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Analysis on WTO Consistency of Economic Sanction Measures

경제 제재 조치의 WTO 합치성에 대한 연구

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Analysis on WTO Consistency of Economic Sanction Measures

by

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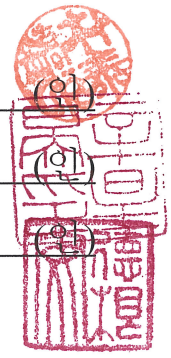

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ABSTRACT

The major controversy found in the GATT/WTO case history on trade disputes involving economic sanction measures was that those practices were often concluded to be neither consistent nor inconsistent with the GATT/WTO jurisprudence. Most of the existing literature has attributed the problem to the legal issues of the GATT *Article XXI: Security Exceptions* provision. However this paper argues that the consistency problem of economic sanction measures in the WTO is in fact embedded in the structural problems of the WTO.

The research depended on rigorous data collection of original texts from the UN, GATT, and the WTO in order to construct a narrative on the historical evolution of the WTO *Security Exceptions* and understand the motivation, objective, and original institutional arrangements of such provision. By reconstructing the forgotten ITO framework that involves tight institutional cooperation between the UN and the trade organization to deal with economic sanction matters, the paper also performs a critical assessment of such framework via analyses with past GATT/WTO dispute cases. Through this process, the thesis discovers essential structural problems of the WTO, for it to handle trade disputes that involve economic sanction measures.

This paper ultimately pinpoints three systematic problems of the WTO in ruling the consistency of economic sanction measures: 1) ambiguity problem of the WTO in establishing its jurisdiction on *Security Exceptions*; 2) lack of procedural articulation of applying the *Security Exceptions*; and 3) outdated perspective on the topic of trade and security. Furthermore, current trends and concerns on security issues clearly support why the strengthening of the multilateral framework for trade and security is essentially necessary. Supported by implications of actual case analyses, the thesis provides critical implications on how the WTO *Security Exceptions* should be amended in order to build up sound and fair multilateral trade order, regarding issues on trade and security.

Key Words: WTO, Security Exceptions, Economic Sanction, UN Conference on Trade and Employment, ITO, Trade and Security

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1.1 Nature of Issue: Economic Sanctions

Economic sanction refers to a deliberate, government-inspired withdrawal or threat of withdrawal of customary economic relations. Traditionally, the counterpart is often equally a state, but any certain group of organization or even an individual can also be targeted for specific sanctions. The primary purpose of practicing economic sanction measures is to punish, deter, or rehabilitate the targeted counterpart without force. The motivation of such action is generally in line with the sender country's immediate commercial or political and security interests. In other words, economic sanctions are highly complicated in nature, as its primary objective and consequences emerge from and become intertwined with different – political and economic, respectively – sectors.

The history of the usage of such measures can be traced back into the times of the ancient Greeks, when Athens imposed import bans on Megaran products in 432 B.C.; however, the modern understanding of economic sanction as a prominent foreign policy tool was prompted after the US President Woodrow Wilson's speech, which called for "absolute boycott" towards the aggressor country

against the League of Nations during the World War I.[1]

Economic sanctions can be imposed unilaterally and plurilaterally, initiated by individual states or even multilaterally through mandatory sanctions implemented by the UN Security Council (since 1945), or formerly by the League of Nations. Regarding the most traditional unilateral sanctions, there is no international criteria clarifying when one country can impose what kind of economic sanctions to another; it is basically up to each country's sovereign domestic policy decisions.[2] From a comprehensive list of modern day (1914-2006) economic sanction cases used for foreign policy goals summarized by Hufbauer and Schott, the United States definitely stands out as the prominent sender country of such policy measure.[3]

Based on the US model, economic sanctions are realized in forms of total embargo, asset freeze and financial controls (including investment and aid controls), import and export controls through licenses and control group lists, and travel bans. Export controls used to be the prime instrument used by the US during the Cold War against the Soviet Union and the Eastern European Communist (EEC) bloc. Still in the post-Cold War era, export controls, especially arms controls have been imposed towards terrorist groups and narcotics gangs, in order to restrict their

[1] Hogan (2006), p.78.
[2] That is why it was once considered to be inherently contrary to international law; Lowenfeld (2002), p.732.
[3] See Hufbauer and Schott (2007).

access to US high-tech arms and goods with potential dual-use.[4] Financial sanction seems to be ultimately the most effective type of measure to impact the target. It is effectively used towards specific political leaders of the recipient state or organization, by tying up the financial means of those who are directly in charge of main policy decisions. The impact of import and export controls depend on the quality of control regulations by the designated products and control groups, and this often creates both subtle and direct disruption of existing trade relations among many different countries.

For multilateral UN sanctions, the authority to decide on its mandatory economic sanctions is independently granted to the UN Security Council, based on Articles 39 and 41 of the UN Charter. [5] The General Assembly only has the right to circulate recommended resolutions to the Members under Article 11, while the Security Council, as a specialized body which has been conferred with primary responsibility for the maintenance of international peace and security by the members of the United Nations based on Chapter V of the Charter, has its particular authority to decide on mandatory sanctions.

[4] Check US Department of the Treasury for a complete list of ongoing US trade sanctions: http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx.

[5] Compliance with a decision of the UN Security Council ordering sanctions pursuant to Articles 39 and 41 of the UN Charter is mandatory by Article 25 and a failure to carry out the decision is a violation of the Charter. The fact that enforcement of sanctions would conflict with a requirement of domestic law is not an excuse under international law for non-compliance with the orders of the Security Council, nor any relief from the obligation stated in Article 25.

The mandatory sanctions are decided within the Security Council through voting by the Permanent Members.[6] According to Article 27.3 of the UN Charter, any decision of the Security Council should be made by an affirmative vote of nine members including the concurring votes of the five permanent members. That said, the veto power of the permanent members plays a significant role in official decisions – which partially explains why UN sanctions never competitively rose during the Cold War with China and the former Soviet Union seating as the Permanent Members of the Security Council along with the US, UK, and France.

This sort of multilateral economic sanction measures also range similarly with those the individual states' imposed for sanctions and many combination and newly thought tactics are attempted to increase the effectiveness of sanctions.[7] Especially after the Cold War, there has been a huge increase in the number of official UN sanctions against various targets of traditional states, terrorist organizations, and even political individuals.

As described above, unilateral sanctions and multilateral UN sanctions are prepared and imposed in different procedural rules and orders. Because unilateral

[6] The Security Council is consisted of fifteen Members of the United Nations. According to Article 23.1 of the UN Charter, China, France, Russia, the United Kingdom, and the United States are the permanent members and ten of the non-permanent members are to be elected every two years.

[7] Article 41 of the UN Charter contains a list of possible measures not involving the use of armed force which may include' complete or partial interruption of economic relations and or rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.' In other words, the length, strength, target, measure, and impact of economic sanctions imposed by the UN Security Council vary immensely as much as those initiated by individual states.

sanctions and multilateral sanctions are inherently rooted from different authority – the sovereign state and international law – there are practical conflicts and institutional difficulties of implementing and controlling economic sanction measures in a congruent manner.

Firstly, the mandate to comply with a decision of the Security Council can imply a conflict on the different level of obligations based on the hierarchy of domestic and international law in the particular state, depending on the jurisdiction of national courts.[8] This also means that the UN lacks full capacity to monitor whether certain unilateral sanction measures are inappropriate or legitimate. There is always a high possibility that the domestic rulings would overrule what the international community insists or encourages. That said, while the use and necessity of economic sanctions are commonly justified, not to mention that it has been a prime tool of statecraft for almost thousand years in history, the scope of economic sanctions in practice is nonetheless ambiguous, in both terms of domestic law and international law.

Secondly, the economic sanction measures implemented either unilaterally or pursuant to the decisions by the Security Council might well conflict with the basic non-discrimination principles and certain specific provisions of the General Agreement on Tariffs and Trade (GATT) and other bilateral and plurilateral trade agreements. The problem is that such conflict would not relieve a state from the obligation to comply with mandatory sanctions decided upon by the Security

[8] Lowenfeld (2002), p.714.

Council; likewise, compliance with the mandate of the Security Council should be regarded as justification or excuse under a bilateral or multilateral agreement against the state applying the sanctions.

This inevitable ambiguity on the scope of economic sanction measures, for them to be primarily based on political considerations, practically generates huge implications to economic consequences. Among many, this paper will focus on their implications on world trade order and continue the next section to provide the perspective of the WTO system dealing with economic sanction measures.

1.2 Scope of Study: WTO *Security Exceptions*

When it comes to the world trade regime, economic sanctions are inherently in violation of the fundamental principle of non-discrimination of the WTO. Article I of the GATT, the Most-Favored-Nations (MFN) clause, stipulates that any member country should treat every single member country equally and never less favorably than any other countries that one has trade relations with. This applies to restraints both on imports and exports. GATT Article XI, Prohibition on Quantitative Restrictions, would also be violated with any trade embargoes and restrictions on certain products, which are typical forms of economic sanctions in practice.

There are clauses elaborated for exceptional cases, which is considered justifiably necessary to alleviate the MFN obligation and prohibition on

quantitative restrictions. Exceptions to quantitative restrictions can be found in cases related to continuous deficit in balance of payments under Articles XII and XXVIII(b) and also in cases that should be considered for temporary safeguard action due to economic impairment from sudden increase of unexpected imports, under Article XIX. Other all-encompassing exceptions to any of the GATT provisions are provided by Article XX General Exceptions, Article XXI Security Exceptions, and Article XXIV of Territorial Applications.

Still, any sort of commercial sanction is strictly prohibited in the WTO, except for cases of retaliation approved by the WTO Dispute Settlement Body (DSB). Exceptions to the general WTO obligations may be applicable only to sanction cases considered not to essentially involve commercial motivations. In other words, in the WTO, economic sanctions are only allowed in limited emergency circumstances relevant to political and security interests, subjected to Article XXI. Article XXI serves as the last resort that allows foreign policy measures to interlude into trade matters by undermining strict obligations of the WTO for politically imminent circumstances.

The exact wordings of Article XXI of the GATT are as the following:

> Article XXI
>
> *Security Exceptions*
>
> Nothing in this Agreement shall be construed
>
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interest; 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, ammunitions 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.

Given the strict eligibility granted to economic sanction measures for practice through Article XXI in the WTO, it is natural to expect careful and rare invocation of such powerful exception clause. When reading through the actual language of the provision above, the first impression of the *Security Exceptions* is that it outlines strict and narrow conditions for its application, only generally to imminent situations specifically related to war. However in a closer look, the provision also provides many opportunities for broad and ambiguous interpretation of wordings such as "essential security interest"[9] and "other emergency in

[9] GATT, Article XXI:(b), first sentence.

international relations,"[10] which loosens the criteria and provides room for abuse of such powerful exception. In fact, the implication of Article XXI has been fiercely controversial in the GATT/WTO trade disputes raised due to economic sanction measures.

Nonetheless, neither change nor amendment on the GATT *Security Exceptions* has been precedent, except the 1982 Ministerial Conference addendum on clarifying procedural matters to invoke Article XXI. Rather, the exact same wordings of GATT Article XXI have been duplicated also in GATS as Article XIV *bis* and in TRIPS as Article 73, when they were adopted for the WTO during the Uruguay Round. The controversy of this overlapping area of politics and economics is neither resolved nor irrelevant in this current world trade order.

1.3 The Question: Can Economic Sanction Measures be WTO Consistent?

The problem found in the GATT/WTO rulings on economic sanction measures was that those practices were often concluded to be neither consistent nor inconsistent with the GATT/WTO jurisprudence. Many of the existing literature have majorly attributed such problems to the legal issues of applying the *Security Exceptions.* Studies have focused on analyzing the language of the *Security*

[10] GATT, Article XXI:(b)(iii).

Exceptions provision to address the scope of the issue, interpretative issues, and the legitimacy on the jurisdiction of the GATT/WTO.[11] However this paper argues that the consistency problem of economic sanction measures in the WTO is in fact embedded in the structural problems of the WTO.

This paper aims to pinpoint both three systematic problems of the WTO in ruling the consistency of economic sanction measures. It is to focus on the institutional incapability of the GATT/WTO to cope with innate controversy of economic sanction measures, arising from the political portion of it. Furthermore, the current trends and concerns on security issues clearly support why the strengthening of the multilateral framework for security in trade is relevant and essentially necessary. The understanding of the systematic problems of the WTO *Security Exceptions* to deal with economic sanction measures provides critical implications on what should be done to establish a proper trade order.

The research depended on rigorous data collection of original texts from the UN, GATT, and the WTO in order to construct a narrative on the historical evolution of the WTO *Security Exceptions* and understand the motivation and objective of such provision. By reconstructing the forgotten ITO framework that involves tight institutional arrangement between the UN and the trade organization to deal with economic sanction matters, the paper also performs a critical assessment of such framework through analyzing past GATT/WTO dispute cases.

[11] Refer to section 2.2 of Chapter II of the thesis for further details on the arguments of the existing literature.

Through this process, the thesis discovers essential structural problems of the WTO, for it to handle trade disputes that involve economic sanction measures.

Ultimately, this thesis concludes that there are three systematic problems of the WTO: 1) ambiguity problem of the WTO in establishing its jurisdiction on *Security Exceptions*; 2) lack of procedural articulation of applying the *Security Exceptions*; and 3) outdated perspective on the topic of trade and security. Supported by implications of actual case analyses, the thesis is able to set a direction on how the WTO *Security Exceptions* should be amended in order to build up sound and fair multilateral trade order, regarding issues on trade and security. Such details of actual solutions should be should be contemplated further in future studies.

The rest of the chapters in this thesis are ordered as the following: Chapter II first provides legal review on GATT/WTO cases and GATT *Article XXI: Security Exceptions* provision based on the existing literature. Chapter III provides historical analysis on how the current WTO *Security Exceptions* has developed since the inception of the ITO and the GATT. Referring to the forgotten ITO framework, reconstructed in Chapter III, Chapter IV performs a critical assessment of such framework, in order to filter out how the WTO can be complemented and what the WTO essentially needs to independently adopt, in order to deal with economic sanction measures in trade disputes. Chapter V lists out three systematic problems of the WTO to deal with trade disputes involving economic sanction

measures, as the major findings of this research. With some guidance to future research, Chapter VI finally concludes by elaborating on the implications of the research.

Chapter II. Legal Review of GATT/WTO Cases and GATT *Article XXI: Security Exceptions*

There have been a total of fourteen cases[12] disputed in the GATT/WTO Dispute Settlement Body (DSB), which the complainant has filed against the sender country upon certain trade sanction measures and the defendant invoked the GATT *Security Exceptions* provision. Among the fourteen cases, the Panel reports have been circulated only for four cases, and all the other ten cases have either been unable to establish the Panel due to lack of consensus during the GATT period or been dismissed during the consultation session in the WTO period. Even for those with circulated Panel report, the natural political sensitivity of the issues often led the Panel to publish only circumventing judgment of the situations.

Despite the frequent use of economic sanction measures practiced against the enemy bloc during the Cold War, the actual number of the GATT disputes regarding sanction measures is far less than expected. Two principal reasons can be pointed out for this relative insignificance of the GATT to the matter of sanctions. First, the GATT contracting parties were basically constituted of the Western US-ally states that often the contracting parties were not the target countries for

[12] See Table 1.

economic sanctions. Secondly, the GATT remained weak and controversial to handle political motivations and rationales for economic sanction measures, also fearing that it may lose its contracting parties, once any of its important constituents, like the United States, turn their back on the institution.[13]

Since the establishment of the WTO, there have been only four cases (practically three, as DS188 and DS201 are basically the same case) related to trade sanction measures discussed in the WTO DSB. This small number of cases is again strange, considering how the DSB procedure is generally acclaimed to bring proliferation of WTO disputes, due to the negative consensus rule for Panel establishment.[14] This procedural improvement is often held for one major reason for the proliferation of dispute cases in the WTO. However, despite such improvement and huge increase in membership, 160 countries in total as of June 2014, there have not been many disputes regarding economic sanction measures.

Table 1. 14 GATT/WTO Dispute Cases that invoked GATT *Security Exceptions*[15]

Request for Consultation	Case Name	Doc./Case Number	Complainant	Invoked provision
1949	*US – Issue of export licenses	CP.3/ SR22-II/28	Czechoslovakia	Art.XXI (b)(ii)
1951	US – Suspension of obligations between the US and Czechoslovakia	CP.5/5-II/36	Czechoslovakia	Art.XXI (b)(iii)

[13] Lowenfeld (2002), p.755.

[14] In the GATT period, the Panel was established only by the consensus of the contracting parties, when requested by the complainant; but in the WTO system, the Panel is automatically established after the consultation procedure, based on the negative consensus rule;
refer to http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm.

[15] Rearranged the table based on the information from the WTO website (www.wto.org).

1954	Peru – Prohibition of Czechoslovakian imports	L/2844	Czechoslovakia	Art.XXI (b)(iii)
1961	Ghana – Ban on imports of Portuguese goods	SR.19/12	Portugal	Art.XXI (b)(iii)
1962	US – Embargo on trade with Cuba	MTN/3B/4 COM.IND/Add.4	Cuba	Art.XXI (b)(iii)
1970	Egypt - Boycott against Israel and secondary boycott	BISD17S/39,40	Israel	Art.XXI (b)(iii)
1975	Sweden – Import quota system for footwear	L/4250 C/M/109	-	Art.XXI
Apr. 30, 1982	*EC, Australia, Canada – Trade restrictions affecting Argentina applied for non-economic reasons	C/W/402	Argentina	Art.XXI (b)(iii)
May 11, 1983	*US – Imports of sugar from Nicaragua	BISD/31S/67	Nicaragua	Art.XXI (b)(iii)
May 6, 1985	*US – Trade measures affecting Nicaragua	L/6053	Nicaragua	Art.XXI (b)(iii)
Jan. 13, 1992	EEC – Trade measures taken by the EC against the Socialist Federal Republic of Yugoslavia	L/6948	Yugoslavia	Art.XXI (b)(ii)(iii)
May 13, 1996	US – The Cuban Liberty and Democratic Solidarity Act	DS38	EC	Art.XXI
Jan. 14, 2000	Nicaragua – Measures Affecting Imports from Honduras and Colombia	DS188	Colombia	Art.XXI
Jun. 6, 2000	Nicaragua – Measures Affecting Imports from Honduras and Colombia	DS201	Honduras	Art.XXI

** Implies existence of Panel Report*

Interestingly, the small number of WTO disputes does not necessarily represent the less number of sanctions imposed or reduced amount of conflict in the trade arena regarding sanction policies. According to the comprehensive list of

modern day (1914-2006) economic sanction cases used for foreign policy goals summarized by Hufbauer and Schott, the number of sanction measures have not decreased in the post-Cold War era, mainly the WTO-period[16]. There has been an increase in UN mandatory sanctions and consistent number of unilateral or plurilateral economic sanctions.[17] Especially after the end of the Cold War, through normalization processes between countries and more joining memberships in the WTO, trade relations over the globe also have become more diverse and complicated.

Looking at the US for one example, there is an ample number of domestic disputes that fine and punish the non-compliance of the business sector to the US trade sanction measures.[18] Because more and more multinational corporations are subjected to US foreign sanction policies, new domestic regulations in Canada, the UK, and Australia, developed as countermeasures to protect and secure sovereign rights of the government on its own nationals, have increased and this easily signify the tensions between different states related to the world trade and business order.[19] In other words, it is apparent that there are more compounding problems and tensions that rise among individual states, but these matters are no longer discussed in the WTO DSB.

The reasons for this avoidance of the WTO DSB as a forum to discuss the

[16] See Hufbauer and Schott (2007).
[17] Ibid.
[18] See Clark and Wang (2007).
[19] Ibid.

legality of trade sanction measures could be traced back through the actual GATT/WTO case history. By pointing out the major legal issues through case analyses of those that have consistently brought up in the GATT/WTO Panel discussions and the subsequent responses of the DSB reflect what made the WTO to become an insignificant institution to deal with economic sanction measures.

2.1 Legal Review of the GATT/WTO Disputed Cases[20]

As it is shown in Table 1, among the specific subparagraphs of GATT *Article XXI: Security Exceptions*, only either subparagraph (b) or just the 'spirit' of Article XXI without reference to the specific provision has been invoked to justify their sanction measures by the defending countries. For those that invoked Article XXI:(b), the 1949 US-Issue of export licenses case was the only one that involved subparagraph (b)(ii) for a debate on export controls of strategic goods, and the rest of the cases were all dealt within the scope of Article XXI:(b)(iii). This provision has been popular to be held as a justification by the defendant country based on its broad language on the scope of exceptions, such as "[actions] taken in time of war or other emergency in international relations."

The typical discussion regarding GATT Article XXI:(b)(iii) can be

[20] The summary of the 10 GATT cases are elaborated in the GATT document MTN.GNG/NG7/W/16 and more details of analyses for several major cases of both the GATT and the WTO can be found in Alford (2011) and Park (2009) as well for reference. In this section, only the cases relevant to the key points of this thesis will be discussed.

majorly exemplified by the 1985 US – Trade measures affecting Nicaragua case. Nicaragua claimed that the "measures had been taken as a form of coercion for political reasons, and formed part of a US policy of political, financial trade and military aggression against Nicaragua."[21] It also added that "[because] the economic weakness of developing countries limited their capacity to retaliate, US declaring national emergency was absurd to suggest that Nicaragua could pose a threat to the national security of one of the most powerful countries in the world; plus there was no armed conflict between the two countries."[22] Nicaragua basically argued the situation between the US and Nicaragua is unreasonable to be considered as in "time of war or other emergency in international relations."[23]

The third parties such as Peru, Czechoslovakia, Egypt and Iceland agreed with Nicaragua that the US' measures were arbitrary, violating the GATT provisions, and it is unreasonable for a powerful country to cite Article XXI as a basis for imposing economic sanctions on a small, poor country that could not possibly threaten US security.[24] This discussion clearly reflects how much Article XXI provision lacks any guideline or testing criteria that defines what makes a situation to be an "emergency in international relations" to practice sanctions to be considered "necessary" to protect "its essential security interests."

In response to Nicaragua's claims, the US argued that Article XXI is left

[21] C/M/188, p. 2.
[22] Ibid., p.3.
[23] GATT, Article XXI:(b)(iii).
[24] C/M/188, p. 3.

to each contracting party, and the judgment of any action which it considers necessary for the protection of its essential security interest[; t]herefore it is not for GATT to approve or disapprove the judgment made by the US as to what was necessary to protect its national security interests.[25] This is one example of how the debate on the appropriateness of the political circumstances in reference to the specific Article XXI provision flows over to whether the GATT fundamentally has its jurisdiction over Article XXI.

Unlike the US, the third parties such as Cuba, Argentina, Chile, Hungary, Sweden, Finland, Switzerland, Canada, Australia, and Japan counter-argued that the "GATT was [in fact] a proper forum to discuss […] implications [of security issues] for the General agreement, because if the principles underlying common commitments were infringed, any contracting party could fall victim to arbitrary measures."[26] They insisted that "[t]he founding fathers were also concerned on the matter that trade and politics cannot be clearly distinguished. GATT should acquire prudence and ensuring mechanism for the contracting parties' rights under the General Agreement."[27]

At the same time, Spain, Austria, India, Egypt, Yugoslavia, Norway and Jamaica referred to the 1982 Ministerial declaration and clearly stated that "economic measures as an instrument of political pressure should not be justified. Also the [US] measure does not fit into Article XXI." However, despite such

[25] Ibid., p. 4.
[26] Ibid., p. 5.
[27] Ibid., p. 14.

discussion, because the Panel was agreed by the US to be established under the condition that it is not granted the authority "to examine or judge the validity of or the motivation for the invocation of Article XXI(b)(iii) by the United States,"[28] the Panel could not determine the legality of US invocation of Article XXI and only checked the nullification of economic benefits of Nicaragua and which finding that basically has no case-resolving impact on either the US or Nicaragua.

In relation to the jurisdiction problem of the GATT/WTO on political and security issues, there also has been a long discussion on the legitimacy of the *Security Exceptions* itself. In the very first 1949 US-Issue of export licenses case, it is interesting to see how the third parties' thoughts also diverged regarding the necessity and effectiveness of the GATT Article XXI. It is stated that the UK thinks "the US [action] should be justified because every country must have the last resort on questions relating to its own security."[29] On the other hand, it is stated that Cuba and Pakistan "think that the case calls for important full investigation, but don't think that practical results could be produced."[30] In other words, Cuba and Pakistan acknowledged practical loopholes of Article XXI in its stated condition to filter out abusive trade sanction measures.

All in all, either Article XXI subparagraph (a) or (c) was never invoked in the GATT/WTO dispute history. Subparagraph (a) of GATT Article XXI, on disclosure of information, did not have clear relevance with actual incidents, and

[28] L/6053, p. 14, paragraph 5.3.
[29] CP.3/SR22-II/28, p.3.
[30] Ibid.

subparagraph (c) was not necessary to be invoked as there was no direct conflict between the rulings of the GATT/WTO and UN mandatory sanctions ordered by the Security Council. In practice, Article XXI (b) has been the most controversial provision and the discussions on how to apply the Security Exceptions has been continuously debated; unfortunately, without sufficient development of the provision itself.

2.2. Legal Review on Applicability of GATT Article XXI

In the 14 cases dealt in the GATT/WTO, some countries didn't want to prolong the discussion on the scope of the provision and rather refused to accept any Panel decision by arguing that the GATT/WTO does not have the authority to impose any ruling against individual states' sovereignty over political issues. In fact, the Panel could not often draw clear guidelines on how to cope with such politically intertwined trade matters. Only four Panel reports, still refraining from any clear judgment on core issues, were circulated in the history of GATT/WTO cases that invoked Article XXI.

The literature in academia on the ambiguity problem of the GATT *Security Exceptions* clause includes legal discussions on the self-judging nature of Article XXI[31], the jurisdiction problem of the GATT/WTO on whether it is a proper

[31] See Bhala (1998), (2005); Jackson (1969); Alexandroff &Sharma (2005).

forum to discuss political issues[32], the applicability of the specific subparagraph conditions[33], and the practical efficacy of Article XXI[34].

According to Bhala (1998), the main cause of the problem for GATT Article XXI comes from the language, *essential security interest*, in subparagraph (b) that it allows members to invoke the provision free from any judicial review and defines the provision to be self-judging.

However, Scholemann & Ohloff (1999) claims that jurisdictional defense (authority to interpret) and substantive defense (authority to define) should be distinguished regarding the GATT Security Exceptions. The authors argue that Article XXI is structurally a limited and conditional exception to the substantive rules of GATT security exception, with its potential for abuse to be subjected to review under normal dispute settlement procedures. Here, the authors bring in one of the principles of international law, 'good faith,' to be the appropriate standard applicable to the definitional prerogative for security interests. This standard requires a Member relying on Article XXI to participate in the Panel proceedings and provide information necessary for the Panel to make findings within its competence. The authors state that the WTO Member may exercise in good faith its "right to be cautious" as part of its sovereign right to protect its national security.

Similarly but more definitely, Van den Bossche and Zdouc (2005) also

[32] See Lowenfeld (2002); WTO(1995); Cann, Jr. (2001).
[33] See Akande & Williams (2003); Hahn (1991); Park (2009); Scholemann & Ohlhoff (1999).
[34] See Alford (2011); Park (2009).

argues that Article XXI is subject to judicial review "otherwise the provision would be prone to abuse without redress."[35] Whether or not the principle of good faith should work, the author asserts that "at a minimum, the Panel and the Appellate Body should conduct an examination as to whether the explanation provided by the Member concerned is reasonable or whether the measure constitutes an apparent abuse.[36]"

Akande & Williams (2003) rather takes a medium stance among the introduced authors in section. The authors first argue that the GATT Article XXI is intended to create a legal obligation; in other words, the GATT jurisprudence is automatically valid. However, they introduce the concept of 'objective' and 'subjective elements' of the provision. Firstly, the authors point to Article XXI:(b) as the one that leaves the most room for self-judging elements. They argue that in no way does the wording suggest it is up to the Panel to question whether the controversial trade measure is necessary for the protection of the security interests; rather it is up to the members to act in good faith. Secondly, the authors specifically point to Article XXI(b)(iii), that the condition, "in time of war or other emergency in international relations," is a rather objective element that can be determined by an international tribunal. Nevertheless, Akande & Williams remain strict on the fact that the WTO Panel or the Appellate Body should not address underlying non-trade issues or motives.

[35] Van den Bossche and Zdouc (2005), p.666.
[36] Ibid.

There are also articles that have approached the nature of *Security Exceptions* in a more political and power-based structure, examining if the principle of good faith actually works. Emmerson (2008) questions whether Article XXI is a legal doctrine or political excuse, in order to pinpoint the ever more aggravating abusive nature of the provision. Interestingly his analysis through international relations perspective on power and security concludes that the power dispute suggests that security issue is a sovereign one of the state which prevails the GATT/WTO obligations and that Article XXI should definitely be self-judging. In the meantime, Lindsay (2003) claims that an ambiguous Article XXI is not free from abuse, history suggests that the ambiguity is often a constructive one. He argues that the nations have informally checked perceived abuses of Article XXI in several instances and that the ambiguity of Article XXI has not necessarily frustrated implementation of the GATT. He argues that the ambiguity of the provision may not produce perfect results, but such results often depend on the time, place, and perspective of the parties.

Furthermore, Alford (2011) explored other circumventing ways how the WTO Members have learned to less utilize direct invocation of GATT Article XXI, and rather indirectly resolve conflicts regarding economic sanctions, as an explanation why there are less number of disputes.

In a critical perspective, this thesis agrees that the principle of good faith should ideally work as a guideline for invoking the *Security Exceptions*; nevertheless, it is also natural for political issues to generate abusive invocation of

the provision based on power distribution. Therefore, the thesis believes that the GATT jurisprudence should be automatically valid and ensure minimum process of judicial review upon the *Security Exceptions* to ensure minimum nullification of economic benefits beyond necessary. However, whether the determination should be authorized solely by the WTO or in cooperation with another international tribunal would be tentative depending on each specific circumstances of different cases. The WTO should also be cautious not to override sovereign rights of the Member countries upon their security interests, based on an economically biased standard.

In that sense, this thesis thinks that the controversies of applying the *Security Exceptions* regarding economic sanction measures are embedded in the systematic institutional problems of the WTO. These legal problems on the *Security Exceptions* are not issues relevant to the single provision but are originated from the structural problems that have been built over, since the inception of the GATT.

Given that, the thesis essentially believes that the WTO Security Exceptions should be amended in order to resolve such recurring legal problems. The understanding of the fundamental systematic problems of the WTO to deal with economic sanction measures would provide clearer vision to how the Security Exceptions should be re-arranged.

The next chapter will discover the origins of the current WTO *Security*

Exceptions with critical analyses on the lack of institutional backbone for its applicability.

III. Analysis on the Historical Evolution of WTO *Security Exceptions*

In order to understand the nature of the current WTO *Security Exceptions*, it is important to trace back the origins of such provision in relation to the original text of the ITO Charter. What the original provision aimed to serve in the context of a comprehensive ITO Charter, as in contrast to the only survived texts of the General Agreement on Tariffs and Trade (GATT) projects a totally different vision of the matter. The inherent deficiency in the structure, content, and elaboration of the GATT *Security Exceptions* was left solely to this single multilateral contract, which merely aimed for a "provisional application," to bear its "birth defects" [37] in the unfortunate failure of the ITO. Yet, the remaining question is why hasn't the *Security Exceptions* been either complemented, updated, or amended even when the World Trade Organization (WTO) was finally established in 1994, after 47 years of long aspired dream to establish an official body to govern the international trade regime.

The idea to create the ITO was originally to build a third pillar sustaining the Bretton Woods system along with the ready established International Monetary

[37] Jackson (1997), p.35.

Fund (IMF) and International Bank of Reconstruction and Development (IBRD). The proposal to launch the ITO was submitted rather later in December 1945 by the US government in order to complement the two original Bretton Woods institutions, which were in effect since July that year. At the first United Nations Economic and Social Council (ECOSOC) session in February 1946, a resolution calling for an international conference on trade and employment to consider the creation of the ITO was adopted. The ITO was proposed to govern not only commercial matters on trade in goods but a comprehensive list of macro and microeconomic matters related to trade such as employment, investment, restrictive business practices, state trading, and competition policies. At the same time, the GATT, specialized agreement on tariff schedules and trade concessions, was agreed to be proceeded simultaneously with the drafting of the ITO Charter, while the GATT was regarded from the beginning to be a subsidiary form of agreement to the whole ITO Charter.

The Preparatory Committee was to meet in London from October to November in 1946, followed by the New York Conference (January – February 1947) led by the Drafting Committee for further amendments on the Charter as well as the first full draft of the GATT. The Second Preparatory Committee meeting was held in Geneva, lasted from April 1 to October 30 1947, where the GATT was completed and signed by the end of the Conference. The GATT came in to force since January 1, 1948, prior to the establishment of the ITO, under

Protocol of Provisional Application[38], which meant its effectiveness to be due only till the ITO finally comes into force. The ITO Charter still underwent further developments at the Plenary Conference in Havana (November 1947 – March 1948). The Final Act of the Charter was signed on March 24, 1948.

Of course the presumption was that soon the ITO would come into existence to operate and back up the institutional support for the GATT; but unfortunately, the US Congress never ratified the 1948 Havana Charter. Foreseeing the hopeless prospect of the ITO's acceptance from domestic politics, President Truman of the United States in fact withdrew the Havana Charter from securing congressional approval in December 1950[39]. Subsequently, the GATT, as the only survivor from the early efforts to design a multilateral trade regime, was to solely operate by filling in the vacuum of the ITO. Many from the Charter were not included in the GATT draft, but the basic principles of Most Favoured Nations (MFN) Treatment and National Treatment (NT), as well as the obligations and rules on quantitative restrictions, subsidies, antidumping, countervailing duties, and safeguards had been mostly updated and amended simultaneously with the ITO Charter in the Preparatory Meetings. It sustained fairly in creating the world trading regime until the advent of the WTO in 1994; however, the essentially flawed provisions and structure of the GATT, originally expected to be applied and practiced in relation to the more comprehensive and detailed principles and

[38] See E/PC/T/202.
[39] Diebold, Jr. (1952), p.1-23.

provisions of the ITO Charter, have not been easily accommodated over time and still remain problematic, including the case of applying Article XXI *Security Exceptions* of the GATT.

3.1 1945-1947: The origins of the Security Exceptions in the ITO Charter and the GATT

The very first draft of the ITO Charter and the relevant *Security Exceptions* provision traces back to the US Proposal draft[40] published in November 1945. Because the ITO Charter was originally aimed to include a broad scope of issues such as commercial policy, restrictive business, and state trading, the *General Exceptions* clauses were also separately designated for each different chapter. The roots of the current GATT *Security Exceptions* can be found from the *General Exceptions* stated under the Commercial Policy chapter[41]. The current title as the '*Security Exceptions'* has not yet been in place and the structure of the provision was in a combined form of the current *General Exceptions* (Article XX) and *Security Exceptions* (Article XXI). Subparagraphs 3 and 8 are very vague in this preliminary drafting stage, but they are still clearly attributable to the current

[40] Proposals for Expansion of World Trade and Employment, Department of State, the United States, November 1945, retrieved from http://www.worldtradelaw.net/document.php?id=misc/ProposalsForExpansionOfWorldTradeAndEmployment.pdf, on October 1, 2014.
[41] See Appendix 1.

components of the *Security Exceptions*.

Subtle changes made in the subsequent draft called the "Suggested Charter" for an ITO of the United Nations[42], prepared by the United States in September 194 6after the first UN ECOSOC session, includes new subparagraphs such as (c) 'relating to fissionable materials' and (k), which outlines the relationship of the ITO principles to be in accordance with the UN Charter[43]. Subparagraphs (c), (d), (e), and (k) of this draft are the main four components that have been restructured and rephrased throughout the subsequent conferences and sessions of the ITO Charter and the GATT drafting Preparatory Committees.

The *General Exceptions* provision under the Commercial Policy chapter (former title of the current *Security Exceptions*) in the ITO Charter had not been dramatically developed throughout the London draft (Nov. 1946)[44] and the New York draft (Mar. 1947)[45]. They basically remain the same from the suggested draft by the US. Yet the codification has been changed to number it as Article 37 from howt it used to be Article 32.

The February 1947 New York draft of the GATT[46] is the first full GATT draft prepared in the meetings, and it is clear from the draft that none of the institutional provisions were reflected in the GATT text, simply because it was

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[42] Suggested Charter for an International Trade Organization of the United Nations, U.S. State Department Proposal, September 1946, retrieved from http://www.worldtradelaw.net/document.php?id=misc/Suggested%20Charter.pdf on October 1, 2014.
[43] See Appendix 2.
[44] See E/PC/T/33.
[45] See E/PC/T/34.
[46] See E/PC/T/C.6/85.

under clear understanding that this trade agreement was to eventually come under the aegis of the ITO[47]. Many of the provisions were simply copied from the Commercial Policy chapter of the ITO Charter and the case was for the *General Exceptions* provision as well. The specific subparagraph notions of (c), (d), (e), and (k) were exactly the same with the Charter, yet it was codified as Article XVIII[48]. One development divergent from the Charter is the hint on what is now called the *chapeau* of Article XX *General Exceptions*. The portion reading, "[the] requirement that measures are not applied in such a manner as to constitute a means of arbitrary or a disguised restriction on international trade…," is a newly added pre-condition that governs the eligibility of certain measures to apply the exception clause. The *chapeau* is an important invention which basically puts gravity on the maintenance of international trade order in primacy, even under the exception provisions, so that it aims to deter and regulate abusive means of arbitrary or disguised restriction on international trade. It is interesting to know that the subparagraphs (c), (d), (e), and (k) used to also be subjected to the *chapeau* condition, unlike today's Article XXI Security Exceptions.

During the Geneva Conference, the General Exceptions under the Commercial Policy chapter underwent a total restructuring. The US delegation first proposed to remove items (c), (d), (e), (j), and (k) from Article 37 and create a new Article which was to be inserted at the end of the Charter to make these

[47] Irwin, Mavroidis, Sykes (2008), p.100.
[48] See Appendix 3.

extracted items as general exceptions to the entire Charter and not solely to the Commercial Policy chapter.[49] It also proposed a new introductory language of the new article to be, "[n]othing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures," which basically got rid of the *chapeau* condition invented for General Exceptions under the Commercial Policy chapter. This proposal was adopted and implemented through creating two separate provisions in the draft[50]: the *General Exceptions* (Article 43) under the Commercial Policy chapter, and the new *General exceptions* (Article 94)[51] under the General Provisions chapter. From the introductory language of the provision in the General Provisions chapter, implemented without a chapeau and in an even more simplified form than what the US delegate initially proposed during the session, it is easily implied that this provision is aimed to be an all-encompassing and strong in nature for the concerns regarding security issues and political motivations.

Subsequently, the Geneva Draft of the GATT[52] happened to have gone through a similar restructuring process with the Charter for the *General Exceptions* provision. In the August 1947 draft, Article 94 of the Charter is arranged in Part I of the GATT Article XIX and the contents of Article 43 of the

[49] E/PC/T/W/23, p.5, paragraph 8.
[50] See E/PC/T/186; E/PC/T/196.
[51] See Appendix 4.
[52] See E/PC/T/189.

Charter is arranged in Part II of the GATT Article XIX. [53] There is a clear distinction between the exception clauses of those relating to political and security issues and of those regarding the other cases, which all used to be listed in mere parallel. The *chapeau* is inexistent for Part I while it is there for Part II. It is clear even within the GATT draft that the Preparatory Committee was aware of the different degree of imminence and permanent nature of the current *Security Exceptions*. In the Verbatim report [54] of September 5, 1947, the discussion initially aimed to simply separate Part I and Part II of Article XIX into two different provisions Article XIX(A) and Article XIX, eventually concluded by inventing a new title for Part I as "*Security Exceptions*". Consequently, in the following tariff negotiation sessions in Geneva for the final elaboration of the GATT draft in October 1947[55], the *General Exceptions* clauses which used to be in two different parts, were completely divided into two separate provisions as what happened for the ITO Charter. Ultimately the final GATT draft was composed of Article XX *General Exceptions* and Article XXI *Security Exceptions*. Any further institutional arrangements was not elaborated under the GATT and rather Article XXIX *The Relation of this Agreement to the Havana Charter* was simply inserted there to let the ITO Charter to be responsible for any further elaborations on obligations and institutional arrangements developed after the GATT has been into force.

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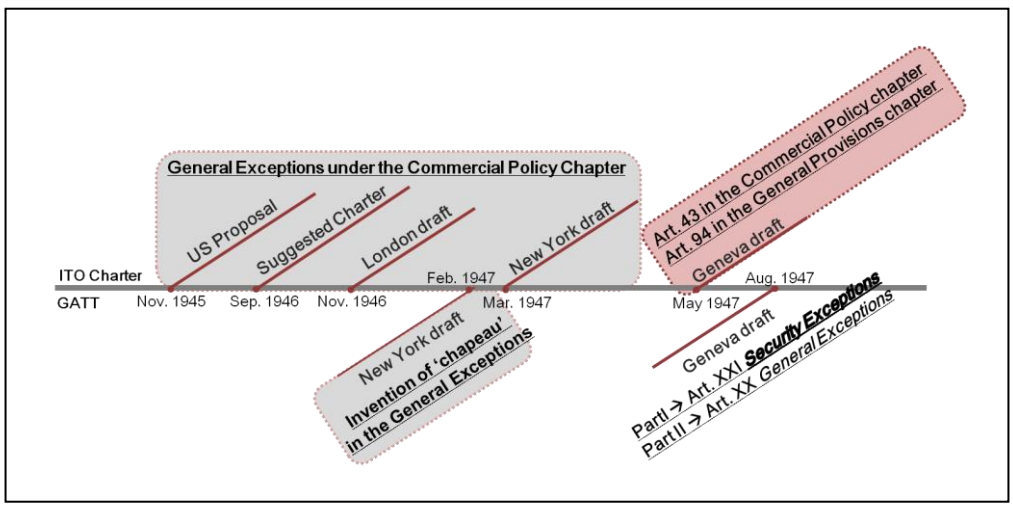
[53] See Appendix 5.
[54] E/PC/T/TAC/PV/11, p.23-26.
[55] See E/PC/T/214, Add.1, Rev.1.

Figure 1. Summary of the 1945-1947 evolution of the current GATT *Security Exceptions*



3.2 1947-1948: Finalizing the Havana Charter

In the previous conferences, there has barely been a discussion on the language and components of the subparagraphs of the *Security Exceptions* provision. Interestingly, much of the elaborations, sophistications, and subsequent developments regarding Article 94 or Article 99 *General Exceptions* (referable to the *Security Exceptions* of the GATT) in the final version of the ITO Charter, were made during the Havana Conference. There was even a sub-committee created to focus on the details of this specific provision.

In collection of diverse discussions regarding the specific subparagraphs, it is clear how the delegates were prone to thinking of preventing and defending

each country from any future threat, reflecting on their experience during the Second World War. The concerns include what the "military establishment" in subparagraph (b)(ii) would mean, whether that to refer only to the actual establishment or that process as a whole, which includes concerns on strategic goods and relevant raw materials[56]; how the actual "action" should be emphasized instead of what the "essential security interests" are in the following sub-subparagraphs of (b)[57]; and the development of Part II regarding peace treaties and special regimes established in the UN[58].

Among many others, one of the most important endeavors in Havana was that they developed a subsequent framework provision, such as Article 86 *Relations with the UN*,[59] and its interpretative notes[60], which precisely elaborated on what was merely stated in one sentence as subparagraph (c) of the *Security Exceptions* in the GATT draft. It is noteworthy to focus especially on paragraph 3 of Article 86 for clear intention for the division of labor on political matters between the ITO and the UN.[61] Below is paragraph 3 of Article 86:

> "… the Organization should not attempt to take action which would involve passing judgment in any way on essentially political matters. Accordingly, and in order to avoid conflict of responsibility between the United Nations and the Organization with respect to such matters,

[56] E/CONF.2/C.6/W.26, paragraph 4.
[57] E/CONF.2/C.6/W.40, p.4, paragraph 3.
[58] E/CONF.2/C.6/W.44, p.1
[59] See Appendix 6.
[60] See Appendix 7.
[61] E/CONF.2/6/93, paragraph 13.

> any measure taken by a Member directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter shall be deemed to fall within the scope of the United Nations, and shall not be subject to the provisions of this Charter."[62]

The sub-committee noted that paragraph 3 of the article is "designed to deal with any measure which is directly in connection with a political matter brought before the United Nations in a manner which will avoid conflict of responsibility between the United Nations and the Organization with respect to political matters."[63] Furthermore, the sub-committee also clarified the importance of effective division of labor and cooperative coherence within the function of the international system between the ITO and the UN. It said, "the important thing [i]s to maintain the jurisdiction of the United Nations over political matters and over economic measures […] taken directly in connection with such a political matter," and to identify the ITO purely as an economic organization.[64]

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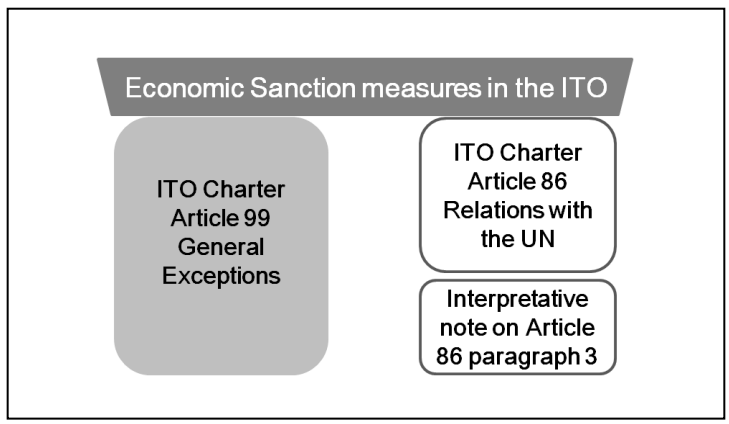
[62] Article 86, paragraph 3, "Final Act of the United Nations Conference on Trade and Employment: Havana Charter for an International Trade Organization" (dated March 24, 1948), retrieved from http://www.worldtradelaw.net/document.php?id=misc/havana.pdf on October 1, 2014.
[63] E/CONF.2/C.6/93, p.3, paragraph 15.
[64] Ibid.

Figure 2. Two pillars of the ITO that enables the organization to deal with economic sanction meausres

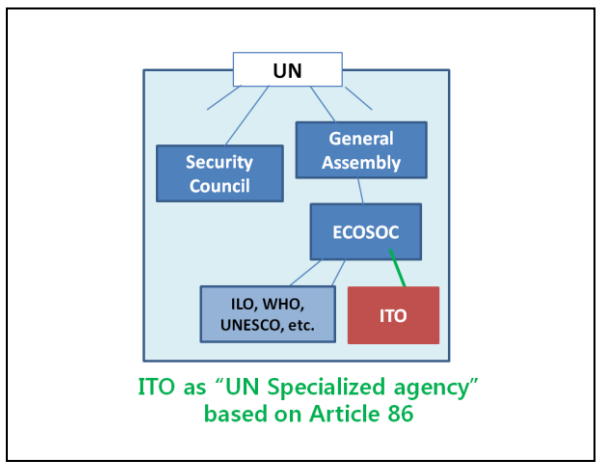


The basic premise for this compatibility in division of labor to be available in practice is that the ITO was originally meant to be a directly linked "specialized agency" of the UN, as noted in paragraph 1 of Article 86 of the Havana Charter. According to the UN Charter, these specialized agencies, for example the ILO, WHO, UNESCO, to just name a few, are ought to be in agreements[65] with the UN Economic and Social Council (UN ECOSOC), which shall be subject to approval by the General Assembly[66]. It is also specified in the second paragraph of Article 63 of the UN Charter that the ECOSOC may "coordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations." This channel of

[65] UN Charter, Chapter VIII, Article 57, paragraph 1 specifies which specialized agencies can be in agreement to be referred as UN specialized agencies.
[66] UN Charter, Chapter IX, Article 63, paragraph 1.

communication between the UN and the UN specialized agencies vested under the UN Charter enables Article 86 of the ITO Charter to work appropriately through a congruent dynamics of policy coordination between the UN and the ITO.

Figure 3. ITO and UN linkage for division of labor on political matters

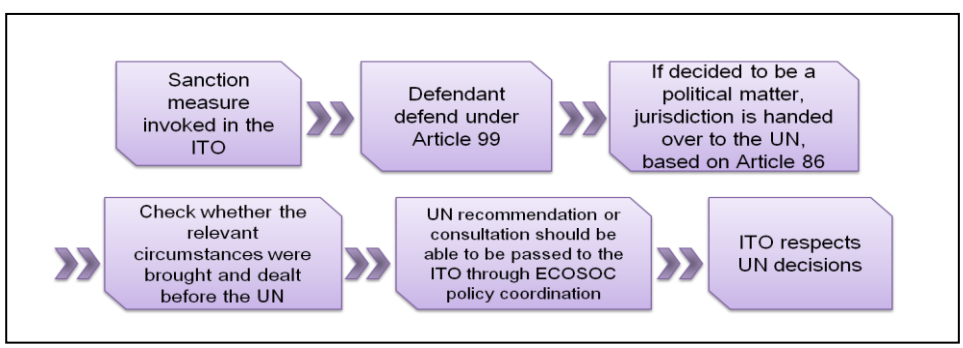


Here, the thesis tries to arrange the expected procedural flow in the ITO and the UN upon executing *Article 99: General Exceptions* of the ITO Charter based on the developments made by Article 86 and its interpretative notes. First, the sanction measure is invoked in the ITO and the defendant defends its action under Article 99 for exemption from other obligations; then, the Panel should first decide whether this case is a political matter[67]. If the matter is accepted as a sole economic matter, the ITO has the full jurisdiction; otherwise, the decision is handed to be dealt within the UN jurisdiction. Second, even though the UN has the

[67] Deciding whether one case is an economic or political matter is of ITO's authority according to ITO Charter, interpretative note of Article 86, paragraph 3.

full authority upon political matters, the UN can only decide upon the matters already "brought before the UN" through the General Assembly, the Security Council, or the ECOSOC meetings, for instance[68]. Third, the recommendation or consultation by the UN can be delivered to the ITO again through the ECOSOC policy coordination mechanism, most importantly because the ITO is a UN specialized agency[69]. Lastly, the ITO may respect the UN recommendations and finally decide on the appealed issue consistently with the UN. The division of labor and avoidance of duplication of jurisdiction is achieved at the same time when the two organizations can efficiently coordinate their policies and decisions. This procedural flow is visually summarized in Figure 4.

Figure 4. Expected procedural flow in case of invocation of Article 99 in the ITO



Eventually, the specific conditions elaborated under the subparagraphs (a)

[68] ITO Charter, Article 86, paragraph 3. of the ITO Charter.
[69] UN Charter, Article 63.

and (b) in the GATT *Security Exceptions* remained basically the same in Article 99[70] of the final draft of the ITO Charter; but what remains as subparagraph (c) in the GATT was independently clarified in Article 86 of the Charter and was eliminated from Article 99. While the original subparagraph (c) simply meant supremacy of the obligations of the UN Charter over the ITO Charter, the substituted Article 86 of the ITO Charter outlined the procedural matters of applying Article 99, institutional relationship between the two organizations – the ITO and the UN — and the legal scope of the ITO jurisdiction on the economic benefits of the third party in political circumstances.

The tragedy is that these provisions and texts of Article 86 and its interpretative note along with Article 99 have never been into force as a consequence of a complete collapse of the ITO. While Article 86 could still have had problems in practice, it is worth emphasizing such arrangements as part of the framework for not only applying the GATT *Security Exceptions* within the trade regime, but also having the vision of practicing such decisions and judgments based on a macro perspective regarding the international system as a whole to work in coherence.

[70] See Appendix 8.

3.3 1948- : GATT Solely in Force without the Charter

With an unfortunate demise of the ITO, the GATT, which originally came into force based on the Protocol of Provisional Application (PPA), survived through a tacit agreement on the indefinite extension of the Protocol. GATT fortunately remained in force but technically there was no backbone provisions which support the issues such as institutional arrangement for the GATT, without the Charter. Even though Article XXIII:2 of the GATT[71] was often used to always consider the GATT provision in relation to the ITO Charter, what was elaborated in Article XXIX *The Relation of this Agreement to the Havana Charter* became much more meaningless with the demise of the ITO.

The relationship between this agreement, the GATT, and the UN was not specified either. Neither did the elaboration of Article 86 of the ITO Charter survive nor was there a new arrangement prepared for the GATT during the Review Session (1954-55). The linkage that connected the ITO and the UN, which enabled the application of the *Security Exceptions* through division of labour was completely lost. In fact, the very first dispute regarding the application of the *Security Exceptions* happened in 1949 between the US and Czechoslovakia[72]. Czechoslovakia was arguing that the US export control regime is in violation of the

[71] This provision encourages consultation from the UN or other international agencies for the GATT in order come up with clear judgment; weaker linkage with the UN than the ITO framework; See Appendix 9.
[72] See CP.3/ SR22-II/28.

GATT, while the US was defending its policy under Article XXI:(b)(ii). The Panel discussions reaffirmed the existence of so many loopholes in the GATT system to rule upon the *Security Exceptions*, especially regarding the lack of jurisdiction of the GATT on political matters and no existing relationship with the UN for a GATT decision[73].

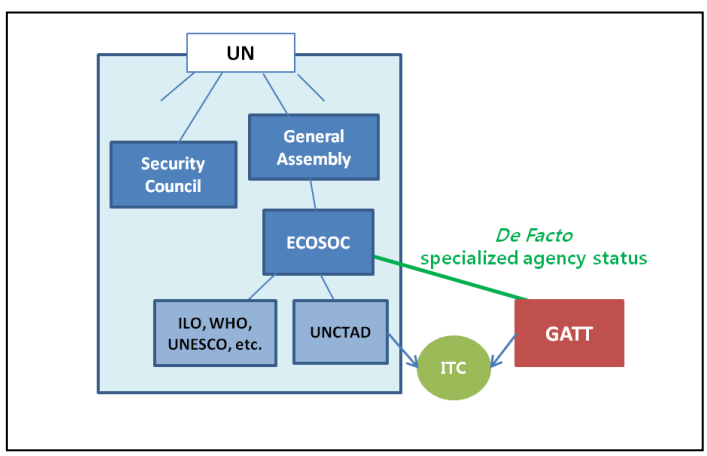
In practice, there was no formal effort to revive or amend the ITO framework of the procedural flow to deal with the *Security Exceptions* during the GATT period. GATT was either intentionally or unintentionally kept deficient to deal with economic sanction matters of political motivation. Nevertheless, as shown in the previous section how the link with the UN could have been important in administering the *Security Exceptions*, the thesis thinks that knowing why and how the GATT remained incapable of coping with economic sanction matters through its *Security Exceptions* is important. Therefore it also aims to review the relationship of the GATT and the UN in this section, following the analyses for the ITO and the UN in the previous section.

What still remained to link the GATT and the UN was the Interim Commission for the ITO (ICITO), which was established during the UN Conference on Trade and Employment and "was never abolished…."[74] ICITO, fundamentally a UN-created commission, was serving as the secretariat to the Contracting Parties of the GATT while preparing for the establishment of the ITO,

[73] Ibid.
[74] A/AC.179/5, p. 1.

and this arrangement was in fact confirmed between the Director-General (called the Executive Secretary until 1965) of the GATT and the Secretary-General of the United Nations in 1952[75]. As so, in exchange of such letters in lieu of the on-going operation of the ICITO, the GATT was confirmed to *de facto* act as a specialized agency of the UN, like what it was expected of the ITO, even without subsequent formal agreement[76]. Furthermore, there was also a *de facto* indirect alignment between the GATT and the UN through governing the International Trade Centre (ITC), established in 1965, together with the UNCTAD, a clear UN specialized agency established in 1964.[77]

Figure 5. Weak *de facto* linkage between the GATT and the UN



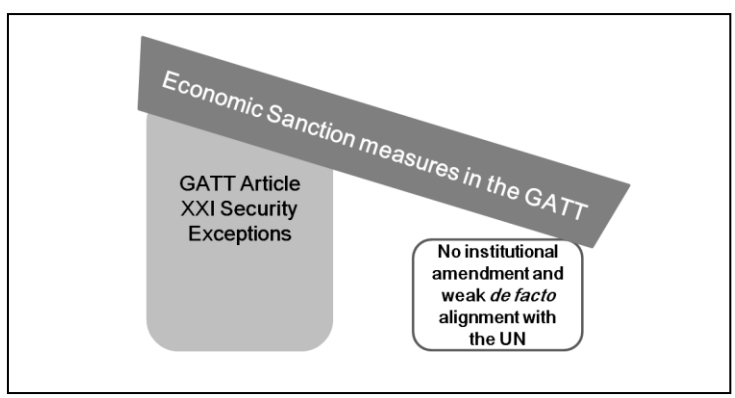
However, this *de facto* alignment between the GATT and the UN did not ensure direct channel of communication and procedural clarity in terms of division

[75] See E/5476/Add.12.
[76] A/AC.179/5, p. 1.
[77] WTO/GC/W/10, p. 7.

of labor and policy coordination. Furthermore, despite the co-governing mechanism shared with UNCTAD and GATT for ITC, some even argue that instead of coordination, these two entities were rather in rivalry for membership and functional sphere, as more developing countries were interested in development issues which UNCTAD was specializing in[78]. In that sense, it is hard to conclude that the UNCTAD and the GATT shared a coordinated policy approach.

In other words, despite the *de facto* linkage between the GATT and the UN, this meant that the GATT fundamentally lost the foundational framework for applying its Article XXI *Security Exceptions*. It lost its jurisdiction on political matters through a vague communication channel with the UN and even a lack of legal scope for the GATT to become a more comprehensive entity.

Figure 6. Lack of sustainable pillars that allow GATT to function on matters relating to economic sanction measures



[78] See A Brief History of UNCTAD: http://unctad.org/en/Pages/About%20UNCTAD/A-Brief-History-of-UNCTAD.aspx, retrieved on January 5th, 2015.

As illustrated in Chapter II, there have been a total of 14 GATT/WTO cases that have arisen due to the use of economic sanction measures and have discussed the applicability of *Article XXI Security Exceptions* on the defending country. There has been almost the same repetitive debate on how should or can the WTO decide on such innately political matters. Amid all the controversial debates and unsolved ambiguity on the applicability of Article XXI, there was one addendum on Article XXI made in the 1982 ministerial meeting[79] after the 1982 US-Imports of sugar from Nicaragua case. The addendum basically encourages increased transparency of the procedure of invoking Article XXI. But other than that, nothing much has practically enhanced the applicability of the provision or alleviated the heated discussions on its ambiguity.

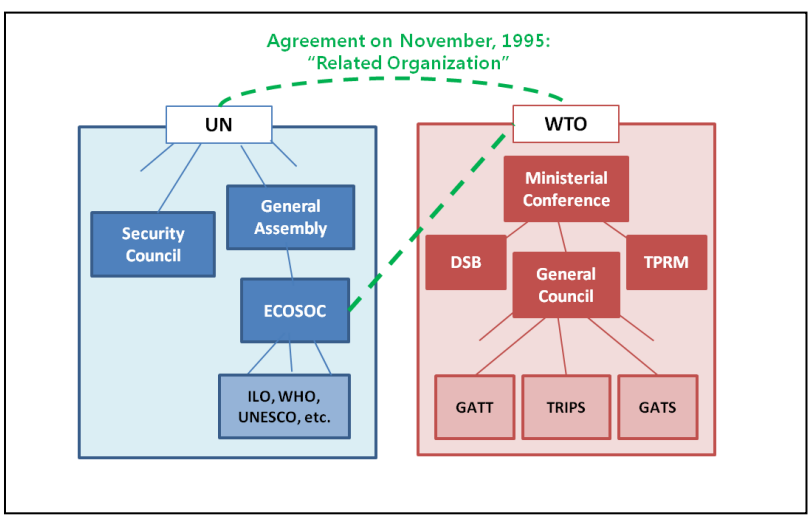
Later in the Uruguay Round, the Secretariat prepared a comprehensive note[80] on the evolution of Article XXI; however, nothing was further amended either after such scrutiny or the establishment of the WTO in 1994. The establishment of the WTO could have been a good opportunity to fill out what was lost, due to the failure of the ITO almost sixty years ago; however, neither was there any articulation in the Marrakesh Protocol that clarified the institutional arrangement between the WTO and the UN or an independent innovation for full jurisdiction of the WTO on the *Security Exceptions*.

In fact, a separate official arrangement for effective cooperation with the

[79] See L/5426; see Appendix 10.
[80] See MTN.GNG/NG7/W/16.

WTO and the UN was made in November 1995, granting both organizations mutual observer status to each other.[81] The document states that the WTO and the UN would extend the former *de facto* relationship of the GATT and the UN; however, this relationship without detailed elaboration is hardly possible to be recognized, since the WTO became a permanent organization with a power as a decision making institution through enhancement and strengthening of its unique and effective system of the Dispute Settlement Body (DSB). As a matter of fact, the WTO regularly attends the UN ECOSOC meeting, not as one of the specialized agencies of the UN, but merely as a related organization. This co-existence provides a room for cooperation in technical issues but not necessarily to the extent of ultimate coherence of rule-making and decision making.

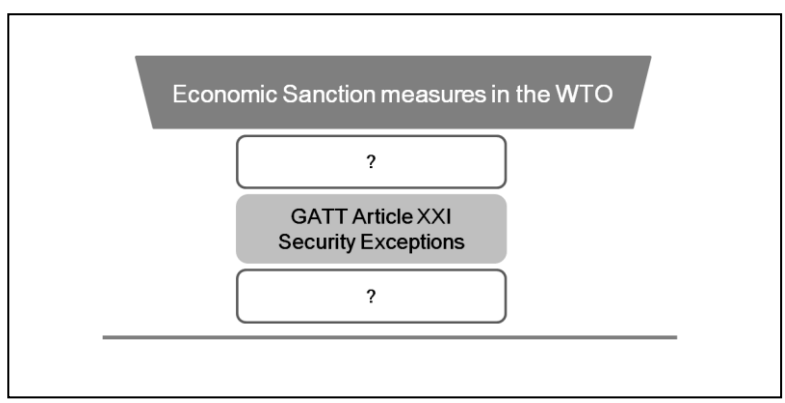
Figure 7. More ambiguous relationship between the WTO and UN



[81] Ibid. p.1.

Without any further elaboration of institutional provisions, yet, the identical language of the GATT *Security Exceptions* was implemented into GATS as Article XIV*bis* and also in TRIPS as Article 73, when the WTO was established. None in the GATT, TRIPS, or the GATS is there any elaboration on the scope, procedure, and institutional arrangement to apply the *Security Exceptions*, for example, like the former Article 86 of the ITO Charter, under the WTO system. Without clear specification and elaboration on the jurisdictional issues on applying such provisions involving political matters, it is hard to identify how the WTO system works regarding economic sanction measures and security issues. How to apply the *Security Exceptions* under the WTO system still remains as a grey area as it was during the GATT period.

Figure 8. Absence of institutional arrangements for the WTO to effectively deal with economic sanction measures



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IV. Critical Assessment of the ITO Framework to Deal with Economic Sanction Measures

As emphasized in Chapter III, one of the critical problems of the past GATT and the current WTO system in dealing with economic sanction measures is that they have lacked the institutional capacity to proceed with the *Security Exceptions* provisions. The originally designed ITO framework, the only feasible blueprint that is ready set up, to effectively utilize the division of labor between the ITO and the UN on political matters, should first be assessed to check its efficacy of application. Examining the efficacy and its expected weaknesses of the ITO framework would provide a clear outline of what the current WTO system structurally is in lack of in relation to and beyond the ITO framework.

Firstly in section 4.1, this thesis would assess the ITO framework by applying the past 14 GATT/WTO cases (Table 1.) accordingly to the expected procedural flow in the ITO, arranged in Chapter III (Figure 3). Secondly in section 4.2, the thesis would proceed to its further analysis in detail on specific cases in order to pinpoint the problems of the WTO *Security Exceptions* beyond the ITO framework.

4.1 Assessment of the ITO Framework to have Complete Division of Labor with the UN for Political Matters

In this section, the 14 actual GATT/WTO cases will be simulated under the original ITO framework in order to critically assess its utility in dealing with economic sanction measures.[82]

Assuming that all the 14 cases were ready decided to be a political matter by the GATT or the WTO Council, firstly, whether the relevant circumstances were brought and dealt before the UN should be checked, otherwise even the UN would not have its jurisdiction over those matters. Despite the fact that the UN Security Council (SC) has the sole authority to determine the "existence of threat" or "the breach of the peace" under Article 39 of the UN Charter in order to impose mandatory economic sanctions, here, the sources for the discussions dealt before the UN would consider not only the SC Repertoires and resolutions but also the legally non-binding General Assembly (GA) Resolutions. One of the practical reasons for including the GA Resolutions for review is that many of the situations during the Cold War were never recognized in the SC, no matter how serious the circumstances were, mainly due to the veto powers the conflicting Permanent Members had.

Those relevant circumstances of the GATT/WTO cases that were never

[82] Refer to Figure 3 in order to check the procedural order of the ITO framework.

discussed to be in concern or existence of threat under the UN during the time of the GATT/WTO disputes were: the situation when Czechoslovakia complained against the US export control regime (1949 and 1951), the reason for Peru's sanction against Czechoslovakian communist regime (1954), the situation when Ghana imposed ban on imports of Portuguese goods (1961), the Cuban missile crisis (1962) that led the US to sanction Cuba, the case for Sweden's global quota on shoes (1975), the situation when US imposed quotas on imports of sugar from Nicaragua (1983), and then when Nicaragua sanctioned against Honduras and Colombia (2000).

Table 2. GATT/WTO cases of which their political circumstances Have NOT been discussed in the UN

Case Name	Complainant
1949 US- Issue of export licenses	Czechoslovakia
1951 US – Suspension of obligations between the US and Czechoslovakia	Czechoslovakia
1954 Peru – Prohibition of Czechoslovakian imports	Czechoslovakia
1961 Ghana – Ban on imports of Portuguese goods	Portugal
1962 US Embargo on trade with Cuba	Cuba
1975 Sweden – Import quota system for footwear	-
1983 US – Imports of sugar from Nicaragua	Nicaragua
2000 Nicaragua – Measures affecting imports from Honduras and Colombia	Colombia/Honduras

Most of those circumstances of the GATT/WTO cases that were not discussed in the UN were when the complainants and the defendants were in

conflict mainly due to the Cold War.[83] Because the 'Cold' War was majorly not an interactive war against the enemy countries, but rather a clear and tacit rupture between the two blocs, economic sanctions as foreign policy tool were mundanely imposed against the other bloc even without any sudden serious outbreak between the sender and the target countries. Therefore, the existence of a trade sanction measure often did not necessarily mean an existence of any political circumstance, other than the fact that the world was under the Cold War at the time being.

However, problems between the countries in each others' enemy bloc have arisen within the GATT system because an economic sanction measure implies a violation of the fundamental principle of the GATT, the Most Favored Nations (MFN) treatment. Most of the Contracting Parties in the GATT system were US-allies, but some exceptional parties like Czechoslovakia Cuba, and Nicaragua, who happened to have joined the GATT, were consistently blocked to enjoy its rights as the Contracting Parties. The Contracting Parties like the US kept imposing trade sanctions against its enemy countries and that is how Czechoslovakia complained for three times in a row (1949[84], 1951[85], 1954[86])

[83] See Table 2.

[84] While the US was keen on how the Soviet Union would organize the communist bloc with the yet remaining independent Eastern European countries after the war, the initial drafts on ERP in 1947 perceived the whole Europe to be the potential recipient of the fund (European Recovery Program, Basic Document 1. (Objectives Committee), (E.O. 11652, Section 3(E) and 5(D), Oct. 31, 1947), retrieved from Truman Library, http://www.trumanlibrary.org/whistlestop/study_collections/marshall/large/documents/pdfs/6-3.pdf#zoom=100, on August 13, 2014; Summary of the Department's position on the content of a European Recovery Plan, Department of State (August 26, 1947), retrieved fromhttp://www.trumanlibrary.org/whistlestop/study_collections/marshall/large/documents/pdfs/6-2.pdf#zoom=100, on August 13, 2014). One of the Eastern European countries,

against the sanction sender countries' (US and Peru) justification of action under the GATT Article XXI. Unfortunately, even through the UN review, these cases were unable to be screened for the legitimacy of the sender countries' claims under the *Security Exceptions* clause, as these cases were also not dealt before the UN due to their political sensitivity.

In fact, the 1962 US trade embargo on Cuba was an on-going response to the Cuban missile crisis where the USSR and the US conflicted in a real incident

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Czechoslovakia, while it allied with the Soviet Union for foreign affairs, its government was restoring democracy and was in fact in favor of accepting the aid offered in the Marshall Plan (Duchacek (1950); The Cold War Museum, "The Czechoslovakia Coup," retrieved from http://www.coldwar.org/articles/40s/czech_coup.asp on August 11, 2014). However, the presence of the Soviet Union increased more aggressively in the remaining independent countries and while denying Czechoslovakia's right to receive aid from the US, Stalin launched a similar program called Conicom for EEC. In February 1948, the communist coup occupied the former independent Czechoslovakia and it was consequently left out from the Marshall Plan. The exclusion of Czechoslovakia from the US Foreign Assistance Act signed in April 1948 was realized also by a separate export control regulation.

[85] Czechoslovakia claimed it would want to normalize foreign economic relations with the US and other Western European countries from an equal status at the General Agreement (CP.6/SR.13). In fact, the US Congress adopted an amendment requiring the President to deny the benefits of MFN treatment to the products of any country "dominated or controlled by Communism" (Jackson (1969), p.749). Moreover, the US sought a waiver under Article XXV, arguing that "fruitful economic relations between any two countries…must presuppose some reasonable degree of mutual respect, some reasonable degree of good faith by each in its dealing with the other. … If there is no genuine means of communication between the two governments, then what possible basis can there before the fulfillment of commercial policy obligations such as we find in the GATT? (CP.6/SR.13) The contracting parties did not expressly grant a waiver, but agreed on a declaration submitted by the US stating that "the government of the US and Czechoslovakia shall be free to suspend, each with respect to the other, the obligations of the GATT (CP.6/SR.13).

[86] Peru also had its own domestic policy to restrict trade with countries having centrally-planned economies under its Supreme Decree of 11 March 1953. Being one of the contracting parties of the GATT, Czechoslovakia again filed a complaint against Peru in 1954, invoking how politically motivated policies should not undermine the motivation of the obligations and basic principles of the General Agreement. Only after long years of consultation between the two countries, Peru finally decided to lift up its import ban in 1967 through Supreme Decree No. 186-h (L/2844).

on nukes.[87] The world gave total attention to it and watched out for whether the next real world war could happen; but this tense anxiety never reached the UN Security Council or the UN General Assembly, again, due to high sensitivity of the issue, when the USSR and the US were both seating as the Permanent Members of the UN.

The 1975 Sweden case was simply a misuse of the *Security Exceptions* against its objective and purpose of the provision; and the conflict in the Central American region between Nicaragua and Honduras repeatedly appeared in the past resolutions but not during the due time of the WTO dispute for reflection.

On the other hand, the circumstances that were discussed in either the General Assembly or the Security Council were those of the cases regarding Egypt's sanction against Israel (1970)[88], the EC, Australia, and Canada's collective sanction against Argentina during the Falklands War between Argentina and the UK (1982)[89], US sanction against Nicaragua (1985)[90], EC sanction case during the war in Yugoslavia (1992)[91], and US sanction against Cuba based on the LIBERTAD act (1996)[92].

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[87] Dobbs, retrieved from http://topics.nytimes.com/top/reference/tinestopics/subjects/c/Cuban_missile_crisis/index_html, on January 10th 2015.
[88] See UN SC Repertoire on determination of threat (1969-1971), p. 197.
[89] See UN GA Resolution, A/RES/37/9; see UN SC Resolution, 502, 505.
[90] See UN GA Resolution, A/RES/40/188.
[91] UN SC Resolutions 713, paragraph 6; 724, paragraph 5.
[92] See UN GA Resolution, A/RES/31/17.

Table 3. GATT/WTO cases of which their political circumstances HAVE been discussed in the UN

Case Name	Complainant	UN Forum	UN Document
1970 Egypt – Boycott against Israel and secondary boycott	Israel	Security Council	SC Repertoire on determination of threat (1969-1971)
1982 EC, Australia, Canada – Trade restrictions affecting Argentina applied for non-economic reasons	Argentina	General Assembly/ Security Council	GA Resolution A/RES/37/9 (37th session, 1982) SC Resolution 502, 505 (1982)
1985 US – Trade measures affecting Nicaragua	Nicaragua	General Assembly/ Security Council	GA Resolution A/RES/40/188 (40th session, 1985) SC Resolution 562 (1985)
1992 EEC – Trade measures taken by the EC against the Socialist Federal Republic of Yugoslavia	Yugoslavia	Security Council	SC Resolution 713 (1991), 724 (1991)
1996 US – The Cuban Liberty and Democratic Solidarity Act	EC	General Assembly	GA Resolution A/RES/31/17 (51st session, 1996)

For those cases dealt before the UN, UN should have been able to have full jurisdiction on the determination of cases, according to the original ITO framework. Except in the 1996 US – The Cuban Liberty and Democratic Solidarity Act (LIBERTAD Act) case, the defendants in all other four cases invoked Article XXI(b)(iii) of the GATT for justification on their trade sanction measures. That means, the UN has the jurisdiction to determine whether the political circumstances that each case was involved in can be identified as "during the time of war" or "other emergency in international relations," as stated in the invoked provision. For

the 1996 case on the Cuban LIBERTAD Act, the US invoked Article XXI, referring to the "spirit" of the clause. Even for this case, the UN would have to be available to determine whether the situation was legitimately appropriate for the US to impose such act at the time being for its "essential security interest."[93]

In order to examine whether the division of labor with the UN, an organization with full jurisdiction on political matters, provides substantial decision making efficacy on whether there was an existence of threat and the sanction imposed was a legitimate action defended under Article XXI:(b)(iii), the UN discussions were scrutinized. For the 1970 Egypt – Boycott against Israel and secondary boycott (1970 Egypt – Israel) case, the UN SC Repertoire notes that there is constant threat in the region[94]. The existence of threat is notified, while it is unclear whether specifically Egypt and Israel were directly in conflict as much as the situation to be defined as "emergency in international relations."

The UN SC Resolution urged for cooperation between the disputing parties and the UN GA Resolution called for total withdrawal of Argentine forces in the Falklands region in 1982[95], which alerts that there was certain "emergency in international relations" relating to the 1982 EC, Australia, Canada – Trade restrictions affecting Argentina applied for non-economic reasons (1982 EC, Australia, Canada – Argentina) case. Despite the certain determination on the political situation of the case, there were still essential trade concerns that the UN

[93] GATT, Article XXI:(b).
[94] UN SC Repertoire on determination of threat (1969-1971), p. 197.
[95] See UN SC Resolution, 505; see UN GA Resolution, A/RES/37/9.

could not handle to completely settle the case[96]. The problem was that the UN GA resolution could not be a reference that illustrates a wrong-going situation in Canada and Australia but only the UK with Argentina. When the UN SC did not authorize any mandatory sanction, the question rose if the sanction measures of Australia and Canada, those who were not directly affected but were merely in part of the Commonwealth nations of the UK, be also justified under Article XXI[97].

For the 1985 US – Trade measures affecting Nicaragua (1985 US-Nicaragua) case, US was formally recommended to withdraw its measure in the GA resolution, given that the freedom to choose the regime type should be respected for each country[98]. It was clear in the resolution that the US was imposing trade sanctions on Nicaragua without sufficient legitimacy, other than that it aims to sanction a communist country. Unfortunately, in the actual case, the GATT Panel did not have the ability to formally address UN discussions. At the same time, due to the non-binding characteristics of GA resolutions, the US simply

[96] While the Falkland Islands have been a subject of controversial sovereign history between the Spanish, Argentines, and the British during the colonial period, in the modern day, it was officially governed as a sovereign territory of the United Kingdom. On April 2, 1982, Argentina aimed to refocus the population's attention to the Argentine forces occupied the Falkland Islands, defending the occupation as an effort to regain islands "that legitimately form part of [their] national patrimony – safeguarding the national honor" ("Argentina Seizes Falkland Islands; British Ships Move," N.Y. Times, Apr. 3, 1982). On May 7, 1982, the European Community (EC), together with Australia and Canada, established a stringent trade embargo which suspends all imports coming from Argentina for an indeterminate period of time (L/5319). With imminent damage upon its economy, Argentina filed a suit to the GATT against EC, Canada and Australia. The EC, Australia, and Canada stated that they have taken certain measures in the light of the situation addressed by the SC Resolution 502 and they have taken these measures on the basis of their "inherent rights" of which Art.XXI is a reflection (L/5317).

[97] See L/5317.

[98] See UN GA Resolution, A/RES/40/188.

ignored the recommendation. Later, the UN SC Resolution called for compliance of the US to the GA Resolution, but that was again ignored.

The 1992 EEC - Trade measures taken by the EC against the Socialist Federal Republic of Yugoslavia (1992 EEC – Socialist Federal Republic of Yugoslavia) case is slightly different from other cases. This case was brought up in the GATT prior to the UN SC authorization of a mandatory sanction against Yugoslavia.[99] Eventually, the case was automatically suspended as UN mandatory sanctions were legitimately defended under Article XXI(c).

Lastly, the US was encouraged in the UN GA resolution to suspend its unilateral policy measure under the LIBERTAD Act against Cuba, except for during the time of imminent turbulence between the two countries[100]. The argument in the resolution clarifies that the US should stop sanctioning Cuba under a normal sense, like in the time being of the WTO dispute. Despite the fact the UN clearly provides a determination that US' action is illegitimate at the time being, this discussion could have merely affected the actual WTO Panel proceedings, as the complainant of this case was EC, not Cuba. EC was the counterparty who had been damaged by US' extraterritorial application of its domestic law on Cuba that the trade concern of this issue is under a different spectrum of the discussion that has been dealt before the UN.

[99] UN SC Resolutions 713, paragraph 6; 724, paragraph 5.
[100] See UN GA Resolution, A/RES/31/17.

Table 4. Analysis of the GATT/WTO dispute cases dealt before the UN

GATT/WTO Dispute (in shortened name)	UN Discussion	Existence of threat / Legitimacy of action	Further Trade Concerns
1970 Egypt – Israel	There is constant threat in the region.	O	-
1982 EC, Australia, Canada – Argentina	UN SC Resolutions found threat in the region and encouraged cooperation between the disputing parties; UN GA Resolution called for total withdrawal of Argentine forces in the Falklands region at the time being.	O	The SC did not authorize any mandatory sanction. Should the actions by Canada and Australia, those who were not directly affected by the incident, be justified?
1985 US –Nicaragua	The US was formally recommended to withdraw its measure in the GA Resolution and SC Resolution..	X	The US simply ignored the GA resolution as it has no legally binding effect. The GATT Panel also did not formally address the issue.
1992 EEC –Socialist Federal Republic of Yugoslavia	The UN SC ordered a mandatory sanction against Yugoslavia.	O	-
1996 US – EC on Cuban LIBERTAD Act	The US was encouraged to suspend its unilateral policy measure under the LIBERTAD Act against Cuba in the GA Resolution	X	The case was brought up by the EC, who had been commercially damaged by the extraterritorial application of the US domestic law on Cuba. Because the case terminated during the consultation, the issues have not been dealt in depth. US ignored the GA resolution and maintained its LIBERTAD Act.

All in all, in assessing the ITO framework, more than half of the cases were found to be excluded from the UN review under the ITO framework, due to their ineligibility originating from absence of prior discussions dealt before the UN. This implied that the WTO should be able to establish its own primary guidelines and rules to clearly define the boundaries of legitimate political circumstance even without the UN. Otherwise, still many cases would not be able to reach any conclusion

Fortunately, regarding the cases of which political circumstances were dealt before the UN prior to the GATT/WTO dispute, the UN discussions were found to be useful to provide primary reference to see whether the relevant political circumstances were directly and essentially related to the threat the state perceived to embark on certain sanction measures complained within the GATT/WTO system. However, it was also clear that it is impossible to have total division of labor even for those cases dealt before the UN, because there were pure trade concerns that the UN cannot handle but only a trade organization, currently the WTO, can and should.

The lesson learned is that the WTO and the UN could cooperate to complement each other through reflecting their existing functions as crucial primary reference. Technical issues yet remain for detailed consideration of how to situate UN GA Resolutions and SC Resolutions coherently and congruently in both the WTO the UN for issues involving political matters. Nevertheless, a total division of labor between the WTO and the UN even on politically motivated

economic sanction matters, as suggested by the ITO framework, does not seem feasible enough.

4.2 Problems of Applying the *Security Exceptions* beyond the ITO Framework

Given that the trade dispute cases involving politically motivated economic sanction measures also inherently exert purely trade-related concerns that have to be dealt independently by a trade organization, currently the WTO for example, this section aims to delve into the problems of applying the *Security Exceptions* itself beyond the ITO framework. From the assessment in previous section, especially three specific cases stand out for its major problems that should be fundamentally discussed in the GATT or the WTO: 1982 EC, Canada, Australia – Argentina case, 1985 US – Nicaragua case, and 1996 US-EC on Cuban LIBERTAD Act case.

First of all, the 1982 EC, Canada, Australia – Argentina case and the 1996 US-EC on Cuban LIBERTAD Act case are both noteworthy on the fact that the complainant-defendant pair and the sender-target pair of the sanction measures were different. The UN discussions on the relevant political circumstances of the cases can provide dependable illustration of the situation; however, these discussions cannot generate a determination on the trade relationship between the

complaining and defending parties. This limitation supports one important reason why trade disputes even engendered from political circumstances should also be understood clearly as independent trade matters.

Secondly, in scrutiny of the 1985 US-Nicaragua case in order to pinpoint the independent problems of applying the *Security Exceptions* beyond the ITO framework, the GATT Panel is found to be problematic for its crude inability to handle Article XXI within its terms of reference[101]. According to the 1985 US-Nicaragua case, it is stated that the GATT Panel's terms of reference provided that the Panel would examine the measures "in the light of the understanding reached at the Council on 1 October 1985 that the Panel cannot examine or judge the validity or motivation for the invocation of Article XXI:(b)(iii) by the United States.[102]" In other words, the problem of applying Article XXI(b)(iii) in GATT disputes was not only a matter of interpretation for the ambiguous language that does not define the specific conditions of what constitutes or determines the "emergency in international relations," but the crude inability of the GATT of not having any authority to decide on inherently political circumstances. This problem leads to an insolvency problem of *de facto* rescindment of the *Security Exceptions* provision. This is a critical obstacle for the GATT or the current WTO, for it to deal with trade matters relating to economic sanction measures. The Panel's lack of terms of

[101] The GATT Council used to, and currently the DSB Council, first decide/s the terms of reference for the Panel before its legal proceedings. The Panel can only discuss the issues that are within the scope of the terms of reference determined by the Council.
[102] GATT C/M/192, p.6.

reference on the provision implies that any complementary function for the organization to decide on political matters is simply meaningless, when the organization does not have the forum to discuss such matters. In order to treat disputes involving politically motivated economic sanction measures as trade matters, it is first important for the WTO to be equipped with its capacity to appropriately publish the *Security Exceptions* within its terms of reference of the Panel.

In section 4.1, one of the implications of the assessment on the ITO framework was that the UN discussions can be a meaningful reference, while a complete division of labor on political matters between the WTO and the UN may not engender sound efficacy in dealing with trade disputes generated from the practice of economic sanction measures. The analysis on the terms of reference problem observed in the 1985 US-Nicaragua case additionally addresses that the complementary role that the UN discussions can have is valid only if the DSB Council can establish a proper terms of reference of the Panel on *Security Exceptions*. Otherwise, when a complete division of labor, suggested by the ITO, is unfeasible, the WTO essentially loses its authority on trade disputes, which are essentially trade matters with partial political nature.

Thirdly, it can be inferred from the 1996 US- EC on Cuban LIBERTAD Act case that the terms of reference problem in the WTO on GATT Article XXI can also potentially lead to an indirect nullification of GATT *Article XXIII: Nullification or Impairment*. GATT Article XXIII is a provision which ensures any

party to file a case when it observes an impairment of its expected trade benefit. The same right of the damaged party to file a case has had been also elaborated in the interpretative note for paragraph 3 of Article 86 for the ITO Charter. Whether that be in the GATT, WTO or even the envisioned ITO, the third party of the relevant political circumstance was given its right before the trade organization to claim for its impaired benefits. Therefore, for the EC to have filed a complaint based on their impairment or nullification of benefits from extraterritorial application of US sanction measures on Cuba is procedurally legitimate. However, assuming that the case has gone through the Panel proceedings, it is foreseeable that the Council may have not been able to describe the terms of reference for discussing the application of Article XXI, just like in the 1985 US – Nicaragua case. This inherent deficiency of the WTO to cope with the *Security Exceptions* may even cause other subsequent provisions in the WTO jurisprudence to be *de facto* insolvent, when the case is linked with an economic sanction measure with political motivation.[103]

Overall, analyses in section 4.1 and 4.2 together illuminate that trade disputes originated from political circumstances are still majorly trade matters and can only partially be political ones. This finding is crucial for understanding how some arguments in the existing literature or the past GATT discussions that claim that the GATT/WTO cases involving economic sanction measures are inherently political matters are paradoxical. While section 4.1 makes clear that complete

[103] WTO (1995), p. 706.

division of labor with the UN, suggested by the ITO, is unfeasible to treat trade disputes, it recommends how UN discussions have the potential to work as primary references when dealing with relevant disputes in the WTO. At the same time, section 4.2 proved evident from the scrutiny of the three specific cases that the structural deficiencies in the WTO to apply the *Security Exceptions* is a fundamental obstacle for the organization to handle economic sanction measures.

Chapter V. Systematic Problems of the WTO to Deal with Economic Sanction Measures

5.1. Ambiguity Problem of the WTO in Establishing its Jurisdiction on *Security Exceptions*

As signified in Chapter IV, the foremost obstacle for the WTO to apply the *Security Exceptions* is the fact that the WTO is unsure of its own jurisdictional authority on the existing *Security Exceptions*.

Treating an issue of innately dual-characteristics solely as a political matter and making obsolete for a trade organization to have its authority on resolving trade matters is absurd. The case analyses in Chapter IV have evidently illustrated how each trade dispute originated from economic sanction measures was inherently formed and entangled as trade issues, often due to different pairs of disputing parties and those countries politically involved in the relevant circumstances. Even the ITO framework from the original ITO Charter, which aimed for clear division of labor on economic and political matters, was proved to be unfeasible, as trade disputes involving economic sanction measures were neither

solely economic nor political matters.

In order to allow legitimate policy intervention on trade relations and to prevent abusive state practices, the WTO should first properly have its clear jurisdiction on the *Security Exceptions*. The WTO should be able to publish the terms of reference for the Panel on *Security Exceptions* and have clear authority upon trade matters. How to consult or refer to other sources and tribunals for objective decision is a different matter subsequent to the jurisdiction problem.

Furthermore, the recent developments found in the FTA *Security Exceptions* provisions which the US[104] and the EU[105] have concluded bilaterally with other countries support why the WTO as an organization governing the multilateral trade system should strengthen its jurisdiction on its *Security Exceptions*. In NAFTA or many of the former FTAs, they used to replicate the exact wordings of GATT Article XXI; however in recent FTAs, the *Security Exceptions* have been amended to imply more potential for ambiguous and arbitrary application. In the Korea-US FTA, for one example, it is worthy to note that the three sub-subparagraphs of subparagraph (b) of Article XXI is totally eliminated; subparagraph (c) is retained but by intentionally leaving out the word "obligations of the UN Charter" and only maintaining the most controversial language in (b)(iii), "any emergency in international relations." These developments are susceptible for interpretation that the US has the intention to

[104] See Appendix 11.
[105] See Appendix 12.

justify many of its unilateral and subsequently extraterritorially applying measures, especially in the post-Cold War period[106], with no debt to its in-execution of what was discussed or recommended in the UN.

If the *Security Exceptions* is essentially of no use, there would not have been such intentional efforts to amend the *Security Exceptions* in bilateral FTAs by the EU or the US. It is again clear from this illustration that the WTO should establish clear jurisdiction upon its *Security Exceptions* and create a multilateral code of conduct upon economic sanction measures that disrupt trade order; otherwise, more arbitrary practices through FTA provisions may prevail in creating chaos in the world trading system.

5.2. Lack of Procedural Articulation to Apply the *Security Exceptions*

The debate on what is the balance between giving room for security issues in trade relations and guaranteeing no abusive use of the *Security Exceptions* was heated since the Preparatory meetings for the ITO. In fact, the Chairman of the Geneva session Preparatory Committee stated that the fact the Members of the Organization would interpret the *Security Exceptions* provision is the guarantee

[106] See Clark and Wang (2007).

against abuses.[107] However, from the past GATT/WTO case history, it was evident that rather the fact the Members can circumvent judgment on *Security Exceptions* caused many cases to be settled based on power distribution between the disputing Member countries. Historically, the mere existence of the *Security Exceptions* without sufficient elaboration on its procedural articulation caused it to play less role in guaranteeing against abuses than in increasing ambiguity on the scope of the provision and in causing the Member countries to rather abstain from utilizing the WTO as a forum to discuss trade disputes related to economic sanction measures.

Even when it was clearly noted that GATT *Article XXI: Security Exceptions* was within the terms of paragraph 2 of GATT *Article XXIII: Nullification or Impairment*[108], the GATT Council still failed to establish appropriate terms of reference on GATT Article XXI: (b)(iii) for the Panel[109]. Without further elaboration on how the Panel should consult or rely on other tribunals for clear judgment of the case[110], the GATT Panel simply lost its authority to at least comment on the problematic consequences on trade matters.

It is revealed in the case analyses of Chapter IV that the lack of procedural articulation besides the lack of institutional arrangement for clear jurisdiction on the *Security Exceptions* is the biggest problem the WTO faces. Above all, in order

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[107] EPCT/A/PV/33, p. 20-21 and Corr.3; EPCT/A/SR/33, p.3.
[108] EPCT/A/SR.33, p. 5.
[109] GATT C/M/192, p.6.
[110] Paragraph 2 of GATT Article XXIII says that "[t]he 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."

to maintain its identity as an economic organization, the WTO would most likely want to refer to different consultations by the UN or other international tribunals when deciding on political issues of the matter. This process should be elaborated further from what is existing in the current jurisprudence, especially on the technical details of how to adopt non-legally binding resolutions to what extent, for example.

However, it was also shown while assessing the ITO framework of applying the *Security Exceptions* that totally depending on a different authority even just for a political issue may not be feasible, as the two organizations, the WTO and the UN, for example, are essentially governing different matters under different institutional settings. In that sense, the WTO should also develop its own testing mechanism of its currently discursive language of the *Security Exceptions*. In other words, the procedural articulation of the *Security Exceptions* may have to follow a similar structure that of the *Article XX: General Exceptions* of the GATT. Due to an interesting development of the *chapeau*[111] for the current *General Exceptions*, the Panel first decides whether a measure is applied in "a means .f arbitrary or unjustifiable discrimination between countries" when deciding based on Article XX. Furthermore, as the subparagraphs of Article XX starts with the condition of "necessary to," the Panel often performs a necessity test. On the

[111] The *chapeau* of GATT *Article XX* is stated as: "[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 disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting part of measures[.]"

contrary, without the *chapeau*, Article XXI neither distinguishes any arbitrary or unjustifiable discrimination between countries nor performs a necessity test as the language attributes the state to decide its necessity to practice certain measure[112].

Yet, the thesis is also a bit cautious to definitely assert the need of a *chapeau* for the *Security Exceptions* equivalently to the *General Exceptions* of the GATT, as the reason why the *chapeau* had been eliminated particularly for the separate *Security Exceptions* during the drafting history is unclear in the study of existing UN documents (Chapter III). It is true that the *Security Exceptions* may need a new invention in the language for a *chapeau*, if it aims to have one, to fit into its unique circumstances. In addition, other testing criteria to define what is "essential security interest" and determine what constitutes "other emergency in international relations" seem also necessary.

5.3. Outdated Perspective on the Topic of Trade and Security

The problem of the WTO *Security Exceptions* also rises from the outdated perspective that it originally have been carried through in 1947, when the GATT draft was first established. The current *Security Exceptions* language reflects a provisional perspective of the Second World War experience. More than a century has passed since 1947 and the relationship between trade and security issues has

[112] In Article XXI, it is stated as "it considers necessary" where it refers to a Member state.

been changed a big deal as much as the world has developed. When it comes to trade matters, there exist issue-specific and sector-specific security issues which have evolved throughout the past history of world economic growth and globalized trade relations. However, none of those developments are reflected in the current *Security Exceptions*, which inevitably makes the provision obsolete to deal with 21st century trade and security issues.

First of all, new issue-specific security issues are those such as terrorism, raveling civil wars in numerous regions, weapons of mass destruction, to name a few. The scope of 'threat' perceived in the UN Security Council and the General Assembly have diverged from the traditional threat of war and nuclear weapons, especially in the post-Cold War period[113]. However, the *Security Exceptions* in the WTO does not cover specifically any of these new developments on the sources of threat and concerns on security in relation to trade.

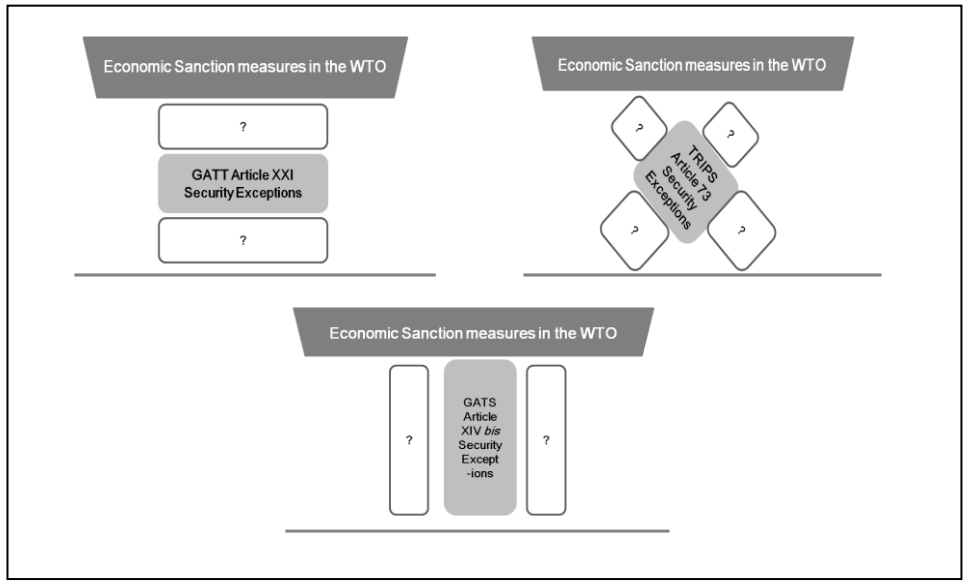
Secondly, the importance of sector-specific concerns of security issues relating to trade can be explained in two perspectives. The two specific WTO dispute cases, US-Section 211 Omnibus Appropriations Act of 1998 (DS176)[114] and US-Measures affecting government procurement (DS 88)[115], are cases that were never formally discussed under Article XXI of the GATT, but which their relevant policy measures at the center of the disputes were economic sanction

[113] Latif (2000), p.27-35.
[114] See WT/DS176/R.
[115] See WT/DS88/1; this case was suspended in the WTO DSB proceedings, and rather decided based on the US Supreme Court decision on the violation of Massachusetts State law against the federal law (Clark and Wang, 2007, p.19-20).

measures of the US. Despite the fact that the origins of the problem causing the dispute in the cases were US economic sanction measures, each of these cases was proceeded as a totally independent commercial case under Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) and Agreement on Government Procurement (GPA), respectively. The thesis does not aim to delve any deeper into the matter; however, these instances imply that there could be sector-specific concerns that make certain cases solely into commercial disputes, while others become politically sensitive issues to be dealt under the *Security Exceptions* clause. Furthermore, sector-specific concerns should be contemplated in more detail in order to take *Security Exceptions* of the GATS and TRIPS as well as that of the GATT. Because the language was simply duplicated from the GATT *Security Exceptions*, security concerns that only services and intellectual property rights can motivate, for example, matters relating to cyber-security, should be reflected into the provisions.

As the world is more integrated with trade and becoming more complicated in its trade relations, there are new demands regarding the topic of trade and security. For the WTO to take its *Security Exceptions* into meaningful effect, the provision should be able to reflect the current world as much as it strives to maintain its fundamental principles.

Figure 9. Different sector-specific and issue-specific pillars are needed to sustain the *Security Exceptions* in each agreement



Chapter VI. Conclusion

This thesis started from the question whether economic sanctions can be WTO consistent. Because the GATT/WTO dispute cases involving economic sanction measures were often concluded to be neither consistent nor inconsistent with the GATT/WTO jurisprudence, the thesis aimed to draw out the fundamental sources of such controversy.

The question for the research was motivated from rather simple curiosity; however the implications the answers of the question exert are found to be very relevant with the current trends of complicated relationship between trade and security. The necessity to strengthen the multilateral framework in the arena of trade and security brings this thesis into the center of the issue.

The thesis pointed out three systematic problems of the WTO in ruling the consistency of economic sanction measures: 1) ambiguity problem of the WTO in establishing its jurisdiction on *Security Exceptions*; 2) lack of procedural articulation of applying the *Security Exceptions*; and 3) outdated perspective on the topic of trade and security. The thesis clarifies how trade disputes involving economic sanction measures are not solely a political matter but inherently a trade matter. Overall, the thesis provides critical implications on how the WTO *Security*

Exceptions should be amended in order to build up sound and fair multilateral trade order, regarding issues on trade and security.

Future studies should include detailed research on how the WTO should improve its jurisdictional and procedural deficiencies to apply the *Security Exceptions*. In addition, as most of the studies were only based on the GATT *Security Exceptions*, future studies should also focus on every each WTO Agreement – GATT, GATS, TRIPS. How the *Security Exceptions* in each of those agreements in the WTO should be amended by reflecting sector-specific and issue-specific concerns should be contemplated in the ever more evolving modern trade era.

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APPENDIX 1.
General Exceptions in the 1945 US Proposal Draft

Chapter III. General Commercial Policy
Section G General Exceptions

The undertakings in this Chapter should not be construed to prevent members from adopting or enforcing measures:

1. necessary to protect public morals;
2. necessary to protect human, animal or plant life or health;
3. relating to the traffic in arms, ammunition and implements of war, and, in exceptional circumstances, all other military supplies;
4. relating to the importation or exportation of gold or silver;
5. necessary to induce compliance with laws or regulations, such as those relating to customs enforcement, deceptive practices, and the protection of patents, trademarks and copyrights, which are not inconsistent with the purposes of the Organization;
6. relating to prison-made goods;
7. imposed for the protection of national treasures of artistic, historic, or archaeological value;
8. undertaken in pursuance of obligations for the maintenance of peace and security; or
9. imposed in exceptional cases, in accordance with a recommendation of the Organization formulate in accordance with criteria and procedures to be agreed upon.

APPENDIX 2.
General Exceptions in the 1946 Suggested Charter for the ITO

Chapter IV General Commercial Policy
Section I. General Exceptions
Article 32. General Exceptions to Chapter IV

Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by a Member of measures:

…

(c) Relating to fissionable materials;

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

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

…

(k) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security; or

…

APPENDIX 3.
General Exceptions in the 1947 New York Draft of the GATT

Article XVIII
General Exceptions

Subject to the requirement that measures are not applied in such a manner as to constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting state of the measure listed below:

…

(c) relating to fissionable materials;

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

(e) in time of war or other emergency in international relations,

…

(k) undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security.

APPENDIX 4.
General Exceptions in the 1947 Geneva Conference Charter Draft

Chapter IX General Provisions
Article 94. General Exceptions

Nothing in this Charter shall be construed

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

(b) to prevent any Member 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 Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

APPENDIX 5.
General Exceptions in the 1947 Geneva Draft of the GATT

Article XIX
General Exceptions

Nothing in this Agreement shall be construed

I.

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

(b) to prevent any Member 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 Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

II. …

APPENDIX 6.
Article 86 of the Havana Charter

SECTION F - OTHER ORGANIZATIONAL PROVISIONS

Article 86

Relations with the United Nations

1. The Organization shall be brought into relationship with the United Nations as soon as practicable as one of the specialized agencies referred to in Article 57 of the Charter of the United Nations. This relationship shall be effected by agreement approved by the Conference.
2. Any such agreement shall, subject to the provisions of this Charter, provide for effective co-operation and the avoidance of unnecessary duplication in the activities of these organizations, and for co-operation in furthering the maintenance or restoration of international peace and security.
3. The Members recognize that the Organization should not attempt to take action which would involve passing judgment in any way on essentially political matters. Accordingly, and in order to avoid conflict of responsibility between the United Nations and the Organization with respect to such matters, any measure taken by a Member directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter shall be deemed to fall within the scope of the United Nations, and shall not be subject to the provisions of this Charter.
4. No action, taken by a Member in pursuance of its obligations under the United Nations Charter for the maintenance or restoration of international peace and

security, shall be deemed to conflict with the provisions of this Charter.

APPENDIX 7.
Interpretative Note to Article 86 in the Havana Charter

Interpretative Note to Article 86
Paragraph 3

Note I

If any Member raises the question whether a measure is in fact taken directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter, the responsibility for making a determination on the question shall rest with the Organization. If, however, political issues beyond the competence of the Organization are involved in making such a determination, the question, shall be deemed to fall within the scope of the United Nations.

Note 2

If a Member which has no direct political concern in a matter brought before the United Nations considers that a measure taken directly in connection therewith and falling within the scope of paragraph 3 of Article 86 constitutes a nullification or impairment within the terms of paragraph 1 of Article 93, it shall seek redress only by recourse to the procedures set forth in Chapter VIII of this Charter.

APPENDIX 8.
General Exceptions in the Havana Charter

Chapter IX. General Provisions
Article 99. General Exceptions

I. Nothing in this Charter shall be construed
- (a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent a Member from taking, either singly or with other States, any action which it considers necessary for the protection of its essential security interests, where such action
  - (i) relates to fissionable materials or to the materials from which they are derived, or
  - (ii) relates to the traffic in arms, ammunition or implements of war, or to traffic in other goods and materials carried on directly or indirectly for the purpose of supplying a military establishment of the Member or of any other country; or
  - (iii) is taken in time of war or other emergency in international relations; or
- (c) to prevent a Member from entering into or carrying out any inter-governmental agreement (or other agreement on behalf of a government for the purpose specified in this sub-paragraph) made by or for a military establishment for the purpose of meeting essential requirements of the national security of one or more of the participating countries; or
- (d) to prevent action taken in accordance with the provisions of Annex M to this Charter.

II. Nothing in this Charter shall be construed to override
- (a) any of the provisions of peace treaties or permanent settlements resulting from the Second World War which

are or shall be in force and which are or, shall be registered with the United Nations, or

(b) any of the provisions of the instruments creating Trust Territories or any other special régimes established by the United Nations.

APPENDIX 9.
Article XXIII:2 Nullification or Impairment in the GATT 1947

Article XXIII Nullification or Impairment

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. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. 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 Secretary1 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.

APPENDIX 10.
Addendum to Article XXI from the 1982 Ministerial Conference

1982 Ministerial Conference
Addendum to Article XXI

1. Subject to the exception in Art.XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Art.XXI;
2. When action is taken under Art.XXI, all contracting parties affected by such action retain their full rights under the General Agreement
3. The Council may be requested to give further consideration to this matter in due course.

APPENDIX 11.
Provision on Security Issues in the Korea-US FTA

ARTICLE 23.2: ESSENTIAL SECURITY

Nothing in this Agreement shall be construed:

(a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

(b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security or the protection of its own essential security interests.

APPENDIX 12.
Provision on Security Issues in the Korea-EU FTA

ARTICLE 15.9: SECURITY EXCEPTIONS

Nothing in this Agreement shall be construed:

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

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

(i) connected with the production of or trade in arms, munitions or war material or relating to economic activities carried out directly or indirectly for the purpose of provisioning a military establishment;

(ii) relating to fissionable and fusionable materials or the materials from which they are derived; or

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

(c) to prevent any Party from taking any action in order to carry out its international obligations for the purpose of maintaining international peace and security.

국문 초록

경제 제재 조치의 WTO 합치성에 대한 연구

경제 제재 조치와 관련된 분쟁 사건들은 GATT 또는 WTO법과 합치하는지에 대한 판결이 역사적으로 모호하게 남아있다. 이러한 논란에 대해 대부분의 기존 문헌들은 GATT 21조 안보 예외 조항의 법적 문제로 쟁점화 하여 설명하고 있다. 하지만 본 논문은 경제 제재 조치의 WTO 합치성에 대한 논란을 WTO의 구조적인 문제로부터 설명한다.

본 연구는 기본적으로 UN, GATT, WTO 원문 회의록과 보고서에 의존한 문헌 연구를 통해 진행되었다. 우선 현재 WTO 안보 예외 조항의 역사적 발전 과정을 분석함으로써, 해당 조항의 본래 목적, 의도, 그리고 제도적 상호 합치성에 대한 이해를 구축하였다. 이 과정에서 ITO 설립이 무산됨에 따라 잊혀졌던 ITO 헌장의 안보 예외 조항 적용 체계가 현재 WTO보다 정교하게 확립되어 있었음을 발견하였다. 본 논문은 경제 제재 조치와 관련된 지난 총 14개의 GATT/WTO 분쟁 사건들을 ITO 헌장의 안보 조항 적용 체계에 따라

판결 유도를 하였다. 그 결과, 기존의 GATT와 현재 WTO의 문제점, 그리고 ITO 체계의 한계점 또한 재평가할 수 있었다.

궁극적으로 본 논문은 위의 연구를 통해 1) 안보 예외 조항에 대한 WTO의 모호한 관할권 문제, 2) 안보 예외 조항의 적용을 위한 정교한 체계 확립의 부족, 3) 무역과 안보에 대한 최신 시각의 부재라는 현재 WTO의 세 가지 구조적 한계점을 지적한다. 또한, 본 논문은 무역과 안보에 대한 다자 체제 구축의 중요성과 필요성을 다시 한 번 상기시킨다. 본 논문이 실제 분쟁 사례들의 분석을 통해 정리한 WTO의 구조적 문제점들은 향후 WTO 안보 예외 조항의 개선과 무역과 안보를 위한 공정한 다자체제 구축에 대한 방향성을 제시한다.

주제어: WTO, 경제 제재 조치, 안보 예외 조항, UN 무역 및 고용회의, ITO, 무역과 안보

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ABSTRACT

The major controversy found in the GATT/WTO case history on trade disputes involving economic sanction measures was that those practices were often concluded to be neither consistent nor inconsistent with the GATT/WTO jurisprudence. Most of the existing literature has attributed the problem to the legal issues of the GATT *Article XXI: Security Exceptions* provision. However this paper argues that the consistency problem of economic sanction measures in the WTO is in fact embedded in the structural problems of the WTO.

The research depended on rigorous data collection of original texts from the UN, GATT, and the WTO in order to construct a narrative on the historical evolution of the WTO *Security Exceptions* and understand the motivation, objective, and original institutional arrangements of such provision. By reconstructing the forgotten ITO framework that involves tight institutional cooperation between the UN and the trade organization to deal with economic sanction matters, the paper also performs a critical assessment of such framework via analyses with past GATT/WTO dispute cases. Through this process, the thesis discovers essential structural problems of the WTO, for it to handle trade disputes that involve economic sanction measures.

This paper ultimately pinpoints three systematic problems of the WTO in ruling the consistency of economic sanction measures: 1) ambiguity problem of the WTO in establishing its jurisdiction on *Security Exceptions*; 2) lack of procedural articulation of applying the *Security Exceptions*; and 3) outdated perspective on the topic of trade and security. Furthermore, current trends and concerns on security issues clearly support why the strengthening of the multilateral framework for trade and security is essentially necessary. Supported by implications of actual case analyses, the thesis provides critical implications on how the WTO *Security Exceptions* should be amended in order to build up sound and fair multilateral trade order, regarding issues on trade and security.

Key Words: WTO, Security Exceptions, Economic Sanction, UN Conference on Trade and Employment, ITO, Trade and Security

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Chapter I. Introduction

1.1 Nature of Issue: Economic Sanctions

Economic sanction refers to a deliberate, government-inspired withdrawal or threat of withdrawal of customary economic relations. Traditionally, the counterpart is often equally a state, but any certain group of organization or even an individual can also be targeted for specific sanctions. The primary purpose of practicing economic sanction measures is to punish, deter, or rehabilitate the targeted counterpart without force. The motivation of such action is generally in line with the sender country's immediate commercial or political and security interests. In other words, economic sanctions are highly complicated in nature, as its primary objective and consequences emerge from and become intertwined with different – political and economic, respectively – sectors.

The history of the usage of such measures can be traced back into the times of the ancient Greeks, when Athens imposed import bans on Megaran products in 432 B.C.; however, the modern understanding of economic sanction as a prominent foreign policy tool was prompted after the US President Woodrow Wilson's speech, which called for "absolute boycott" towards the aggressor country

against the League of Nations during the World War I.[1]

Economic sanctions can be imposed unilaterally and plurilaterally, initiated by individual states or even multilaterally through mandatory sanctions implemented by the UN Security Council (since 1945), or formerly by the League of Nations. Regarding the most traditional unilateral sanctions, there is no international criteria clarifying when one country can impose what kind of economic sanctions to another; it is basically up to each country's sovereign domestic policy decisions.[2] From a comprehensive list of modern day (1914-2006) economic sanction cases used for foreign policy goals summarized by Hufbauer and Schott, the United States definitely stands out as the prominent sender country of such policy measure.[3]

Based on the US model, economic sanctions are realized in forms of total embargo, asset freeze and financial controls (including investment and aid controls), import and export controls through licenses and control group lists, and travel bans. Export controls used to be the prime instrument used by the US during the Cold War against the Soviet Union and the Eastern European Communist (EEC) bloc. Still in the post-Cold War era, export controls, especially arms controls have been imposed towards terrorist groups and narcotics gangs, in order to restrict their

[1] Hogan (2006), p.78.
[2] That is why it was once considered to be inherently contrary to international law; Lowenfeld (2002), p.732.
[3] See Hufbauer and Schott (2007).

access to US high-tech arms and goods with potential dual-use.[4] Financial sanction seems to be ultimately the most effective type of measure to impact the target. It is effectively used towards specific political leaders of the recipient state or organization, by tying up the financial means of those who are directly in charge of main policy decisions. The impact of import and export controls depend on the quality of control regulations by the designated products and control groups, and this often creates both subtle and direct disruption of existing trade relations among many different countries.

For multilateral UN sanctions, the authority to decide on its mandatory economic sanctions is independently granted to the UN Security Council, based on Articles 39 and 41 of the UN Charter. [5] The General Assembly only has the right to circulate recommended resolutions to the Members under Article 11, while the Security Council, as a specialized body which has been conferred with primary responsibility for the maintenance of international peace and security by the members of the United Nations based on Chapter V of the Charter, has its particular authority to decide on mandatory sanctions.

[4] Check US Department of the Treasury for a complete list of ongoing US trade sanctions: http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx.

[5] Compliance with a decision of the UN Security Council ordering sanctions pursuant to Articles 39 and 41 of the UN Charter is mandatory by Article 25 and a failure to carry out the decision is a violation of the Charter. The fact that enforcement of sanctions would conflict with a requirement of domestic law is not an excuse under international law for non-compliance with the orders of the Security Council, nor any relief from the obligation stated in Article 25.

The mandatory sanctions are decided within the Security Council through voting by the Permanent Members.[6] According to Article 27.3 of the UN Charter, any decision of the Security Council should be made by an affirmative vote of nine members including the concurring votes of the five permanent members. That said, the veto power of the permanent members plays a significant role in official decisions – which partially explains why UN sanctions never competitively rose during the Cold War with China and the former Soviet Union seating as the Permanent Members of the Security Council along with the US, UK, and France.

This sort of multilateral economic sanction measures also range similarly with those the individual states' imposed for sanctions and many combination and newly thought tactics are attempted to increase the effectiveness of sanctions.[7] Especially after the Cold War, there has been a huge increase in the number of official UN sanctions against various targets of traditional states, terrorist organizations, and even political individuals.

As described above, unilateral sanctions and multilateral UN sanctions are prepared and imposed in different procedural rules and orders. Because unilateral

[6] The Security Council is consisted of fifteen Members of the United Nations. According to Article 23.1 of the UN Charter, China, France, Russia, the United Kingdom, and the United States are the permanent members and ten of the non-permanent members are to be elected every two years.

[7] Article 41 of the UN Charter contains a list of possible measures not involving the use of armed force which may include' complete or partial interruption of economic relations and or rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.' In other words, the length, strength, target, measure, and impact of economic sanctions imposed by the UN Security Council vary immensely as much as those initiated by individual states.

sanctions and multilateral sanctions are inherently rooted from different authority – the sovereign state and international law – there are practical conflicts and institutional difficulties of implementing and controlling economic sanction measures in a congruent manner.

Firstly, the mandate to comply with a decision of the Security Council can imply a conflict on the different level of obligations based on the hierarchy of domestic and international law in the particular state, depending on the jurisdiction of national courts.[8] This also means that the UN lacks full capacity to monitor whether certain unilateral sanction measures are inappropriate or legitimate. There is always a high possibility that the domestic rulings would overrule what the international community insists or encourages. That said, while the use and necessity of economic sanctions are commonly justified, not to mention that it has been a prime tool of statecraft for almost thousand years in history, the scope of economic sanctions in practice is nonetheless ambiguous, in both terms of domestic law and international law.

Secondly, the economic sanction measures implemented either unilaterally or pursuant to the decisions by the Security Council might well conflict with the basic non-discrimination principles and certain specific provisions of the General Agreement on Tariffs and Trade (GATT) and other bilateral and plurilateral trade agreements. The problem is that such conflict would not relieve a state from the obligation to comply with mandatory sanctions decided upon by the Security

[8] Lowenfeld (2002), p.714.

Council; likewise, compliance with the mandate of the Security Council should be regarded as justification or excuse under a bilateral or multilateral agreement against the state applying the sanctions.

This inevitable ambiguity on the scope of economic sanction measures, for them to be primarily based on political considerations, practically generates huge implications to economic consequences. Among many, this paper will focus on their implications on world trade order and continue the next section to provide the perspective of the WTO system dealing with economic sanction measures.

1.2 Scope of Study: WTO *Security Exceptions*

When it comes to the world trade regime, economic sanctions are inherently in violation of the fundamental principle of non-discrimination of the WTO. Article I of the GATT, the Most-Favored-Nations (MFN) clause, stipulates that any member country should treat every single member country equally and never less favorably than any other countries that one has trade relations with. This applies to restraints both on imports and exports. GATT Article XI, Prohibition on Quantitative Restrictions, would also be violated with any trade embargoes and restrictions on certain products, which are typical forms of economic sanctions in practice.

There are clauses elaborated for exceptional cases, which is considered justifiably necessary to alleviate the MFN obligation and prohibition on

quantitative restrictions. Exceptions to quantitative restrictions can be found in cases related to continuous deficit in balance of payments under Articles XII and XXVIII(b) and also in cases that should be considered for temporary safeguard action due to economic impairment from sudden increase of unexpected imports, under Article XIX. Other all-encompassing exceptions to any of the GATT provisions are provided by Article XX General Exceptions, Article XXI Security Exceptions, and Article XXIV of Territorial Applications.

Still, any sort of commercial sanction is strictly prohibited in the WTO, except for cases of retaliation approved by the WTO Dispute Settlement Body (DSB). Exceptions to the general WTO obligations may be applicable only to sanction cases considered not to essentially involve commercial motivations. In other words, in the WTO, economic sanctions are only allowed in limited emergency circumstances relevant to political and security interests, subjected to Article XXI. Article XXI serves as the last resort that allows foreign policy measures to interlude into trade matters by undermining strict obligations of the WTO for politically imminent circumstances.

The exact wordings of Article XXI of the GATT are as the following:

> Article XXI
>
> *Security Exceptions*
>
> Nothing in this Agreement shall be construed
>
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interest; 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, ammunitions 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.

Given the strict eligibility granted to economic sanction measures for practice through Article XXI in the WTO, it is natural to expect careful and rare invocation of such powerful exception clause. When reading through the actual language of the provision above, the first impression of the *Security Exceptions* is that it outlines strict and narrow conditions for its application, only generally to imminent situations specifically related to war. However in a closer look, the provision also provides many opportunities for broad and ambiguous interpretation of wordings such as "essential security interest"[9] and "other emergency in

[9] GATT, Article XXI:(b), first sentence.

international relations,"[10] which loosens the criteria and provides room for abuse of such powerful exception. In fact, the implication of Article XXI has been fiercely controversial in the GATT/WTO trade disputes raised due to economic sanction measures.

Nonetheless, neither change nor amendment on the GATT *Security Exceptions* has been precedent, except the 1982 Ministerial Conference addendum on clarifying procedural matters to invoke Article XXI. Rather, the exact same wordings of GATT Article XXI have been duplicated also in GATS as Article XIV *bis* and in TRIPS as Article 73, when they were adopted for the WTO during the Uruguay Round. The controversy of this overlapping area of politics and economics is neither resolved nor irrelevant in this current world trade order.

1.3 The Question: Can Economic Sanction Measures be WTO Consistent?

The problem found in the GATT/WTO rulings on economic sanction measures was that those practices were often concluded to be neither consistent nor inconsistent with the GATT/WTO jurisprudence. Many of the existing literature have majorly attributed such problems to the legal issues of applying the *Security Exceptions.* Studies have focused on analyzing the language of the *Security*

[10] GATT, Article XXI:(b)(iii).

Exceptions provision to address the scope of the issue, interpretative issues, and the legitimacy on the jurisdiction of the GATT/WTO.[11] However this paper argues that the consistency problem of economic sanction measures in the WTO is in fact embedded in the structural problems of the WTO.

This paper aims to pinpoint both three systematic problems of the WTO in ruling the consistency of economic sanction measures. It is to focus on the institutional incapability of the GATT/WTO to cope with innate controversy of economic sanction measures, arising from the political portion of it. Furthermore, the current trends and concerns on security issues clearly support why the strengthening of the multilateral framework for security in trade is relevant and essentially necessary. The understanding of the systematic problems of the WTO *Security Exceptions* to deal with economic sanction measures provides critical implications on what should be done to establish a proper trade order.

The research depended on rigorous data collection of original texts from the UN, GATT, and the WTO in order to construct a narrative on the historical evolution of the WTO *Security Exceptions* and understand the motivation and objective of such provision. By reconstructing the forgotten ITO framework that involves tight institutional arrangement between the UN and the trade organization to deal with economic sanction matters, the paper also performs a critical assessment of such framework through analyzing past GATT/WTO dispute cases.

[11] Refer to section 2.2 of Chapter II of the thesis for further details on the arguments of the existing literature.

Through this process, the thesis discovers essential structural problems of the WTO, for it to handle trade disputes that involve economic sanction measures.

Ultimately, this thesis concludes that there are three systematic problems of the WTO: 1) ambiguity problem of the WTO in establishing its jurisdiction on *Security Exceptions*; 2) lack of procedural articulation of applying the *Security Exceptions*; and 3) outdated perspective on the topic of trade and security. Supported by implications of actual case analyses, the thesis is able to set a direction on how the WTO *Security Exceptions* should be amended in order to build up sound and fair multilateral trade order, regarding issues on trade and security. Such details of actual solutions should be should be contemplated further in future studies.

The rest of the chapters in this thesis are ordered as the following: Chapter II first provides legal review on GATT/WTO cases and GATT *Article XXI: Security Exceptions* provision based on the existing literature. Chapter III provides historical analysis on how the current WTO *Security Exceptions* has developed since the inception of the ITO and the GATT. Referring to the forgotten ITO framework, reconstructed in Chapter III, Chapter IV performs a critical assessment of such framework, in order to filter out how the WTO can be complemented and what the WTO essentially needs to independently adopt, in order to deal with economic sanction measures in trade disputes. Chapter V lists out three systematic problems of the WTO to deal with trade disputes involving economic sanction

measures, as the major findings of this research. With some guidance to future research, Chapter VI finally concludes by elaborating on the implications of the research.

Chapter II. Legal Review of GATT/WTO Cases and GATT *Article XXI: Security Exceptions*

There have been a total of fourteen cases[12] disputed in the GATT/WTO Dispute Settlement Body (DSB), which the complainant has filed against the sender country upon certain trade sanction measures and the defendant invoked the GATT *Security Exceptions* provision. Among the fourteen cases, the Panel reports have been circulated only for four cases, and all the other ten cases have either been unable to establish the Panel due to lack of consensus during the GATT period or been dismissed during the consultation session in the WTO period. Even for those with circulated Panel report, the natural political sensitivity of the issues often led the Panel to publish only circumventing judgment of the situations.

Despite the frequent use of economic sanction measures practiced against the enemy bloc during the Cold War, the actual number of the GATT disputes regarding sanction measures is far less than expected. Two principal reasons can be pointed out for this relative insignificance of the GATT to the matter of sanctions. First, the GATT contracting parties were basically constituted of the Western US-ally states that often the contracting parties were not the target countries for

[12] See Table 1.

economic sanctions. Secondly, the GATT remained weak and controversial to handle political motivations and rationales for economic sanction measures, also fearing that it may lose its contracting parties, once any of its important constituents, like the United States, turn their back on the institution.[13]

Since the establishment of the WTO, there have been only four cases (practically three, as DS188 and DS201 are basically the same case) related to trade sanction measures discussed in the WTO DSB. This small number of cases is again strange, considering how the DSB procedure is generally acclaimed to bring proliferation of WTO disputes, due to the negative consensus rule for Panel establishment.[14] This procedural improvement is often held for one major reason for the proliferation of dispute cases in the WTO. However, despite such improvement and huge increase in membership, 160 countries in total as of June 2014, there have not been many disputes regarding economic sanction measures.

Table 1. 14 GATT/WTO Dispute Cases that invoked GATT *Security Exceptions*[15]

Request for Consultation	Case Name	Doc./Case Number	Complainant	Invoked provision
1949	*US – Issue of export licenses	CP.3/ SR22-II/28	Czechoslovakia	Art.XXI (b)(ii)
1951	US – Suspension of obligations between the US and Czechoslovakia	CP.5/5-II/36	Czechoslovakia	Art.XXI (b)(iii)

[13] Lowenfeld (2002), p.755.

[14] In the GATT period, the Panel was established only by the consensus of the contracting parties, when requested by the complainant; but in the WTO system, the Panel is automatically established after the consultation procedure, based on the negative consensus rule;
refer to http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm.

[15] Rearranged the table based on the information from the WTO website (www.wto.org).

1954	Peru – Prohibition of Czechoslovakian imports	L/2844	Czechoslovakia	Art.XXI (b)(iii)
1961	Ghana – Ban on imports of Portuguese goods	SR.19/12	Portugal	Art.XXI (b)(iii)
1962	US – Embargo on trade with Cuba	MTN/3B/4 COM.IND/Add.4	Cuba	Art.XXI (b)(iii)
1970	Egypt - Boycott against Israel and secondary boycott	BISD17S/39,40	Israel	Art.XXI (b)(iii)
1975	Sweden – Import quota system for footwear	L/4250 C/M/109	-	Art.XXI
Apr. 30, 1982	*EC, Australia, Canada – Trade restrictions affecting Argentina applied for non-economic reasons	C/W/402	Argentina	Art.XXI (b)(iii)
May 11, 1983	*US – Imports of sugar from Nicaragua	BISD/31S/67	Nicaragua	Art.XXI (b)(iii)
May 6, 1985	*US – Trade measures affecting Nicaragua	L/6053	Nicaragua	Art.XXI (b)(iii)
Jan. 13, 1992	EEC – Trade measures taken by the EC against the Socialist Federal Republic of Yugoslavia	L/6948	Yugoslavia	Art.XXI (b)(ii)(iii)
May 13, 1996	US – The Cuban Liberty and Democratic Solidarity Act	DS38	EC	Art.XXI
Jan. 14, 2000	Nicaragua – Measures Affecting Imports from Honduras and Colombia	DS188	Colombia	Art.XXI
Jun. 6, 2000	Nicaragua – Measures Affecting Imports from Honduras and Colombia	DS201	Honduras	Art.XXI

** Implies existence of Panel Report*

Interestingly, the small number of WTO disputes does not necessarily represent the less number of sanctions imposed or reduced amount of conflict in the trade arena regarding sanction policies. According to the comprehensive list of

modern day (1914-2006) economic sanction cases used for foreign policy goals summarized by Hufbauer and Schott, the number of sanction measures have not decreased in the post-Cold War era, mainly the WTO-period[16]. There has been an increase in UN mandatory sanctions and consistent number of unilateral or plurilateral economic sanctions.[17] Especially after the end of the Cold War, through normalization processes between countries and more joining memberships in the WTO, trade relations over the globe also have become more diverse and complicated.

Looking at the US for one example, there is an ample number of domestic disputes that fine and punish the non-compliance of the business sector to the US trade sanction measures.[18] Because more and more multinational corporations are subjected to US foreign sanction policies, new domestic regulations in Canada, the UK, and Australia, developed as countermeasures to protect and secure sovereign rights of the government on its own nationals, have increased and this easily signify the tensions between different states related to the world trade and business order.[19] In other words, it is apparent that there are more compounding problems and tensions that rise among individual states, but these matters are no longer discussed in the WTO DSB.

The reasons for this avoidance of the WTO DSB as a forum to discuss the

[16] See Hufbauer and Schott (2007).
[17] Ibid.
[18] See Clark and Wang (2007).
[19] Ibid.

legality of trade sanction measures could be traced back through the actual GATT/WTO case history. By pointing out the major legal issues through case analyses of those that have consistently brought up in the GATT/WTO Panel discussions and the subsequent responses of the DSB reflect what made the WTO to become an insignificant institution to deal with economic sanction measures.

2.1 Legal Review of the GATT/WTO Disputed Cases[20]

As it is shown in Table 1, among the specific subparagraphs of GATT *Article XXI: Security Exceptions*, only either subparagraph (b) or just the 'spirit' of Article XXI without reference to the specific provision has been invoked to justify their sanction measures by the defending countries. For those that invoked Article XXI:(b), the 1949 US-Issue of export licenses case was the only one that involved subparagraph (b)(ii) for a debate on export controls of strategic goods, and the rest of the cases were all dealt within the scope of Article XXI:(b)(iii). This provision has been popular to be held as a justification by the defendant country based on its broad language on the scope of exceptions, such as "[actions] taken in time of war or other emergency in international relations."

The typical discussion regarding GATT Article XXI:(b)(iii) can be

[20] The summary of the 10 GATT cases are elaborated in the GATT document MTN.GNG/NG7/W/16 and more details of analyses for several major cases of both the GATT and the WTO can be found in Alford (2011) and Park (2009) as well for reference. In this section, only the cases relevant to the key points of this thesis will be discussed.

majorly exemplified by the 1985 US – Trade measures affecting Nicaragua case. Nicaragua claimed that the "measures had been taken as a form of coercion for political reasons, and formed part of a US policy of political, financial trade and military aggression against Nicaragua."[21] It also added that "[because] the economic weakness of developing countries limited their capacity to retaliate, US declaring national emergency was absurd to suggest that Nicaragua could pose a threat to the national security of one of the most powerful countries in the world; plus there was no armed conflict between the two countries."[22] Nicaragua basically argued the situation between the US and Nicaragua is unreasonable to be considered as in "time of war or other emergency in international relations."[23]

The third parties such as Peru, Czechoslovakia, Egypt and Iceland agreed with Nicaragua that the US' measures were arbitrary, violating the GATT provisions, and it is unreasonable for a powerful country to cite Article XXI as a basis for imposing economic sanctions on a small, poor country that could not possibly threaten US security.[24] This discussion clearly reflects how much Article XXI provision lacks any guideline or testing criteria that defines what makes a situation to be an "emergency in international relations" to practice sanctions to be considered "necessary" to protect "its essential security interests."

In response to Nicaragua's claims, the US argued that Article XXI is left

[21] C/M/188, p. 2.
[22] Ibid., p.3.
[23] GATT, Article XXI:(b)(iii).
[24] C/M/188, p. 3.

to each contracting party, and the judgment of any action which it considers necessary for the protection of its essential security interest[; t]herefore it is not for GATT to approve or disapprove the judgment made by the US as to what was necessary to protect its national security interests.[25] This is one example of how the debate on the appropriateness of the political circumstances in reference to the specific Article XXI provision flows over to whether the GATT fundamentally has its jurisdiction over Article XXI.

Unlike the US, the third parties such as Cuba, Argentina, Chile, Hungary, Sweden, Finland, Switzerland, Canada, Australia, and Japan counter-argued that the "GATT was [in fact] a proper forum to discuss […] implications [of security issues] for the General agreement, because if the principles underlying common commitments were infringed, any contracting party could fall victim to arbitrary measures."[26] They insisted that "[t]he founding fathers were also concerned on the matter that trade and politics cannot be clearly distinguished. GATT should acquire prudence and ensuring mechanism for the contracting parties' rights under the General Agreement."[27]

At the same time, Spain, Austria, India, Egypt, Yugoslavia, Norway and Jamaica referred to the 1982 Ministerial declaration and clearly stated that "economic measures as an instrument of political pressure should not be justified. Also the [US] measure does not fit into Article XXI." However, despite such

[25] Ibid., p. 4.
[26] Ibid., p. 5.
[27] Ibid., p. 14.

discussion, because the Panel was agreed by the US to be established under the condition that it is not granted the authority "to examine or judge the validity of or the motivation for the invocation of Article XXI(b)(iii) by the United States,"[28] the Panel could not determine the legality of US invocation of Article XXI and only checked the nullification of economic benefits of Nicaragua and which finding that basically has no case-resolving impact on either the US or Nicaragua.

In relation to the jurisdiction problem of the GATT/WTO on political and security issues, there also has been a long discussion on the legitimacy of the *Security Exceptions* itself. In the very first 1949 US-Issue of export licenses case, it is interesting to see how the third parties' thoughts also diverged regarding the necessity and effectiveness of the GATT Article XXI. It is stated that the UK thinks "the US [action] should be justified because every country must have the last resort on questions relating to its own security."[29] On the other hand, it is stated that Cuba and Pakistan "think that the case calls for important full investigation, but don't think that practical results could be produced."[30] In other words, Cuba and Pakistan acknowledged practical loopholes of Article XXI in its stated condition to filter out abusive trade sanction measures.

All in all, either Article XXI subparagraph (a) or (c) was never invoked in the GATT/WTO dispute history. Subparagraph (a) of GATT Article XXI, on disclosure of information, did not have clear relevance with actual incidents, and

[28] L/6053, p. 14, paragraph 5.3.
[29] CP.3/SR22-II/28, p.3.
[30] Ibid.

subparagraph (c) was not necessary to be invoked as there was no direct conflict between the rulings of the GATT/WTO and UN mandatory sanctions ordered by the Security Council. In practice, Article XXI (b) has been the most controversial provision and the discussions on how to apply the Security Exceptions has been continuously debated; unfortunately, without sufficient development of the provision itself.

2.2. Legal Review on Applicability of GATT Article XXI

In the 14 cases dealt in the GATT/WTO, some countries didn't want to prolong the discussion on the scope of the provision and rather refused to accept any Panel decision by arguing that the GATT/WTO does not have the authority to impose any ruling against individual states' sovereignty over political issues. In fact, the Panel could not often draw clear guidelines on how to cope with such politically intertwined trade matters. Only four Panel reports, still refraining from any clear judgment on core issues, were circulated in the history of GATT/WTO cases that invoked Article XXI.

The literature in academia on the ambiguity problem of the GATT *Security Exceptions* clause includes legal discussions on the self-judging nature of Article XXI[31], the jurisdiction problem of the GATT/WTO on whether it is a proper

[31] See Bhala (1998), (2005); Jackson (1969); Alexandroff &Sharma (2005).

forum to discuss political issues[32], the applicability of the specific subparagraph conditions[33], and the practical efficacy of Article XXI[34].

According to Bhala (1998), the main cause of the problem for GATT Article XXI comes from the language, *essential security interest*, in subparagraph (b) that it allows members to invoke the provision free from any judicial review and defines the provision to be self-judging.

However, Scholemann & Ohloff (1999) claims that jurisdictional defense (authority to interpret) and substantive defense (authority to define) should be distinguished regarding the GATT Security Exceptions. The authors argue that Article XXI is structurally a limited and conditional exception to the substantive rules of GATT security exception, with its potential for abuse to be subjected to review under normal dispute settlement procedures. Here, the authors bring in one of the principles of international law, 'good faith,' to be the appropriate standard applicable to the definitional prerogative for security interests. This standard requires a Member relying on Article XXI to participate in the Panel proceedings and provide information necessary for the Panel to make findings within its competence. The authors state that the WTO Member may exercise in good faith its "right to be cautious" as part of its sovereign right to protect its national security.

Similarly but more definitely, Van den Bossche and Zdouc (2005) also

[32] See Lowenfeld (2002); WTO(1995); Cann, Jr. (2001).
[33] See Akande & Williams (2003); Hahn (1991); Park (2009); Scholemann & Ohlhoff (1999).
[34] See Alford (2011); Park (2009).

argues that Article XXI is subject to judicial review "otherwise the provision would be prone to abuse without redress."[35] Whether or not the principle of good faith should work, the author asserts that "at a minimum, the Panel and the Appellate Body should conduct an examination as to whether the explanation provided by the Member concerned is reasonable or whether the measure constitutes an apparent abuse.[36]"

Akande & Williams (2003) rather takes a medium stance among the introduced authors in section. The authors first argue that the GATT Article XXI is intended to create a legal obligation; in other words, the GATT jurisprudence is automatically valid. However, they introduce the concept of 'objective' and 'subjective elements' of the provision. Firstly, the authors point to Article XXI:(b) as the one that leaves the most room for self-judging elements. They argue that in no way does the wording suggest it is up to the Panel to question whether the controversial trade measure is necessary for the protection of the security interests; rather it is up to the members to act in good faith. Secondly, the authors specifically point to Article XXI(b)(iii), that the condition, "in time of war or other emergency in international relations," is a rather objective element that can be determined by an international tribunal. Nevertheless, Akande & Williams remain strict on the fact that the WTO Panel or the Appellate Body should not address underlying non-trade issues or motives.

[35] Van den Bossche and Zdouc (2005), p.666.
[36] Ibid.

There are also articles that have approached the nature of *Security Exceptions* in a more political and power-based structure, examining if the principle of good faith actually works. Emmerson (2008) questions whether Article XXI is a legal doctrine or political excuse, in order to pinpoint the ever more aggravating abusive nature of the provision. Interestingly his analysis through international relations perspective on power and security concludes that the power dispute suggests that security issue is a sovereign one of the state which prevails the GATT/WTO obligations and that Article XXI should definitely be self-judging. In the meantime, Lindsay (2003) claims that an ambiguous Article XXI is not free from abuse, history suggests that the ambiguity is often a constructive one. He argues that the nations have informally checked perceived abuses of Article XXI in several instances and that the ambiguity of Article XXI has not necessarily frustrated implementation of the GATT. He argues that the ambiguity of the provision may not produce perfect results, but such results often depend on the time, place, and perspective of the parties.

Furthermore, Alford (2011) explored other circumventing ways how the WTO Members have learned to less utilize direct invocation of GATT Article XXI, and rather indirectly resolve conflicts regarding economic sanctions, as an explanation why there are less number of disputes.

In a critical perspective, this thesis agrees that the principle of good faith should ideally work as a guideline for invoking the *Security Exceptions*; nevertheless, it is also natural for political issues to generate abusive invocation of

the provision based on power distribution. Therefore, the thesis believes that the GATT jurisprudence should be automatically valid and ensure minimum process of judicial review upon the *Security Exceptions* to ensure minimum nullification of economic benefits beyond necessary. However, whether the determination should be authorized solely by the WTO or in cooperation with another international tribunal would be tentative depending on each specific circumstances of different cases. The WTO should also be cautious not to override sovereign rights of the Member countries upon their security interests, based on an economically biased standard.

In that sense, this thesis thinks that the controversies of applying the *Security Exceptions* regarding economic sanction measures are embedded in the systematic institutional problems of the WTO. These legal problems on the *Security Exceptions* are not issues relevant to the single provision but are originated from the structural problems that have been built over, since the inception of the GATT.

Given that, the thesis essentially believes that the WTO Security Exceptions should be amended in order to resolve such recurring legal problems. The understanding of the fundamental systematic problems of the WTO to deal with economic sanction measures would provide clearer vision to how the Security Exceptions should be re-arranged.

The next chapter will discover the origins of the current WTO *Security*

Exceptions with critical analyses on the lack of institutional backbone for its applicability.

III. Analysis on the Historical Evolution of WTO *Security Exceptions*

In order to understand the nature of the current WTO *Security Exceptions*, it is important to trace back the origins of such provision in relation to the original text of the ITO Charter. What the original provision aimed to serve in the context of a comprehensive ITO Charter, as in contrast to the only survived texts of the General Agreement on Tariffs and Trade (GATT) projects a totally different vision of the matter. The inherent deficiency in the structure, content, and elaboration of the GATT *Security Exceptions* was left solely to this single multilateral contract, which merely aimed for a "provisional application," to bear its "birth defects" [37] in the unfortunate failure of the ITO. Yet, the remaining question is why hasn't the *Security Exceptions* been either complemented, updated, or amended even when the World Trade Organization (WTO) was finally established in 1994, after 47 years of long aspired dream to establish an official body to govern the international trade regime.

The idea to create the ITO was originally to build a third pillar sustaining the Bretton Woods system along with the ready established International Monetary

[37] Jackson (1997), p.35.

Fund (IMF) and International Bank of Reconstruction and Development (IBRD). The proposal to launch the ITO was submitted rather later in December 1945 by the US government in order to complement the two original Bretton Woods institutions, which were in effect since July that year. At the first United Nations Economic and Social Council (ECOSOC) session in February 1946, a resolution calling for an international conference on trade and employment to consider the creation of the ITO was adopted. The ITO was proposed to govern not only commercial matters on trade in goods but a comprehensive list of macro and microeconomic matters related to trade such as employment, investment, restrictive business practices, state trading, and competition policies. At the same time, the GATT, specialized agreement on tariff schedules and trade concessions, was agreed to be proceeded simultaneously with the drafting of the ITO Charter, while the GATT was regarded from the beginning to be a subsidiary form of agreement to the whole ITO Charter.

The Preparatory Committee was to meet in London from October to November in 1946, followed by the New York Conference (January – February 1947) led by the Drafting Committee for further amendments on the Charter as well as the first full draft of the GATT. The Second Preparatory Committee meeting was held in Geneva, lasted from April 1 to October 30 1947, where the GATT was completed and signed by the end of the Conference. The GATT came in to force since January 1, 1948, prior to the establishment of the ITO, under

Protocol of Provisional Application[38], which meant its effectiveness to be due only till the ITO finally comes into force. The ITO Charter still underwent further developments at the Plenary Conference in Havana (November 1947 – March 1948). The Final Act of the Charter was signed on March 24, 1948.

Of course the presumption was that soon the ITO would come into existence to operate and back up the institutional support for the GATT; but unfortunately, the US Congress never ratified the 1948 Havana Charter. Foreseeing the hopeless prospect of the ITO's acceptance from domestic politics, President Truman of the United States in fact withdrew the Havana Charter from securing congressional approval in December 1950[39]. Subsequently, the GATT, as the only survivor from the early efforts to design a multilateral trade regime, was to solely operate by filling in the vacuum of the ITO. Many from the Charter were not included in the GATT draft, but the basic principles of Most Favoured Nations (MFN) Treatment and National Treatment (NT), as well as the obligations and rules on quantitative restrictions, subsidies, antidumping, countervailing duties, and safeguards had been mostly updated and amended simultaneously with the ITO Charter in the Preparatory Meetings. It sustained fairly in creating the world trading regime until the advent of the WTO in 1994; however, the essentially flawed provisions and structure of the GATT, originally expected to be applied and practiced in relation to the more comprehensive and detailed principles and

[38] See E/PC/T/202.
[39] Diebold, Jr. (1952), p.1-23.

provisions of the ITO Charter, have not been easily accommodated over time and still remain problematic, including the case of applying Article XXI *Security Exceptions* of the GATT.

3.1 1945-1947: The origins of the Security Exceptions in the ITO Charter and the GATT

The very first draft of the ITO Charter and the relevant *Security Exceptions* provision traces back to the US Proposal draft[40] published in November 1945. Because the ITO Charter was originally aimed to include a broad scope of issues such as commercial policy, restrictive business, and state trading, the *General Exceptions* clauses were also separately designated for each different chapter. The roots of the current GATT *Security Exceptions* can be found from the *General Exceptions* stated under the Commercial Policy chapter[41]. The current title as the '*Security Exceptions'* has not yet been in place and the structure of the provision was in a combined form of the current *General Exceptions* (Article XX) and *Security Exceptions* (Article XXI). Subparagraphs 3 and 8 are very vague in this preliminary drafting stage, but they are still clearly attributable to the current

[40] Proposals for Expansion of World Trade and Employment, Department of State, the United States, November 1945, retrieved from http://www.worldtradelaw.net/document.php?id=misc/ProposalsForExpansionOfWorldTradeAndEmployment.pdf, on October 1, 2014.
[41] See Appendix 1.

components of the *Security Exceptions*.

Subtle changes made in the subsequent draft called the "Suggested Charter" for an ITO of the United Nations[42], prepared by the United States in September 194 6after the first UN ECOSOC session, includes new subparagraphs such as (c) 'relating to fissionable materials' and (k), which outlines the relationship of the ITO principles to be in accordance with the UN Charter[43]. Subparagraphs (c), (d), (e), and (k) of this draft are the main four components that have been restructured and rephrased throughout the subsequent conferences and sessions of the ITO Charter and the GATT drafting Preparatory Committees.

The *General Exceptions* provision under the Commercial Policy chapter (former title of the current *Security Exceptions*) in the ITO Charter had not been dramatically developed throughout the London draft (Nov. 1946)[44] and the New York draft (Mar. 1947)[45]. They basically remain the same from the suggested draft by the US. Yet the codification has been changed to number it as Article 37 from howt it used to be Article 32.

The February 1947 New York draft of the GATT[46] is the first full GATT draft prepared in the meetings, and it is clear from the draft that none of the institutional provisions were reflected in the GATT text, simply because it was

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[42] Suggested Charter for an International Trade Organization of the United Nations, U.S. State Department Proposal, September 1946, retrieved from http://www.worldtradelaw.net/document.php?id=misc/Suggested%20Charter.pdf on October 1, 2014.
[43] See Appendix 2.
[44] See E/PC/T/33.
[45] See E/PC/T/34.
[46] See E/PC/T/C.6/85.

under clear understanding that this trade agreement was to eventually come under the aegis of the ITO[47]. Many of the provisions were simply copied from the Commercial Policy chapter of the ITO Charter and the case was for the *General Exceptions* provision as well. The specific subparagraph notions of (c), (d), (e), and (k) were exactly the same with the Charter, yet it was codified as Article XVIII[48]. One development divergent from the Charter is the hint on what is now called the *chapeau* of Article XX *General Exceptions*. The portion reading, "[the] requirement that measures are not applied in such a manner as to constitute a means of arbitrary or a disguised restriction on international trade…," is a newly added pre-condition that governs the eligibility of certain measures to apply the exception clause. The *chapeau* is an important invention which basically puts gravity on the maintenance of international trade order in primacy, even under the exception provisions, so that it aims to deter and regulate abusive means of arbitrary or disguised restriction on international trade. It is interesting to know that the subparagraphs (c), (d), (e), and (k) used to also be subjected to the *chapeau* condition, unlike today's Article XXI Security Exceptions.

During the Geneva Conference, the General Exceptions under the Commercial Policy chapter underwent a total restructuring. The US delegation first proposed to remove items (c), (d), (e), (j), and (k) from Article 37 and create a new Article which was to be inserted at the end of the Charter to make these

[47] Irwin, Mavroidis, Sykes (2008), p.100.
[48] See Appendix 3.

extracted items as general exceptions to the entire Charter and not solely to the Commercial Policy chapter.[49] It also proposed a new introductory language of the new article to be, "[n]othing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures," which basically got rid of the *chapeau* condition invented for General Exceptions under the Commercial Policy chapter. This proposal was adopted and implemented through creating two separate provisions in the draft[50]: the *General Exceptions* (Article 43) under the Commercial Policy chapter, and the new *General exceptions* (Article 94)[51] under the General Provisions chapter. From the introductory language of the provision in the General Provisions chapter, implemented without a chapeau and in an even more simplified form than what the US delegate initially proposed during the session, it is easily implied that this provision is aimed to be an all-encompassing and strong in nature for the concerns regarding security issues and political motivations.

Subsequently, the Geneva Draft of the GATT[52] happened to have gone through a similar restructuring process with the Charter for the *General Exceptions* provision. In the August 1947 draft, Article 94 of the Charter is arranged in Part I of the GATT Article XIX and the contents of Article 43 of the

[49] E/PC/T/W/23, p.5, paragraph 8.
[50] See E/PC/T/186; E/PC/T/196.
[51] See Appendix 4.
[52] See E/PC/T/189.

Charter is arranged in Part II of the GATT Article XIX. [53] There is a clear distinction between the exception clauses of those relating to political and security issues and of those regarding the other cases, which all used to be listed in mere parallel. The *chapeau* is inexistent for Part I while it is there for Part II. It is clear even within the GATT draft that the Preparatory Committee was aware of the different degree of imminence and permanent nature of the current *Security Exceptions*. In the Verbatim report [54] of September 5, 1947, the discussion initially aimed to simply separate Part I and Part II of Article XIX into two different provisions Article XIX(A) and Article XIX, eventually concluded by inventing a new title for Part I as "*Security Exceptions*". Consequently, in the following tariff negotiation sessions in Geneva for the final elaboration of the GATT draft in October 1947[55], the *General Exceptions* clauses which used to be in two different parts, were completely divided into two separate provisions as what happened for the ITO Charter. Ultimately the final GATT draft was composed of Article XX *General Exceptions* and Article XXI *Security Exceptions*. Any further institutional arrangements was not elaborated under the GATT and rather Article XXIX *The Relation of this Agreement to the Havana Charter* was simply inserted there to let the ITO Charter to be responsible for any further elaborations on obligations and institutional arrangements developed after the GATT has been into force.

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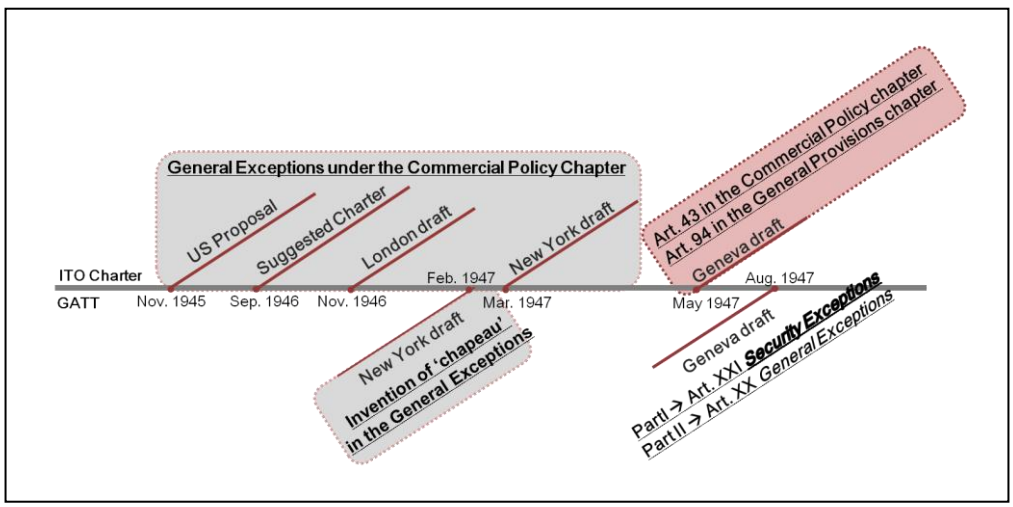
[53] See Appendix 5.
[54] E/PC/T/TAC/PV/11, p.23-26.
[55] See E/PC/T/214, Add.1, Rev.1.

Figure 1. Summary of the 1945-1947 evolution of the current GATT *Security Exceptions*



3.2 1947-1948: Finalizing the Havana Charter

In the previous conferences, there has barely been a discussion on the language and components of the subparagraphs of the *Security Exceptions* provision. Interestingly, much of the elaborations, sophistications, and subsequent developments regarding Article 94 or Article 99 *General Exceptions* (referable to the *Security Exceptions* of the GATT) in the final version of the ITO Charter, were made during the Havana Conference. There was even a sub-committee created to focus on the details of this specific provision.

In collection of diverse discussions regarding the specific subparagraphs, it is clear how the delegates were prone to thinking of preventing and defending

each country from any future threat, reflecting on their experience during the Second World War. The concerns include what the "military establishment" in subparagraph (b)(ii) would mean, whether that to refer only to the actual establishment or that process as a whole, which includes concerns on strategic goods and relevant raw materials[56]; how the actual "action" should be emphasized instead of what the "essential security interests" are in the following sub-subparagraphs of (b)[57]; and the development of Part II regarding peace treaties and special regimes established in the UN[58].

Among many others, one of the most important endeavors in Havana was that they developed a subsequent framework provision, such as Article 86 *Relations with the UN*,[59] and its interpretative notes[60], which precisely elaborated on what was merely stated in one sentence as subparagraph (c) of the *Security Exceptions* in the GATT draft. It is noteworthy to focus especially on paragraph 3 of Article 86 for clear intention for the division of labor on political matters between the ITO and the UN.[61] Below is paragraph 3 of Article 86:

> "… the Organization should not attempt to take action which would involve passing judgment in any way on essentially political matters. Accordingly, and in order to avoid conflict of responsibility between the United Nations and the Organization with respect to such matters,

[56] E/CONF.2/C.6/W.26, paragraph 4.
[57] E/CONF.2/C.6/W.40, p.4, paragraph 3.
[58] E/CONF.2/C.6/W.44, p.1
[59] See Appendix 6.
[60] See Appendix 7.
[61] E/CONF.2/6/93, paragraph 13.

> any measure taken by a Member directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter shall be deemed to fall within the scope of the United Nations, and shall not be subject to the provisions of this Charter."[62]

The sub-committee noted that paragraph 3 of the article is "designed to deal with any measure which is directly in connection with a political matter brought before the United Nations in a manner which will avoid conflict of responsibility between the United Nations and the Organization with respect to political matters."[63] Furthermore, the sub-committee also clarified the importance of effective division of labor and cooperative coherence within the function of the international system between the ITO and the UN. It said, "the important thing [i]s to maintain the jurisdiction of the United Nations over political matters and over economic measures […] taken directly in connection with such a political matter," and to identify the ITO purely as an economic organization.[64]

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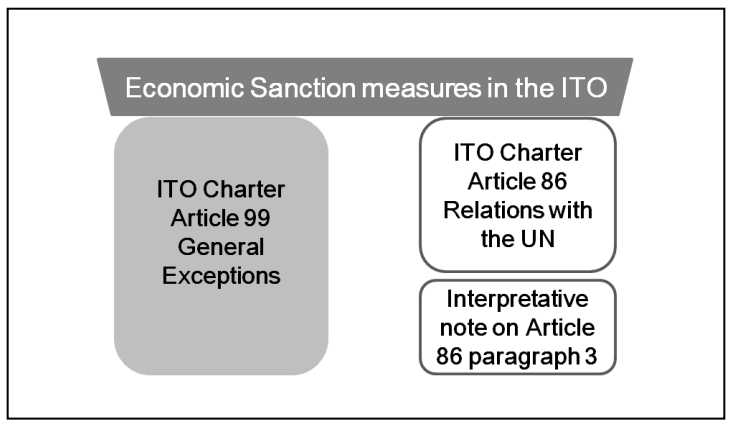
[62] Article 86, paragraph 3, "Final Act of the United Nations Conference on Trade and Employment: Havana Charter for an International Trade Organization" (dated March 24, 1948), retrieved from http://www.worldtradelaw.net/document.php?id=misc/havana.pdf on October 1, 2014.
[63] E/CONF.2/C.6/93, p.3, paragraph 15.
[64] Ibid.

Figure 2. Two pillars of the ITO that enables the organization to deal with economic sanction meausres

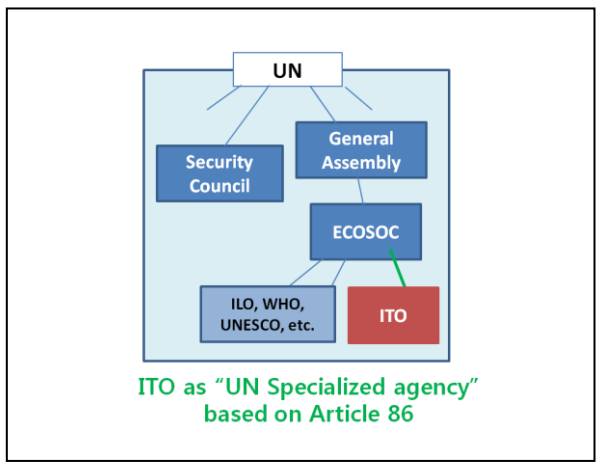


The basic premise for this compatibility in division of labor to be available in practice is that the ITO was originally meant to be a directly linked "specialized agency" of the UN, as noted in paragraph 1 of Article 86 of the Havana Charter. According to the UN Charter, these specialized agencies, for example the ILO, WHO, UNESCO, to just name a few, are ought to be in agreements[65] with the UN Economic and Social Council (UN ECOSOC), which shall be subject to approval by the General Assembly[66]. It is also specified in the second paragraph of Article 63 of the UN Charter that the ECOSOC may "coordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations." This channel of

[65] UN Charter, Chapter VIII, Article 57, paragraph 1 specifies which specialized agencies can be in agreement to be referred as UN specialized agencies.
[66] UN Charter, Chapter IX, Article 63, paragraph 1.

communication between the UN and the UN specialized agencies vested under the UN Charter enables Article 86 of the ITO Charter to work appropriately through a congruent dynamics of policy coordination between the UN and the ITO.

Figure 3. ITO and UN linkage for division of labor on political matters

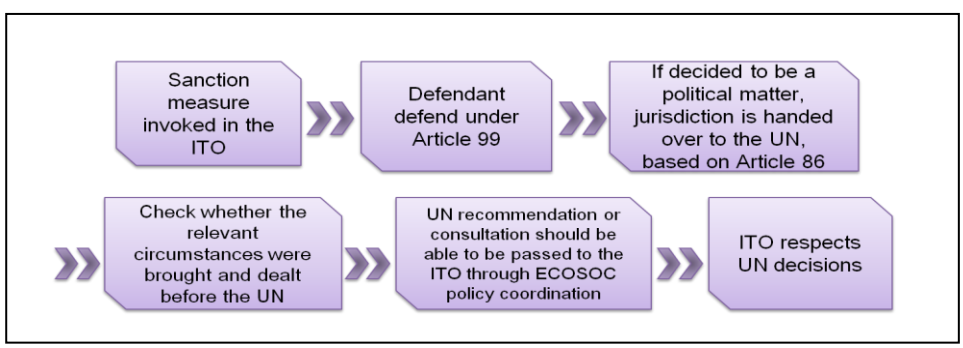


Here, the thesis tries to arrange the expected procedural flow in the ITO and the UN upon executing *Article 99: General Exceptions* of the ITO Charter based on the developments made by Article 86 and its interpretative notes. First, the sanction measure is invoked in the ITO and the defendant defends its action under Article 99 for exemption from other obligations; then, the Panel should first decide whether this case is a political matter[67]. If the matter is accepted as a sole economic matter, the ITO has the full jurisdiction; otherwise, the decision is handed to be dealt within the UN jurisdiction. Second, even though the UN has the

[67] Deciding whether one case is an economic or political matter is of ITO's authority according to ITO Charter, interpretative note of Article 86, paragraph 3.

full authority upon political matters, the UN can only decide upon the matters already "brought before the UN" through the General Assembly, the Security Council, or the ECOSOC meetings, for instance[68]. Third, the recommendation or consultation by the UN can be delivered to the ITO again through the ECOSOC policy coordination mechanism, most importantly because the ITO is a UN specialized agency[69]. Lastly, the ITO may respect the UN recommendations and finally decide on the appealed issue consistently with the UN. The division of labor and avoidance of duplication of jurisdiction is achieved at the same time when the two organizations can efficiently coordinate their policies and decisions. This procedural flow is visually summarized in Figure 4.

Figure 4. Expected procedural flow in case of invocation of Article 99 in the ITO



Eventually, the specific conditions elaborated under the subparagraphs (a)

[68] ITO Charter, Article 86, paragraph 3. of the ITO Charter.
[69] UN Charter, Article 63.

and (b) in the GATT *Security Exceptions* remained basically the same in Article 99[70] of the final draft of the ITO Charter; but what remains as subparagraph (c) in the GATT was independently clarified in Article 86 of the Charter and was eliminated from Article 99. While the original subparagraph (c) simply meant supremacy of the obligations of the UN Charter over the ITO Charter, the substituted Article 86 of the ITO Charter outlined the procedural matters of applying Article 99, institutional relationship between the two organizations – the ITO and the UN — and the legal scope of the ITO jurisdiction on the economic benefits of the third party in political circumstances.

The tragedy is that these provisions and texts of Article 86 and its interpretative note along with Article 99 have never been into force as a consequence of a complete collapse of the ITO. While Article 86 could still have had problems in practice, it is worth emphasizing such arrangements as part of the framework for not only applying the GATT *Security Exceptions* within the trade regime, but also having the vision of practicing such decisions and judgments based on a macro perspective regarding the international system as a whole to work in coherence.

[70] See Appendix 8.

3.3 1948- : GATT Solely in Force without the Charter

With an unfortunate demise of the ITO, the GATT, which originally came into force based on the Protocol of Provisional Application (PPA), survived through a tacit agreement on the indefinite extension of the Protocol. GATT fortunately remained in force but technically there was no backbone provisions which support the issues such as institutional arrangement for the GATT, without the Charter. Even though Article XXIII:2 of the GATT[71] was often used to always consider the GATT provision in relation to the ITO Charter, what was elaborated in Article XXIX *The Relation of this Agreement to the Havana Charter* became much more meaningless with the demise of the ITO.

The relationship between this agreement, the GATT, and the UN was not specified either. Neither did the elaboration of Article 86 of the ITO Charter survive nor was there a new arrangement prepared for the GATT during the Review Session (1954-55). The linkage that connected the ITO and the UN, which enabled the application of the *Security Exceptions* through division of labour was completely lost. In fact, the very first dispute regarding the application of the *Security Exceptions* happened in 1949 between the US and Czechoslovakia[72]. Czechoslovakia was arguing that the US export control regime is in violation of the

[71] This provision encourages consultation from the UN or other international agencies for the GATT in order come up with clear judgment; weaker linkage with the UN than the ITO framework; See Appendix 9.
[72] See CP.3/ SR22-II/28.

GATT, while the US was defending its policy under Article XXI:(b)(ii). The Panel discussions reaffirmed the existence of so many loopholes in the GATT system to rule upon the *Security Exceptions*, especially regarding the lack of jurisdiction of the GATT on political matters and no existing relationship with the UN for a GATT decision[73].

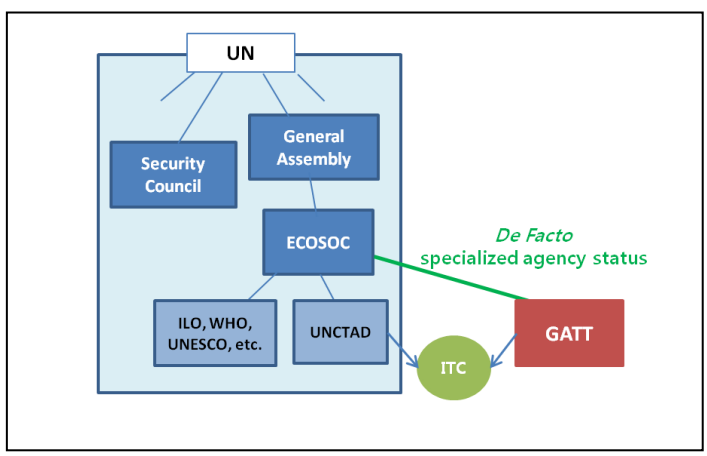
In practice, there was no formal effort to revive or amend the ITO framework of the procedural flow to deal with the *Security Exceptions* during the GATT period. GATT was either intentionally or unintentionally kept deficient to deal with economic sanction matters of political motivation. Nevertheless, as shown in the previous section how the link with the UN could have been important in administering the *Security Exceptions*, the thesis thinks that knowing why and how the GATT remained incapable of coping with economic sanction matters through its *Security Exceptions* is important. Therefore it also aims to review the relationship of the GATT and the UN in this section, following the analyses for the ITO and the UN in the previous section.

What still remained to link the GATT and the UN was the Interim Commission for the ITO (ICITO), which was established during the UN Conference on Trade and Employment and "was never abolished…."[74] ICITO, fundamentally a UN-created commission, was serving as the secretariat to the Contracting Parties of the GATT while preparing for the establishment of the ITO,

[73] Ibid.
[74] A/AC.179/5, p. 1.

and this arrangement was in fact confirmed between the Director-General (called the Executive Secretary until 1965) of the GATT and the Secretary-General of the United Nations in 1952[75]. As so, in exchange of such letters in lieu of the on-going operation of the ICITO, the GATT was confirmed to *de facto* act as a specialized agency of the UN, like what it was expected of the ITO, even without subsequent formal agreement[76]. Furthermore, there was also a *de facto* indirect alignment between the GATT and the UN through governing the International Trade Centre (ITC), established in 1965, together with the UNCTAD, a clear UN specialized agency established in 1964.[77]

Figure 5. Weak *de facto* linkage between the GATT and the UN



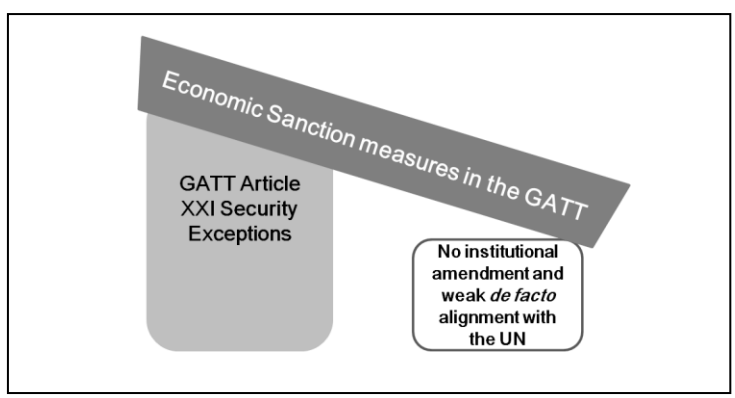
However, this *de facto* alignment between the GATT and the UN did not ensure direct channel of communication and procedural clarity in terms of division

[75] See E/5476/Add.12.
[76] A/AC.179/5, p. 1.
[77] WTO/GC/W/10, p. 7.

of labor and policy coordination. Furthermore, despite the co-governing mechanism shared with UNCTAD and GATT for ITC, some even argue that instead of coordination, these two entities were rather in rivalry for membership and functional sphere, as more developing countries were interested in development issues which UNCTAD was specializing in[78]. In that sense, it is hard to conclude that the UNCTAD and the GATT shared a coordinated policy approach.

In other words, despite the *de facto* linkage between the GATT and the UN, this meant that the GATT fundamentally lost the foundational framework for applying its Article XXI *Security Exceptions*. It lost its jurisdiction on political matters through a vague communication channel with the UN and even a lack of legal scope for the GATT to become a more comprehensive entity.

Figure 6. Lack of sustainable pillars that allow GATT to function on matters relating to economic sanction measures



[78] See A Brief History of UNCTAD: http://unctad.org/en/Pages/About%20UNCTAD/A-Brief-History-of-UNCTAD.aspx, retrieved on January 5th, 2015.

As illustrated in Chapter II, there have been a total of 14 GATT/WTO cases that have arisen due to the use of economic sanction measures and have discussed the applicability of *Article XXI Security Exceptions* on the defending country. There has been almost the same repetitive debate on how should or can the WTO decide on such innately political matters. Amid all the controversial debates and unsolved ambiguity on the applicability of Article XXI, there was one addendum on Article XXI made in the 1982 ministerial meeting[79] after the 1982 US-Imports of sugar from Nicaragua case. The addendum basically encourages increased transparency of the procedure of invoking Article XXI. But other than that, nothing much has practically enhanced the applicability of the provision or alleviated the heated discussions on its ambiguity.

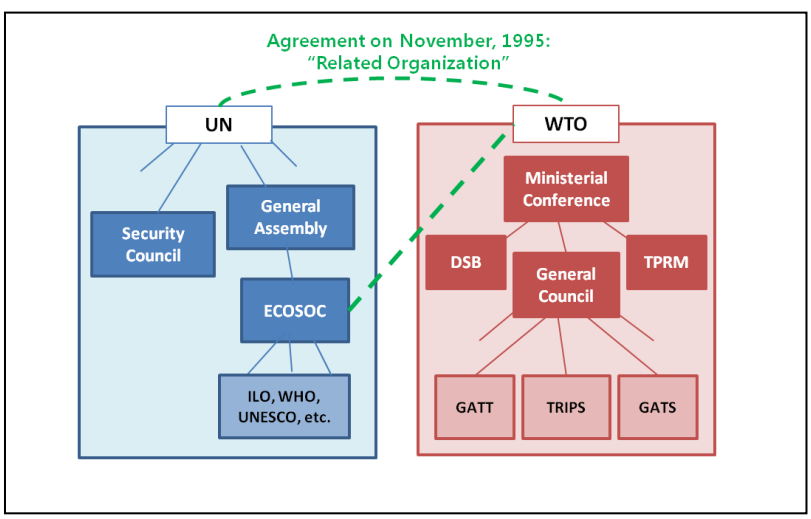
Later in the Uruguay Round, the Secretariat prepared a comprehensive note[80] on the evolution of Article XXI; however, nothing was further amended either after such scrutiny or the establishment of the WTO in 1994. The establishment of the WTO could have been a good opportunity to fill out what was lost, due to the failure of the ITO almost sixty years ago; however, neither was there any articulation in the Marrakesh Protocol that clarified the institutional arrangement between the WTO and the UN or an independent innovation for full jurisdiction of the WTO on the *Security Exceptions*.

In fact, a separate official arrangement for effective cooperation with the

[79] See L/5426; see Appendix 10.
[80] See MTN.GNG/NG7/W/16.

WTO and the UN was made in November 1995, granting both organizations mutual observer status to each other.[81] The document states that the WTO and the UN would extend the former *de facto* relationship of the GATT and the UN; however, this relationship without detailed elaboration is hardly possible to be recognized, since the WTO became a permanent organization with a power as a decision making institution through enhancement and strengthening of its unique and effective system of the Dispute Settlement Body (DSB). As a matter of fact, the WTO regularly attends the UN ECOSOC meeting, not as one of the specialized agencies of the UN, but merely as a related organization. This co-existence provides a room for cooperation in technical issues but not necessarily to the extent of ultimate coherence of rule-making and decision making.

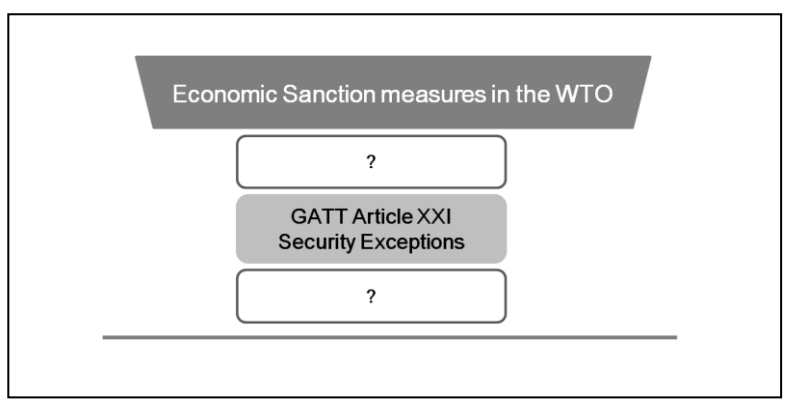
Figure 7. More ambiguous relationship between the WTO and UN



[81] Ibid. p.1.

Without any further elaboration of institutional provisions, yet, the identical language of the GATT *Security Exceptions* was implemented into GATS as Article XIV*bis* and also in TRIPS as Article 73, when the WTO was established. None in the GATT, TRIPS, or the GATS is there any elaboration on the scope, procedure, and institutional arrangement to apply the *Security Exceptions*, for example, like the former Article 86 of the ITO Charter, under the WTO system. Without clear specification and elaboration on the jurisdictional issues on applying such provisions involving political matters, it is hard to identify how the WTO system works regarding economic sanction measures and security issues. How to apply the *Security Exceptions* under the WTO system still remains as a grey area as it was during the GATT period.

Figure 8. Absence of institutional arrangements for the WTO to effectively deal with economic sanction measures



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IV. Critical Assessment of the ITO Framework to Deal with Economic Sanction Measures

As emphasized in Chapter III, one of the critical problems of the past GATT and the current WTO system in dealing with economic sanction measures is that they have lacked the institutional capacity to proceed with the *Security Exceptions* provisions. The originally designed ITO framework, the only feasible blueprint that is ready set up, to effectively utilize the division of labor between the ITO and the UN on political matters, should first be assessed to check its efficacy of application. Examining the efficacy and its expected weaknesses of the ITO framework would provide a clear outline of what the current WTO system structurally is in lack of in relation to and beyond the ITO framework.

Firstly in section 4.1, this thesis would assess the ITO framework by applying the past 14 GATT/WTO cases (Table 1.) accordingly to the expected procedural flow in the ITO, arranged in Chapter III (Figure 3). Secondly in section 4.2, the thesis would proceed to its further analysis in detail on specific cases in order to pinpoint the problems of the WTO *Security Exceptions* beyond the ITO framework.

4.1 Assessment of the ITO Framework to have Complete Division of Labor with the UN for Political Matters

In this section, the 14 actual GATT/WTO cases will be simulated under the original ITO framework in order to critically assess its utility in dealing with economic sanction measures.[82]

Assuming that all the 14 cases were ready decided to be a political matter by the GATT or the WTO Council, firstly, whether the relevant circumstances were brought and dealt before the UN should be checked, otherwise even the UN would not have its jurisdiction over those matters. Despite the fact that the UN Security Council (SC) has the sole authority to determine the "existence of threat" or "the breach of the peace" under Article 39 of the UN Charter in order to impose mandatory economic sanctions, here, the sources for the discussions dealt before the UN would consider not only the SC Repertoires and resolutions but also the legally non-binding General Assembly (GA) Resolutions. One of the practical reasons for including the GA Resolutions for review is that many of the situations during the Cold War were never recognized in the SC, no matter how serious the circumstances were, mainly due to the veto powers the conflicting Permanent Members had.

Those relevant circumstances of the GATT/WTO cases that were never

[82] Refer to Figure 3 in order to check the procedural order of the ITO framework.

discussed to be in concern or existence of threat under the UN during the time of the GATT/WTO disputes were: the situation when Czechoslovakia complained against the US export control regime (1949 and 1951), the reason for Peru's sanction against Czechoslovakian communist regime (1954), the situation when Ghana imposed ban on imports of Portuguese goods (1961), the Cuban missile crisis (1962) that led the US to sanction Cuba, the case for Sweden's global quota on shoes (1975), the situation when US imposed quotas on imports of sugar from Nicaragua (1983), and then when Nicaragua sanctioned against Honduras and Colombia (2000).

Table 2. GATT/WTO cases of which their political circumstances Have NOT been discussed in the UN

Case Name	Complainant
1949 US- Issue of export licenses	Czechoslovakia
1951 US – Suspension of obligations between the US and Czechoslovakia	Czechoslovakia
1954 Peru – Prohibition of Czechoslovakian imports	Czechoslovakia
1961 Ghana – Ban on imports of Portuguese goods	Portugal
1962 US Embargo on trade with Cuba	Cuba
1975 Sweden – Import quota system for footwear	-
1983 US – Imports of sugar from Nicaragua	Nicaragua
2000 Nicaragua – Measures affecting imports from Honduras and Colombia	Colombia/Honduras

Most of those circumstances of the GATT/WTO cases that were not discussed in the UN were when the complainants and the defendants were in

conflict mainly due to the Cold War.[83] Because the 'Cold' War was majorly not an interactive war against the enemy countries, but rather a clear and tacit rupture between the two blocs, economic sanctions as foreign policy tool were mundanely imposed against the other bloc even without any sudden serious outbreak between the sender and the target countries. Therefore, the existence of a trade sanction measure often did not necessarily mean an existence of any political circumstance, other than the fact that the world was under the Cold War at the time being.

However, problems between the countries in each others' enemy bloc have arisen within the GATT system because an economic sanction measure implies a violation of the fundamental principle of the GATT, the Most Favored Nations (MFN) treatment. Most of the Contracting Parties in the GATT system were US-allies, but some exceptional parties like Czechoslovakia Cuba, and Nicaragua, who happened to have joined the GATT, were consistently blocked to enjoy its rights as the Contracting Parties. The Contracting Parties like the US kept imposing trade sanctions against its enemy countries and that is how Czechoslovakia complained for three times in a row (1949[84], 1951[85], 1954[86])

[83] See Table 2.

[84] While the US was keen on how the Soviet Union would organize the communist bloc with the yet remaining independent Eastern European countries after the war, the initial drafts on ERP in 1947 perceived the whole Europe to be the potential recipient of the fund (European Recovery Program, Basic Document 1. (Objectives Committee), (E.O. 11652, Section 3(E) and 5(D), Oct. 31, 1947), retrieved from Truman Library, http://www.trumanlibrary.org/whistlestop/study_collections/marshall/large/documents/pdfs/6-3.pdf#zoom=100, on August 13, 2014; Summary of the Department's position on the content of a European Recovery Plan, Department of State (August 26, 1947), retrieved fromhttp://www.trumanlibrary.org/whistlestop/study_collections/marshall/large/documents/pdfs/6-2.pdf#zoom=100, on August 13, 2014). One of the Eastern European countries,

against the sanction sender countries' (US and Peru) justification of action under the GATT Article XXI. Unfortunately, even through the UN review, these cases were unable to be screened for the legitimacy of the sender countries' claims under the *Security Exceptions* clause, as these cases were also not dealt before the UN due to their political sensitivity.

In fact, the 1962 US trade embargo on Cuba was an on-going response to the Cuban missile crisis where the USSR and the US conflicted in a real incident

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Czechoslovakia, while it allied with the Soviet Union for foreign affairs, its government was restoring democracy and was in fact in favor of accepting the aid offered in the Marshall Plan (Duchacek (1950); The Cold War Museum, "The Czechoslovakia Coup," retrieved from http://www.coldwar.org/articles/40s/czech_coup.asp on August 11, 2014). However, the presence of the Soviet Union increased more aggressively in the remaining independent countries and while denying Czechoslovakia's right to receive aid from the US, Stalin launched a similar program called Conicom for EEC. In February 1948, the communist coup occupied the former independent Czechoslovakia and it was consequently left out from the Marshall Plan. The exclusion of Czechoslovakia from the US Foreign Assistance Act signed in April 1948 was realized also by a separate export control regulation.

[85] Czechoslovakia claimed it would want to normalize foreign economic relations with the US and other Western European countries from an equal status at the General Agreement (CP.6/SR.13). In fact, the US Congress adopted an amendment requiring the President to deny the benefits of MFN treatment to the products of any country "dominated or controlled by Communism" (Jackson (1969), p.749). Moreover, the US sought a waiver under Article XXV, arguing that "fruitful economic relations between any two countries…must presuppose some reasonable degree of mutual respect, some reasonable degree of good faith by each in its dealing with the other. … If there is no genuine means of communication between the two governments, then what possible basis can there before the fulfillment of commercial policy obligations such as we find in the GATT? (CP.6/SR.13) The contracting parties did not expressly grant a waiver, but agreed on a declaration submitted by the US stating that "the government of the US and Czechoslovakia shall be free to suspend, each with respect to the other, the obligations of the GATT (CP.6/SR.13).

[86] Peru also had its own domestic policy to restrict trade with countries having centrally-planned economies under its Supreme Decree of 11 March 1953. Being one of the contracting parties of the GATT, Czechoslovakia again filed a complaint against Peru in 1954, invoking how politically motivated policies should not undermine the motivation of the obligations and basic principles of the General Agreement. Only after long years of consultation between the two countries, Peru finally decided to lift up its import ban in 1967 through Supreme Decree No. 186-h (L/2844).

on nukes.[87] The world gave total attention to it and watched out for whether the next real world war could happen; but this tense anxiety never reached the UN Security Council or the UN General Assembly, again, due to high sensitivity of the issue, when the USSR and the US were both seating as the Permanent Members of the UN.

The 1975 Sweden case was simply a misuse of the *Security Exceptions* against its objective and purpose of the provision; and the conflict in the Central American region between Nicaragua and Honduras repeatedly appeared in the past resolutions but not during the due time of the WTO dispute for reflection.

On the other hand, the circumstances that were discussed in either the General Assembly or the Security Council were those of the cases regarding Egypt's sanction against Israel (1970)[88], the EC, Australia, and Canada's collective sanction against Argentina during the Falklands War between Argentina and the UK (1982)[89], US sanction against Nicaragua (1985)[90], EC sanction case during the war in Yugoslavia (1992)[91], and US sanction against Cuba based on the LIBERTAD act (1996)[92].

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[87] Dobbs, retrieved from http://topics.nytimes.com/top/reference/tinestopics/subjects/c/Cuban_missile_crisis/index_html, on January 10th 2015.
[88] See UN SC Repertoire on determination of threat (1969-1971), p. 197.
[89] See UN GA Resolution, A/RES/37/9; see UN SC Resolution, 502, 505.
[90] See UN GA Resolution, A/RES/40/188.
[91] UN SC Resolutions 713, paragraph 6; 724, paragraph 5.
[92] See UN GA Resolution, A/RES/31/17.

Table 3. GATT/WTO cases of which their political circumstances HAVE been discussed in the UN

Case Name	Complainant	UN Forum	UN Document
1970 Egypt – Boycott against Israel and secondary boycott	Israel	Security Council	SC Repertoire on determination of threat (1969-1971)
1982 EC, Australia, Canada – Trade restrictions affecting Argentina applied for non-economic reasons	Argentina	General Assembly/ Security Council	GA Resolution A/RES/37/9 (37th session, 1982) SC Resolution 502, 505 (1982)
1985 US – Trade measures affecting Nicaragua	Nicaragua	General Assembly/ Security Council	GA Resolution A/RES/40/188 (40th session, 1985) SC Resolution 562 (1985)
1992 EEC – Trade measures taken by the EC against the Socialist Federal Republic of Yugoslavia	Yugoslavia	Security Council	SC Resolution 713 (1991), 724 (1991)
1996 US – The Cuban Liberty and Democratic Solidarity Act	EC	General Assembly	GA Resolution A/RES/31/17 (51st session, 1996)

For those cases dealt before the UN, UN should have been able to have full jurisdiction on the determination of cases, according to the original ITO framework. Except in the 1996 US – The Cuban Liberty and Democratic Solidarity Act (LIBERTAD Act) case, the defendants in all other four cases invoked Article XXI(b)(iii) of the GATT for justification on their trade sanction measures. That means, the UN has the jurisdiction to determine whether the political circumstances that each case was involved in can be identified as "during the time of war" or "other emergency in international relations," as stated in the invoked provision. For

the 1996 case on the Cuban LIBERTAD Act, the US invoked Article XXI, referring to the "spirit" of the clause. Even for this case, the UN would have to be available to determine whether the situation was legitimately appropriate for the US to impose such act at the time being for its "essential security interest."[93]

In order to examine whether the division of labor with the UN, an organization with full jurisdiction on political matters, provides substantial decision making efficacy on whether there was an existence of threat and the sanction imposed was a legitimate action defended under Article XXI:(b)(iii), the UN discussions were scrutinized. For the 1970 Egypt – Boycott against Israel and secondary boycott (1970 Egypt – Israel) case, the UN SC Repertoire notes that there is constant threat in the region[94]. The existence of threat is notified, while it is unclear whether specifically Egypt and Israel were directly in conflict as much as the situation to be defined as "emergency in international relations."

The UN SC Resolution urged for cooperation between the disputing parties and the UN GA Resolution called for total withdrawal of Argentine forces in the Falklands region in 1982[95], which alerts that there was certain "emergency in international relations" relating to the 1982 EC, Australia, Canada – Trade restrictions affecting Argentina applied for non-economic reasons (1982 EC, Australia, Canada – Argentina) case. Despite the certain determination on the political situation of the case, there were still essential trade concerns that the UN

[93] GATT, Article XXI:(b).
[94] UN SC Repertoire on determination of threat (1969-1971), p. 197.
[95] See UN SC Resolution, 505; see UN GA Resolution, A/RES/37/9.

could not handle to completely settle the case[96]. The problem was that the UN GA resolution could not be a reference that illustrates a wrong-going situation in Canada and Australia but only the UK with Argentina. When the UN SC did not authorize any mandatory sanction, the question rose if the sanction measures of Australia and Canada, those who were not directly affected but were merely in part of the Commonwealth nations of the UK, be also justified under Article XXI[97].

For the 1985 US – Trade measures affecting Nicaragua (1985 US-Nicaragua) case, US was formally recommended to withdraw its measure in the GA resolution, given that the freedom to choose the regime type should be respected for each country[98]. It was clear in the resolution that the US was imposing trade sanctions on Nicaragua without sufficient legitimacy, other than that it aims to sanction a communist country. Unfortunately, in the actual case, the GATT Panel did not have the ability to formally address UN discussions. At the same time, due to the non-binding characteristics of GA resolutions, the US simply

[96] While the Falkland Islands have been a subject of controversial sovereign history between the Spanish, Argentines, and the British during the colonial period, in the modern day, it was officially governed as a sovereign territory of the United Kingdom. On April 2, 1982, Argentina aimed to refocus the population's attention to the Argentine forces occupied the Falkland Islands, defending the occupation as an effort to regain islands "that legitimately form part of [their] national patrimony – safeguarding the national honor" ("Argentina Seizes Falkland Islands; British Ships Move," N.Y. Times, Apr. 3, 1982). On May 7, 1982, the European Community (EC), together with Australia and Canada, established a stringent trade embargo which suspends all imports coming from Argentina for an indeterminate period of time (L/5319). With imminent damage upon its economy, Argentina filed a suit to the GATT against EC, Canada and Australia. The EC, Australia, and Canada stated that they have taken certain measures in the light of the situation addressed by the SC Resolution 502 and they have taken these measures on the basis of their "inherent rights" of which Art.XXI is a reflection (L/5317).

[97] See L/5317.

[98] See UN GA Resolution, A/RES/40/188.

ignored the recommendation. Later, the UN SC Resolution called for compliance of the US to the GA Resolution, but that was again ignored.

The 1992 EEC - Trade measures taken by the EC against the Socialist Federal Republic of Yugoslavia (1992 EEC – Socialist Federal Republic of Yugoslavia) case is slightly different from other cases. This case was brought up in the GATT prior to the UN SC authorization of a mandatory sanction against Yugoslavia.[99] Eventually, the case was automatically suspended as UN mandatory sanctions were legitimately defended under Article XXI(c).

Lastly, the US was encouraged in the UN GA resolution to suspend its unilateral policy measure under the LIBERTAD Act against Cuba, except for during the time of imminent turbulence between the two countries[100]. The argument in the resolution clarifies that the US should stop sanctioning Cuba under a normal sense, like in the time being of the WTO dispute. Despite the fact the UN clearly provides a determination that US' action is illegitimate at the time being, this discussion could have merely affected the actual WTO Panel proceedings, as the complainant of this case was EC, not Cuba. EC was the counterparty who had been damaged by US' extraterritorial application of its domestic law on Cuba that the trade concern of this issue is under a different spectrum of the discussion that has been dealt before the UN.

[99] UN SC Resolutions 713, paragraph 6; 724, paragraph 5.
[100] See UN GA Resolution, A/RES/31/17.

Table 4. Analysis of the GATT/WTO dispute cases dealt before the UN

GATT/WTO Dispute (in shortened name)	UN Discussion	Existence of threat / Legitimacy of action	Further Trade Concerns
1970 Egypt – Israel	There is constant threat in the region.	O	-
1982 EC, Australia, Canada – Argentina	UN SC Resolutions found threat in the region and encouraged cooperation between the disputing parties; UN GA Resolution called for total withdrawal of Argentine forces in the Falklands region at the time being.	O	The SC did not authorize any mandatory sanction. Should the actions by Canada and Australia, those who were not directly affected by the incident, be justified?
1985 US –Nicaragua	The US was formally recommended to withdraw its measure in the GA Resolution and SC Resolution..	X	The US simply ignored the GA resolution as it has no legally binding effect. The GATT Panel also did not formally address the issue.
1992 EEC –Socialist Federal Republic of Yugoslavia	The UN SC ordered a mandatory sanction against Yugoslavia.	O	-
1996 US – EC on Cuban LIBERTAD Act	The US was encouraged to suspend its unilateral policy measure under the LIBERTAD Act against Cuba in the GA Resolution	X	The case was brought up by the EC, who had been commercially damaged by the extraterritorial application of the US domestic law on Cuba. Because the case terminated during the consultation, the issues have not been dealt in depth. US ignored the GA resolution and maintained its LIBERTAD Act.

All in all, in assessing the ITO framework, more than half of the cases were found to be excluded from the UN review under the ITO framework, due to their ineligibility originating from absence of prior discussions dealt before the UN. This implied that the WTO should be able to establish its own primary guidelines and rules to clearly define the boundaries of legitimate political circumstance even without the UN. Otherwise, still many cases would not be able to reach any conclusion

Fortunately, regarding the cases of which political circumstances were dealt before the UN prior to the GATT/WTO dispute, the UN discussions were found to be useful to provide primary reference to see whether the relevant political circumstances were directly and essentially related to the threat the state perceived to embark on certain sanction measures complained within the GATT/WTO system. However, it was also clear that it is impossible to have total division of labor even for those cases dealt before the UN, because there were pure trade concerns that the UN cannot handle but only a trade organization, currently the WTO, can and should.

The lesson learned is that the WTO and the UN could cooperate to complement each other through reflecting their existing functions as crucial primary reference. Technical issues yet remain for detailed consideration of how to situate UN GA Resolutions and SC Resolutions coherently and congruently in both the WTO the UN for issues involving political matters. Nevertheless, a total division of labor between the WTO and the UN even on politically motivated

economic sanction matters, as suggested by the ITO framework, does not seem feasible enough.

4.2 Problems of Applying the *Security Exceptions* beyond the ITO Framework

Given that the trade dispute cases involving politically motivated economic sanction measures also inherently exert purely trade-related concerns that have to be dealt independently by a trade organization, currently the WTO for example, this section aims to delve into the problems of applying the *Security Exceptions* itself beyond the ITO framework. From the assessment in previous section, especially three specific cases stand out for its major problems that should be fundamentally discussed in the GATT or the WTO: 1982 EC, Canada, Australia – Argentina case, 1985 US – Nicaragua case, and 1996 US-EC on Cuban LIBERTAD Act case.

First of all, the 1982 EC, Canada, Australia – Argentina case and the 1996 US-EC on Cuban LIBERTAD Act case are both noteworthy on the fact that the complainant-defendant pair and the sender-target pair of the sanction measures were different. The UN discussions on the relevant political circumstances of the cases can provide dependable illustration of the situation; however, these discussions cannot generate a determination on the trade relationship between the

complaining and defending parties. This limitation supports one important reason why trade disputes even engendered from political circumstances should also be understood clearly as independent trade matters.

Secondly, in scrutiny of the 1985 US-Nicaragua case in order to pinpoint the independent problems of applying the *Security Exceptions* beyond the ITO framework, the GATT Panel is found to be problematic for its crude inability to handle Article XXI within its terms of reference[101]. According to the 1985 US-Nicaragua case, it is stated that the GATT Panel's terms of reference provided that the Panel would examine the measures "in the light of the understanding reached at the Council on 1 October 1985 that the Panel cannot examine or judge the validity or motivation for the invocation of Article XXI:(b)(iii) by the United States.[102]" In other words, the problem of applying Article XXI(b)(iii) in GATT disputes was not only a matter of interpretation for the ambiguous language that does not define the specific conditions of what constitutes or determines the "emergency in international relations," but the crude inability of the GATT of not having any authority to decide on inherently political circumstances. This problem leads to an insolvency problem of *de facto* rescindment of the *Security Exceptions* provision. This is a critical obstacle for the GATT or the current WTO, for it to deal with trade matters relating to economic sanction measures. The Panel's lack of terms of

[101] The GATT Council used to, and currently the DSB Council, first decide/s the terms of reference for the Panel before its legal proceedings. The Panel can only discuss the issues that are within the scope of the terms of reference determined by the Council.
[102] GATT C/M/192, p.6.

reference on the provision implies that any complementary function for the organization to decide on political matters is simply meaningless, when the organization does not have the forum to discuss such matters. In order to treat disputes involving politically motivated economic sanction measures as trade matters, it is first important for the WTO to be equipped with its capacity to appropriately publish the *Security Exceptions* within its terms of reference of the Panel.

In section 4.1, one of the implications of the assessment on the ITO framework was that the UN discussions can be a meaningful reference, while a complete division of labor on political matters between the WTO and the UN may not engender sound efficacy in dealing with trade disputes generated from the practice of economic sanction measures. The analysis on the terms of reference problem observed in the 1985 US-Nicaragua case additionally addresses that the complementary role that the UN discussions can have is valid only if the DSB Council can establish a proper terms of reference of the Panel on *Security Exceptions*. Otherwise, when a complete division of labor, suggested by the ITO, is unfeasible, the WTO essentially loses its authority on trade disputes, which are essentially trade matters with partial political nature.

Thirdly, it can be inferred from the 1996 US- EC on Cuban LIBERTAD Act case that the terms of reference problem in the WTO on GATT Article XXI can also potentially lead to an indirect nullification of GATT *Article XXIII: Nullification or Impairment*. GATT Article XXIII is a provision which ensures any

party to file a case when it observes an impairment of its expected trade benefit. The same right of the damaged party to file a case has had been also elaborated in the interpretative note for paragraph 3 of Article 86 for the ITO Charter. Whether that be in the GATT, WTO or even the envisioned ITO, the third party of the relevant political circumstance was given its right before the trade organization to claim for its impaired benefits. Therefore, for the EC to have filed a complaint based on their impairment or nullification of benefits from extraterritorial application of US sanction measures on Cuba is procedurally legitimate. However, assuming that the case has gone through the Panel proceedings, it is foreseeable that the Council may have not been able to describe the terms of reference for discussing the application of Article XXI, just like in the 1985 US – Nicaragua case. This inherent deficiency of the WTO to cope with the *Security Exceptions* may even cause other subsequent provisions in the WTO jurisprudence to be *de facto* insolvent, when the case is linked with an economic sanction measure with political motivation.[103]

Overall, analyses in section 4.1 and 4.2 together illuminate that trade disputes originated from political circumstances are still majorly trade matters and can only partially be political ones. This finding is crucial for understanding how some arguments in the existing literature or the past GATT discussions that claim that the GATT/WTO cases involving economic sanction measures are inherently political matters are paradoxical. While section 4.1 makes clear that complete

[103] WTO (1995), p. 706.

division of labor with the UN, suggested by the ITO, is unfeasible to treat trade disputes, it recommends how UN discussions have the potential to work as primary references when dealing with relevant disputes in the WTO. At the same time, section 4.2 proved evident from the scrutiny of the three specific cases that the structural deficiencies in the WTO to apply the *Security Exceptions* is a fundamental obstacle for the organization to handle economic sanction measures.

Chapter V. Systematic Problems of the WTO to Deal with Economic Sanction Measures

5.1. Ambiguity Problem of the WTO in Establishing its Jurisdiction on *Security Exceptions*

As signified in Chapter IV, the foremost obstacle for the WTO to apply the *Security Exceptions* is the fact that the WTO is unsure of its own jurisdictional authority on the existing *Security Exceptions*.

Treating an issue of innately dual-characteristics solely as a political matter and making obsolete for a trade organization to have its authority on resolving trade matters is absurd. The case analyses in Chapter IV have evidently illustrated how each trade dispute originated from economic sanction measures was inherently formed and entangled as trade issues, often due to different pairs of disputing parties and those countries politically involved in the relevant circumstances. Even the ITO framework from the original ITO Charter, which aimed for clear division of labor on economic and political matters, was proved to be unfeasible, as trade disputes involving economic sanction measures were neither

solely economic nor political matters.

In order to allow legitimate policy intervention on trade relations and to prevent abusive state practices, the WTO should first properly have its clear jurisdiction on the *Security Exceptions*. The WTO should be able to publish the terms of reference for the Panel on *Security Exceptions* and have clear authority upon trade matters. How to consult or refer to other sources and tribunals for objective decision is a different matter subsequent to the jurisdiction problem.

Furthermore, the recent developments found in the FTA *Security Exceptions* provisions which the US[104] and the EU[105] have concluded bilaterally with other countries support why the WTO as an organization governing the multilateral trade system should strengthen its jurisdiction on its *Security Exceptions*. In NAFTA or many of the former FTAs, they used to replicate the exact wordings of GATT Article XXI; however in recent FTAs, the *Security Exceptions* have been amended to imply more potential for ambiguous and arbitrary application. In the Korea-US FTA, for one example, it is worthy to note that the three sub-subparagraphs of subparagraph (b) of Article XXI is totally eliminated; subparagraph (c) is retained but by intentionally leaving out the word "obligations of the UN Charter" and only maintaining the most controversial language in (b)(iii), "any emergency in international relations." These developments are susceptible for interpretation that the US has the intention to

[104] See Appendix 11.
[105] See Appendix 12.

justify many of its unilateral and subsequently extraterritorially applying measures, especially in the post-Cold War period[106], with no debt to its in-execution of what was discussed or recommended in the UN.

If the *Security Exceptions* is essentially of no use, there would not have been such intentional efforts to amend the *Security Exceptions* in bilateral FTAs by the EU or the US. It is again clear from this illustration that the WTO should establish clear jurisdiction upon its *Security Exceptions* and create a multilateral code of conduct upon economic sanction measures that disrupt trade order; otherwise, more arbitrary practices through FTA provisions may prevail in creating chaos in the world trading system.

5.2. Lack of Procedural Articulation to Apply the *Security Exceptions*

The debate on what is the balance between giving room for security issues in trade relations and guaranteeing no abusive use of the *Security Exceptions* was heated since the Preparatory meetings for the ITO. In fact, the Chairman of the Geneva session Preparatory Committee stated that the fact the Members of the Organization would interpret the *Security Exceptions* provision is the guarantee

[106] See Clark and Wang (2007).

against abuses.[107] However, from the past GATT/WTO case history, it was evident that rather the fact the Members can circumvent judgment on *Security Exceptions* caused many cases to be settled based on power distribution between the disputing Member countries. Historically, the mere existence of the *Security Exceptions* without sufficient elaboration on its procedural articulation caused it to play less role in guaranteeing against abuses than in increasing ambiguity on the scope of the provision and in causing the Member countries to rather abstain from utilizing the WTO as a forum to discuss trade disputes related to economic sanction measures.

Even when it was clearly noted that GATT *Article XXI: Security Exceptions* was within the terms of paragraph 2 of GATT *Article XXIII: Nullification or Impairment*[108], the GATT Council still failed to establish appropriate terms of reference on GATT Article XXI: (b)(iii) for the Panel[109]. Without further elaboration on how the Panel should consult or rely on other tribunals for clear judgment of the case[110], the GATT Panel simply lost its authority to at least comment on the problematic consequences on trade matters.

It is revealed in the case analyses of Chapter IV that the lack of procedural articulation besides the lack of institutional arrangement for clear jurisdiction on the *Security Exceptions* is the biggest problem the WTO faces. Above all, in order

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[107] EPCT/A/PV/33, p. 20-21 and Corr.3; EPCT/A/SR/33, p.3.
[108] EPCT/A/SR.33, p. 5.
[109] GATT C/M/192, p.6.
[110] Paragraph 2 of GATT Article XXIII says that "[t]he 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."

to maintain its identity as an economic organization, the WTO would most likely want to refer to different consultations by the UN or other international tribunals when deciding on political issues of the matter. This process should be elaborated further from what is existing in the current jurisprudence, especially on the technical details of how to adopt non-legally binding resolutions to what extent, for example.

However, it was also shown while assessing the ITO framework of applying the *Security Exceptions* that totally depending on a different authority even just for a political issue may not be feasible, as the two organizations, the WTO and the UN, for example, are essentially governing different matters under different institutional settings. In that sense, the WTO should also develop its own testing mechanism of its currently discursive language of the *Security Exceptions*. In other words, the procedural articulation of the *Security Exceptions* may have to follow a similar structure that of the *Article XX: General Exceptions* of the GATT. Due to an interesting development of the *chapeau*[111] for the current *General Exceptions*, the Panel first decides whether a measure is applied in "a means .f arbitrary or unjustifiable discrimination between countries" when deciding based on Article XX. Furthermore, as the subparagraphs of Article XX starts with the condition of "necessary to," the Panel often performs a necessity test. On the

[111] The *chapeau* of GATT *Article XX* is stated as: "[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 disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting part of measures[.]"

contrary, without the *chapeau*, Article XXI neither distinguishes any arbitrary or unjustifiable discrimination between countries nor performs a necessity test as the language attributes the state to decide its necessity to practice certain measure[112].

Yet, the thesis is also a bit cautious to definitely assert the need of a *chapeau* for the *Security Exceptions* equivalently to the *General Exceptions* of the GATT, as the reason why the *chapeau* had been eliminated particularly for the separate *Security Exceptions* during the drafting history is unclear in the study of existing UN documents (Chapter III). It is true that the *Security Exceptions* may need a new invention in the language for a *chapeau*, if it aims to have one, to fit into its unique circumstances. In addition, other testing criteria to define what is "essential security interest" and determine what constitutes "other emergency in international relations" seem also necessary.

5.3. Outdated Perspective on the Topic of Trade and Security

The problem of the WTO *Security Exceptions* also rises from the outdated perspective that it originally have been carried through in 1947, when the GATT draft was first established. The current *Security Exceptions* language reflects a provisional perspective of the Second World War experience. More than a century has passed since 1947 and the relationship between trade and security issues has

[112] In Article XXI, it is stated as "it considers necessary" where it refers to a Member state.

been changed a big deal as much as the world has developed. When it comes to trade matters, there exist issue-specific and sector-specific security issues which have evolved throughout the past history of world economic growth and globalized trade relations. However, none of those developments are reflected in the current *Security Exceptions*, which inevitably makes the provision obsolete to deal with 21st century trade and security issues.

First of all, new issue-specific security issues are those such as terrorism, raveling civil wars in numerous regions, weapons of mass destruction, to name a few. The scope of 'threat' perceived in the UN Security Council and the General Assembly have diverged from the traditional threat of war and nuclear weapons, especially in the post-Cold War period[113]. However, the *Security Exceptions* in the WTO does not cover specifically any of these new developments on the sources of threat and concerns on security in relation to trade.

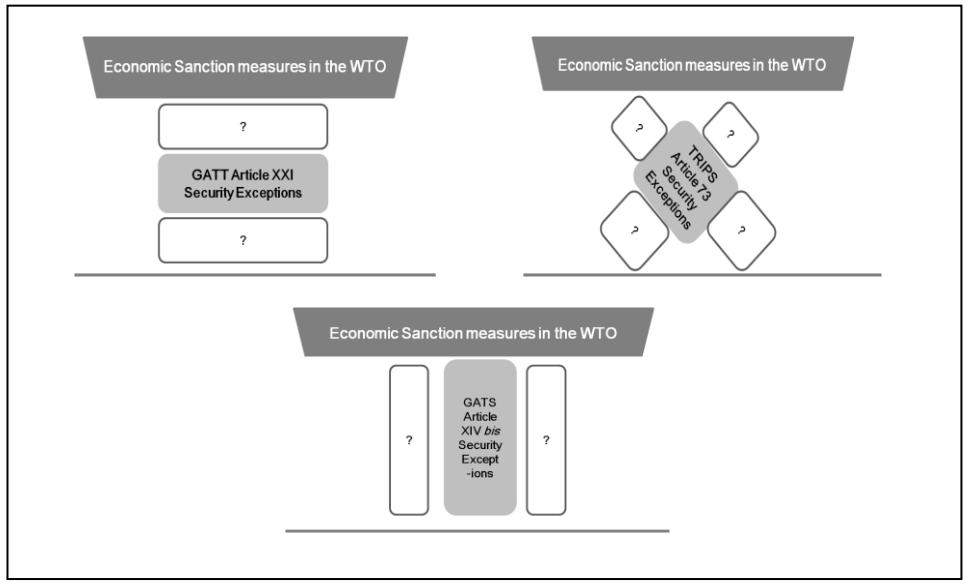
Secondly, the importance of sector-specific concerns of security issues relating to trade can be explained in two perspectives. The two specific WTO dispute cases, US-Section 211 Omnibus Appropriations Act of 1998 (DS176)[114] and US-Measures affecting government procurement (DS 88)[115], are cases that were never formally discussed under Article XXI of the GATT, but which their relevant policy measures at the center of the disputes were economic sanction

[113] Latif (2000), p.27-35.
[114] See WT/DS176/R.
[115] See WT/DS88/1; this case was suspended in the WTO DSB proceedings, and rather decided based on the US Supreme Court decision on the violation of Massachusetts State law against the federal law (Clark and Wang, 2007, p.19-20).

measures of the US. Despite the fact that the origins of the problem causing the dispute in the cases were US economic sanction measures, each of these cases was proceeded as a totally independent commercial case under Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) and Agreement on Government Procurement (GPA), respectively. The thesis does not aim to delve any deeper into the matter; however, these instances imply that there could be sector-specific concerns that make certain cases solely into commercial disputes, while others become politically sensitive issues to be dealt under the *Security Exceptions* clause. Furthermore, sector-specific concerns should be contemplated in more detail in order to take *Security Exceptions* of the GATS and TRIPS as well as that of the GATT. Because the language was simply duplicated from the GATT *Security Exceptions*, security concerns that only services and intellectual property rights can motivate, for example, matters relating to cyber-security, should be reflected into the provisions.

As the world is more integrated with trade and becoming more complicated in its trade relations, there are new demands regarding the topic of trade and security. For the WTO to take its *Security Exceptions* into meaningful effect, the provision should be able to reflect the current world as much as it strives to maintain its fundamental principles.

Figure 9. Different sector-specific and issue-specific pillars are needed to sustain the *Security Exceptions* in each agreement



Chapter VI. Conclusion

This thesis started from the question whether economic sanctions can be WTO consistent. Because the GATT/WTO dispute cases involving economic sanction measures were often concluded to be neither consistent nor inconsistent with the GATT/WTO jurisprudence, the thesis aimed to draw out the fundamental sources of such controversy.

The question for the research was motivated from rather simple curiosity; however the implications the answers of the question exert are found to be very relevant with the current trends of complicated relationship between trade and security. The necessity to strengthen the multilateral framework in the arena of trade and security brings this thesis into the center of the issue.

The thesis pointed out three systematic problems of the WTO in ruling the consistency of economic sanction measures: 1) ambiguity problem of the WTO in establishing its jurisdiction on *Security Exceptions*; 2) lack of procedural articulation of applying the *Security Exceptions*; and 3) outdated perspective on the topic of trade and security. The thesis clarifies how trade disputes involving economic sanction measures are not solely a political matter but inherently a trade matter. Overall, the thesis provides critical implications on how the WTO *Security*

Exceptions should be amended in order to build up sound and fair multilateral trade order, regarding issues on trade and security.

Future studies should include detailed research on how the WTO should improve its jurisdictional and procedural deficiencies to apply the *Security Exceptions*. In addition, as most of the studies were only based on the GATT *Security Exceptions*, future studies should also focus on every each WTO Agreement – GATT, GATS, TRIPS. How the *Security Exceptions* in each of those agreements in the WTO should be amended by reflecting sector-specific and issue-specific concerns should be contemplated in the ever more evolving modern trade era.

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APPENDIX 1.
General Exceptions in the 1945 US Proposal Draft

Chapter III. General Commercial Policy
Section G General Exceptions

The undertakings in this Chapter should not be construed to prevent members from adopting or enforcing measures:

1. necessary to protect public morals;
2. necessary to protect human, animal or plant life or health;
3. relating to the traffic in arms, ammunition and implements of war, and, in exceptional circumstances, all other military supplies;
4. relating to the importation or exportation of gold or silver;
5. necessary to induce compliance with laws or regulations, such as those relating to customs enforcement, deceptive practices, and the protection of patents, trademarks and copyrights, which are not inconsistent with the purposes of the Organization;
6. relating to prison-made goods;
7. imposed for the protection of national treasures of artistic, historic, or archaeological value;
8. undertaken in pursuance of obligations for the maintenance of peace and security; or
9. imposed in exceptional cases, in accordance with a recommendation of the Organization formulate in accordance with criteria and procedures to be agreed upon.

APPENDIX 2.
General Exceptions in the 1946 Suggested Charter for the ITO

Chapter IV General Commercial Policy
Section I. General Exceptions
Article 32. General Exceptions to Chapter IV

Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by a Member of measures:

…

(c) Relating to fissionable materials;

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

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

…

(k) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security; or

…

APPENDIX 3.
General Exceptions in the 1947 New York Draft of the GATT

Article XVIII
General Exceptions

Subject to the requirement that measures are not applied in such a manner as to constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting state of the measure listed below:

…

(c) relating to fissionable materials;

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

(e) in time of war or other emergency in international relations,

…

(k) undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security.

APPENDIX 4.
General Exceptions in the 1947 Geneva Conference Charter Draft

Chapter IX General Provisions
Article 94. General Exceptions

Nothing in this Charter shall be construed

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

(b) to prevent any Member 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 Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

APPENDIX 5.
General Exceptions in the 1947 Geneva Draft of the GATT

Article XIX
General Exceptions

Nothing in this Agreement shall be construed

I.

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

(b) to prevent any Member 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 Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

II. …

APPENDIX 6.
Article 86 of the Havana Charter

SECTION F - OTHER ORGANIZATIONAL PROVISIONS

Article 86

Relations with the United Nations

1. The Organization shall be brought into relationship with the United Nations as soon as practicable as one of the specialized agencies referred to in Article 57 of the Charter of the United Nations. This relationship shall be effected by agreement approved by the Conference.
2. Any such agreement shall, subject to the provisions of this Charter, provide for effective co-operation and the avoidance of unnecessary duplication in the activities of these organizations, and for co-operation in furthering the maintenance or restoration of international peace and security.
3. The Members recognize that the Organization should not attempt to take action which would involve passing judgment in any way on essentially political matters. Accordingly, and in order to avoid conflict of responsibility between the United Nations and the Organization with respect to such matters, any measure taken by a Member directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter shall be deemed to fall within the scope of the United Nations, and shall not be subject to the provisions of this Charter.
4. No action, taken by a Member in pursuance of its obligations under the United Nations Charter for the maintenance or restoration of international peace and

security, shall be deemed to conflict with the provisions of this Charter.

APPENDIX 7.
Interpretative Note to Article 86 in the Havana Charter

Interpretative Note to Article 86
Paragraph 3

Note I

If any Member raises the question whether a measure is in fact taken directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter, the responsibility for making a determination on the question shall rest with the Organization. If, however, political issues beyond the competence of the Organization are involved in making such a determination, the question, shall be deemed to fall within the scope of the United Nations.

Note 2

If a Member which has no direct political concern in a matter brought before the United Nations considers that a measure taken directly in connection therewith and falling within the scope of paragraph 3 of Article 86 constitutes a nullification or impairment within the terms of paragraph 1 of Article 93, it shall seek redress only by recourse to the procedures set forth in Chapter VIII of this Charter.

APPENDIX 8.
General Exceptions in the Havana Charter

Chapter IX. General Provisions
Article 99. General Exceptions

I. Nothing in this Charter shall be construed
- (a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent a Member from taking, either singly or with other States, any action which it considers necessary for the protection of its essential security interests, where such action
  - (i) relates to fissionable materials or to the materials from which they are derived, or
  - (ii) relates to the traffic in arms, ammunition or implements of war, or to traffic in other goods and materials carried on directly or indirectly for the purpose of supplying a military establishment of the Member or of any other country; or
  - (iii) is taken in time of war or other emergency in international relations; or
- (c) to prevent a Member from entering into or carrying out any inter-governmental agreement (or other agreement on behalf of a government for the purpose specified in this sub-paragraph) made by or for a military establishment for the purpose of meeting essential requirements of the national security of one or more of the participating countries; or
- (d) to prevent action taken in accordance with the provisions of Annex M to this Charter.

II. Nothing in this Charter shall be construed to override
- (a) any of the provisions of peace treaties or permanent settlements resulting from the Second World War which

are or shall be in force and which are or, shall be registered with the United Nations, or

(b) any of the provisions of the instruments creating Trust Territories or any other special régimes established by the United Nations.

APPENDIX 9.
Article XXIII:2 Nullification or Impairment in the GATT 1947

Article XXIII Nullification or Impairment

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. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. 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 Secretary1 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.

APPENDIX 10.
Addendum to Article XXI from the 1982 Ministerial Conference

1982 Ministerial Conference
Addendum to Article XXI

1. Subject to the exception in Art.XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Art.XXI;
2. When action is taken under Art.XXI, all contracting parties affected by such action retain their full rights under the General Agreement
3. The Council may be requested to give further consideration to this matter in due course.

APPENDIX 11.
Provision on Security Issues in the Korea-US FTA

ARTICLE 23.2: ESSENTIAL SECURITY

Nothing in this Agreement shall be construed:

(a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

(b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security or the protection of its own essential security interests.

APPENDIX 12.
Provision on Security Issues in the Korea-EU FTA

ARTICLE 15.9: SECURITY EXCEPTIONS

Nothing in this Agreement shall be construed:

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

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

(i) connected with the production of or trade in arms, munitions or war material or relating to economic activities carried out directly or indirectly for the purpose of provisioning a military establishment;

(ii) relating to fissionable and fusionable materials or the materials from which they are derived; or

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

(c) to prevent any Party from taking any action in order to carry out its international obligations for the purpose of maintaining international peace and security.

국문 초록

경제 제재 조치의 WTO 합치성에 대한 연구

경제 제재 조치와 관련된 분쟁 사건들은 GATT 또는 WTO법과 합치하는지에 대한 판결이 역사적으로 모호하게 남아있다. 이러한 논란에 대해 대부분의 기존 문헌들은 GATT 21조 안보 예외 조항의 법적 문제로 쟁점화 하여 설명하고 있다. 하지만 본 논문은 경제 제재 조치의 WTO 합치성에 대한 논란을 WTO의 구조적인 문제로부터 설명한다.

본 연구는 기본적으로 UN, GATT, WTO 원문 회의록과 보고서에 의존한 문헌 연구를 통해 진행되었다. 우선 현재 WTO 안보 예외 조항의 역사적 발전 과정을 분석함으로써, 해당 조항의 본래 목적, 의도, 그리고 제도적 상호 합치성에 대한 이해를 구축하였다. 이 과정에서 ITO 설립이 무산됨에 따라 잊혀졌던 ITO 헌장의 안보 예외 조항 적용 체계가 현재 WTO보다 정교하게 확립되어 있었음을 발견하였다. 본 논문은 경제 제재 조치와 관련된 지난 총 14개의 GATT/WTO 분쟁 사건들을 ITO 헌장의 안보 조항 적용 체계에 따라

판결 유도를 하였다. 그 결과, 기존의 GATT와 현재 WTO의 문제점, 그리고 ITO 체계의 한계점 또한 재평가할 수 있었다.

궁극적으로 본 논문은 위의 연구를 통해 1) 안보 예외 조항에 대한 WTO의 모호한 관할권 문제, 2) 안보 예외 조항의 적용을 위한 정교한 체계 확립의 부족, 3) 무역과 안보에 대한 최신 시각의 부재라는 현재 WTO의 세 가지 구조적 한계점을 지적한다. 또한, 본 논문은 무역과 안보에 대한 다자 체제 구축의 중요성과 필요성을 다시 한 번 상기시킨다. 본 논문이 실제 분쟁 사례들의 분석을 통해 정리한 WTO의 구조적 문제점들은 향후 WTO 안보 예외 조항의 개선과 무역과 안보를 위한 공정한 다자체제 구축에 대한 방향성을 제시한다.

주제어: WTO, 경제 제재 조치, 안보 예외 조항, UN 무역 및 고용회의, ITO, 무역과 안보

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