
168. WTO Agreement pmbl., supra note 16.
169. GATT, supra note 1, art. XIX (1)(a).
materials to domestic industry, and the acquisition of products in short supply all have national security overtones.\textsuperscript{171}

Nevertheless, both of these articles place substantial limitations on the exercise of unilateral discretion. Article XIX, as implemented by the Agreement on Safeguards, imposes requirements regarding serious injury, notification, consultation, investigation, surveillance, and duration, and requires that restrictions be imposed “only to the extent necessary.”\textsuperscript{172} Article XX exceptions are all subject to restrictions that prohibit the use of measures that constitute arbitrary or unjustifiable discrimination or that constitute disguised restraints on trade, and some article XX exceptions are further qualified by a “necessity” requirement.\textsuperscript{173} As is obvious from the Panel Report in United States — Restrictions on Imports of Tuna,\textsuperscript{174} these conditions must be satisfied before an exception can be invoked, and a WTO panel will indeed review an economic restriction to determine whether those conditions have been met.\textsuperscript{175} As a result, a nation will not be allowed to impose an embargo under article XX simply because it wants to force another nation to alter its internal policies.\textsuperscript{176}

The above indicates that both the United Nations and the WTO envision global relationships that are based upon community and international agreement rather than upon relative economic strength. The unilateral imposition of security-based sanctions, based upon a self-defining and fluid security exception, stands in opposition to such a vision. Undertaken without parameters or accountability, such sanctions undermine the stability of the international trading system and endanger both the credibility and viability of the WTO Agreement.\textsuperscript{177} As the Panel indicated in United States — Trade Measures Affecting Nicaragua, economic sanctions imposed for security reasons create uncertainty in trade relations, reduce the incentives for governments to engage in open trade practices, reduce the willingness of businesses to invest overseas, and run counter to the GATT aim of fostering non-discriminatory trade policies.\textsuperscript{178} Rather than enhancing the rule of law

\textsuperscript{171} GATT, supra note 1, arts. XX (g) (natural resources), XX (i) (essential quantities), and XX (j) (short supply).
\textsuperscript{172} Agreement on Safeguards, supra note 167, arts. 2 and 4 (serious injury), art. 3 (investigation), art. 5 (only to the extent necessary), art. 7 (duration), art. 12 (notification and consultation), art. 13 (surveillance).
\textsuperscript{173} See supra notes 36-41 and accompanying text.
\textsuperscript{174} United States—Restrictions on Imports of Tuna, GATT Doc. DS29/R (June 16, 1994).
\textsuperscript{176} United States—Restrictions on Imports of Tuna, supra note 174, ¶¶ 5.38-39, 5.42.
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upon which a multilateral system must be based, the exercise of discretion gives rise to a trading system that can be arbitrary, unpredictable, and unsustainable, and such discretion can serve to deny promised protections to the world's weaker economic partners.

B. The Creation of Standards

The unilateral imposition of security-based sanctions, whether invoked pursuant to article XXI or customary international law, should reflect a substantial and quite encompassing decision-making process. In reality, however, such a decision may merely represent the broad, and often unchecked, discretion of one individual — an individual who is subject to a variety of political pressures and who is "guided" by statutory authority that conveniently confuses national security with politics, foreign policy, and general economic welfare. To remedy this problem, the following section presents a series of criteria that should be weighed whenever such a decision is being made. In this regard, no single criterion is meant to be determinative. Instead, each criterion should be viewed as one component of a broad, educated, and honest decision-making process.

1. Respecting the Rights to Sovereignty and Nonintervention

All nations are bound by both treaty and customary international law to the fundamental principles of sovereignty and nonintervention. These closely linked doctrines stand for the proposition that every State has the right to conduct its affairs without outside interference and that all nations must respect not only the territorial integrity of other States but their political integrity as well. Thus, nations are prohibited from intervening either directly or indirectly in the internal or external affairs of another State regarding matters that a sovereign State is permitted to decide freely for itself, including the choice and implementation of political, economic, social and cultural systems; the formation of foreign policy; the adoption of ideology; the protection of currency and assets; and the creation of alliances and trading relationships with other nations.
There is no clear prohibition against the use of economic sanctions for political and ideological purposes. In the Nicaragua case, for example, the International Court of Justice declined to hold that the U.S. embargo constituted a form of indirect intervention. While the term “economic sanction” may include, for example, multilateral sanctions imposed pursuant to U.N. authorization or sanctions specifically designed to punish, condemn, or spur racial equality, this Article focuses on the application of unilateral, security-based sanctions, which inherently lack procedural safeguards and are apparently free from all international inquiry. These sanctions, imposed without multilateral support or accountability, are particularly suspect and must therefore be carefully scrutinized in light of the principles found in both the WTO Agreement and the U.N. Charter.

It is within such a context that sanctions allegedly imposed for security purposes are often only tangentially aimed at protecting essential security interests and are primarily aimed at coercing other nations to alter their foreign or domestic policies or to change their established trading relationships. The United States, for example, has admitted 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.” It has imposed security-based sanctions for the purpose of encouraging the ouster of one regime and the establishment of another; for the purpose of requiring a transition to a particular political or economic system; for the purpose of affecting political realignment; and for the purpose of coercing other nations into supporting U.S. policies.

Common sense suggests that the whole purpose of such coercion, while dressed in terms of protecting essential security interests, is actually designed to intervene in the internal or external affairs of another nation and to influence the “choices” being made by that sovereign. Despite the laudable purposes that may or may not be involved, “[t]he element of coercion . . . forms the very essence of prohibited intervention” when it is employed to deny other sovereign States their freedom to choose. As was argued in the Tuna case, the doctrine of sovereignty requires that every State remain “supreme internally.” The use of a security-based sanction can not only

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Note 10, at 339 (remarks by Lawrence Boisson de Chazournes) (“[A]ny economic countermeasures, irrespective of their purpose, have to comply with the customary international law principle of non-intervention.”); Cleveland, supra note 10, at 49-56; and Henderson, supra note 10, at 191-96.

185. Panel, The Costs and Benefits, supra note 10, at 339 (remarks by Lawrence Boisson de Chazournes). See also supra notes 74 and 77 (discussing the broad discretion of states in determining what constitutes a “security threat” that might serve as a basis for imposition of economic sanctions); Cleveland, supra note 10, at 6-7 (arguing that sanctions can promote internalization of human rights norms by the target state).

186. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 126 (June 27) (“[A]t this point, the Court had merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention.”).

187. Id. at 109.

188. Id. at 56; supra notes 127-135 and accompanying text.

189. Id. at 108.


191. Id., ¶ 4.38.
represent an attempt to interfere with this internal supremacy, it also can represent an attempt to place that interference above review.

The questions of sovereignty and intervention at least arguably present an inherent conflict. On the one hand, every nation has the sovereign right, absent voluntarily assumed treaty obligations, to decide and to implement its own foreign policy. On the other hand, each nation also has the sovereign right to conduct its affairs free from interference by others.

The fine line between these two rights is a matter of interpretation. The Helms-Burton Act, for example, is viewed by the United States as a mere extension of a long established foreign policy dating back to the Kennedy administration. The Europeans, in contrast, believe that the Act is a perfect example of interfering with the internal affairs of other nations and is, along with U.S. policies toward Iran and Libya, both "illegal and counterproductive." Similarly, Canada and a variety of Latin American States view Helms-Burton as an extraterritorial application of U.S. law and a clear invasion of their individual sovereignty.

This line between potentially conflicting sovereign rights is especially problematic in the area of secondary boycotts. In such instances, one nation threatens to punish another nation (or the corporate entities of that nation) even though the latter poses no direct security threat. These boycotts are imposed in an attempt to mandate multilateral support for a decision that was made unilaterally. They are designed "to penalize countries which, in the exercise of their sovereign rights" want nothing to do with the dispute at hand. Such measures are simply imposed against any country which follows "policies not agreeable to" the United States.

One might also question the sovereign right of a nation to subvert the monetary system of another State or to "assist" in the overthrow of its government. In regard to the former, the courts have recognized that "[t]he economic lifeblood of a nation is drawn from its monetary supply, and the protection of the nation's currency is crucial to its economic survival." Nevertheless, U.S. statutes for example, are specifically designed to undermine the monetary systems of unfriendly nations by means of obstructing the flow of hard currency to those countries. Such a goal is accomplished not only by means of a refusal to trade, but also by means of prohibiting other nations or corporations from transferring hard currency (and other needed resources or expertise) to those targets, and by threatening to withhold payment to international financial institutions that provide loans or other assistance to those countries.

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192. U.S. Dept. of Commerce, supra note 112.
196. Id. at 34.
It is a fundamental tenet of international law that no nation shall “assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.”\(^{199}\) Certainly these principles are primarily designed to prohibit the support of contras or other armed opposition through the provision of financial aid, training, intelligence, the supply of arms and so forth.\(^{200}\) Nevertheless, such terms as “assist,” “foment,” “incite,” and “interfere” do tend to leave substantial room for interpretation. One might question the precise meaning of legislation such as the LIBERTAD Act which specifically authorizes the President to “furnish assistance and provide other support” for democratic groups in Cuba and for other individuals and non-governmental organizations in support of democracy-building efforts.\(^{201}\) While this Act in no way envisions the providing of military aid, it does in fact envision fostering or perhaps inciting a new governmental and economic system.

Issues such as these do not lend themselves to easy resolution. The distinction between the sovereign rights of one nation and the subordination of the sovereignty of another is nebulous at best. Nevertheless, three observations appear to be substantially true. First, security-based economic sanctions, regardless of whether they fit the legal definition of intervention, are often designed to coerce another sovereign or to alter its internal or external choices. Second, rights of sovereignty must always be viewed in the context of existing international agreements that might limit the exercise of those rights. Since the nature of economic sanctions is to impose restrictions on international trade, they must be imposed only within the confines of the WTO Agreement. Since the U.N. Charter requires each nation to respect its treaty obligations,\(^{202}\) every State should possess the right to demand faithful performance of those obligations. Finally, sanctions and intervention are options available only to the most powerful nations.\(^{203}\) Under such circumstances, a duty to weigh the relative rights of sovereignty and non-intervention should, at least at the outset, be firmly placed upon the potential imposer of the sanction, and thus incorporated into its broad decision-making process.

2. The Need to Consider the Target’s Stage of Development

It has been argued that there is “no distinction in GATT or in international law between developed and developing countries in matters of security.”\(^{204}\) Such a position raises serious questions since it views article XXI

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\(^{199}\) Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 102 (June 27) (citation omitted).

\(^{200}\) Id. at 119, 124, 127.


\(^{202}\) U.N. CHARTER pmbl.


\(^{204}\) GATT Council, Minutes of Meeting held on June 29-30, 1982, GATT Doc. C/M/159, at 20 (Aug. 10, 1982).
as merely an island within the broader WTO Agreement, totally devoid of all context or constructive framework. It is also an argument that assumes the inevitability of power-based relationships and that perpetuates the struggle between the North and the South, between the rich and the poor. It ignores the inability of weaker nations to retaliate or to achieve any sort of equitable relief under article XXIII, and it ignores the fact that the severity of human misery imposed is often proportionate to the lack of economic development.

The decision regarding whether to unilaterally impose security-based economic sanctions must take into consideration the developmental stage of the potential target. Both the WTO Agreement and its GATT predecessor have accorded special treatment to less-developed nations in an attempt to stimulate their growth and to enhance their ability to share in an increasing pool of global wealth. For decades, it has been clearly established that "the promotion of the trade of less-developed countries and the provision of increased access for their products in world markets" are "among the primary objectives of the Contracting Parties."205

The whole purpose of Part IV of the General Agreement206 is to address, and to alleviate, the specific problems facing less-developed countries. Part IV recognizes the particular urgency of enhancing the economic and social development of these nations through the expansion of international trade. It recognizes the need for raising standards of living in these countries, for expanding their export earnings, and for ensuring the availability of essential imports. In order to promote their growth, developed countries are to give substantial priority to the reduction of trade barriers on products of particular export interest to poorer nations and to the provision of improved accessibility to world markets for those products.207

In reflecting these sentiments, the WTO has invited the contracting parties to improve generalized-system-of-preferences and most-favored-nation treatment for products of particular export interest to least-developed countries and to facilitate the participation of poorer countries in multilateral-trade-negotiation agreements.208 Pursuant to the so-called Enabling Clause, contracting parties have been specifically authorized to accord "differential and more favourable treatment to developing countries, without according such treatment to other contracting parties" and to provide further "special treatment" for those developing nations that are indeed in their earliest stages of development.209

None of these provisions are expressly directed at the use of the security exception. Nevertheless, they do reflect a fundamental recognition that even the most sacred of GATT tenets must be tempered to meet the needs of less fortunate nations. Without question, the WTO is founded upon the basic

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206. GATT, supra note 1, arts. XXXVI-XXXVIII.

207. Id.


premise of "non-discrimination" among nations. Despite this fact, the agreement specifically encourages discrimination in favor of less-developed countries. By doing so, the agreement implicitly recognizes that its mandates must always be adjusted to take into consideration the various stages of development of its Member States. Thus, the argument that the security exception must be immune from such considerations loses much of its persuasiveness.

The most relevant statement in this regard is found in article XXXVII, paragraph 3(c). It 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. . . ." 210 It could be argued that this article was not meant to encompass the invocation of the security exception and that its mandates should be limited to such "other measures" as those surrounding article XIX, subsidies, dumping, and the like. 211 On the other hand, it can also be argued that the degree of hardship imposed by any given (or particular) restraint on trade does not vary in accordance with the ground upon which it is based. A quota on sugar imposed pursuant to article XIX, for example, will have the same effect on a less-developed exporting nation as an identical quota imposed under article XXI. Since article XXXVII(3)(c) is aimed at restrictions that are admittedly lawful or permitted under the agreement, it should not stretch the imagination too far to suggest that nations considering a valid exercise of the security exception be bound to consider the developmental status of their potential targets. 212

Several nations have, in fact, argued that such a relationship exists between article XXI and paragraph 3(c) of article XXXVII (and between article XXI and Part IV in general). In regard to the U.S. embargo of Nicaragua, for example, the Egyptian representative indicated that when invoking the provisions of article XXI, "due regard should be given to the essential interests of developing countries in the spirit of Part IV" and that "particular attention should be drawn to Article XXXVII:3(c)." 213 Numerous other States also took the position that special caution should be used when the target is a developing country and that the U.S. actions against Nicaragua actually violated Part IV of the Agreement. 214 In so arguing, these nations were recognizing a fundamental nexus between the decision to exercise the security exception and the developmental status of the target country.

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210. GATT, supra note 1, art. XXXVII, para. 3(c) (emphasis added).
211. "According to the 1976 Secretariat Note on the application of Part IV, the drafting history of Part IV shows that 'escape clause action and countervailing and anti-dumping duties' were among the 'other measures' intended as being subject to the provisions of Article XXXVII:3(c)." GATT ANALYTICAL INDEX, supra note 10, at 1065-67.
212. In this regard it is worthy of note that Lawrence Boisson de Chazoumes, in discussing the costs of countermeasures, has indicated that there are costs "of a macro-economic nature depending upon the degree of development of a country and the extent of its integration into the world economy." Panel, The Costs and Benefits (remarks by Laurence Boisson de Chazoumes), supra note 10, at 340.
213. GATT Council, Minutes of Meeting held on May 29, 1985, GATT Doc. C/M/188, at 12 (June 28, 1985).
214. For comments to this effect by a variety of representatives, see id. at 5, 7, 10, 12, 13-14, 16.
The duty to consider the developmental status of the target nation can also be based upon a sense of fundamental fairness. Developing countries, and especially least-developed countries, generally have no ability to retaliate, no ability to receive compensation for damages incurred, and no ability to achieve any sort of effective redress under the nullification or impairment provisions of article XXIII.\textsuperscript{215} The suspension of concessions or other obligations on the part of the target is truly meaningless when a two-way embargo has been imposed.\textsuperscript{216}

As a result, there is very little impetus for developed countries to avoid "wrongful" decisions. If one may assume, for the sake of argument, that a developed country "wrongfully" imposes a security-based economic sanction, it need not fear the imposition of any penalty. In this sense, the developed country actually has very little to lose. In light of political expediencies at home, it thus becomes apparent that political leaders may err on the side of imposing the sanction. Unfortunately, a politically convenient decision (resulting in little or no adverse effect on the invoker) may have a devastating effect on the trade of a developing country, on its ability to service foreign debt, and on its ability to experience growth and development.\textsuperscript{217}

Finally, incorporating the developmental status of a potential target into the decision-making process may help alleviate some of the tensions surrounding North/South relations. Whether or not one agrees with the argument that the security exception is a mechanism by which richer nations impose their will upon the poor, it is quite clear that many nations have the perception that the use of security-based sanctions is substantially a reflection of North/South issues and power differentials.\textsuperscript{218} Economic sanctions may only be effectively employed by those with economic strength and the history of economic sanctions supports the argument that targets tend to be economically weak and lacking in the ability to retaliate.\textsuperscript{219} Additionally, barring such threats as chemical or biological terrorism, the threat posed by a weaker nation is less than that posed by one with substantial economic, political and military strength. As a result, it has been asserted that the use of these inherently discriminatory economic sanctions sets a dangerous precedent.


\textsuperscript{218} See, e.g., GATT Council, Minutes of Meeting held on June 29-30, 1982, GATT Doc. C/M/159, at 13-22 (Aug. 10, 1982); GATT Council, Minutes of Meeting held on May 7, 1982, GATT Doc. C/M/157, at 3-13 (June 22, 1982). For a listing of those nations supporting Nicaragua's request for the establishment of a panel, see GATT Council, Minutes of Meeting held on July 17-19, 1985, GATT Doc. C/M/191, at 42 (Sep. 11, 1985).

\textsuperscript{219} See, e.g., GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED 95 (2d ed. 1990).
"with severe consequences for the future of developing countries" and that the most powerful of nations must therefore be bound to demonstrate "the greatest self-restraint" in exercising the security exception.221

3. The Need to Consider Relative Impact

A security-based sanction imposed by an industrialized nation and a security-based sanction imposed by a less-developed nation may be generically identical. Each of these nations, for example, may choose to impose a two-way embargo against a target whose activities are threatening the essential security interests of both. The impact of these sanctions, however, will often be substantially different.

There is no question that a sanction imposed by an economic power against a less-developed target will have a considerable influence on the social, political, and economic well-being of that target. This is especially true because the invoking State will often be a major purchaser of the target’s primary exports, a major supplier of needed imports, and a major source of financial aid. Additionally, the invoking State’s political clout may reduce the ability of the target to seek alternative sources of supply and demand. The abrupt termination of these relationships creates extraordinary economic and social consequences for a dependent country and may not only temporarily interrupt, but substantially reverse, its social and economic development. Sanctions may indeed have “costs of a macro-economic nature depending upon the degree of development of a country and the extent of its integration into the world economy.”222 In contrast, an identical sanction imposed by a smaller nation that engages in limited trade with the target (and provides no external financing) would have only a marginal impact on the health of the target.

Any impact assessment should encompass not only an analysis of the immediate effect of the sanction but an examination of the effects that such an interruption in social and economic intercourse will have on the nation’s ability to pursue future growth and development.223 The inclusion of an element of “time” would serve to recognize that the impact of any given sanction may increase exponentially over its duration. Certainly the imposition of a two-way embargo for a period of one or two years could have a substantial adverse effect on a target. Sanctions imposed over the course of twenty or thirty years, however, could alter the fundamental character of a nation and its people. Not only can long-term sanctions breed a generation of animosity and distrust, they can create a generation that has experienced

220. Trade Restrictions Affecting Argentina Applied for Non-economic Reasons, GATT Doc. C/M/157, at 3 (June 22, 1982) (quoting a statement made by the representative of Argentina at a GATT Council meeting held on 7 May 1982).

221. GATT Council, Minutes of Meeting held on Nov. 5, 1986, GATT Doc. C/M/204, at 13 (Nov. 19, 1986) (quoting a statement made by the representative of Hungary at a GATT Council meeting held on 5 and 6 November 1982).


223. Panel, The Costs and Benefits, supra, note 10, at 359 (remarks by W. Michael Reisman) ("[T]he mid-term and long-term, as well as the short-term consequences of prospective economic sanctions must be projected and appraised.").
nothing but a life of poverty and dependence upon the State. They can create a
generation that lacks the education, technological expertise, and
entrepreneurial skills necessary to compete in a global market.

This is not to imply that strong nations should not impose security-based
sanctions against the weak or that some minimum developmental threshold
should be established. Even the least-developed of countries must sometimes
bear the consequences of its actions. What is being argued is that such long-
term consequences should be considered when deciding whether the “degree”
of a particular course of action is truly necessary in light of the security threat
being posed and the objectives being sought. Such a decision-making process
would recognize that sanctions specifically directed at tangible, identifiable
threats, and that are supported by the international community, are more likely
to be successful within a limited time frame. On the other hand, “security-
based” sanctions that are designed to alter the fundamental political and
economic structures of another nation, that are based upon security threats
which are ill-defined by nebulous or broadly encompassing terms, and that
politically preclude any future admission of failure, tend to run the risk of
lengthy imposition and exponential impact. As a result, any decision to
impose a security-based sanction should be based not only upon the existence
of a real or perceived threat to national security (as opposed to a desire to
punish or to influence the lawful behavior of another sovereign), but upon the
likelihood that the sanction will achieve its valid security purpose within a
time frame that reflects the relationship between the degree of the threat being
posed and the degree of hardship being effected.

4. The Need to Consider the Consistency/Likelihood of Success
Dichotomy

Because the security exception is designed to allow nations to protect
their essential security interests, it would seem logical that any decisions to
invoke this exception would include consideration of the likelihood that the
imposed sanctions would be successful in accomplishing their protective
purpose. If the sanctions are truly incapable of alleviating the threat to
security, or are indeed irrelevant to the threat being imposed, one might ask
why they are being employed and whether they should be granted the
immunity from international scrutiny that is apparently provided by this
particular exception. Sanctions imposed to influence the lawful decisions of
other nations or to punish a nation for unacceptable (though non-threatening)
conduct should in fact be judged in light of the substantive and procedural
limitations provided for in such international agreements as the U.N. Charter
and the United Nations Declaration Concerning Friendly Relations.

The fact that the “likelihood of success” should be a criterion when
deciding whether to impose a security-based sanction is not unprecedented.
The Export Administration Act of 1979, for example, demands that export

224. For a discussion regarding the effectiveness (or lack thereof) of sanctions, see GARY
CLYDE HUFFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED 95 (2d ed. 1990).
225. See supra notes 142-181 and accompanying text.
controls be consistently judged in terms of their effectiveness in advancing national security and foreign policy interests. This act is extremely cognizant of the fact that export controls can be quite ineffective in the face of substantial foreign availability or where the reaction of other nations would render the controls ineffective. Absent the ability to effectively enforce the controls or absent the ability to achieve intended purposes, the controls should be discarded.\(^{227}\)

While export controls can undoubtedly be distinguished from broader economic sanctions, the purpose of protecting essential security interests is often common to both forms of restrictive activity. As a result, if "ineffectiveness" is indeed a consideration when contemplating the imposition of a security-based export control, it should also be a consideration when contemplating the use of sanctions under the security exception. The fact that the former may more directly reflect the political influence of domestic industries is not a satisfactory basis upon which to create a distinction.

The likelihood of success of any economic sanction, including security-based sanctions, will depend upon a variety of circumstances. Both the nature and the magnitude of the goals or purposes of the sanction will affect the probability that those goals will be achieved. A major study of economic sanctions found that sanctions tend to be more effective when their goals are "relatively modest," thus reducing both the importance of international cooperation and the likelihood that rival powers will step in to provide assistance to the target.\(^{228}\) On the other hand, efforts to bring about major policy changes on the part of an adversary have "succeeded only infrequently."\(^{229}\)

The relationship between "success" and "purpose" can become quite nebulous. Not only must the goals of the sanction policy be identified and defined, those goals may change or evolve substantially over the life of the sanction.\(^{230}\) Nevertheless, three observations should be borne in mind. First, there need be no expectation that a security-based sanction will be successful either immediately or within a short period of time, since the desired effects of a sanction may in fact increase, or decrease, over its duration.\(^{231}\) However, it is also true that a sanction that is likely to succeed only over a substantial number of years is also more likely to impose a disproportionate impact on the target. Second, in undertaking the difficult task of establishing the goals of a

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230. Panel, Effects and Effectiveness, supra note 10, at 208 (remarks by Michael P. Malloy); Panel, The Gulf War, supra note 10, at 185-86 (remarks by Danforth Newcomb) (citing shifts in the goals of sanctions against Iraq). For a discussion on the potential relevance of purpose or intent, see Cameron, supra note 10, at 238-41.

security-based sanction, nations should limit their analysis (by definition) to alleviating the threats being posed to their essential security interests. Broad foreign policy concerns and even laudable philosophical ideas should not be addressed under the auspices of the security exception, but should instead be handled on a more multilateral basis and subjected to greater international scrutiny. Third, any decision regarding the establishment of goals and the imposition of sanctions to accomplish those goals should be made in light of the realities of international relations. In this regard, nations must recognize the fundamental fact that unilaterally imposed sanctions have generally yielded less than stellar results. 232

In addition to both foreign availability (which can render ineffective one-half of a two-way embargo) and the nature and magnitude of purpose, the likelihood of success of a security-based sanction can be analyzed in light of several other factors as well. According to Elliott, sanctions in general tend to be more effective when the invoker can avoid incurring high costs to itself, when the invoker accounts for a large portion of the target’s trade, when the sanction can be imposed quickly and decisively with substantial costs to the target, and when the invoker and the target are generally friendly toward one another and conduct a substantial degree of economic intercourse. 233

Unfortunately, while the likelihood of success should be considered when contemplating the imposition of a security-based sanction, the use of such a criterion is inherently discriminatory. One of the primary factors in determining the likelihood of success is the strength of the invoking nation relative to its target. 234 When the target is a small developing country, lacking in the ability to retaliate, and substantially dependent upon the invoker in terms of both trade and economic assistance, the costs to the target tend to rise and the costs to the invoker tend to fall.

The problem, of course, is that the use of this criterion runs directly counter to another important consideration discussed earlier, namely the need to consider the target’s stage of development. 235 As was noted previously, one of the fundamental objectives of the WTO is to provide the opportunity for less-developed countries to share in an increasing pool of global wealth, and the WTO has always accorded special treatment to these nations in an attempt to advance such a purpose. The use of the “likelihood of success” criterion tends to ignore the spirit of Part IV of the Agreement. It tends to perpetuate

232. See generally, Gaugh, supra note 10, at 86-87; Panel, The Gulf War, supra note 10, at 172-73 (remarks by Kimberly Ann Elliott) (analyzing the effectiveness of sanctions); Schmitt, supra note 24, at 4; Panel, Effects and Effectiveness, supra note 10, at 211 (remarks by Covey T. Oliver) (stating that unilateral sanctions by the U.S. severely hindered Chile’s economic development).

233. Panel, The Gulf War, supra note 10, at 172-73, 174 (remarks by Kimberly Ann Elliott). In order to place these criteria in their proper perspective, it may be noted that Ms. Elliott pointed out that “our goal was to develop a set of recommendations for making sanctions a more effective foreign policy tool. We were interested in the instrumental use of sanctions, not in their use for domestic political or international signaling purposes. An instrumental use of sanctions is one in which the sanctions were intended to achieve a specific change in the policies, capabilities, or government of a foreign country.” Id. at 170 (emphasis in original). See also GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED 95 (2d ed. 1990).


235. See supra Part III.B.2 and accompanying notes.
the use of power-based relations, degrades the concept of sovereignty, and encourages a fundamental distrust between the rich and the poor.\textsuperscript{236}

Finally, the use of this criterion raises substantial questions regarding the issue of consistency. The U.N. Charter is based upon the fundamental principle of the “sovereign equality” of all of its members,\textsuperscript{237} and each member has pledged to recognize the “equal rights . . . of nations large and small.”\textsuperscript{238} Similarly, all contracting parties to the WTO have recognized that the rules and procedures of the WTO system must be “fairly applied” and that the “consistency” of the system must be preserved.\textsuperscript{239}

Nevertheless, security-based sanctions continue to be employed on a selective basis. Despite the fact that various countries pose similar threats to the security interests of the United States, for example, our responses to those threats have varied substantially in light of the relative importance of the particular countries involved. As a result, the United States has not only been questioned in regard to its motives, but it has also been the subject of legitimate allegations of hypocrisy.

The Cuban embargo tends to underscore the double standard that applied when responding to perceived threats to essential security interests. Despite the fact that the Pentagon has concluded that Cuba no longer poses any significant threat to U.S. security,\textsuperscript{240} the United States has continued its embargo on the basis of security concerns specifically surrounding, at least in part, the violation of fundamental human rights.\textsuperscript{241} The maintenance of these sanctions has given rise to the question of whether the United States would impose such an embargo against a more powerful nation or a more significant trading partner under similar circumstances. In light of the fact that security-based sanctions have not been applied to other nations with less than laudable human rights records, the answer to this question has become quite obvious.

The very different trade policies implemented by the United States towards Cuba and China illustrate such hypocrisy. President Clinton indicated that China has been “on the wrong side of history” regarding human rights.\textsuperscript{242} However, rather than viewing these human rights violations as a threat to U.S. security (as has been the case with the violations in Cuba), the President chose to increase trade between the two nations in the hope that additional economic relationships would spur the democratic process.\textsuperscript{243} Additionally, the legislation enacted in 2000 that will extend normal trade relations treatment to the People's Republic of China\textsuperscript{244} specifically recognizes that “the human

\textsuperscript{236} Id.
\textsuperscript{237} U.N. CHARTER art. 2, para. 1.
\textsuperscript{238} Id. pmbl.
\textsuperscript{240} Marquis, supra note 118.
\textsuperscript{242} Craig R. Whitney, Dissents on Iran and Iraq; Carrots-for-China Policy Haunts U.S. in the Gulf, N.Y. Times, Nov. 9, 1997, § 4, at 1.
\textsuperscript{243} Id.
\textsuperscript{244} Normal Trade Relations for the People's Republic of China, Pub. L. No. 106-286, 114 Stat. 880 (2000). This Act does not in and of itself grant normal trade relations to China, but instead
rights record of the People’s Republic of China is a matter of very serious concern and that “Congress deplores violations by the [Chinese] Government . . . of human rights, religious freedoms, and worker rights . . . .” On the other hand, the legislation also recognizes that the trade in goods between China and the United States totaled almost ninety-five billion dollars in 1999, and that China’s commitments pursuant to its WTO accession would, if realized, “provide considerable opportunities for United States farmers, businesses, and workers.” The existence of such a dichotomy, however, should not imply in any way that the use of security-based sanctions should be increased or that an embargo should be imposed against the People’s Republic of China. Instead, the reasons that the United States has not imposed sanctions against China should be used to examine and reevaluate U.S. policy toward Cuba. Security-based sanctions should only be imposed consistently and their use as a convenient, low-cost, foreign policy tool against weaker nations should be discouraged.

Additionally, a nation’s particular response to a perceived security threat can apparently be influenced by the needs of its domestic industries. U.S. sanctions against India and Pakistan, for example, were imposed in response to nuclear tests being conducted by those two nations. These sanctions, however, exempted both food exports and the export of fertilizer. While one might hope that these exceptions were based on humanitarian concerns, it would appear that the former exemption was primarily a response to farmers in the Pacific Northwest (who would have been barred from bidding on a thirty-seven million dollar wheat order from Pakistan) and that the latter exemption was based upon the fact that India was the second-largest importer of American phosphate fertilizer. Similarly, the Trade Sanctions Reform and Export Enhancement Act of 2000 was designed to appease U.S. farmers and other agricultural interests by way of easing sanctions regarding agricultural sales. In order to appease the politically important anti-Castro Cuban-American community, however, the Act simultaneously prohibits any U.S. person from “financing” any such agricultural sale to Cuba.

It can be argued that the concerns of domestic industries may be relevant to the development of a nation’s “foreign policy.” On the other hand, it can also be argued that these concerns should not be treated as relevant when contemplating the use of a security-based sanction and that they should not be allowed to influence the manner in which a nation perceives, or responds to, a

245. Id. § 202(11).
246. Id. § 202(12).
247. Id. § 202(4).
248. Id. § 411(4).
250. Id.
251. Id.
253. Id. § 903.
254. Id. § 908.
potential security risk. As a result, the development and implementation of broad foreign policy objectives must in fact be distinguished from the imposition of security sanctions. If sanctions are to be invoked in a consistent and nondiscriminatory manner, they cannot be dependant upon the relative importance of the target to domestic business. Additionally, the existence of selective application would seem to indicate that a sanction is more foreign-policy oriented than security based and would raise questions regarding the degree to which the invoking nation actually considers the sanction necessary for insuring its essential security interests.

Finally, any use of a “likelihood of success” criterion, at least when contemplating sanctions against another member of the United Nations or WTO, must give some credence to the concept of “good faith.” While certainly a nebulous mandate, the requirement of good faith has been consistently adopted throughout the law of treaties. The 1969 Vienna Convention, the primary authority in this regard, indicates that States must “refrain from acts which would defeat the object and purpose of a treaty” and that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Similarly, all members of the WTO have agreed to apply the WTO Agreement “fairly” and with “consistency,” while all members of the United Nations have pledged to “fulfill in good faith the obligations assumed by them” under the Charter.

This standard of good faith, while perhaps not sufficiently concrete to judge the motives of a nation, should be sufficiently clear to prohibit discriminatory actions. If two nations are posing a substantially similar threat to the essential security interests of another nation, the imposition of sanctions against one and not the other would seem to violate these requirements of good faith and fundamental fairness. To demand at least some measure of consistency would tend to de-politicize the decision-making process and would remove the tendency to err on the side of imposition when a weaker target is involved. A nation contemplating the use of a security-based sanction against a poorer neighbor should query whether it would impose such a sanction against a significant trading partner under similar circumstances.

5. Necessity, Exhaustion, and the Least Restrictive Alternative

In determining whether to impose a security-based sanction, and in determining the actual magnitude of that sanction, a nation should consider whether its actions are in fact “necessary”; whether it has exhausted its options for negotiation and consultation; and whether the measures being


258. Id., art. 26.


taken represent the least restrictive means for achieving their desired results. Of course, these three concepts will often prove to be interdependent. It could be argued, for example, that if a less restrictive means is available for accomplishing the goals being sought, then a more restrictive measure would not in fact be "necessary" under such a circumstance. Similarly, if a nation has chosen not to exhaust potentially promising mechanisms for negotiation and consultation, the imposition of a sanction would not be "necessary" at least at that particular point in time. Further, a security-based sanction whose degree of impact far exceeds the degree of the threat being posed would arguably be "unnecessary" to the extent of that differential.

These concepts have been recognized in a variety of contexts in the international arena. For example, article 33 of the U.N. Charter requires parties involved in a dispute that is likely to endanger international peace and security to "first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement . . . or other peaceful means of their own choice." In terms of WTO obligations, the Agreement on Technical Barriers to Trade provides that technical regulations shall not create "unnecessary obstacles" to trade and "shall not be more trade-restrictive than necessary" to fulfill legitimate objectives (including those objectives related to national security). Similarly, the Agreement on Safeguards provides that such measures shall be applied "only to the extent necessary" to prevent serious injury and article XX of the GATT limits the use of several General Exceptions through the imposition of a "necessary" requirement.

With regard to exhaustion, article XXII requires each contracting party to afford "adequate opportunity for consultation regarding . . . any matter affecting the operation" of the agreement. The Understanding on Rules and Procedures Governing the Settlement of Disputes reiterates the WTO’s resolve "to strengthen and improve the effectiveness of the consultation procedures" and to afford "adequate opportunity for consultation." In order to do so, the Understanding requires (assuming a request has been made) that the parties engage in good faith consultations with a view toward reaching a "mutually satisfactory solution." It also provides that parties should attempt to obtain satisfactory adjustment "before resorting to further action" under this Understanding and it encourages the use of good offices, conciliation, mediation, and arbitration procedures. Finally, in specific

261. Id., art. 33.
262. Id.
263. Agreement on Technical Barriers to Trade, art. 2, para. 2, supra note 165, at 122.
264. Agreement on Safeguards, art. 5.1, supra note 167, at 277. See also GATT, supra note 1, art. XIX:1(a) ("to the extent and for such a time as may be necessary").
265. See GATT, supra note 1, art. XX(a), (b), (d), (l).
266. Id., art. XXII, para. 1.
268. Id., art. 4, para. 1.
269. Id., art. 4, para. 2.
270. Id., art. 4, para. 3.
271. Id., art. 4, para. 5.
272. Id., art. 5.
273. Id., art. 25.
regard to less-developed countries, the GATT provides that a developed contracting party shall “explore all possibilities of constructive remedies” before applying measures against a less-developed member.\textsuperscript{274}

The security exception provided for in article XXI of the General Agreement on Tariffs and Trade states that nothing in the Agreement shall prevent a contracting party from taking any action which “it considers necessary” for the protection of its essential security interests.\textsuperscript{275} Despite the “it considers” qualifier, article XXI’s inclusion of the word “necessary” is clearly not without meaning. Even if it is assumed that the article’s “it considers necessary” language establishes a self-defining nature for essential security interests, an invoking nation would still have the duty to address the necessity issue. The fact that a nation’s ultimate decision may not be reviewable by an external body does not relieve that nation from its obligation to engage in its own analysis of whether the measure being contemplated is necessary.

When engaging in such an analysis, nations must recognize that security-based sanctions are not “necessary” merely because they are “useful,”\textsuperscript{276} or merely because they “tend” to protect essential security interests.\textsuperscript{277} Similarly, sanctions are not “necessary” merely because they are politically expedient, philosophically defensible, or free from substantial costs to the invoker. Instead, a measure can be viewed as necessary when it conforms to the expectations of the international community.

In \textit{United States — Restrictions on Imports of Tuna}, a GATT Panel examined the issue of “necessity” in substantial detail.\textsuperscript{278} While this examination focused on the “necessary” requirement found in article XX, the panel’s findings are nevertheless relevant. In this regard, the primary difference between the “necessary” language of article XX and the “it considers necessary” language of article XXI involves the issue of “who” is entitled to make the relevant determination. While the necessity of an article XX measure is subject to judicial scrutiny and the necessity of an article XXI measure is arguably not, there is no reason to believe that the singular term “necessary” should be defined in different ways under the two provisions. Stated alternatively, the “it considers” and “necessary” language can be separated into two distinct concepts. While the former is directed at the issue of potential reviewability (and implies that decisions to invoke article XXI may be subject only to internal analysis), the latter term should arguably remain a definitional constant.

In the \textit{Tuna} case, the United States argued that the term “necessary” should simply be defined as that which is “needed.”\textsuperscript{279} It argued that “any interpretation of this word as meaning ‘least inconsistent’ with the General

\textsuperscript{274} GATT, supra note 1, art. XXXVII, para. 3(c) (discussing the use of countermeasures and the exhaustion of settlement procedures). See also Panel, \textit{The Costs and Benefits}, supra note 10, at 339 (remarks by Laurence Boisson de Chazoumes).

\textsuperscript{275} GATT, supra note 1, art. XXI (b).

\textsuperscript{276} Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 117 (June 27).

\textsuperscript{277} \textit{Id.} at 141.

\textsuperscript{278} United States—Restrictions on Imports of Tuna, GATT Doc DS29/R, ¶¶ 3.63-.81, 4.30, 5.34-6.2 (June 16, 1994).

\textsuperscript{279} \textit{Id.} ¶ 3.64.
“Creating Standards” would be “needlessly complex and unpredictable.” It would require a nation to prove the non-existence of other measures and to establish a range of available alternatives and “rank them according to ‘least inconsistency’ with the provisions of the General Agreement.”

In contrast, the EEC argued that the term “necessary” actually means “indispensable,” “requisite,” “inevitably determined,” or “unavoidable.” It is a term that implies that there is “no other way or means to achieve” a desired policy objective. As a result, a measure that is otherwise inconsistent with the GATT could only be justified as “necessary” if “there was no alternative measure . . . that was either consistent or less inconsistent with other GATT provisions.” Similarly, the government of Costa Rica argued that the U.S. measures were not necessary “since the United States could not claim that it had exhausted all existing possibilities of achieving its goal.” Specific solutions, such as those involving international negotiation, “had been disregarded by the United States.”

After weighing these various arguments, the GATT Panel basically assumed the position advanced by the EEC. It held that “in the ordinary meaning of the term, ‘necessary’ meant that no alternative existed.” In so holding, the court observed that:

[A] contracting party cannot justify a measure inconsistent with another GATT provision as “necessary” . . . if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.

Admittedly in the context of article XX measures, the concept of necessity was tied to both the “exhaustion” and “least trade-restrictive alternative” doctrines. As a result, although a decision regarding what is “necessary” to protect essential security interests may actually reside with the nation invoking article XXI, the same form of analysis should be applied by that nation in its decision-making process.

Finally, as has been argued by W. Michael Reisman, parallels can be drawn between the use of highly coercive economic sanctions (which, one can assume, would include security-based measures) and the law of armed conflict. In this regard, Reisman argues that the requirements for the lawful use of force, such as necessity and the ability to discriminate between combatants and noncombatants, should be used to test the legitimacy of highly

280. Id.
281. Id.
282. Id., ¶ 3.71.
283. Id.
284. Id., ¶ 3.81.
286. Id.
287. Id., ¶ 5.35.
coercive economic sanctions and that such a test should be applied before the decision to institute such a sanction is made. He argues that an economic sanctions program, in order to be lawful, "must undertake a preliminary 'impact assessment' study" to weigh the potential collateral damage of different strategic options and that the strategic option ultimately selected must minimize such damage "to the extent possible." While phrased in somewhat different terms, these arguments strongly support the suggestion that the concepts of necessity, exhaustion, and least restrictive alternative should be incorporated into a nation’s article XXI analysis.

6. **The Need to Consider the Effect on Non-target Nations**

In contemplating the use of a security-based sanction, a nation should also consider the potential effects of the sanction on third-party (non-target) countries. Addressing such an obligation in general terms, the 1982 Ministerial Declaration provided that the contracting parties, both in the application of measures and in the exercise of GATT rights, should give "fullest consideration . . . to the trading interests of other contracting parties." Thus, it could certainly be argued that even if the imposition of an article XXI sanction lies within the "rights" of a contracting party, that party is not simply free to disregard the trading interests of other affected States.

Moreover, in the Decision Concerning Article XXI of the General Agreement, the Contracting Parties specifically recognized that when taking action pursuant to the exceptions contained in article XXI, a nation "should take into consideration the interests of third parties which may be affected" by that action.

Such a recognition reflects the fact that the impact of economic sanctions is almost never limited to the target State. Customer nations, supplier nations, and neighbors are inevitably affected by the sanction, particularly when their economies are fragile, their resources are limited, or their social and political structures are unstable. A target State, for example, might be the primary supplier of a raw material or other needed input to surrounding (non-target) countries. That input may be supplied to those countries at low cost due to geographical proximity or the existence of a free trade area or system of preferences. Because of its weakened financial condition, however, the target may no longer be in the position to produce, and then supply, those inputs. Such an argument was advanced by Nicaragua when it noted that the U.S. embargo had caused serious adverse effects on the

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290. *Id.* at 354-55. *See also* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27) (arguing that whether self-defense is lawful "depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence").


292. *Id.* at 357.


294. *Id.* at 11.


296. *Id.*
whole Central American Common Market. The embargo had reduced Nicaragua's exports to the other members of the Common Market by twenty-five percent, more than half of which consisted of industrial inputs and intermediate goods for Central American industry.

The weakened condition of the target may affect non-target nations in other ways as well. Third countries may lose an important customer for their goods and services, existing contracts may be interrupted or canceled, debts may become uncollectable, balance of payments may be distorted, and higher prices (when the target is a major producer) may be incurred. In addition to these trade-related issues, third countries may also experience a variety of social problems. For example, political and social unrest in the target nation may easily spill over to neighboring countries. This is especially true when the non-target nation experiences collateral economic hardship or houses factions that are sympathetic to the plight of the target. Similarly, a sudden inflow of refugees from the target nation can exhaust already limited social, medical, and financial resources.

These effects, of course, may be magnified if the third country becomes an actual "participant" in a security-based sanctions program originally instituted unilaterally by another nation. A unilateral sanction that is imposed by a powerful trading partner may indeed "summon" a variety of reluctant participants. Third parties may in fact be coerced into participation through threats of similar sanctions or through threats of reducing or eliminating foreign aid.

Under such circumstances, it can be argued that the "coercing" nation should have the duty to compensate (or at least to assist) third nations that experience substantial hardship as a result of their participation in the sanctions program. This argument is supported by the fact that when a sanctions program is imposed by the United Nations, rather than unilaterally, some relief is indeed available. Article 50 of the U.N. Charter specifically recognizes that sanctions can pose considerable difficulties for non-target States that aid in the implementation of those U.N. sanctions. Article 50 provides that when preventive or enforcement measures are taken by the Security Council, any non-target State "confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems." In the case of the sanctions imposed against Iraq, for example, the Security Council charged the Sanctions Committee with the task of reviewing article 50 requests from States being confronted with such "special

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298. Id.
299. See Joyner, supra note 10, at 261, n.75 (providing an example of Romania's losses following compliance with UN's sanction on Iraqi). In regard to higher prices, see also Panel, The Gulf War, supra note 10, at 174 (remarks by Kimberly Ann Elliott).
300. See, e.g., Iran and Libya Sanctions Act of 1996, supra note 198.
301. U.N. CHARTER art. 50.
302. Id.
economic problems." According to Schlittler, twenty-one States had requested article 50 consideration (as of March 18, 1991), and the working group that heard those requests made recommendations, endorsed by both the Sanctions Committee and the Security Council, "to appeal to all states on an urgent basis to provide immediate assistance to the countries concerned and to invite international institutions to upgrade their assistance programs with these countries."

Finally, when analyzing the potential impact of a sanction on non-target States, the invoking nation should also consider the effects of its actions on the political and military stability of the region. Sanctions are sometimes imposed in order to address or curtail instability in a troubled region. The measures imposed by the European Community against the Socialist Federal Republic of Yugoslavia, for example, were in part directed at the "political instability" in that European region and its "potentially destabilizing consequences elsewhere." Export control laws, and the sanctions applied in the event of their breach, are similarly aimed at maintaining regional (as well as global) military stability.

Unfortunately, in certain circumstances, sanctions can actually contribute to political instability and military imbalance as well. For example, it is conceivable that the target State, while engaging in acts that arguably threaten the security of the invoking nation, has historically played a substantial leadership role in a particular geographic area and has provided a stabilizing influence on the social, political, and economic fabric of that region. The isolating effect of the sanction may be to remove such an influence and to encourage a renewal of political, religious, or ethnic tensions. Similarly, the crippling of the military potential of the target may, on a relative basis, increase the military might of one of its neighbors. Such a circumstance may incite the exercise of newly acquired power against either the target itself or the target's protectorates or allies.

In either event, the imposition of security-based sanctions tends to tamper with the existing balance of power. Such an interference may well result in the taming of a rogue nation or the ouster of a tyrannical leader. On the other hand, it may also lead to zealous parochial support for the target, a total breakdown of mutual deference among adjoining nations, or a renewal of historical divisions and hatreds. In light of this potential diversity of results, an invoking nation must learn to accept the need for considering more thoroughly the totality of its actions.

304. Id. For some brief comments regarding such assistance, see Panel, The Costs and Benefits, supra note 10, at 359 (remarks by W. Michael Reisman), and Panel, The Costs and Benefits, supra note 10, at 349 (remarks by Shigeo Kawagishi). Regarding costs borne by non-target states, see Joyner, supra note 10, at 261-62, 268-69.
7. The Need to Quantify Essential Security Interests
   
a. An Overview

A "threat" to the essential security interests of a nation cannot be viewed in a vacuum. A nation's response to a perceived security threat may have the effect of removing or reducing the external threat being posed. On the other hand, it may actually increase both the severity and the breadth of the offensive behavior. Similarly, a response may serve to solidify the international community in a global condemnation of the offending nation, or it may serve to alienate important allies and spawn a deterioration in foreign relations. Therefore, a nation considering the use of a security-based sanction should refrain from focusing solely on the immediate (or singular) threat being posed. Instead, a nation should examine the overall or net security gains or losses that a particular response would engender.

The economic development and well-being of a nation will always be the primary mechanism for defending essential security interests from external threats. In an interdependent world, however, this well-being is fundamentally linked to both free and open trade and congenial relationships among trading partners. As Professor Jackson has noted, the trade policy of the United States "is and has been to promote national security by expanding world trade."[^307]

As a result, the use of a security-based sanction, as well as the use of import and export restrictions for national security purposes, must be viewed in the broader context of a long-term economic welfare strategy that is inherently dependent upon the reactions of other nations to restrictive practices. Security-based restrictions on imports, for example, may actually diminish national security by perpetuating inefficiency and by requiring trading concessions that damage other sectors of domestic industry.[^308] Export controls often foreclose substantial foreign markets to domestic producers, reduce international competitiveness, inhibit research and development, and reduce the overall "economic national security" of a nation.[^309] The imposition of sanctions, as well as the attempt to coerce multilateral support, can give rise to retaliatory actions that jeopardize essential security interests far more than the conduct of the target State.

Such a recognition of the importance of international reaction and the possibility that even legitimate foreign policy controls can be counterproductive reflects an understanding of international relations that is substantially lacking in the use of security-based measures. Sanctions imposed for national security purposes tend to focus on singular issues or events. Perhaps the failure to consider more fully the totality of an action reflects the basic fear that threats to essential security interests go to the heart of national sovereignty. On the other hand, such a failure may also reflect the fact that security-based measures tend to be, at least domestically, both politically justifiable and politically expedient. Criteria dealing with the protection of

[^308]: See Wilch, supra note 10, at 173-75 and 192-93.
vital interests, for example, are not designed to invoke an analysis of long-term effects on international trade or to provide insight as to why restrictions should not be applied. Instead, these criteria provide a potpourri of justifications regarding why restrictions should be applied and they tend to focus on protecting the short-term viability of domestic industries. Even more pointedly, the vesting of unbridled discretion to impose security-based sanctions is often unencumbered by any real substantive context or guiding principles that could provoke an examination of the actual costs of a particular sanction, rather than merely its benefits.

In order to determine the "net" security gain or loss resulting from the imposition of a sanction, it is necessary to account for factors such as the sanction’s likelihood of success, the existence of foreign availability, the effect on non-target States, and the disruption (or undermining) of the multilateral trading system. These factors must always be viewed in light of the need for consistency in application, predictability of conduct, and the reasonable expectations of other nations.

In addition, there are other factors that must also be examined in order to more accurately determine the net gain or loss from sanction activity, including the response of other nations to the sanction, the sanction’s effect on both foreign relations and the national security of other nations, and the actual nature of the security threat.

b. The Need to Consider the Response of Third Party Nations

In the understandable pursuit of self-interest, States are constantly negotiating a multitude of issues that encompass a variety of security and non-security concerns. As a result, an individual goal must always be tempered or balanced against other goals, and individual decisions must be made both within this context of broad interaction and with an appreciation of the realities of a quid-pro-quo political system.

Third-party nations that are dissatisfied with the imposition of a security-based sanction may therefore express their frustration in a number of different ways. Responses by a third party might include withdrawing its support for a proposed environmental agreement, altering its position regarding the relationship between trade and international labor standards, or reducing its protection of intellectual property rights. From a national security perspective, a nation might choose to retaliate by means of imposing trade restrictions against the invoking nation; it might increase its financial aid to the target country; it might refuse to support a new weapons treaty or to honor other (unrelated) sanctioning activity; or it might withdraw its funding or military personnel from other strategic areas of the world.

The need to consider net security gains and losses within such an environment was quite clear in the recent negotiations between the United

States and the European Union regarding the enforcement of Helms-Burton and the Iran-Libya Sanctions Act. Pursuant to these negotiations, President Clinton waived sanctions against three foreign companies doing business in Iran and promised to seek legislation to prevent sanctions against businesses operating in Cuba. In exchange for these concessions, the EU and Russia agreed to tighten their controls over the export of weapons technology to Iran. Administration officials indicated that these agreements "had taken the poison out of two vicious disputes that had affected Washington's ability to win European support on other matters." They argued that these concessions would encourage Europe and Russia to cooperate with the United States in isolating Iraq and in addressing the financial crises in Asia. They also thought the concessions would encourage Russia to ratify the Start II nuclear arms control treaty. One may assume that in the absence of such concessions, the pursuit of these other important national security goals would be jeopardized.

Similarly, one might question whether there is a net gain to national security when a sanction serves to intensify existing divisions between North and South or between rich and poor. Certainly the sanctions imposed against Nicaragua served to solidify Southern opposition to U.S. foreign policy. The Helms-Burton Act was condemned by the twenty-seven member states of the Latin American Economic System as a violation of international law and the principle of sovereignty, and some believe that its unilateral imposition without consultation may harm future diplomatic relations by complicating the accession of Chile to NAFTA and by hampering the creation of the Free Trade Area of the Americas.

On the other hand, the United States has also recognized that security-based restrictions should be viewed in light of "our entire foreign trade and foreign relations" agenda. It has been noted that such restrictions may undercut our leadership in the fight to liberalize trade; provide other countries with an excuse for using the security exception for protectionist purposes; damage our relationships with nations that have joined in common defense arrangements; and weaken the economies of our allies by foreclosing substantial markets for their exports. Taking these admissions to their logical conclusion, trade restrictions, as well as the coercion of third nations

316. Id.
317. Id.
318. Id.
320. Cata, supra note 194, at 529.
322. Id. at 87.
324. Id. at 4-5, 8-9, 11, 14-16.
into participation in sanctions programs, could ultimately endanger the national security of the United States by endangering the national security of our allies. Weakening the economic health of friendly nations, either by reducing the level of their exports or by denying them needed imports, will inevitably affect the essential security interests of the invoking nation.

In contemplating the use of a security-based sanction, a nation should also consider the likelihood of countervailing measures. The Helms-Burton Act, for example, led to the enactment of a variety of blocking statutes by Mexico, Canada, and the European Union.325 The Mexican law prohibits Mexican companies from furnishing any information to foreign authorities in regard to their activities, and it allows for the institution of lawsuits to recover ("claw-back") any damages that were assessed against Mexican companies.326 Similarly, the Canadian statute places restrictions on the discovery process and the giving of evidence by Canadian defendants. It provides for the customary "claw-back" of any damages that were paid under Title III of Helms-Burton, and it prohibits compliance with extraterritorial measures imposed by the United States.327 Under such circumstances, any relief that is actually provided to U.S. citizens may be quite fleeting.

Finally, since national security is inherently linked to economic welfare, any determination of net security gains or losses must include the impact of trade-related actions on the domestic economy of the invoking nation. While certainly dependent upon world opinion, trade restrictive conduct may lead to imposition of retaliatory countermeasures by affected nations that can take a substantial toll on domestic industries.328 The protection of a vital industry, for example, may ultimately lead to a decline in the health of other industrial sectors.

This is not to imply that security-based activity is justified merely because its economic benefits outweigh its economic costs. The security exception was not designed to permit protectionism in the name of economic welfare. What is being argued is that economic costs and benefits should be considered (along with a variety of other factors) in determining whether a particular security-based action would increase or decrease the overall security interests of a nation. In those instances when security, as defined in its totality, would be decreased by the imposition of restrictions or sanctions, such options should be dismissed.

Given these considerations, the evaluation of economic effect will always require a degree of delicacy. The fact that security-based restrictive activity may benefit the domestic economy, and thus be a positive in terms of both economic welfare and national security, does not in itself negate the legitimacy of the action. On the other hand, the prospect of economic benefit may taint the decision-making process and give rise to questions regarding motive. Additionally, the assessment of adverse economic effects should be

325. Glossop, supra note 194, at 118; Kleinfeld & Wengel, supra note 130, at 404; Segall, Export Controls, supra note 10, at 395.
326. Cata, supra note 194, at 529.
limited to the issue of whether the imposition of sanctions would decrease overall national security; such an assessment should not form the basis for the imposition of a security-based measure. If restrictions are in fact necessary to protect economic welfare, a nation must rely on other non-security related provisions within the GATT Agreement which are accompanied by a variety of procedural and substantive safeguards.

Nations would be wise to examine potential security-based activity within this broader context while keeping the above caveat in mind. In the area of export controls, for example, it has been argued that U.S. restrictions have affected billions of dollars worth of exports in computers, software, telecommunications equipment, and machine tools "without strengthening security" and that licensing delays (which significantly impact profitability) have been similarly incurred "without a meaningful addition to national security." From a broader perspective, it has been estimated that sanctions cost U.S. companies fifteen to nineteen billion dollars in lost exports each year and that those companies employ 200,000 fewer people in export-oriented jobs. Retaliatory responses by both target and non-target countries may also foreclose overseas markets to domestic producers and may adversely affect growth and development, the availability of raw materials and skilled labor, and the future competitive position of the economy. Long-term effects such as these tend to drain governmental resources and may ultimately be manifested in social and political division. Both the likelihood and the severity of these consequences will be heightened when security-based restrictions or sanctions are undertaken unilaterally without the consensus of the international community. Thus, unilateral action will be less likely to achieve its desired result and will also be more likely to invoke a substantially broader-based retaliatory response.

c. The Need to Consider the Nature of the Threat

Exactly what constitutes a threat to essential security interests, and thus what conduct justifies the use of security-based restrictions, are inherently subjective considerations, for article XXI allows a nation to take "any action which it considers necessary" to protect its security interests. However, threats to security can take a wide variety of forms and can differ substantially in their degree of severity. As a result, it is both erroneous and unjust to analyze the imposition of security-based sanctions in a one-size-fits-all mentality.

In order to broaden the analytical framework for the evaluation of a potential sanctions action, nations might consider initiating their decision-making process by questioning whether the offending conduct actually

329. Gaugh, supra note 10, at 61-62 (citation omitted).
331. For a recognition of the fact that factors such as the existence of raw materials, growth and development, and skilled labor affect national security, see Trade Expansion Act of 1962 § 232(d), 19 U.S.C. § 1862(d) (1994).
333. GATT, supra note 1, art. XXI(b).
endangers their national security or whether its effects are primarily limited to the national security of another State. This is not to imply that a nation's security is not dependent, at least in part, upon the security of its allies and other friendly nations or that issues of morality have no place in international relations.

What is being argued, however, is that unilateral security-based sanctions should reflect the gravity of the security concern. In terms of degree, it would seem logical that a threat directed at a third country would be somewhat less onerous than a threat aimed directly at the invoking nation. Additionally, such a sanction must be based upon an actual threat, or at least a perceived threat, to a nation's essential security interests and thus should not be automatically employed in support of another nation. For example, an armed attack against the nation of Mexico would certainly threaten the essential security interests of the United States. On the other hand, it is somewhat more 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. In short, security-based sanctions other than those imposed by the United Nations should not be employed merely to create a group boycott among nations with similar economic and political philosophies.

In addition to recognizing that a potential invoker may only be tangentially affected by the target's conduct, nations must be willing to examine potential threats to their essential security interests on a case by case basis. Without such an examination, an appropriate response will not be forthcoming. The criteria being presented in this Article are each dependent upon an understanding of the actual nature of the threat being posed. Since that nature will vary, nations cannot properly tailor their response unless they are willing to analyze each instance of offensive conduct independently. A draconian response to a limited threat, or for that matter a limited response to a draconian threat, may indeed result in a substantial loss to the net security interests of the invoking nation.

Threats to essential security interests may apparently range from a direct nuclear attack to the protection of boot manufacturers and cheese producers. Between these two extremes are potentially catastrophic threats, such as the development or use of chemical, biological, or other weapons of mass destruction. Associated with such threats are concerns regarding the dangers of technology transfer, diversion, re-exportation, and the dual use of goods and services. Other threats to national security include international terrorism, systematic human rights violations, potential mass migration, the presence of a nuclear power facility in a neighboring country and narcotics trafficking. In each of these cases, of course, the dangers being posed may be further

334. GATT Council, Minutes of Meeting held on May 7, 1982, GATT Doc. C/M/157, at 2, 5, 6 (June 22, 1982).
enhanced by geographical proximity, by rogue nation status, or by irrational leadership.

These threats can pose differing degrees of danger to an invoking nation. The use of biological weapons, for example, should provoke a substantially greater response than should the re-exportation of goods that are already abundantly available from other international producers. In light of the substantial collateral damage that can be caused by an over-response, nations should be willing both to consider the actual degree of offensive conduct and to weigh the realistic security gains or losses that would result from a particular responsive action.

d. Threats to International Peace and the Need for Humanitarian Considerations

Throughout the decision-making process, nations must also recognize that the imposition of sanctions may decrease net national security by way of endangering the international peace. Article 2 of the U.N. Charter not only requires members to settle their disputes peacefully, it requires that disputes be settled in a manner "that international peace and security, and justice, are not endangered." In this regard, it must be acknowledged that all sanctions are inherently designed to impose social, political, and economic hardship on the target. Not only may coercive sanctions provoke hostility and retaliation, they may pose a threat to the peace by jeopardizing the conditions of stability and well-being that are necessary to maintain that peace. Article 55 of the Charter recognizes that such stability is in fact dependent upon such factors as increased standards of living, higher employment, economic and social progress, and better education and health care. Unfortunately, it is precisely such conditions that are intentionally undermined by the imposition of a security-based sanction.

In addressing a similar issue, Clinton Cameron has noted that whether economic sanctions will endanger international peace and security depends upon the quantity and degree of economic hardship being suffered by the target as a result of the imposition. The greater the hardship, the more likely the sanctions will result in retaliation and an endangering of the peace. When a powerful nation, or a group of nations acting collectively, denies access to a product or to a market that is essential to the well-being of the target State, the risk to international peace will be substantially increased.

Some security-based sanctions are imposed for humanitarian purposes and are designed to force nations to alter abhorrent policies. The actions taken against such States as Iraq and Cuba were aimed, at least in part, at reversing the tide of oppression and the systematic denial of human rights being experienced in those countries. Additionally, sanctions often provide exceptions for humanitarian purposes allowing the provision of medicine and

336. U.N. CHARTER art. 2, para. 3.
337. Id., art. 55.
338. Cameron, supra note 10, at 251.
339. Id. at 251-52.
medical supplies and the donation of food, clothing, and educational materials necessary to meet basic human needs or to relieve human suffering.  

Nevertheless, economic sanctions, including those imposed for security purposes, generally hurt people more than governments. As a human rights observer in Haiti noted, the military command and wealthy elite "were waxing rich off the contraband industry the economic sanctions had spawned" while the rest of the population was literally "starving to death." Unfortunately, such a scenario is quite common. The effects of foreclosing consumer markets, denying economic aid, withholding essential goods and services, and blacklisting the identity of a nation are primarily borne by those who are most in need. Additionally, the hardships experienced by a blameless population will not be limited to the period in which the sanction is imposed. It may take years to reconstruct not only the physical and economic infrastructure of the nation, but its social fabric as well.

As a result, some believe that humanitarian considerations should not only play a role in the decision-making process, but that they should be a significant factor in determining the actual lawfulness of a sanction. In a similar vein, Reisman argues that the use of highly coercive economic sanctions, like other strategic instruments of high coercion, "must be based on lawful contingencies." In this context, he asserts that such sanctions must be more precisely designed in light of their ability to discriminate between the military/political elite and the general population and that different options must be compared in an attempt to minimize collateral damage to the extent possible. Additionally, the amount of collateral damage to be allowed would depend upon such factors as the degree of injury threatened by the target's conduct, the irreparability of that injury should it occur, and whether the target's population has no meaningful say in the decision giving rise to the offensive conduct. Since security-based economic sanctions are generally highly coercive in nature, similar considerations should apply.


341. Panel, The Costs and Benefits, supra note 10, at 350-51 (remarks by W. Michael Reisman). See also Joyner, supra note 10, at 269 ("UN sanctions might impact more severely on the civilian population of a target State than the offending government, as, for example, in the protracted case of Iraq."); id. at 270 ("[C]ost [often] falls most heavily on the civilian population of the State, rather than on the recalcitrant government itself").


346. Id. at 356-59.

347. Id. at 356, 357-58.
Creating Standards

The elevation of humanitarian considerations from a moral conception to a moral and legal conception would encourage nations to more fully weigh the consequences of sanctioning activity. More significantly, however, if such considerations are indeed a "legal conception," then they should be subject to judicial scrutiny. All rights and all duties that find their basis in the law must in fact be capable of being evaluated by the law. As a result, the introduction of such a legal assessment into the process of imposing security-based sanctions could provide an initial foundation for the accountability of nations.

IV. SEARCHING FOR JURISDICTION AND ACCOUNTABILITY

A. The Willingness to Examine Security Issues

The powerful will always be reluctant to yield their power, and, as such, the strongest of nations have been unified in their belief that matters of security are overwhelmingly political in nature and therefore non-justiciable. On the other hand, the right to protect essential security interests is not unlimited since it must be exercised in the context of other international legal principles and in the context of international agreements that have been voluntarily undertaken. For example, if a nation claims that its national security requires the employment of genocide, two fundamental tenets of international law would be brought into substantial conflict, namely, the respect for national sovereignty and the prohibition against genocide. One would sincerely hope that the international community would not accept the security rationale under such a circumstance. While such an example represents the extreme, it also reflects the fact that the argument of non-reviewability will give way to universal condemnation.

Similarly, nations often choose to actually surrender a degree of sovereignty through international cooperation in order to obtain some form of mutual advantage. The language of article XXI, for example, would seem to represent such a concession and, therefore, invite a degree of external scrutiny. Article XXI does not merely speak in terms of "security interests,"

348. For a discussion regarding the relationship between a "legal conception" and "legal appreciation" or "evaluation by the law," see Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 286 (June 27) (Schwebel, J., dissenting) (quoting HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 179-80 (1933)).
349. Id.
350. Nicaragua has argued, for example, that article XXI of the General Agreement must be interpreted in light of international law and the decisions of the United Nations and the International Court of Justice. Unpublished Panel Report on United States—Trade Measures Affecting Nicaragua, 1986 WL 363154, /6053, ¶¶ 4.5, 5.2, 5.15 (Oct. 13, 1986) (unadopted). See also Hahn, supra note 10, at 579 (noting that article XXI is "part of a legal text" and "exceptions to legal texts must be interpreted narrowly"), at 589 ("the drafters did see legal limits to the use of the security exception"), at 584 ("XXII(b) has "objective prerequisites considerably limiting its scope"), and at 592, n.149 ("[A] correct understanding of GATT allows Panels to review article XXI actions in substance, albeit according to the remarkably loose standard prescribed by article XXI."). For a more detailed discussion of Hahn's position, and the limitations placed upon review, see supra notes 71-77 and accompanying text.
351. U.N. CHARTER art. 2.
but in terms of essential security interests. It does not allow security-based measures to be taken "at any time," but rather during times of "war or other emergenc[ies] in international relations." Since exceptions to the basic principles of the GATT should be strictly construed, some credence must be given to such restrictive language. If exceptions for foreign policy and national security concerns are so beyond the scope of the GATT, and so universally ingrained in customary international law, there would have been no need for even including article XXI within the General Agreement.

Whether the article XXI exception is self-defining, however, is in fact irrelevant to a variety of more fundamental issues surrounding the reviewability of security-based actions. For example, even if it is assumed that such an exception is self-defining, a position that has never been adopted by the Contracting Parties, such a fact would not be based upon the requirements of customary international law. Instead, it would merely reflect the fact that nations, whether consciously or not and whether reluctantly or not, have agreed to permit such discretion as part of the broad negotiating process that led to the creation of the GATT. As a result, the reviewability of security measures is not necessarily foreclosed by customary law nor would the issue of reviewability be precluded from consideration in other agreements such as treaties of friendship, commerce, and navigation. Further, setting article XXI aside for a moment, the fact that security issues may be non-justiciable does not in itself foreclose review of what actually constitutes a security issue. In other words, before a dispute can be determined to be non-justiciable, the true nature of that dispute must be identified. Mere allegations should not be equated with fact. Actions may be reviewable for the purpose of determining if they are based upon security concerns and therefore beyond external scrutiny.

The resolution of these issues will ultimately depend upon the willingness of a judicial or quasi-judicial body to exercise jurisdiction in their regard. In Military and Paramilitary Activities In and Against Nicaragua, the International Court of Justice clearly indicated that it would be willing to accept such a role. At least under the circumstances presented in that case, the Court was adamant in its belief that essential security interests, and the actions taken in their regard, were neither above the law nor free from judicial scrutiny.

After noting that “the Court has jurisdiction to determine any dispute as to its own jurisdiction,” and that its judgment in that regard would be both final and binding upon the parties, the Court held that it clearly had jurisdiction to determine whether the measures taken by the United States

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353. GATT, supra note 1, art. XXI(b)(iii).
354. Hahn, supra note 10, at 579 ("[E]xceptions to legal texts must be interpreted narrowly."); id. at 590-91 (discussing "emergency in international relations"); Laing, supra note 10, at 336 (discussing "essential" security interests).
356. Hahn, supra note 10, at 611-12; see also supra note 77 and accompanying text.
357. 1986 I.C.J.14 (June 27).
358. Id. at 24.
were "justifiable" under the security exception contained in the Treaty of Friendship, Commerce, and Navigation.\textsuperscript{359} Certainly the fact that the Treaty of Friendship employed the "necessary" rather than the "it considers necessary" language of article XXI of the GATT played a substantial role in the Court's analysis.\textsuperscript{360} Of critical importance, however, is the fact that in the absence of the "it considers" language, the Court was free (and quite willing) to determine which measures were necessary to protect essential security interests and which measures were not. After indicating that security-based actions must be more than merely "useful,"\textsuperscript{361} the Court held that the sanctions imposed by way of the trade embargo were indeed unnecessary to protect the essential security interests of the United States.\textsuperscript{362} In light of such a holding, it would appear that at least some of the restrictions limiting the review of security issues are not in fact required by customary law, but are instead \textit{self-imposed} by nations through international agreement. As reiterated in the \textit{Oil Platform} case, a security exception that does not impose the "it considers" restriction would simply be viewed as a potential, and reviewable, defense on the merits.\textsuperscript{363}

The \textit{Nicaragua} case also presents an interesting analogy in its rejection of the alleged justification of "collective self-defense."\textsuperscript{364} While dissenting on other grounds, Judge Schwebel addressed this issue in detail and indicated that he could not subscribe to any contention that the use of force in self-defense was "a 'political' and hence non-justiciable question."\textsuperscript{365} While the U.N. Charter recognizes the inherent right of both individual and collective self-defense, such a recognition could not be interpreted to mean that only the nation exercising that right would have the power to judge the legality of its actions. Instead, the U.N. Security Council would clearly be entitled "to adjudge the legality of a State's resort to self-defense and to decide whether such recourse is legitimate."\textsuperscript{366}

Schwebel relied extensively on Lauterpacht's treatise \textit{The Functioning of Law in the International Community}.\textsuperscript{367} In that work, Lauterpacht observed that while recourse to self-defense is not in itself illegal, "it is the business of the Courts to determine whether, how far, and for how long there was a necessity to have recourse to it."\textsuperscript{368} Like any other dispute of substantial importance, recourse to self-defense is "capable of judicial decision, and it is only the determination of States not to have questions of this nature decided by a foreign tribunal which may make it non-justiciable."\textsuperscript{369}

The use of force in self-defense is an action designed to protect national security or, in the language of article XXI, "essential security interests." In

\textsuperscript{359} \textit{Id.} at 116, 136.
\textsuperscript{360} \textit{Id.} at 115-16.
\textsuperscript{361} \textit{Id.} at 117, 141.
\textsuperscript{362} \textit{Id.} at 141-42.
\textsuperscript{363} 1996 I.C.J. 811 (Dec. 12).
\textsuperscript{364} The Court rejected the justification of collective self-defense by a vote of twelve to three. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 146 (June 27).
\textsuperscript{365} \textit{Id.} at 284 (Schwebel, J., dissenting).
\textsuperscript{366} \textit{Id.} at 285.
\textsuperscript{367} \textit{See supra} note 348.
\textsuperscript{368} 1986 I.C.J. 14, 286 (June 27) (Schwebel, J., dissenting).
\textsuperscript{369} \textit{Id.}
light of the discussion above, it would appear that such an action would not be self-defining, but would instead be evaluated under the law by both the International Court of Justice and the U.N. Security Council. Under such a circumstance, it would seem somewhat ironic that economic sanctions, being similarly designed to protect essential security interests, would be free from all evaluation. While sanctions do not constitute forcible measures as conventionally understood, their impact can be substantially greater. To so thoroughly distinguish between two responses, one economic and one military, both of which are aimed at protecting identical interests and imposing substantial damage, would seem to be contradictory.

In regard to the United Nations Security Council, several arguments may be advanced in support of its jurisdiction over questions involving the lawfulness of security-based activity. For example, article 34 of the Charter authorizes the Security Council to investigate "any dispute" or "any situation" that "might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." Certainly, the unilateral imposition of security-based sanctions could be categorized as a "situation" that might lead to "international friction." As a result, the Security Council would have the power to examine at least the issue of whether the imposition of sanctions would pose such a risk. If it is indeed found that the continuance of such a situation would be likely to endanger the maintenance of international peace, it is logical to conclude that the dispute would fall under the provisions of article 33. In such circumstances, a dispute not settled by the parties must be referred to the Security Council pursuant to article 37. The Council may then decide whether to recommend appropriate terms of settlement under article 37 or to recommend "appropriate procedures or methods of adjustment" pursuant to article 36.371

Several other Charter provisions could also serve as the basis for Security Council jurisdiction over unilaterally imposed security-based sanctions. As has been noted, severe economic sanctions, often imposing substantially greater hardship than armed attack, inherently undermine the conditions for peace outlined under article 55. As a result, such sanctions may represent a form of dispute settlement that endangers international peace in violation of article 2.3. In addition, sanctions of this kind may pose a "threat to the peace" under article 39. In terms of the latter, the Security Council has been given the authority to determine the existence of any threat to the peace and therefore to define which conduct actually constitutes a threat to the peace, and to take both economic and military measures in fashioning a response.376

370. U.N. CHARTER art. 34 (emphasis added). See also id., art. 35 ("[A]ny Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or the General Assembly.").
371. Id., art. 36, para. 1; id. art. 37, para. 2.
372. See supra notes 142-157, and 336-337 and accompanying text.
373. U.N. CHARTER art. 55.
374. Id., art. 2., para. 3.
375. Id., art. 39.
376. Id., arts. 39, 41, 42.
In recognizing the interplay between the Security Council and the International Court of Justice, article 36.3 provides that in making recommendations regarding disputes that may endanger international peace, the Security Council "should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice." The mere presence of a "legal element" in a dispute that is overwhelmingly political in character, however, does not transform that dispute into one of a justiciable nature. As Judge Oda noted, the phrase "as a general rule" serves to underscore the fact that the existence of such an element should not necessarily attract the application of the provision.

On the other hand, it can also be argued that international agreements such as the GATT, the U.N. Charter, and Treaties of Friendship all represent attempts to "de-politicize" the relationships among nations. They are legal instruments that establish a series of rights and obligations based upon mutual advantage, mutual concession, and reasonable expectations. Under such a circumstance, an international body should be empowered to review whether a nation's actions adhere to the terms and the spirit of those agreements. Such an argument should not be interpreted as denying nations the right to protect their essential security interests. Instead, it simply represents a mandate that nations exercise their rights within the confines of international contracts voluntarily undertaken.

Finally, a proposal to increase the involvement of other international institutions in security-based disputes would build upon the "institutional comity" approach urged by Antonio F. Perez. Recognizing the current disconnect between the United Nations and the World Trade Organization regarding security issues, Perez believes that we must "reconceive the relationships between . . . supranational organizations" and view the World Trade Organization "as a member of the family of 'sovereign' supranational institutions . . . " Employing choice of law principles, Perez argues that the World Trade Organization should look to the practices of the United Nations to ascertain the circumstances under which States can legitimately invoke the security exception and, in particular, "to whether the Security Council has ever found a similar situation to warrant international enforcement action." Such an approach would incorporate the activity of the Security Council into the work of the WTO Dispute Settlement Body and would require the World Trade Organization, when necessary, "to subordinate its policies and interests to those of coordinate institutions" and to grant deference to the law

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377. Id., art. 36, para. 3. Article 36, paragraph 1 refers to "a dispute of the nature referred to in Article 33 or of a situation of like nature." Article 33, in turn, refers to any dispute "the continuance of which is likely to endanger the maintenance of international peace and security."
379. Id.
380. In regard to the concept of reasonable expectations, see supra note 312 and accompanying text.
381. Perez, supra note 10.
382. Id. at 302.
383. Id. at 381.
384. Id. at 306.
385. Id. at 375.
of the United Nations. By looking to Security Council practices regarding what constitutes both threats to international peace and security and objective measures of good faith, the institutional comity approach could eliminate the self-judging character of the security exception.

B. Searching for Accountability

This Article has proposed a variety of factors to be considered when contemplating the use of security-based measures. It has argued that nations should weigh their essential security interests against potential disruptions to the multilateral trading system. It has urged nations to respect the rights of sovereignty and non-intervention and to take action only in light of the concepts of necessity, exhaustion, and least restrictive alternatives. It has asserted the relevance of the target's stage of development, the effect on non-target nations, the need for consistency in application, and the likelihood of success. Finally, this Article has suggested that nations engage in a cost/benefit analysis, encompassing such additional variables as the actual nature of the threat being posed and the response of third party nations, in order to more accurately depict the net security gains and losses that would result from a particular action.

As a minimum, this Article has proposed that nations employ these considerations as self-imposed guidelines in their decision-making process. By doing so, potential invokers would be permitted to make a more realistic, a more broadly based, and a more intelligent decision regarding competing options. Additionally, such an analysis would tend to curtail activity based upon immediate political expediency and would help to reverse the tendency to err on the side of imposition.

The nature of essential security interests, however, has changed. In light of increasing political and economic interdependence, and in light of escalating technological advancement, a threat to security is rarely limited to the interests of a single nation. Whether the result of the evolving character of security concerns or of the fact that industrialized nations are acting on behalf of their less-developed neighbors, threats to essential security interests tend to be substantially more global in their impact and in the response they may invoke. The security concerns of most industrialized nations, for example, do not revolve around the likelihood of an armed invasion at their borders. Instead, their concerns are directed at the development of chemical and biological weapons by rogue nations, at the existence of international terrorism, and at the widespread abuse of fundamental human rights. These concerns, however, are similarly shared by almost all members of the global community, indicating that such activities endanger the future well-being of all nations. As a result, a focus on national security, rather than on global security, would seem to be somewhat misplaced, and a proposal that suggests a more multilateral approach to security issues would appear to be justified.

386. Id. at 358.
387. Id. at 372-75.
Additionally, by suggesting an increase in the level of multilateral participation in security-based disputes, and by encouraging potential invokers to engage in a detailed decision-making process, the proposal presented here may aid in the internalization of global norms. In his seminal article on why nations obey international law, Harold Koh described a “transnational legal process” of interaction, interpretation, and internalization through which an international norm penetrates a nation’s domestic legal system, becomes part of that nation’s “internal value set,” and reshapes the national interest and identity of that nation.\(^8\) Repeated interactions between transnational actors, Koh argues, forces interpretation or enunciation of global norms, and, when internalized through legislative, judicial, or executive acceptance, generates legal rules that will guide future interactions.\(^9\) By provoking a dialogue regarding the need for both external review and more effective remedies for target nations, and by laying out a variety of considerations to be employed by nations as internal or self-imposed guidelines, this proposal attempts to spur such a process.

1. **The Ineffectiveness of the GATT System**

The use of a multilateral approach to security issues has been conspicuously absent over the life of the GATT. Disputes involving security-based activities have historically been resolved through the use of power-based relations rather than through consensus or a recognition of mutual advantage. The realities of this dispute settlement system are particularly disappointing since the procedural framework necessary for multilateral participation is already in place.

It is generally believed that the use of the security exception under article XXI is not free from the “nullification or impairment” provisions of article XXIII.\(^0\) During the 1947 discussion in Geneva it was stated that a

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\(^9\) Id. at 2646.

\(^0\) Article XXIII of GATT provides:

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the Contracting Parties. The Contracting Parties shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The Contracting Parties may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary.
contracting party affected by the exercise of article XXI "would have the right to seek redress of some kind" under article XXIII since "there is no exception from the application" of article XXIII "to this or any other Article." The addition of a note to clarify the fact that the provisions of article XXIII were applicable to article XXI "was rejected as unnecessary." Similarly, in the Decision Concerning Article XXI of the General Agreement, the Contracting Parties decided that "when action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement."

In practice, the applicability of article XXIII to article XXI has been raised on a variety of occasions. In United States—Trade Measures Affecting Nicaragua, for example, the government of Nicaragua argued that it had been recognized by both the drafters of the General Agreement and by the Contracting Parties "that an invocation of Article XXI did not prevent recourse to Article XXIII." In recognizing such a fact, the GATT Panel carried out its examination of the U.S. embargo as a non-violation case under article XXIII, paragraph 1(b). While no remedy was forthcoming, the Panel did in fact consider "the question of whether the nullification or impairment of the trade opportunities of Nicaragua through the embargo constituted a nullification or impairment of benefits accruing to Nicaragua within the meaning of Article XXIII:1(b)." Similarly, in both the Yugoslavia and Argentina cases, a number of contracting parties took the position that the provisions of article XXI were indeed subject to those of article XXIII. Even the United States has admitted that "Article XXIII rights were not necessarily lost in all cases in which Article XXI was invoked" and that the use of article XXI "did not prevent recourse to the procedure of Article XXIII."

consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

391. GATT ANALYTICAL INDEX, supra note 10, at 606.
392. Id.
394. Id. at 24.
396. Id. ¶ 4.8.
397. Id. ¶ 5.6.
Article XXIII contemplates the use of both “violation” and “non-violation” complaints. A violation complaint involves an allegation that the party complained against has engaged in activity that is in fact inconsistent with the terms of the GATT. Such a complaint provides a number of advantages to the complaining party. First, if a violation of the agreement has occurred, a nullification or impairment of the benefits accruing to the complaining party will be presumed. Such a prima facie case of nullification or impairment relieves the complaining party of the burden of demonstrating injury and shifts the burden of proof to the defending party to show that such a nullification or impairment has not occurred. Second, if a violation of the agreement has occurred and evidence rebutting a nullification or impairment is lacking, the panel is apparently bound to recommend the actual withdrawal of the offending measure.

Non-violation complaints are brought pursuant to paragraph 1(b) of article XXIII. This paragraph allows recourse to article XXIII if a nullification or impairment results from a measure taken by another party “whether or not” such a measure conflicts with the provisions of the Agreement. As a result, this provision recognizes that even lawful measures consistent with the GATT may nevertheless nullify or impair the benefits accruing to another member. When a violation of the agreement is not being alleged, however, the existence of nullification or impairment is linked to the issue of “reasonable expectations” and to activity “that could not reasonably have been anticipated at the time when the . . . concessions were negotiated.” As Hoekman and Mavroidis have noted, reasonable expectations are created by way of concessions that are negotiated at any given point in time and contracting parties can reasonably expect that the balance of these concessions will not be later nullified or impaired. As a
result, governmental actions that offset or modify these agreed-upon concessions can give rise to a non-violation complaint.\footnote{Id. See also Hahn, supra note 10, at 611 ("Under GATT caselaw, a complaint will eventually be successful if the 'damaged' party could reasonably expect the other Contracting Party not to take the damaging measure.").}

The use of a non-violation complaint, however, is subject to two distinct disadvantages. First, the burden of proving a nullification or impairment is placed squarely upon the complaining party who, pursuant to the Understanding on Rules and Procedures Governing the Settlement of Disputes, must present "a detailed justification in support of any complaint."\footnote{Id., art. 26, para. 1(b).} As a result, the benefits of a \textit{prima facie} action are lost. Second, while a panel or the Appellate Body may recommend that a party "make a mutually satisfactory adjustment," the defending party has absolutely no obligation to withdraw the measure even if benefits are being nullified or impaired.\footnote{Id., ¶ 5.11.}

Unfortunately, when severe economic sanctions are imposed by a powerful nation against a weak one, recourse to article XXIII is meaningless. Under current GATT practice, or more directly pursuant to the mandate of industrialized nations, the exercise of article XXI is self-defining. As a result, a nation exercising its discretion under that article cannot, by definition, be in violation of the GATT. On the other hand, if the existence of a nullification or impairment is established by way of a non-violation proceeding, the panel would lack authority to order the removal of the sanction. Similarly, if the panel chose to recommend that the sanctioning nation compensate the target for the nullification or impairment, such compensation would not, to say the least, be forthcoming. Finally, if the panel chose to authorize the target to suspend its concessions and obligations toward the sanctioning nation, this would achieve little, for the sanctioning nation will likely have already severed all trading relationships with the target.

The impotency of article XXIII was nowhere more apparent than in the Nicaragua case.\footnote{Unpublished Panel Report on United States—Trade Measures Affecting Nicaragua, 1986 WL 363154, L/6053, ¶ 5.11 (Oct. 13, 1986) (unadopted).} Crippled by the terms of reference and the inability to examine either motivation or justification, the panel was forced to treat the allegations as a non-violation complaint. Since the panel had no authority to require a removal of the embargo, and since the United States had previously indicated that it would not agree to such a removal, the panel refrained from making a meaningless recommendation in that regard.\footnote{Id., ¶¶ 5.7-.10.} Similarly, since the United States had already imposed a two-way embargo against Nicaragua, any authorization permitting Nicaragua to suspend the application of concessions toward the United States would also be meaningless.\footnote{Id., ¶ 5.11.} As a result, the panel "had to conclude" that even if the embargo nullified or impaired benefits accruing to Nicaragua, the Contracting Parties could "take no decision under Article XXIII, paragraph 2 that would re-establish the balance of advantages"
under the agreement. In short, the only decision that was actually handed down by the Panel was that it could provide no solutions to Nicaragua's problem.

2. **Broadening the Remedial Base**

Fourteen years have passed since the panel issued its non-opinion in the *Nicaragua* case. Since then, the Contracting Parties completed the Uruguay Round of Negotiations, creating the World Trade Organization and substantially strengthening the Dispute Settlement Body. Nevertheless, the fundamental questions left open in *Nicaragua*—whether article XXI is in fact self-defining and whether adequate redress is available to affected parties under article XXIII—have remained completely unanswered.

Such a circumstance can lead to only one conclusion. If less-developed nations are to have a say in this new international framework, and if they are to be free to make lawful decisions without external interference, substantial changes must be made to existing policy. In terms of the GATT, these changes may be implemented by either allowing WTO panels to determine whether a nation has "violated" article XXI or by expanding the remedies available in "non-violation" cases.

Suggesting a multilateral approach to the resolution of security disputes can no longer be dismissed as overly dramatic. As already reflected in the U.N. Charter, the GATT must recognize the fact that even "inherent rights" are not without limitation. These rights, while primarily within the discretion of a sovereign, may indeed give way to a greater need for inclusion. Additionally, when the element of economic and political power is introduced, the exercise of inherent rights may substantially conflict with the principle of "sovereign equality." As a result, to allow intimidation or abuse through the arbitrary use of power, based upon a misguided conception of natural right, is simply unacceptable.

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415. *Id.* See also GATT Council, Minutes of Meeting held on Nov. 5, 1986, GATT Doc. CM/204, at 8-9 (Nov. 19, 1986).

416. Unpublished Panel Report on United States—Trade Measures Affecting Nicaragua, 1986 WL 363154, L/5853, ¶ 5.11 (Oct. 13, 1986) (unadopted) ("[The] Panel decided not to propose a ruling in this case on the basic question of whether actions under article XXI could nullify or impair GATT benefits of the adversely affected contracting party."); *id.*, ¶ 5.17: [I]f it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the Contracting Parties ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in this provision? If the Contracting Parties give a panel the task of examining a case involving an Article XXI invocation without authorizing it to examine the justification of that invocation, do they limit the adversely affected contracting party's right to have its complaint investigated in accordance with Article XXIII:2? Are the powers of the Contracting Parties under Article XXIII:2 sufficient to provide redress to contracting parties subjected to a two-way embargo?

417. *Id.* See, e.g., U.N. CHARTER art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.") (emphasis added).

418. *Id.*, art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").

419. In discussing the potential abuse of economic power, Jackson has indicated that "[F]or this reason it might be wise to try to put Article XXI invocations on a more multilateral basis." *Jackson,
With regard to the first of these options, there are a variety of reasons why a target nation would welcome the opportunity to institute a “violation” complaint. As noted earlier, the remedies of suspending concessions or imposing retaliatory measures are often without meaning. On the other hand, if an actual violation is found, nullification or impairment will be presumed, the burden of proof will be shifted to the invoking nation, and a withdrawal of the measure will be recommended. Additionally, a finding that the imposition of a sanction was in fact inconsistent with a nation’s obligations under the GATT would tend to muster international opinion in opposition to such a measure.

In order to find a violation, a WTO panel must be empowered either to examine the specific prerequisites found within article XXI or to examine more broadly the actual nature and definition of a security interest. As such, the amount of authority that could be delegated to a WTO panel could vary considerably in degree.

In addressing this issue of degree, it can be argued that article XXI already contemplates the use of violation complaints. If a violation of this article was meant to be inherently impossible, there would have been no need to list the particular circumstances under which it could be applied or to include the qualifying concepts of “essential” security interests or “emergencies in international relations.” As Hahn has argued, these objective prerequisites place legal limits on the scope and use of the security exception and serve to underscore the fact that article XXI is not exempt from all review. An invoking State has the duty to show that these prerequisites have been met and to “supply sufficient facts to exclude improper motivation.” As a result, the invoking State would have to demonstrate that it was acting to protect its essential security interests, and if it chose not to participate in the proceedings, it “would have to bear the disadvantage arising out of such omission and lose its protection provided by Article XXI.”

On the other hand, Hahn also recognizes substantial restrictions on the scope of review and argues that if the prerequisites of article XXI are met, the article does not further restrict the rights of parties to apply economic measures for political purposes. Additionally, if a party has acted lawfully under the provisions of article XXI, the panel could not continue its examination under the provisions of article XXIII since there is no room for the reasonable expectations approach when article XXI is involved.
A search for greater accountability, however, does not have to be limited to the current scope of article XXI, nor must it be limited by prevailing notions of national sovereignty. Instead, the inevitability of increasing global interdependence requires that the conceptual boundaries of these traditional theories be tested. We cannot allow current perceptions of self-interest or present realities to frustrate a vision for more multilateral participation.

Therefore, this Article argues that WTO panels should be granted a greater degree of authority both in terms of the scope of their review and the remedies they may provide. In regard to the former, a panel could be empowered to examine the fundamental question of whether an action reflects a bona fide security concern as measured in terms of some of the considerations that have been outlined throughout this Article. For example, a panel could examine an action in light of the demands of necessity, exhaustion, and the availability of a less restrictive alternative. They could examine issues regarding consistency of application, the likelihood of success, and the response of third parties. Even the concept of net security gains or losses accruing to the invoking nation could be examined since a finding of net loss would shed light on the elusive issues of motivation and justification.

These considerations would be applied in an attempt to distinguish between measures designed to protect essential security interests and those designed for purposes of economic, political, or cultural manipulation. When it would be extremely unlikely that the action would achieve its stated purpose, for example, or when the net security of the invoking nation would in fact be diminished, it would be difficult to view the measure as being either necessary or essential. By applying these considerations, mere claims of essential security interests would no longer be equated with a bona fide exercise of the security exception. Instead, the burden of proving justification would be on the party seeking to be released from its GATT obligations. Similarly, if an even greater degree of authority were to be granted, a panel fashioning an appropriate remedy could also consider such factors as the target’s stage of development, the effect of the measure on non-target nations, and the potential disruption to the multilateral trading system.

This Article recognizes that such a broad investigation would be well beyond the current jurisdiction of a WTO panel. In contemplating such a process, however, a number of factors should be kept in mind. First, while the WTO admittedly lacks the competence to decide political questions, some have argued that it does have the power to address the trade-related effects that may emanate from a political decision. Second, such an investigation would not be designed to prohibit a nation from exercising the security exception, but would instead be designed to ensure that such an exception was in fact based upon a security concern. Nations should be required to adhere to the provisions of the 1982 Ministerial Declaration and abstain from taking restrictive trade measures “for reasons of a non-economic character.”

Third, a finding that a measure was in fact inconsistent with the terms of article XXI

\[\text{426. } \text{See, e.g., GATT Council, Minutes of Meeting held on May 7, 1982, GATT Doc. C/M/157, at 13 (June 22, 1982).}\]

would not necessarily mean that such a measure would be precluded by the
GATT. The action, while an invalid exercise of the security exception, could
still be pursued under a more appropriate article of the agreement and subject
to the due process procedures contained in any such article.

If the performance of such an analysis leads to the conclusion that a
measure is not a bona fide exercise of the security exception, be it in terms of
motivation, necessity, or effect, the panel would be entitled to find that a
violation of the GATT has occurred, that a prima facie case of nullification or
impairment has been established, and that a withdrawal of the measure should
be recommended. If one believes that more credence should be given to a
sovereign’s security-based activity, an alternate process could be employed.
Under such an alternative, a panel would be denied the authority to
recommend the withdrawal of the measure, but it would be allowed to find a
prima facie nullification or impairment, thereby shifting the burden of proof to
the invoking nation. In the absence of a sufficient rebuttal, the panel could
recommend the waiver remedy discussed below.

On the other hand, if a measure were found to be a bona fide exercise of
the security exception, a panel could still be entitled to address the question of
nullification or impairment in a non-violation proceeding. Such an argument
would be supported by the fact that this issue was specifically left unanswered
in the Nicaragua case. In such a non-violation proceeding, the complaining
party would have the burden of proof regarding such elements as reasonable
expectations and the existence of injury. If a nullification or impairment of
benefits was established, however, the panel would not be entitled to require a
withdrawal. This Article suggests, however, that the Panel should be
permitted to recommend a general waiver.

The remedies currently available under article XXIII have proven
ineffective when severe security-based measures have been involved. The
obvious political tensions that give rise to the imposition of the measures tend
to make “sympathetic consideration” and “satisfactory adjustment” extremely
difficult. Nevertheless, article XXIII was arguably designed not merely to
authorize reprisal or the withdrawal of concessions, but to maintain and
restore the “balance of interests” among the parties. As the Nicaraguan
delegation argued, one of the basic benefits of the GATT was a party’s right
to a satisfactory adjustment when the balance of rights and duties had been
affected. Merely authorizing the suspension of concessions would be neither
satisfactory nor a restoration of the balance of interests argued for above. In
the delegation’s opinion, the Contracting Parties were fully entitled to
recommend any action, consistent with international law and the basic
objectives of the agreement, that would mitigate the effects of the embargo.

429. GATT, supra note 1, art. XXIII, para. 1.
431. Id. Professor Jackson has indicated that the language of article XXIII “is broad and
sweeping. The language itself is not limited just to ‘compensating’ redress but is broad enough to be
used as the basis for serious sanctions. For instance, all concessions of all other contracting parties could
be suspended vis-à-vis a notoriously offending contracting party—in effect, driving it out of GATT—if
In the spirit of providing such satisfactory solutions, this Article suggests that WTO panels should play a greater role in the WTO waiver process. Under current practice, the granting of waivers falls within the jurisdiction of the Contracting Parties. Article XXV, paragraph 5 of the GATT provides that in exceptional circumstances, the Contracting Parties “may waive an obligation imposed upon a contracting party by this Agreement; Provided that any such decision shall be approved by a two-thirds majority of the votes cast.”

While accompanied by a variety of procedural mechanisms, such as consultation, the granting of notice, and the use of a working party to examine the waiver request, article XXV, paragraph 5 is extremely broad in scope. It allows the Contracting Parties to waive any and all obligations undertaken by members, including those concerning non-discrimination, and it “places no limitations on the exercise of that right.”

In the Nicaragua case, the Nicaraguan delegation, in searching for a more meaningful remedy, requested that the panel recommend to the Contracting Parties that they grant a general waiver of article I, in accordance with article XXV, paragraph 5. Such a waiver would permit nations to choose to give differential and more favorable treatment to Nicaraguan products in order to alleviate the effects of the embargo and to restore the balance of rights under the Agreement. The United States responded by indicating that it would be beyond the competence of a panel to recommend any action be taken by third contracting parties who were neither party to, nor represented in, the dispute.

In considering whether it would be appropriate for a panel established under article XXIII to make such a recommendation, the Nicaragua Panel noted that the GATT practices and procedures surrounding waivers were designed to ensure that a waiver would not be granted without first considering the views of the parties that would be directly affected by the waiver. It concluded that the Panel would be acting contrary to such practice and procedure if it were to recommend a change in the obligations of third parties that had no part in the Panel’s proceedings and whose views it could therefore not consider.

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432. GATT, supra note 1, art. XXV, para. 5. This article states that:

In exceptional circumstances not elsewhere provided for in this Agreement, the Contracting Parties may waive an obligation imposed upon a contracting party by this Agreement; Provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The Contracting Parties may also by such a vote (i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and (ii) prescribe such criteria as may be necessary for the application of this paragraph.

433. GATT ANALYTICAL INDEX, supra note 10, at 883-85.

434. Id. at 882 citing the Report of the Working Party in 1952 on The European Coal and Steel Community.


436. Id. ¶¶ 4.1, 4.12, 4.15.

437. Id. ¶ 5.13.

438. Id. ¶ 5.14.
However, the panel did go on to emphasize the fact that Nicaragua had the right to submit a request for a waiver directly to the Contracting Parties. In an apparent attempt to encourage Nicaragua to do so, the panel indicated that its decision not to recommend the waiver was based solely on procedural grounds and should in no way be interpreted as prejudging a decision by the Contracting Parties.\textsuperscript{439} The Panel recalled that the consequences of the embargo had been severe and had "seriously upset" competitive relationships.\textsuperscript{440}

Despite current practice, this Article proposes that a WTO panel, at least under certain prescribed circumstances, should be made part of the waiver decision-making process. The panel should be entitled to recommend a general or blanket waiver under article XXV, paragraph 5 when (i) an article XXIII complaint challenges the imposition of a security-based measure; (ii) applying the broad considerations suggested throughout this Article, the panel finds that the measure imposed was not a \textit{bona fide} exercise of the security exception or that it resulted in a non-violation nullification or impairment; (iii) the party instituting the complaint is in fact a developing country, or as a surrogate measure, has a disproportionally small Gross National Product when compared to that of the invoker; and (iv) the panel finds that in the absence of a waiver no other meaningful remedy would be available. This waiver would allow other contracting parties, at their option, to give preferential treatment to the goods and services of the target in order to counterbalance the effects of the sanction.

Several observations may be made in support of such a proposal. First, the absence of any other meaningful remedy should be accepted as a sufficient basis for satisfying the "exceptional circumstances" prerequisite of article XXV:5. Without such an interpretation, the protection afforded by article XXIII would become a nullity for less-developed contracting parties. Additionally, the filing of a blanket waiver request by the target nation should be viewed as a procedural substitute for individual filings by third party nations potentially interested in granting a preference. Second, it should be emphasized that a waiver would only allow, not require, the granting of preferential treatment. Third, the authority to issue such a recommendation may actually serve to deter questionable security-based activity. As both a reflection of international public opinion and as a mechanism for facilitating the waiver process, a recommendation or the threat thereof may discourage nations from erring on the side of imposition. Fourth, since the use of such a recommendation would be designed to protect the interests of less-developed countries lacking the power of retaliation, its use would reflect not only the spirit of Part IV of the GATT,\textsuperscript{441} but also the sentiments expressed in the Enabling Clause.\textsuperscript{442} Since the Enabling Clause already permits contracting parties to "accord differential and more favourable treatment to developing

\begin{footnotes}
\footnotetext[439]{\textit{Id.}}
\footnotetext[440]{\textit{Id.}}
\footnotetext[441]{\textit{See supra} notes 205-214 and accompanying text.}
\footnotetext[442]{\textit{Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 203 (1980).}}
\end{footnotes}
countries, without according such treatment to other contracting parties, it can be argued that the use of the recommendations being proposed would be consistent with the basic objectives of the GATT. Fifth, by examining the broad considerations presented in this Article, and by making a recommendation based upon such an analysis, a panel would provide a substantial body of evidence for the Contracting Parties to consider. The panel’s findings could actually facilitate the waiver process by replacing the working party review system.

One might argue that a panel should not make recommendations regarding contracting parties who did not take part in the proceedings and whose views were therefore not considered. To address this problem, this Article suggests that article XXIII complaints challenging security-based measures be reviewed in two phases. During the first phase of the proceedings, the panel would address the issues of whether the measure was a bona fide exercise of the security exception and (irrespective of such a finding) whether benefits accruing to the complaining party have been nullified or impaired. During the second or remedy phase of the hearing, the panel could invite all potentially affected parties to join the proceedings for the purpose of expressing their views. Such a process would in fact reflect the basic objectives found in article 10 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. This article provides that not only will the interests of the actual parties to a dispute “be fully taken into account during the panel process,” but that the interests of “those of other Members under a covered agreement at issue in the dispute” will also be considered. More particularly, it provides that “any Member having a substantial interest in a matter before a panel . . . shall have an opportunity to be heard by the panel and to make written submissions.” A further degree of participation is ensured by the fact that any party feeling adversely affected by the panel’s recommendation would have similar recourse to article XXIII.

The granting of preference to the products of a target nation, of course, could adversely affect the competitive position of third countries that produce and export similar products. As the demand for the target’s products increase, however, an equilibrium might eventually be reached that could reflect both the lower or non-existent tariff and the upward pressure on price. As a safety mechanism, however, it is beyond question that the existence of a waiver does not preclude an affected party from seeking relief. While preferences would be valid when extended in conformity with the terms of a waiver granted by the Contracting Parties, the Understanding in Respect of Waivers clearly provides that third parties whose benefits have been nullified or impaired as a

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443. Id.
444. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 10, supra note 17, at 362.
445. Id., art. 10, para. 1.
446. Id., art. 10, para. 2.
447. Id., art. 10, para. 4.
result of the application of measures taken pursuant to a waiver, would be entitled to seek relief under article XXIII. 448

Finally, in considering the blanket waiver remedy being proposed here, the Contracting Parties will face a fundamental policy issue. If panels are granted the authority to recommend waivers in the prescribed circumstances outlined above, the mechanism for giving effect to those recommendations must be addressed. The Contracting Parties could take the position that such a recommendation will only be implemented if a two-thirds majority of the votes cast by the Contracting Parties, pursuant to the procedures contained in article XXV, paragraph 5, is forthcoming. Alternatively, waiver recommendations contained in a panel report could be adopted pursuant to the procedures outlined in the Understanding on Rules and Procedures Governing the Settlement of Disputes. 449 Under such circumstances, the waiver would be adopted, along with the rest of the Panel Report, unless there was a consensus not to adopt the Report. 450

In either event, the use of the waiver mechanism, at least in non-violation cases, would represent an attempt to balance the rights of sovereignty with a movement toward multilateralism. It would, in effect, provide a multilateral remedy in security disputes while preserving the individual decision-making power of the invoker. In a non-violation case, the panel would be acknowledging a nation’s sovereign right to impose a security measure and could not require withdrawal or alteration of policy. At the same time, the panel would be recognizing the rights of all other sovereign nations to express, by means of granting preferences to the target, their agreement or disagreement with the invoker’s practices. Further, the existence of such agreement or disagreement would tend to provoke interpretations of international norms and thereby spur the process of internalization.

3. **A Concluding Comment**

In searching for accountability, the WTO dispute settlement mechanism is not the only venue for the resolution of security-based issues. As discussed earlier, 451 a credible argument can be made that both the International Court of Justice and the U.N. Security Council could exercise jurisdiction in this regard. Nevertheless, a closer working relationship between the WTO and the United Nations should be established. Article XXIII, for example, provides that the Contracting Parties may consult with the Economic and Social Council of the United Nations as well as with “any appropriate inter-governmental organization” in any case where such consultation is deemed necessary. 452 Another possibility for interaction between the United Nations and the WTO can be found in the Havana Charter, which arguably envisions

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448. Understanding in Respect of Waivers of Obligations Under the General Agreement on Tariffs and Trade 1994, WTO Agreement, Annex 1A, LEGAL TEXTs, supra note 1, at 29.
450. For discussion regarding the adoption of Panel Report and the Understanding on Rules and Procedures Governing the Settlement of Disputes, see supra note 17.
451. See supra notes 357-380 and accompanying text.
452. GATT, supra note 1, art. XXIII, para. 2.
the possibility of seeking advisory opinions from the International Court of Justice regarding the interpretation of GATT provisions. Additionally, the United Nations could play a more substantial role in the approval or disapproval of proposed unilateral security-based sanctions. Both invokers and targets could be granted the option of divesting WTO panels of security-related jurisdiction in favor of ICJ or U.N. Security Council proceedings.

Unfortunately, while international agreements tend to emphasize both the need for cooperation and the principle of sovereign equality, the realities of economic and political power do not reflect those ideals. The possession of power allows a nation to pursue its self-interest more actively, as domestic pressures tend to encourage a nation to do.

In a world that is substantially segregated in terms of wealth, power can be a significant ally when used to improve global standards of living and the observance of fundamental human rights. In order for a unilateral exercise of power to be beneficial, however, the invoker's self-interest must correspond to the economic, political, and cultural needs of other nations. Such a synthesis is often lacking.

If less-developed nations are to have a voice within our international institutions and if they are to have the opportunity to share in the increasing pool of global wealth, our perceptions of self-interest must be tempered with a broader allegiance to international law. Governments, as well as the people they represent, must recognize that their future well-being is dependent upon a reduction in the economic and political divisions among nations and that a more multilateral approach to the resolution of global disputes is to be embraced rather than feared.


454. See GATT Council, Minutes of Meeting held on Nov. 5, 1986, GATT Doc. C/M/204, at 12-13 (Nov. 19, 1986). In regard to increasing the interaction between the World Trade Organization and the United Nations with reference to security issues, see Perez, supra note 10.