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Regulatory Problems of Governing Globalization in the WTO: A Focus on Balance-of-Payments Safeguard and Security Exceptions

세계화에 따른 WTO 규범의 과제: 국제수지예외조항과 안보예외조항을 중심으로

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by

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ABSTRACT

Regulatory Problems of Governing Globalization in the WTO: A Focus on Balance-of-Payments Safeguard and Security Exceptions

The world trading system, envisaged as the third pillar of the Bretton Woods system, originally aimed for trade liberalization in order to support peace and stability in the post-war world order. Many of the provisions in the ITO Charter and the GATT supported the work of the United Nations Security Council on deterring war and the IMF on disciplining the fixed par-value system, which were the two essential foundations of the post-war international system. The balance-of-payments safeguard provisions and the security exception provisions in the WTO are the direct remnants of these systemic concerns from the Bretton Woods system, while having lacked sufficient structural reform since then. Despite a dramatic transformation in the international monetary system, global trade environment and world political situation, the Balance-of-Payments Safeguard and Security Exceptions have not gone through a fundamental reform in a series of GATT negotiation rounds. Even in the most recent FTAs among developed economies that adopt advanced regulatory framework on 21st century trade issues, these provisions have often been neglected in the reform process.

A few number of invocation of Balance-of-Payments Safeguard and Security Exceptions in the WTO system does not necessarily represent the obsoleteness of structural relationships of trade with finance and security. Rather, it represents the lack of appropriate regulatory framework for these modern relationships. This study examines the historical evolution of relevant legal provisions in the world trading system and distortions in trade relations through their past and current applications. Ultimately, the study aims to guide and suggest structural challenges of the WTO system in establishing sound relationships between trade and finance in minimizing systemic risks against chronic financial crisis and between trade and security to manage arbitrary execution of economic power in foreign relations.

Keywords: WTO, Bretton Woods system, trade and finance, trade and security, FTAs, global economic governance

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I. Introduction

1. Scope and Significance of Study

This study aims to contribute to the literature on global economic governance specifically on the regulatory problems of governing globalization in the World Trade Organization (WTO). Among many different topics that rise under such debate, this study particularly focuses on the problems of regulatory structures that have been embedded at the inception of a multilateral trading regime to support the overarching conditions of the international system. The envisioned function of the International Trade Organization (ITO)/General Agreement on Tariffs and Trade (GATT) was primarily subject to the United Nations (UN) and International Monetary Fund (IMF) conditions of world peace and economic stability at the time. In that sense, trade and finance and trade and security relationships have been the two fundamental linkages embedded in the international trading regime ever since. In fact, the relevant legal provisions defining these two relationships in the WTO are still haunted by the Bretton Woods legacies, lacking sufficient reform in accordance to the dramatic process of globalization throughout the past decades.

For trade and finance relationship, the study delves into the origin, evolution and challenges regarding the balance-of-payments (BOP) safeguard provision. The

study revisits the ITO origins and GATT amendments of BOP provisions to highlight the failure of WTO BOP provisions to redeem their structural deficiencies. The existing literature have argued the lack of economic justification of BOP safeguard measures, especially after the collapse of the Bretton Woods system, but not necessarily pointed out the outdated structure of the preserved legal provisions in the GATT/WTO. The persistent use of BOP measures by developing countries in the GATT system had been criticized for significantly undermining trade liberalization efforts. Beyond such well-known trend, this study categorizes the types of misuses and abuses of BOP safeguard measures. By doing so, the study pinpoints the problem of legal obscurity of BOP provisions and a need for clear and consistent surveillance standard applicable in the post-Bretton Woods monetary system. The study suggests a reform agenda for the GATT BOP safeguard provision, including ways to substantively coordinate the WTO and the IMF on BOP problems. There has been ample amount of literature pointing out the need for coherence between the Bretton Woods institutions, but this study provides a more concrete proposal on institutionalizing recent IMF developments on reserve adequacy in the WTO.

For trade and security relationship, the study examines the origin, evolution and challenges of Security Exceptions. The study revisits the ITO origins and GATT declarations of Security Exceptions to highlight the failure of WTO Security Exceptions to redeem their structural deficiencies. The existing literature concede that the ambiguity of Security Exceptions is controversial, though arguments have been divisive on whether this provision requires a reform. By structurally

comparing the changed conditions between the Cold War and the post-Cold War period, this study emphasizes that the vague legal conditions of the provision no longer sustains stability of the multilateral trading regime. Recent invocations of Security Exceptions in WTO dispute cases, after a more than 15 years of seemingly intentional avoidance, pressure the WTO dispute settlement body more than necessary. The study provides specific proposals on remanding the provision, to a workable one, suitable to the 21st century security realm.

This study is significant as a stepping stone towards further research on building regulatory coherence within global economic governance. The process of refining the BOP safeguard provision will help the WTO identify its modern role and function of risk prevention and mitigation in the age of chronic economic crises. The proper operation of Security Exceptions is essential in sustaining the multilateral trading system without an insurmountable loophole to Members' basic rights and obligations. Remanding such outdated pillars is as crucial as building new bridges for future challenges. This study aims to provide a small but firm step towards equipping the WTO with regulatory innovations to govern further problems of globalization.

2. Research Methodology

Global trade institutions set the basic rules of the game for international trade.[1] In absence of proper institutions, global externalities occurring from interaction of different states can often lead self-interested states Prisoner's dilemma.[2] Frictions occurring at geographical, cultural and systemic boundaries of states in reality can cause huge transaction costs and pose inherent limitations for economic bargaining.[3] Therefore, deliberate endeavors for cooperative solutions in a global scale is indispensable in the modern open world.

Yet, there are rising tensions in the further process of globalization, as the decision making process remains on the hands of the states, while economic activities are more and more driven by privatized, democratized and even multinational non-state actors. Notably, international organizations have also been continuously extending their influence over state sovereignty as law makers and reviewers.[4] International rules and institutions set upon outdated premises should also evolve along the process of globalization, in order to incorporate dynamic transitions in the realities of the market. In that sense, legal analysis of existing regulatory structures can provide diagnosis to the need for remand on industrial

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[1] Douglas North, *Institutions, Institutional Change and Economic Performance* (Cambridge, UK: Cambridge University Press, 1990), p. 3.
[2] Deepak Nayyar, "Towards Global Governance," in *Governing Globalization, Issues and Institutions* (ed.) Deepak Nayyar (Oxford: Oxford University Press, 2002), p. 13.
[3] In reference to Coase theorem; *refer* to Ronald H. Coase, "The Problem of Social Cost," III *Law & Economics* 1 (1960).
[4] *See* Jose E. Alvarez, *International Organizations as Law-Makers* (New York: Oxford University Press, 2005).

relationships and implications to creating up-to-date international norms.

Accordingly, this study mainly adopts legal analysis in understanding the limits and problems of existing global trade institutions. Yet the study largely benefits from an interdisciplinary approach in analyzing different external factors that have shaped and caused lags in the reform process. For example, the study understands the evolution of the existing institution based on a historical framework of international affairs. At the same time, the main analysis of the system is subject to the relevant legal provisions and case studies. In suggesting a reform agenda, the study combines political and economic perspectives to provide both theory-consistent and practical proposals for the multilateral trading system.

3. Structure of Contents

In Chapter II, the study identifies different problems of governing globalization in the WTO, from a historical point of view. The chapter describes the change in the trading environment, driven by the process of globalization. It discusses how such change in the external context constantly demands more flexible adaptation of the WTO's regulatory structures. Additionally, the chapter elaborates on why a particular focus is shed on analyzing regulatory problems of BOP provisions and Security Exceptions in this study. Chapter III delves into challenges for the WTO to remand trade and finance relationship based on the BOP safeguard provisions. Chapter IV follows to investigate challenges for the WTO to remand trade and

security relationship based on security exceptions provisions. Finally, Chapter V derives common implications from separate analyses of different legal provisions in the WTO for reform. The chapter also alludes to future research agenda regarding maintenance of the WTO system compatible to the next stage and speed of globalization.

II. Identifying Regulatory Problems of Governing Globalization in the WTO

1. Embedded Concerns Linked with Trade Since the 1940s

Looking back to the 1940s, the origin of the ITO can be traced to different facets of the international system. The ITO was considered a specialized agency within the overall UN umbrella, just like any other international organizations at the time, serving to support peace and stability of the postwar international system.[5] At the same time, the ITO was envisioned as the third pillar of the Bretton Woods system, along with the IMF and the International Bank of Reconstruction and Development (IBRD), not only to reconstruct the world economy from postwar devastation, but more so to settle an economic order less susceptible to downturns experienced in the inter-war period.[6] Symbolically, the negotiations that led to the establishment

[5] Havana Charter Article 1 states the Charter "[recognizes] the determination of the United Nations to create conditions of stability and well-being which are necessary for peaceful and friendly relations among nations…." *See Final Act of the United Nations Conference on Trade and Employment: Havana Charter for an International Trade Organization* (Havana Charter) (dated 24 Mar. 1948), retrieved from http://worldtradelaw.net/misc/havana.pdf.download (visited Aug. 15, 2018).

[6] Simon Reisman, "The Birth of a World Trading System: ITO and GATT," in *The Bretton Woods-GATT System, Retrospect and Prospect after Fifty Years*, (ed) Orin Kirshner (New York, USA: M.E. Sharpe Inc., 1996), p. 82; *refer* to Richard Peet, *Unholy Trinity, the IMF, WB, and the WTO* (New York: Zed Books, 2009)

of the Bretton Woods system also marked transition in both political and economic leadership from the imperial United Kingdom (UK) to the United States (US), along the Atlantic Charter.[7]

The design of the new monetary and trading system was highly biased to the legacies of the Great Depression. Studies show that the improper adherence to the gold standard, which the countries used to perceive it as the basis of normal monetary relations, trapped them under the famous macroeconomic trilemma and hindered their reflationary policy options.[8] The two major curses that distressed contemporary economies under depression were unemployment and constant deflationary pressures. The combination of loss of income and persistent fall in price increased the burden of existing debt and was translated into stubbornly dragging demand in the economy. The scars left during the period supported management based on Keynesian thinking, which obsesses on macroeconomic aggregates to pursue full employment policies and maintain strict balance in payments.[9] Many countries were forced to exit the gold under severe deflationary shocks and as most of them were facing BOP deficits, countries ran for competitive devaluation for an edge on exports. Devastating beggar-thy-neighbor policies in the 1930s only aggravated the situation.[10] Speculative activities additionally increased

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[7] Margaret Garritsen de Vries, "The Bretton Woods Conference and the Birth of the International Monetary Fund," in *The Bretton Woods-GATT System, Retrospect and Prospect after Fifty Years*, (ed) Orin Kirshner (New York: M.E. Sharpe Inc., 1996), p. 5.

[8] Nicholas Crafts and Peter Fearon, "Lessons from the 1930s Great Depression," 26(3) *Oxford Review of Economic Policy* 285 (2010), p. 289.

[9] Roberto Campos, "Fifty Years of Bretton Woods," in *The Bretton Woods-GATT System, Retrospect and Prospect after Fifty Years*, (ed) Orin Kirshner (New York, USA: M.E. Sharpe Inc., 1996), p. 104.

[10] After all, protectionist pressures erupted to devise tools to induce more consumer spending in

volatility of currencies that helplessly abandoned the gold, serving as a nightmare for ready torn economies.[11] Even though the rigidness of the gold standard has been the key element of rapid transmission of economic turmoil, such experience kept the willingness of the Bretton Woods architects to commonly prioritize stabilization of the exchange rate.[12] But there were mixed willingness to cooperatively promote liberal trade relations and to ensure domestic full employment policies against external deflationary pressures, typically aggressive by the US and defensive by the UK.[13]

While Article VII of the Mutual Aid Agreement explicitly aimed at abolishing British discriminatory trade relationship based on its imperial preferences towards the Commonwealth countries,[14] the financial matters were considered ready complex and important to serve the basis of the new postwar economic system.[15] The Bretton Woods conference in 1944 only discussed financial matters to establish the IMF and the IBRD. The new rule of the game on monetary relations was adjustable foreign par value expressed in gold-convertible US dollars. Countries were responsible to maintain bilateral balances in payments with no restrictions on

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the domestic economy by defending the level of wage from cheaper imports. The United States introduced the Smoot-Hawley tariff bill in 1930 that led to higher import duties across-the-board. This triggered Canada, Spain, Italy and Switzerland to impose direct retaliatory measures against the United States. The United Kingdom also introduced the Imports Duties Act in 1932 and France, too, adopted exchange controls and quotas to defend its balance-of-payments. *See* Douglas A. Irwin, Petros C. Mavroidis and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), p. 6.

[11] Crafts and Fearon (2010), *supra* note 8, p. 295.

[12] Garritsen de Vries (1996), *supra* note 7, p. 5.

[13] *Refer* to Irwin, Mavroidis and Sykes (2008), *supra* note 10, p. 12-97; Garritsen de Vries (1996), *supra* note 7, p. 5-8.

[14] Irwin, Mavroidis and Sykes (2008), *supra* note 10, p. 14-15.

[15] Roberto Campos (1996), *supra* note 9, p. 100.

current payments, except on scarce currency situations.[16] Other trade issues that demanded reconciliation with domestic needs for development, such as fluctuations in commodity prices and demand management for full employment, were to be discussed separately in the UN Conference on Trade and Employment.[17]

Accordingly, the drafts of the Havana Charter prepared between 1947 and 1948 actually contain broad range of issues related to trade. The GATT that was separately prepared from the Charter focused on reciprocal tariff reductions, that facilitated President Roosevelt's promotion of Reciprocal Tariff and Trade Act (RTAA) in a multilateral level.[18] In the Havana Charter, a political compromise between the UK and the US resulted in chapters for vast extents of issues but with ambiguous disciplines. A chapter on restrictive business practices, included concerns on monopolies and cartels. But the divergent domestic regulations between European practices and American antitrust tradition hardly converged.[19] A chapter on employment represented concerns of the European countries, in fear of the revival of US' deflationary practices, against the lack of safety lock in the monetary system, when the Keynesian plan of the International Clearing Union (ICU) failed to be adopted.[20] A chapter on investment was sensitive to the demands

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[16] Raymond F. Mikesell, "Some Issues in the Bretton Woods Debates," in *The Bretton Woods-GATT System, Retrospect and Prospect after Fifty Years*, (ed) Orin Kirshner (New York, USA: M.E. Sharpe Inc., 1996), p. 24.
[17] Roberto Campos (1996), *supra* note 9, p. 100.
[18] Raymond Vernon, "The US Government at Bretton Woods and After," in *The Bretton Woods-GATT System, Retrospect and Prospect after Fifty Years*, (ed) Orin Kirshner (New York, USA: M.E. Sharpe Inc., 1996), p. 54-59.
[19] William Diebold, Jr., "From the ITO to GATT – And Back?," in *The Bretton Woods-GATT System, Retrospect and Prospect after Fifty Years*, (ed) Orin Kirshner (New York, USA: M.E. Sharpe Inc., 1996), p. 153.
[20] Garritsen de Vries (1996), *supra* note 7, p. 5.

of the American investors for further protection of their rights while many other countries sought freedom of utilizing incoming foreign capital according to the governments' best intentions.[21] A chapter on commodity trade tried to address stable provision of agricultural products and price stability in natural resources necessary for economic recovery, but not necessarily in favor of the periphery countries' industrialization process via export.[22]

In the mid-1940s, the nation states were the main actors both in political and economic matters in the international scene that state autonomy was relatively a more important aspect of international cooperation at the time.[23] This was also true for trade institutions that the GATT and the ITO Charter both carried much exception clauses for sovereign policy spaces. Instead of the strict dispute settlement mechanism that exists in the current WTO system, trade institutions initially endeavored at elaborating withdrawal, amendment, modification and joint action processes of the parties.[24] As non-discrimination principle and general prohibition of quantitative restrictions were stringently applied, more exception provisions were discussed to combat any shackle that could restrict governments pursuing their own domestic policy goals. Such remnants in the GATT include provisions on cinematograph films, marks of origin, exceptions to the rule of non-discrimination, state trading enterprises, trade remedy measures, and general

[21] Diebold, Jr. (1996), *supra* note 19, p. 156.
[22] Roberto Campos (1996), *supra* note 9, p. 100.
[23] Nayyar (2002), *supra* note 2, p. 3.
[24] For example, *see* GATT Articles XXV Joint Action by the Contracting Parties, XXVII Withholding or Withdrawal of Concessions, XXXVIII Modification of Schedules, XXX Amendments, XXI Withdrawal.

exceptions.[25]

At the same time, gearing the trading system compatibly with the existing political and financial system was an important challenge. The utmost goal of the UN was to peacefully deter military conflicts,[26] by approving and utilizing mandatory economic sanctions through the Security Council (SC). It did not exclude the power to adopt unilateral sanctions or collective actions which left a void of legitimacy to different use of economic sanctions. Adhering to such principles, the GATT and the ITO both adopted national security exception clauses that open up the possibility of trade sanctions with strict adherence to the UN Charter, obligating the application of mandatory ones.[27] In relation to the Bretton Woods system, the intertwined relationship among currency, foreign trade, and domestic policy were intricately contemplated even from the beginning of planning. However, at restricting fluctuations of exchange rates and controls on current payments, the architects of the Bretton Woods did not state clear mechanism that restores balance in payments, if not by exchange rate revaluation at fundamental disequilibrium. One mechanism introduced in the trading system was an exception

[25] *See General Agreement on Tariffs and Trade, Text of the General Agreement* (GATT 1947) (Geneva, Jul. 1986), https://www.wto.org/english/docs_e/legal_e/gatt47.pdf (visited Aug. 29, 2018), Articles IV (Special Provisions relating to Cinematograph Films), IX (Marks of Origin), XIV (Exceptions to the rule of Non-discrimination), XVII (State Trading Enterprises) and XX (General Exceptions).

[26] UN Charter Article 1:1 states "[t]he purposes of the United Nations are to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means…."

[27] *Refer* to GATT 1947, *supra* note 25, Article XXI (Security Exceptions); Havana Charter, *supra* note 5, Article 86 (Relationship with the United Nations) and Article 99 (General Exceptions).

clause to allow trade restrictions for the purpose of balancing payments.[28] In line with the scarce currency clause in the Articles of Agreement (AA) of the IMF, the trade institutions adopted clauses that allow trade restrictions equivalent to such monetary practices.[29] As erratic currency practices can also significantly deter normal trade relations, halting postwar recovery, a prosperity in the trading system was premised on a stable management of exchange rates.[30]

Meanwhile, the establishment of the ITO failed in 1950 and most of the relevant economic policy concerns, like investment and restrictive business practices, linked with trade activities vanished in the realm of multilateral trade regulation. The world that the, both institutionally and substantially, feeble GATT[31] had to survive soon faced a rapid course of globalization through remarkable economic opening in all trade, investment and financial flows as well as economic integration in both demand and supply sides of the market.[32] The scope of activities also extended to flows of services, technology, information and ideas across national boundaries. At the same time, the economic role of the nation state has gradually been constrained, through processes of liberalization and privatization, if not political ones.[33]

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[28] *Refer* to GATT 1947, *supra* note 25, Article XII (Restrictions to Safeguard the Balance of Payments); Havana Charter, *supra* note 5, Article 21 (Restrictions to Safeguard the Balance of Payments).

[29] *Refer* to GATT 1947, *supra* note 25, Article XIV (Exceptions to the rule of Non-discrimination); Havana Charter, *supra* note 5, Article 23 (Exceptions to the rule of Non-discrimination).

[30] *Refer* to GATT 1947, *supra* note 25, Article XV (Exchange Arrangements); Havana Charter, *supra* note 5, Article 24 (Relationship with the International Monetary Fund and Exchange Arrangements).

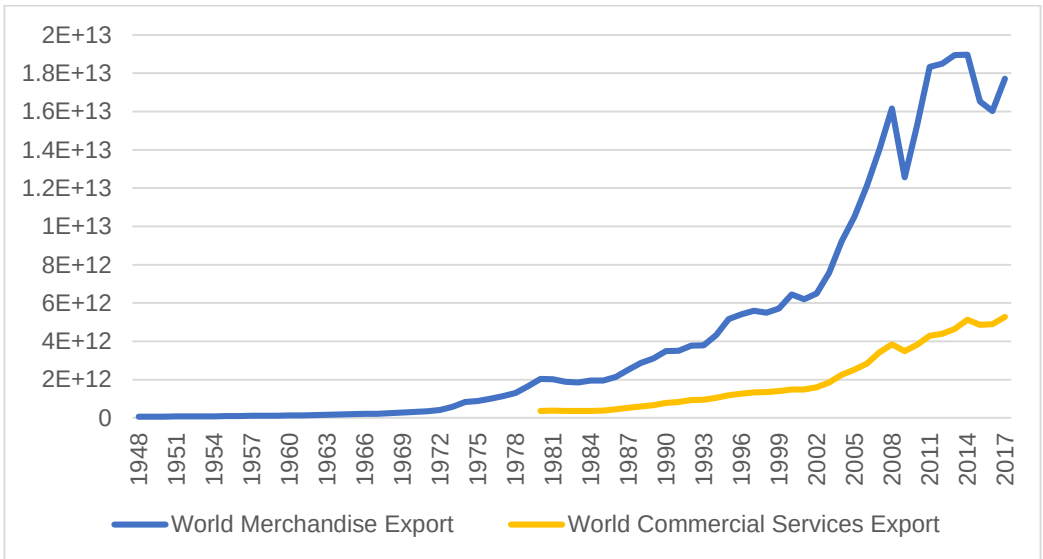
[31] John H. Jackson, *The World Trading System, Law and Policy of International Economic Relations*, Second edition (Cambridge: Massachusetts Institute of Technology, 1999), p. 39

[32] Deepak Nayyar (2002), *supra* note 2, p. 7.

[33] *Ibid.*

Governments became to share the stage with significant non-state actors, such as corporate entities and civil societies.

Graph 1. World Exports of Goods & Services, in US Dollars
(Goods: 1947-2017; Services: 1980-2017)



Source: Compilation of data from WTO Statistics at http://stat.wto.org/Home/WSDBHome.aspx by the author

For five decades, the GATT cleverly nurtured itself into a bulky institution that finally lived up to the expectations of the ITO through establishing the WTO in 1994. As much as notable developments in trade regulations, such as the adoption of multiple agreements on trade in goods, General Agreement on Trade in Services (GATS), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Understanding of the Dispute Settlement (DSU), there are also serious deficiencies the organization has yet to overcome in coping with challenges of globalization. Modern trade relations with capital, security, technology and sustainability require much contemplation, even further than how the architects of

the initial Bretton Woods system considered.

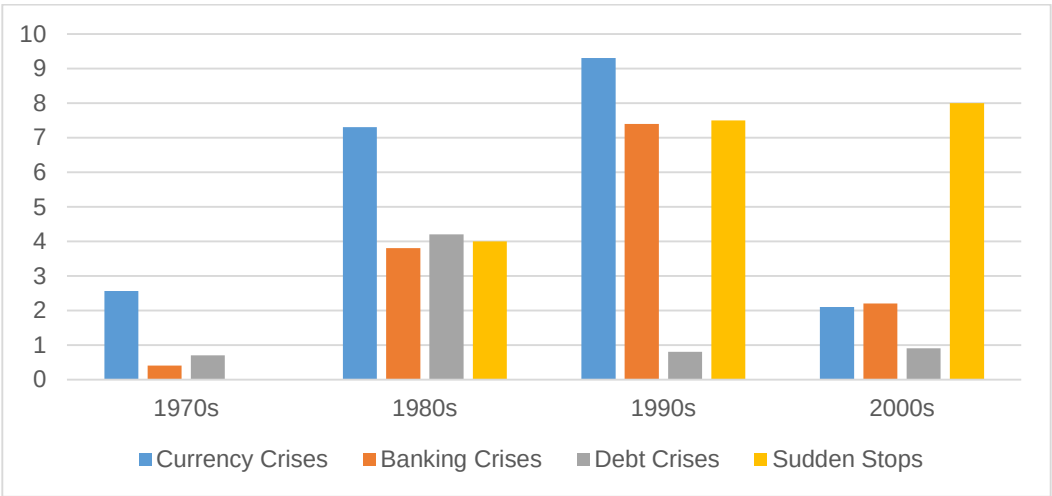
2. Globalization and Limited Adaptation of the WTO

The quarter end of the twentieth century marked the most rapid and comprehensive progress of globalization. More or less, the expansion of the GATT was a process of elaborating formal obligations of trade liberalization and inviting newly emerging economies into the major scene of economic transactions. The basic approach of state negotiations and the structural setting of the GATT, based on the understanding of merchandise trade between geographically separated markets, were not fundamentally revisited even at the Uruguay Round. While the GATS and TRIPS carried far-reaching implications to much extended scope of trade, the actual structure of regulatory provisions were mostly replicated from the traditional rule of the GATT. The newly established WTO was burdened with a stack of homework to adapt to consequences of globalization, including liberalization of capital flows, technological innovation and emergence of non-state actors, by the end of the twentieth century.

Especially the breakdown of the Bretton Woods system had groundbreaking implication not only for the IMF and the World Bank to rethink of their roles but also for the GATT. As noted in the initial objectives of trade institutions in the 1940s, the core function of Bretton Woods institutions was set to deal with BOP difficulties

in cooperation of each other.[34] The collapse of the fixed par value and relaxation of strict capital controls met a new era of flexible parities and rapid expansion of capital flows through foreign direct investments (FDIs), portfolio debts, portfolio equity and derivatives not only within industrialized countries but also gradually to and from emerging economies.[35] Policy options and mechanisms to manage the BOP differed by countries, while consequences of domestic policies were ever more intertwined among different economies.

Graph 2. Average Number of Financial Crises over Decades
(crises: 1971-2007 | sudden stops: 1980-2009)



Source: Replication of "Figure 5." from Stijn Claessens and M. Ayhan Kose, "Financial Crises: Explanations, Types, and Implications," *IMF Working Paper* (dated January 2013), WP/13/28, p. 61.

* The number of crises during 1971-2007 are counted based on data from Luc Laeven and Fabian Valencia, "Systemic Banking Crises: A New Database," *IMF Working Paper* (dated November 2008), WP/08/224 and the number of sudden stops during 1980-2009 are counted based on data from Kristin J. Forbes and Francis E. Warnock, "Capital Flow Waves: Surges, Stops, Flight, and Retrenchment," 88 *Journal of International Economics* 235 (2012).

[34] Diebold, Jr. (1996), *supra* note 19, p. 159.
[35] Committee on Global Financial System of Bank for International Settlements, "Capital Flows and Emerging Market Economies," *CGFS Papers,* No. 33 (dated Jan. 2009), p. 25-40.

What such transition meant to the vulnerability of the world economy was a new era of not fewer currency crises but even more banking crises, twin crises, and higher risk of sudden stops contaminated by sudden capital surge and flights.[36] While trade policy served a subsidiary role in managing cyclical and temporary imbalance in payments under the Bretton Woods system, the new era made normal trade relations easily susceptible to volatilities in the financial market. The trade institution became to require expansion of its concerns over investment, financial markets, and macroeconomic coordination. Partially, it was achieved through the adoption of GATS and Agreement on Trade-Related Investment Measures (TRIMS) in the Uruguay Round. But outdated structures such as the BOP safeguard provisions were only retained in the GATT and incompletely added in the GATS.[37] The Coherence Mandate adopted in the WTO aims to ensure constant endeavors to enhance cooperation and compatibility among the Bretton Woods institutions, but major efforts are seemingly left to the effectiveness of communication at the staff-level.[38] An important linkage to facilitate macroeconomic coordination is missing in today's global economic governance.

In parallel to such transition in the dimension and scope of economic transactions, one of the most intriguing trade practices retained in the WTO system

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[36] Stjin Claessens and M. Ayhan Kose, "Financial Crises: Explanations, Types, and Implications," *IMF Working Paper* (dated Jan. 2013), WP/13/28, p. 11-21; *Refer* to Michael Bordo, Barry Eichengreen, Daniela Klingebiel, Maria Soledad, Martinez-Peria and Andrew K. Rose, "Is the Crisis Problem Growing More Severe?," 16(32) *Economic Policy* 51 (2001).

[37] *Refer* to *Marrakesh Agreement*, Annex 1B, *General Agreement on Trade in Services* (GATS) (1994), Article XII (Restrictions to Safeguard the Balance-of-Payments).

[38] Marc Auboin, "Fulfilling the Marrakesh Mandate on Coherence: Ten Years of Cooperation between the WTO, IMF and World Bank," *WTO Discussion Paper*, No. 13 (2007), p. 32.

is antidumping measure, that mainly used to serve mercantilist interests within imperial relations. Existing literature has come up with explanations for dumping practices as exploitation of monopolistic power,[39] predatory pricing,[40] and adjustment strategy on demand fluctuations to explain the use of antidumping measures.[41] Even though punishing such price discrimination practice has always been controversial despite the legal standing of the measure,[42] antidumping duties since the 1970s have been the most frequently utilized trade remedy tool.[43] Repeatedly, studies sought to suggest better policies in dealing with dumping practices, proposing that anti-competitive practices should ultimately be built in the WTO rules, echoing the foregone plans of the ITO.[44] At the first WTO Ministerial Conference, competition policy has been voted as one of the five Singapore Issues of priority, but these were later withdrawn from the Doha Development Agenda,

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[39] *Refer* to Jacob Viner. *Dumping: A Problem in International Trade* (Chicago: Chicago University Press, 1927).

[40] *Refer* to Paul Joskow and Alvin K. Klevorick. "A Framework for Analysing the Predatory Pricing Policy, 89 *Yale Law Journal* 213 (1979); Frank H. Easterbrook. "Predatory Strategies and Counter-Strategies," 48 *University of Chicago Law Review* 263 (1981).

[41] *Refer* to Dan Bernhardt. "Dumping, adjustment costs and uncertainty," 8 *Journal of Economic Dynamics and Control* 349 (1984).

[42] *Refer* to Bruce A. Blonigen and Thomas J. Prusa. "The Cost of Antidumping: the Devil is in the Details," 6(4) Policy Reform 233 (2003); Kyle Bagwell and Robert W. Staiger. "The Design of Trade Agreements," in *The Handbook of Commercial Policy,* (eds.) Kyle Bagwell and Robert W. Staiger (Amsterdam: North-Holland, 2016).

[43] *Refer* to Thomas J. Prusa. "On the Spread and Impact of Antidumping," *NBER Working Paper* No. 7404 (1999); Thomas J. Prusa. "Antidumping: A Growing Problem in International Trade," 28(5) *The World Economy* 683 (2005); Chad P. Bown. "Taking Stock of Antidumping, Safeguards and Countervailing Duties, 1990-2009," 34(12) The World Economy 1955 (2011); Bruce A. Blonigen and Thomas J. Prusa. "Dumping and Antidumping Duties," NBER Working Paper No. 21573 (2015).

[44] *Refer* to Patrick A. Messerlin. "Competition Policy and Antidumping Reform: An Exercise in Transition" in *Competitive Liberalization and Global Free Trae: A Vision for the Early 21st Century*, (ed.) C. Fred Bergsten (Washington DC: Institute for International Economics, 1996); Bernard Hoekman. "Competition Policy and the Global Trading System," *Policy Research Working Paper* No. 1735, World Bank (1997).

facing much contention.[45] Ever since the competition chapter in the ITO Charter has lost its way of revival in the context of trade dialogues, policy intervention on trade incentives has been limited to the use of myopic trade remedy measures.

Inherently, these trade remedy actions on trade in goods are product-based and levies are subject to either the government or the firm based on the exporting country's territorial border. In the meantime, acceleration of information and communication technology revolution allowed production stages[46] to be held in distant spatial areas, proliferating global value chains across nation borders.[47] Antidumping measures were ready utilized mostly by developed countries to counter their increasing relative inefficiency in labor-intensive industries.[48] Yet, the rise of global value chains, usually seeking natural resources and labor-intensive intermediate goods offshore, cause levies raise the cost of manufacturing in downstream industries. The nullification of terms-of-trade benefits not only happens within the injured sector but can negatively affect the whole global production network. The GATT rules on antidumping measures have developed through the Kennedy, Tokyo and the Uruguay Rounds, but domestic successes of

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[45] WTO, *Investment, Competition, Procurement, Simpler Procedures*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm.

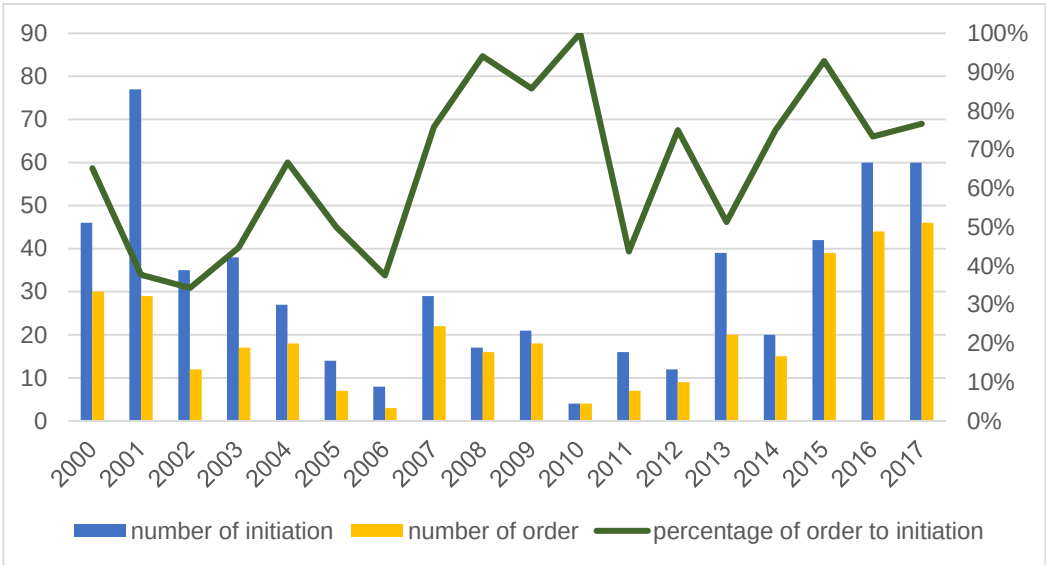
[46] *Refer* to Richard Baldwin, "Trade and Industrialisation after Globalisation's Second Unbundling: How Building and Joining a Supply Chain are Different and Why It Matters," NBER Working Paper No. 17716 (2011).

[47] *Refer* to Gary Gereffi, John Humphrey and Timothy Sturgeon, "The Governance of Global Value Chains," 12(1) *Review of International Political Economy* 78 (2005); Gary Gereffi. "Global Value Chains and International Competition," 56(1) *The Antitrust Bulletin* 37 (2011); Gary Gereffi. "Global Value Chains in a Post-Washington Consensus World," 21(1) *Review of International Political Economy* 9 (2014).

[48] *Refer* to Douglas A. Irwin. "The Rise of US Anti-dumping Activity in Historical Perspective," 28(5) *The World Economy* 651 (2005), p. 651-656 on the preparation of US antidumping law.

overcoming injury determination procedure and the size of margins have been growing in the US even recently.[49]

Graph 3. US Practice of Antidumping Investigations and Orders, 2000-2017



Source: Compilation of data from ITA, *Enforcement and Compliance – Antidumping and Countervailing Duty Investigations Initiated After January 01, 2000*, retrieved from https://enforcement.trade.gov/stats/inv-initiations-2000-current.html (last visited Dec. 14, 2018) and USITC, *Antidumping and Countervailing Duty Investigations*, retrieved from https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations.htm (last visited Dec. 14, 2018) and USITC, "Antidumping and Countervailing Duty Orders in Place, as of December 14, 2018" by the author.

The enlargement of WTO Members in the 2000s awoken the issue of dealing with non-market economies (NMEs) and state-owned enterprises (SOEs), issues that have been dismissed ever since the withdrawal of the Havana Charter.[50] Countervailing duties against China started to be considered in 2006 and China has

[49] *Ibid.*; Bruce Blonigen. "Evolving Discretionary Practices of US Antidumping Activity," 39(3) *The Canadian Journal of Economics* 874 (2006), p. 875; *refer* to [Graph 2.] as well.
[50] *Refer* to GATT Article XVII State Trading Enterprises; Havana Charter, Section D State Trading and Related Matters (Articles 29-32) in Chapter IV Commercial Policy.

been constantly attacked by many of its trading partners.[51] New rules on SOEs developed in some regional trade agreements seem to follow the basic structure of a subsidy framework in the WTO to control traffic in global market for fair competition.[52] Yet, none of these endeavors are officially adopted in the WTO.

Allegations over problems of the existing trade remedy system have been pervasive since the 2000s, and even more increasing due to further implications of interacting with the rise of global value chains. But empirical studies are catching up only recently, as data on trade in value-added are finally compiled for a significant range of time period.[53] There are growing literature aimed at re-figuring theory of optimal trade policy by factoring in the characteristics of global value chains and focusing on welfare effects of trade in value-added.[54]

Besides, the introduction of GATS has been critical in discussing the trade remedy mechanism suitable for services trade. Due to the nature of services industry, domestic injury upon market opening may be inevitable and even severer than in manufacturing industries. But the question of how to impose trade remedy actions depending on the mode of supply suffers from finding a practical answer. For example, prohibiting business for a notified period of time on investment already

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[51] Dukgeun Ahn, Ji Yeong Yoo and Minjung Kim. "Analysis on Legal Issues and Characteristics of Chinese Subsidies Subjected to Countervailing Measures," 123 *International Trade Law* 9 (2015, *In Korean*), p. 11.

[52] For example, *refer* to Chapter 17 State-Owned Enterprises of the Trans-Pacific Partnership (TPP) Agreement, (signed on 4 Feb. 2016).

[53] *Refer* to World Bank Group, IDE-JETRO, OECD, UIBE, WTO. *Global Value Chain Development Report 2017 – Measuring and Analyzing the Impact of GVCs on Economic Development* (2017).

[54] For example, *see* Emily J. Blanchard, Chad P. Bown, Robert C. Johnson. "Global Value Chains and Trade Policy," *NBER Working Paper* No. 21883 (2017).

presiding in the domestic market (mode 3) as a safeguard measure would be puzzling in terms of proportionality and applicability. This may also contradict with investment rules set in other bilateral Free Trade Agreements (FTAs). In fact, the legal provisions on trade remedy actions in the GATS calling for a proper establishment of these mechanisms have not undergone any progress in the Doha Round.[55]

Furthermore, the prevalence of digital trade that construes the geographical nature of combined transactions of both goods and services even further complicates the future of policy intervention on trade incentives. The internet platform suppliers tend to monopolize the global market these days and services they provide are not based on certain geographical boundaries. The recent antitrust battle in the EU against Google is one example of how domestic competition rules regulate multinational companies on certain business activities affecting price.[56] As another example, net-neutrality policies could become a prevalent tool in managing trade remedy effects for digital trade.[57] In remanding the structure of international trade rules on how policy can intervene into private business activities,

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[55] *See* GATS, *supra* note 37, Articles X (Emergency Safeguard Measures) and XV (Subsidies).

[56] Foo Yun Chee, "Europe Hits Google with Record $5 Billion Antitrust Fine, Appeal Ahead," *Reuters* (dated Jul. 18, 2018), retrieved from https://www.reuters.com/article/us-eu-google-antitrust/europe-hits-google-with-record-5-billion-antitrust-fine-appeal-ahead-idUSKBN1K80U8 (last visited Dec. 15, 2018).

[57] While competition policy has dropped out of the agenda of the Doha Round, GATS Reference Paper on Basic Telecommunications exceptionally deals with some of antitrust issues in the telecommunications sector. In fact, there are debates on whether US FCC's decision to withdraw net-neutrality policy in 2015 is in violation of the GATS. *Refer to* Jennifer A. Manner with Alejandro Hernandez. "An Overlooked Basis of Jurisdiction for Net Neutrality: The World Trade Organization Agreement on Basic Telecommunications Services," 22 *Commlaw Conspectus* 57 (2014); David Hartridge, *Client Alert – Internet Neutrality and WTO Rules*, White & Case (2015).

the units of accounting, origin of products, methods of supply should all be reconsidered to fit into the realm of 21st century trading environment.

On the other hand, the discussions on economic and social development have ripened in the UN by the 1990s. The WTO, at its establishment, also engraved its objective relevant to sustainable development in the preamble,[58] in order to balance values of trade liberalization with other sustainability goals and to reflect further demands of the developing countries.[59] However, various issues in line with progress in other international systems started to clash seriously with the WTO. For example, biodiversity for food and nutrition has driven cross-cutting debates within the existing WTO rules. As the UN Convention on Biological Diversity (CBD) states, the issue directly contributes to food security, nutrition and preserving agricultural ecosystem.[60] In certain aspects, regulating agricultural and fisheries subsidies can lower trade-distorting measures as well as help discipline land degradation and overfishing.[61] Biodiversity can even address under-nutrition associated with poverty and development, but the concern can be multifaceted as the policy approach of prohibiting government support on agricultural products can

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[58] WTO, Preamble, *Marrakesh Agreement Establishing the World Trade Organization*, retrieved from https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (last visited Dec. 15, 2018).
[59] *Refer* to John H. Jackson, *Restructuring the GATT* (New York: Council of Foreign Relations Press, 1990); John H. Jackson. "World Trade Rules and Environmental Policies: Congruence or Conflict?," 49 *Washington and Lee Law Review* 4 (1992); Michael Ming Du, "The Rise of National Regulatory Autonomy in the GATT/WTO Regime," 14(3) *Journal of International Economic Law* 639 (2011); Wenwei Guan, "How Should the GATT General Exceptions Be?: A Critique of the 'Common Intention' Approach of Treaty Interpretation," 48(2) *Journal of World Trade* 219 (2014).
[60] United Nations, Preamble, *Convention on Biological Diversity* (1992), retrieved from https://www.cbd.int/doc/legal/cbd-en.pdf (last visited Dec. 15, 2018).
[61] ICTSD, "Biodiversity for Food and Nutrition at the WTO," *COP-8 Biodiversity and Trade Briefing*, No. 3 (2006).

contradict with special and differential treatment principle towards less developed Members. There are couple more ways the debates take place in particular concern under the WTO. Biodiversity can be threatened by the TRIPS obligation on securing exclusive rights of private plant breeders on improved seeds. It could include bio-piracy by patenting the invention based on the genetic resources and traditional knowledge from the originating country. Similar discussions on disclosure of traditional knowledge and folklore for fair and transparent sharing of property rights are taking place in the TRIPS Council, at the World Intellectual Property Rights Organization (WIPO), and individual states' domestic law.[62] Particularly for the WTO, how to balance the rights of private breeders, commercial interests of poor farmers, and preservation of genetic diversity of crops is a sustainability issue of the institution. Furthermore, treatment of invasive alien species under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) is not merely an issue of border control as trade barriers, but it is aligned with a global sustainability issues of conserving biodiversity of distinctive local flora and fauna.[63] The WTO has the responsibility to cooperate with non-trade organizations such as the International Plant Protection Convention (IPPC) and World Organization for Animal Health (OIE) for the issue.

Trade and climate change has also been a hot potato in line with subsidy rules

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[62] WTO, *Background and the Current Situation, TRIPS: Reviews, Article 27.3(b) and Related Issues*, retrieved from https://www.wto.org/english/tratop_e/trips_e/art27_3b_background_e.htm (last visited Dec. 15, 2018).

[63] WTO, Defending Biodiversity from 'Alien Species' – Role of Trade Rules Examined, Sanitary, Phytosanitary Measures: 'Invasive Alien Species' Seminar (dated 12-13 Jul. 2012), retrieved from https://www.wto.org/english/news_e/news12_e/sps_18jul12_e.htm (visited Dec. 14, 2018).

in the WTO. While non-actionable subsidies in the WTO regime terminated in 1999, the debate on an environment-friendly energy subsidy regime has been reviving in recent years.[64] Some arguments claim applying GATT Article XX(b) to the SCM Agreement is insufficient that the WTO needs a new supportive structure that links trade and climate change regimes.[65] Furthermore, trade and labor is another tangible issue within the broader concept of trade and human rights. As the WTO declared in 1996 that it will observe internationally recognized labor standards,[66] the ILO conventions prohibiting child labor[67] can lead to trade sanctions if the imported product are produced in violation of the convention. However, how far these standards are going to aim and mandatorily thwart trade is another concern. In fact, the quality of handling these issues depends more on active participation of private actors in the realm of corporate social responsibility than top-down government restrictions. Acknowledgement of progressive standards incorporated in recent FTAs[68] may be encouraging but effectiveness of regulating human rights

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[64] *Refer* to Patrice Bougette and Christophe Charlier, "Renewable energy, Subsidies, and the WTO: Where Has the 'Green' Gone?," 51 *Energy Economics* 407 (2015).

[65] *Refer* to Ilaria Espa and Gracia Marin Duran, "Renewable Energy Subsidies and WTO Law: Time to Rethink the Case for Reform Beyond Canada – Renewable Energy/FIT Program," 21(3) *Journal of International Economic Law* 621 (2018).

[66] WTO, *Labour Standards: Consensus, Coherence and Controversy, Understanding the WTO: Cross-Cutting and New Issues*, retrieved from https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm (visited Dec. 5, 2018).

[67] *See* ILO Labor Convention No. 138, Minimum Age Convention (1972) and No. 182, Worst Forms of Child Labour Convention (1999).

[68] *Refer* to Kimberly Ann Elliott and Richard B. Freeman, *Can Labor Standards Improve Under Globalization?* (Washington DC: Institute for International Economics, 2003); Pablo Lazo Grandi, *Trade Agreements and Their Relation to Labour Standards*, *ICTSD Programme on EPAs and Regionalism*, Issue Paper No.3 (dated Nov. 2009); Cathleen Cimino-Isaacs, "Labor Standards in the TPP," in *Trans-Pacific Partnership: An Assessment*, (eds.) Cathleen Cimino-Isaacs and Jeffrey J. Schott (Washington DC: Peterson Institute of International Economics, 2016).

through a trade policy tool should also be contemplated on its holistic implications.[69]

Such topics discussed under the theme of sustainable development are, in fact, in line with the concept of human security, adopted at the UN.[70] In other words, this reflects how the realm of security has been broadened over the course of globalization from strictly military complications to other aspects of life and survival in general. Sanctions can now become a direct source of political conflict as economic leverage has grown through much interdependence and integration between states. Not only diplomatic crisis but also a lack of global public good can now be considered as national security concerns. Issues like cybersecurity involves a totally different dimension of warfare from a traditional sense. However, the WTO is hardly equipped to manage these diverse and fast-paced challenges of globalization under its current structures.

In fact, many of these challenges of globalization do not lay within the WTO itself. Most of them essentially requires regulatory coherence, policy coordination, and cooperative commitments with other institutions and a group of states both externally and internally of the WTO. Yet, identifying withered structures for reform within the WTO could serve as a starting point for enhancing the capacity of the WTO in governing globalization. Specifically, this study examines specific

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[69] Some further insights on addressing human rights issues with trade policy can be found at Michael Ewing-Chow, "First Do No Harm: Myanmar Trade Sanctions and Human Rights," 5(2) *Northwestern Journal of International Human Rights* 157 (2007).

[70] United Nations, General Assembly Resolution, A/RES/66/290 states that "human security is an approach to assist Member States in identifying and addressing widespread and cross-cutting challenges to the survival, livelihood and dignity of their people."

legal provisions that define the rights and obligations of Members over two fundamental trade relationships and discuss their regulatory problems and challenges of the WTO in terms of governing globalization.

3. A Focus on the Problems of Balance-of-Payments Safeguard and Security Exceptions

Among a list of WTO difficulties in governing globalization, this particular study aims to focus on the most fundamental nexus embedded since the establishment of the trading system. The premises to support the existing international system based on the UN and other Bretton Woods institutions were essential to the identity of the ITO and the GATT in the 1940s. However, over the course of globalization many of the previous conditions of the international system fundamentally changed as much as the transformed identity of the GATT to the WTO. The following chapters will each examine the existing legal relationship of trade with finance and security, specifically based on BOP safeguard provisions and security exceptions provisions in the WTO. The assessment on their misalignment would hopefully provide suggestions of reform, as a first step, within the capacity of the WTO.

As the trade arrangement was settled the latest among the three – the UN, the IMF, and the ITO/GATT – the provisions in the trade agreements stated principles and obligations regarding institutional jurisdiction and division of labor with the

UN and the IMF. The ITO used to have a provision regarding its relationship with the UN in Article 86 of the Havana Charter, and the GATT retained a provision on the relationship with the IMF in Article XV.

The ITO envisioned itself as a special agency to the UN[71] and no action taken for the pursuance of obligations under the UN Charter was to be construed by ITO obligations.[72] Any political matter brought before the UN and the ITO was to be dealt under the scope of the UN.[73] Such formal relationship vanished when the ITO Charter was abandoned by the US Congress. The only indistinct relationship has been stated in GATT Article XXIII:2, where "the contracting parties [are permitted to] consult with … the Economic and Social Council of the United Nations … in cases where they consider such consultation necessary." The WTO, as a formal institutional entity, started to renew its relationship with the UN after almost 50 years of quasi-institutional operation of the GATT.[74]

On the contrary, the GATT from the beginning carried Article XV separately from the ITO Charter that outlines partial relationship with the IMF relating to exchange actions. Despite the initially provisional nature of the GATT, the IMF authority on exchange actions directly linked as means of transactions in trade in goods would have called for a dire need of clarification between trade and finance in the GATT.

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[71] Havana Charter, *supra* note 5, Article 86:1.
[72] *Ibid*., Article 86:4.
[73] *Ibid*., Article 86:3.
[74] Having arranged through a protocol of provisional application, the GATT has been named to have "birth defects. *See* John H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (London: Royal Institute of International Affairs, 1998), p. 15.

GATT Article XII has provided room for the contracting parties to temporarily intervene into trade for the sake of maintaining the practically fixed exchange rate in a more stable manner. Especially given the devastating experience of downward spiral in the 1930s, for the deficit-bound countries, a BOP safeguard represented a temporary relief for economic stability from imminent threat of reserve depletion that can lead to currency volatility.[75] Reflecting the most preferred policy tool at the time, the BOP safeguard was allowed in forms of quantitative restrictions, despite the general obligation to eliminate them under the GATT. The systemic weight of such exception clause at the time is reflected in GATT Article XXIV, where free-trade areas requiring liberalization on substantially all the trade even allows cases relating to Article XII for a legitimate exemption.[76]

Likewise, the use of economic sanctions has been officially accepted as an effective alternative to military confrontation under the UN system. While sanction authorized by the UN SC could overrule any other multilateral obligations,[77] the sovereign states have not been constrained from imposing unilateral or plurilateral sanctions under the UN Charter. Having gone through twice of major scale wars, the contracting parties of the GATT demanded, on the one hand, an increase in economic interdependence that will raise the trade-off of moving into a chicken game; on the other hand, a full guarantee of sovereign action in times of national security emergency. Political instability and remaining skepticism of the time provided an open-ended exception clause, while prospecting a practice of

[75] *Refer* to *supra* note 9.
[76] *See* GATT 1947, *supra* note 25, Article XXIV:8.
[77] *See* UN Charter, Articles 39-43.

considerate invocation.

The common problem the WTO faces today is that trade policy is no longer a mere subsidiary tool unilaterally supporting the core objectives of the international system. In the past several decades, the world trading system has not only grown for its own sake but trade has become an essential source of power and a major factor driving economic fundamentals. The importance of mutual relationships between trade and finance and trade and security for policy coordination is higher than ever. Yet, the overdue structures in the WTO system have not withered away and been haunting the current relationships.

When the flexible exchange rate system was facilitated among the advanced economies in the 1970s, the GATT BOP safeguard measure already lost its rationale.[78] As more emerging economies underwent financial deepening, the realm of issue on economic volatility of developing countries also moved on much towards the management of capital account transactions. Even if current account management is still important in managing systemic risks, trade restrictions are no longer considered a key policy response. In fact, the current economic system is warier on the fact that undisciplined exchange rate arrangements could harm trade relations.[79] The WTO BOP Committee initiated discussions on trade and BOP

[78] *Refer to* C. Fred Bergsten, "Reforming the GATT: The Use of Trade Measures for Balance-of-Payments Purposes," 7 *Journal of International Economics* 1 (1977).

[79] This debate is often termed as exchange rate misalignment intruding trade relations. Global imbalance has been an issue blaming China on manipulating its exchange rate for more than a decade. This issue has also been debated under the context of export subsidy under the WTO SCM Agreement as well as possible violation based on GATT Article XV:4. *Refer* to Gregory Shaffer and Michael Waibel, "The Misalignment of the Trade and Monetary Legal Order," in *Transnational Legal Orders*, (eds.) Terence Halliday and Gregory Shaffer, (New York: Cambridge University Press, 2015); Robert W. Staiger and Alan O. Sykes, "'Currency Manipulation' and

issues until the early 2000s, but the focus soon moved towards broader and new ties directly affecting trade. With the launch of Doha Round in 2001, relevant discussions in the realm of trade and finance had been initiated in divergent perspectives under the working parties on trade and investment, trade and development, and trade, debt and finance. The discussion on the WTO Coherence Mandate came up with various aid facilities and trade finance for the least developed economies' growth and trade.[80] However, progress in more fundamental and advanced relationship between trade and finance has been lacking. Much needed policy discussions have been delayed, neither officially remanding outdated structures nor introducing new approaches.[81]

It is worse for the case on the relationship between trade and security, as an official call to review Security Exceptions under the WTO was raised only in 2015 by the Russian Federation at the Nairobi Ministerial Conference.[82] There were secretariat reports on Security Exceptions prepared during the Uruguay Round negotiations, but no significant discussions took place even after the end of the Cold War. A regulatory loophole in governing trade and security concerns has been apparent throughout the GATT history,[83] but was undermined even under the WTO,

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World Trade," 9(4) *World Trade Review* 583, 2010; Claus D. Zimmermann, "Exchange Rate Misalignment and International Law," 105(3) *The American Journal of International Law* 423 (2011).

[80] Auboin (2007), *supra* note 38, p. 30-32.

[81] Technical and administrative cooperation has been enhanced but there are also claims that institutional coordination is currently at its political limit. *Refer to Ibid*.; Zimmermann (2011), *supra* note 79, p. 476.

[82] WTO, Proposal on MC10 Ministerial Declaration – Part III, WT/MIN(15)/W/14 (dated 13 Nov. 2015), p. 2.

[83] *Refer* to Chapter IV.

based on the faith over rational behavior of states to avoid political costs of abusing an exceptional clause.[84] In 2018, the world commitment for political cooperation is failing, even threatening the credibility of WTO governance on trade and security nexus more than ever.[85]

Such illogical remnants of legal provisions supporting the past structure of the international system can become a basis of unregulated trade restrictions especially in times of adversity. Overdue intactness of such embedded structure lacks necessary support for the trading regime parallel to the contemporary international system. Remanding such embedded structures in the trading institution to appropriately support the international system would provide fundamental guidance to further regulatory coherence in modern international governance.

[84] *Refer to* Peter Lindsay, "The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure," 52 *Duke Law Journal* 1277 (2003); Andrew Emmerson, "Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse?," 2(1) *Journal of International Economic Law* 134 (2008).

[85] The case of US imposition of Section 232 measures on steel and aluminum products and consequent WTO disputes represent such breakdown. For further analysis, *refer to* Chapter IV.

III. Balance-of-Payments Safeguard for 'Trade and Finance' in the WTO System[86]

In face of Global Financial Crisis, international efforts to enhance overall risk mitigation system have taken place in different global economic regimes. Against the backdrop, the WTO should also reconsider its existing provisions to seek sustainable reform compatible with the modern economic environment. Yet, the BOP safeguard provisions are still haunted by the structure designed for trade and BOP relationship in the postwar Bretton Woods system. Disguised rationales prolonged the use of GATT Articles XII and XVIII:B. The incompetency of the IMF at the collapse of the fixed par-value system aggravated the lack of systemic management on trade restrictions for BOP purposes. At the Uruguay Round, the contracting parties set only modest deterrence through procedural rules over recurring abuses and misuses, without a fundamental transformation in the approach on trade and BOP concerns. Even recent FTAs among developed countries retain GATT Article XII *mutatis mutandis*.

Despite the claimed obsoleteness of BOP safeguard measures in the WTO,[87]

[86] This chapter is an amended version of the manuscript approved for publication as a forthcoming journal article: Ji Yeong Yoo, "Restructuring the GATT Balance-of-Payments Safeguard in the WTO," 53(4) *Journal of World Trade* (*forthcoming 2019*).

[87] *Refer to* Karen McCusker, "Are Trade Restrictions to Protect the Balance of Payments

the legal obscurity of the provisions does not eliminate a crucially unproductive loophole in the world trade system. Meanwhile, it is timely to clarify a proper function of the WTO BOP provisions against modern systemic risks generating chronic financial crises. This study aims to outline a reform agenda for the GATT BOP safeguard provision, suitable to the contemporary WTO and IMF system.

1. ITO Foundations of Trade and BOP Linkages within the Bretton Woods System

The postwar settlement of trade for the ITO initially structured BOP linkages in a comprehensive way, by identifying different causes of BOP problems and distinguishing applicable policy methods for respective challenges. Preliminary articulation of BOP issues in different chapters of trade negotiation drafts provides fresh perspective compared to what has survived under the GATT. The forgotten ITO foundations on trade and BOP linkages can provide a basis for further analysis on relevant deficiency in the current WTO system.

1.1. BOP Concerns Linked to Macroeconomic Management

The two major curses that distressed the economies under depression in the

Becoming Obsolete?," *Intereconomics* 89 (2000).

1930s were unemployment and constant deflationary pressures. The combination of loss of income and persistent fall in price increased the burden of existing debt and was translated into stubbornly dragging demand in the economy.[88] Such memories from the Great Depression haunted the negotiating parties of the ITO Charter to design sound mechanisms that can ensure macroeconomic stability based on full employment and maintenance of effective demand for the expansion of world trade. The report of the first session of the Preparatory Committee at the UN Conference on Trade and Employment presents detailed accounts on the considerations of BOP issues linked to macroeconomic management in the chapter on Employment.

While full employment was an undeniable policy goal stated as one of the objectives of establishing the ITO,[89] negotiating parties expressed concerns on BOP difficulties led to the trading partner when a country's domestic employment level is achieved primarily through maintaining export surplus.[90] The negotiating parties clarified how inappropriately maintained trade surplus can cause spillover effects to other deficit countries, fundamentally disrupting the BOP equilibrium.[91] In a confined scenario where external deflationary pressure is posed to a deficit country due to improper macroeconomic policies in a surplus country, the

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[88] For further background on the narrative of Great Depression, *refer to* Barry Eichengreen, *Golden Fetters: The Gold Standard and the Great Depression, 1919-1939* (New York: Oxford University Press, 1992) and Crafts and Fearon (2010), *supra* note 8.
[89] Havana Charter, *supra* note 5, Article 1.1.
[90] *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment* (London report), E/PC/T/33 (dated Nov. 1946), http://worldtradelaw.net/document.php?id=misc/London%20Draft.pdf (visited Aug. 10, 2018), p. 5 (section E, para. 1),
[91] *Ibid*., p. 5 (section E, para. 3).

negotiating parties tried to emphasize the responsibility of a surplus country in initiating corrective adjustments.[92] Such discussion developed into a corresponding provision under the name of "Removal of Maladjustments in the Balance of Payments" in the draft Charters.[93] The obligation stipulated on a surplus country to cooperatively amend disequilibrium displays a main departure from the current BOP approach in the WTO.[94]

At the same time, the negotiating parties considered a need for safeguard measures in deficit countries under such circumstances.[95] Based on the AA of the IMF, the countries in face of BOP difficulties were able to impose capital controls in the risk of capital flight, apply for appropriate depreciation, if not a competitive one, or restrict purchases of scarce currency caused by huge export surplus.[96] The IMF was ready equipped with policy tools available to countries who need flexibility in their monetary management. Under the ITO framework, the negotiating parties tried to introduce additional trade safeguard applicable to a limited case where "serious or abrupt decline in effective demand in other countries"

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[92] *Ibid*., p. 5 (section E, para. 2).
[93] Can be traced at London report, *supra* note. 90, Article 7; *Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment* (New York report), E/PC/T/34 (dated 5 Mar. 5 1947), retrieved from http://worldtradelaw.net/document.php?id=misc/New%20York%20Draft.pdf (visited Aug. 2, 2018), Article 6; *Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment* (Geneva report), E/PC/T/186 (dated 10 Sep. 1947), retrieved from http://worldtradelaw.net/document.php?id=misc/1947%20Geneva%20Preparatory%20Conference%20Report.pdf (visited Aug. 2, 2018), Article 5; Havana Charter, *supra* note 5, Article 4.
[94] Current GATT Article XII:5 stipulates that if there is a persistent disequilibrium in BOPs the contracting parties should initiate discussions with the IMF. There is no specific paragraph obliging an action by a surplus country.
[95] London report, *supra* note 90, p. 5 (section F, para. 1).
[96] *Ibid*., p. 5 (section F, para. 2).

disrupt equilibrium.[97] This approach is also unfamiliar in the WTO because invocation of such provision is conditioned to a specific source of BOP difficulty, not on the status of payments position of the safeguarding country.[98] The attempt to restrict the use of a trade safeguard only to a BOP problem connected to a disruption in trade seems meaningful. Such concerns developed as a single provision under the name of "Safeguards for Members Subject to External Deflationary Pressure" in the draft Charters.[99]

With the demise of the ITO Charter in 1950, the entire chapter on Employment vanished without any remnant in the provisional GATT text. Yet, interestingly, the negotiation history suggests that the 'situational claim' under GATT Article XXIII:1(c) was considered to be invoked in circumstances involving macroeconomic or employment factors. It was suggested that Article XIII of the GATT should be able to be invoked when any situation relating to the Employment Chapter of the Havana Charter arise.[100] Such history reflects the weight of full employment and macroeconomic stability as policy goal at the time. Though, there is no specific reference on such BOP concerns linked to macroeconomic management in the WTO system.

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[97] *Ibid.*, p. 5 (section F, para. 4).
[98] Current GATT Article XII asks to review any special factor related to BOP status but does not filter out a specific external cause for invocation.
[99] Can traced at London report, *supra* note 90, Article 8; New York report, *supra* note 93, Article 7; Geneva report, *supra* note 93, Article 7; Havana Charter, *supra* note 5, Article 6.
[100] WTO, *GATT Analytical Index* (Geneva, Switzerland: WTO, 1998), p. 668.

1.2. BOP Problems Linked to Import Demand Rising from Development Needs

Since the preliminary dialogues on the plans for postwar settlement of economic order between the US and the UK in the early 1940s, the defense over BOP deficits had been considered one of the most important policy goals by the UK.[101] Tools to maintain BOP was crucial at the negotiation table for the ITO, as most countries, except for the US, were facing BOP deficits after the war. However, the rules on restrictions to safeguard the BOP designed for the Havana Charter were not essentially to treat the fundamental problems of the BOP.

Since the postwar recovery was agreed to rely upon restoration of trade relations, the IMF prohibited restrictions on current payments transfers and rather expected establishment of currency convertibility.[102] Meanwhile, the IMF prepared buffer stocks, available in addition to national reserves, for the members to address short to medium term payments imbalances.[103] If necessary, the par-value system also allowed revaluation of the exchange rate upon approval of the IMF.[104] Given such prepared functions of the IMF, it was already confirmed under the Bretton Woods system "that trade restrictions should be avoided whenever possible."[105] It

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[101] For background information, *see* Irwin, Mavroidis and Sykes, *supra* note 10, p. 5-97.
[102] *Articles of Agreement of the International Monetary Fund* (Articles of Agreement) (dated 22 Jul. 1944), retrieved from https://fraser.stlouisfed.org/files/docs/historical/martin/17_07_19440701.pdf (visited Aug. 15, 2018), Art. VIII, section 2(a).
[103] *Ibid*., Schedule E. Administration of Liquidation
[104] *Ibid*., Art. IV, section 5.
[105] London report, *supra* note 90, p. 14 (section C, para. 2(t)); Havana Charter also states that expansion not contraction of international trade is important to restore stable BOP equilibrium; *See*

is rather paradoxical to understand the provision called "Restrictions to Safeguard the Balance of Payments"[106] in the Commercial Policy chapter of the draft Charters as a safeguard for fundamental disequilibrium in BOP positions. Under strict controls required in the capital account transactions under the Bretton Woods system, theoretically, either allotting more monetary reserves or controlling the current account could temporarily contribute to remedying cyclical external imbalances (c.f. CAB = NKF + RT).[107] Trade measures for BOP purposes were intended to operate at the marginal level of alleviating temporary burdens, subject to the practically fixed par-value system.[108]

Development, industrialization and recovery were considered priority among other goals for postwar prosperity. The BOP safeguard measure was expected to temporarily ease dual burdens of governments to maintain the par-value and cope with high demand of imports to pursue development programs.[109] While "internal reconstruction" is essential in restoring a country's BOP position in a "sound and lasting basis,"[110] the negotiating parties tried to allow a safeguard action depending

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Havana Charter, *supra* note 5, Article 21.1(d).

[106] Can be traced at London report, *supra* note 90, Article 26; New York report, *supra* note 93, Article 26; Geneva report, *supra* note 93, Article 21; Havana Charter, *supra* note 5, Article 21.

[107] For detailed understanding on BOP identity, s*ee* IMF, *Balances of Payments and International Investment Position Manual* (Sixth Edition, BPM6) (2009), retrieved from https://www.imf.org/external/pubs/ft/bop/2007/pdf/bpm6.pdf (visited Aug. 2, 2018), p. 224-225.

[108] Officially, the par-value was adjustable but its change was strictly limited to rare occasions approved by the IMF. It was generally perceived as a fixed system. *Refer to* Ronald I. McKinnon, "The Rules of the Game: International Money in Historical Perspective," XXXI *Journal of Economic Literature* 1 (1993) for detailed understanding on the actual operation of the Bretton Woods system.

[109] The impact of restrictions for development purpose was not considered an "unnecessary damage." *See* London report, *supra* note 90, p. 12 (section C, paras. 2(a)-(b)).

[110] *Ibid*., p. 12 (section C, para. 2(a)); Havana Charter, *supra* note 5, Article 21.4(c).

on the "external financial position"[111] caused by inevitable increase in import demand. One way to avoid unnecessary trade restrictions was to introduce a principle relying on the status of "monetary reserves"[112] to emphasize the invocation based on "external" financial position, not domestic protectionist interest.[113] The priority on postwar recovery is reflected in the exceptional treatment of essential products required for development even when applying BOP safeguard measures.[114]

In fact, the identity of this provision was intended simply as an exception rule to the general prohibition on the use of quantitative restrictions in the draft Charters.[115] This structure probably explains why GATT Article XII states exception only to the use of quantitative restrictions for BOP purposes, while price-based measures are now preferred in the WTO system. Since quantitative restrictions used to be the main trade policy tool in the 1940s, general elimination of quantitative restrictions pursued in the ITO triggered the negotiating parties' concern on securing policy space for adjustment. The structure of this provision, inherently attached to the rules on quantitative restrictions, also explains how this specific safeguard action was considered a marginal trade relief subject to the

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111 London report, *supra* note 90, p. 12, (section C, para. 2(b)).
112 Havana Charter, *supra* note 5, Article 21.3(a).
113 *Ibid.*, Art. 21.3(c)(ii); London report, *supra* note 90, p. 12-13 (section C, para. 2(b)).
114 Havana Charter, *supra* note 5, Articles 21.4(a) and 21.4(b)(ii).
115 In the Havana Charter, provisions called "General Elimination of Quantitative Restrictions" (corresponding to GATT Article XI), "Restrictions to safeguard the Balance of Payments" (corresponding to GATT Article XII), "Non-discrimination Administration of Quantitative Restrictions" (corresponding to GATT Article XIII), "Exceptions to the Rule of Non-discrimination" (corresponding to GATT Article XIV) and "Relationship with the International Monetary Fund and Exchange Arrangements" (corresponding to GATT Article XV) were grouped in Section B called "Quantitative Restrictions and Related Exchange Matters".

burdens of postwar recovery needs and the fixed exchange rate system.

1.3. BOP Concerns Linked to Exchange Arrangements

As the ITO was considered a third pillar of the Bretton Woods system, the compatibility of the trading system with the existed monetary system was one of the core concerns in the postwar architecture of international economic governance. By the time of negotiations for the Charter, currency convertibility was yet fully achieved even among major currencies and the IMF had strict authority on controlling currency flows for the maintenance of the par-value system. In other words, BOP difficulties of one country could permeate to others and aggravate a bottleneck in traffic of trade, simply due to a problem in currency flows.

One way to cope with these concerns in the trading system was to relax the non-discrimination principle in imposing quantitative restrictions for BOP purposes.[116] The negotiating parties discussed how a trade restriction with an equivalent effect of IMF approved exchange restriction against scarce currency should be flexibly allowed as a practical option.[117] Countries under the common quota in the IMF raised concerns that they may need to impose discriminatory restrictions for the defense of their common reserves.[118] The negotiating parties

[116] "Exceptions to the Rule of Non-discrimination" was numbered Article 28 in London and New York reports and Article 23 in the Geneva report and Havana Charter.
[117] London report, *supra* note 90, p. 14, (section C, para. 3(d)(i)); Havana Charter, *supra* note 5, Article 23.5(a).
[118] London report, *supra* note 90, p. 14 (section C, para. 3(d)(ii)); Havana Charter, *supra* note 5, Article 23.3(a).

also agreed that a country with inconvertible currencies may face excessive burden in contraction of exports due to non-discriminatory imposition of quantitative restrictions by another member.[119] As fundamental disequilibrium in the BOP linked to exchange arrangements should be dealt in the IMF, the ITO did not seek a structural role in preventing BOP problems in such matter. It rather sought a subsidiary role on BOP problems in the trading system by enhancing mutual compatibility with the AA and containing unnecessary spread of BOP difficulties causing overall contraction in trade. Such provision remains in the current GATT as Article XIV.

Table 1. Summary of ITO Framework Governing BOP Problems

Systemic premises	- **Adjustable but practically fixed par-value system** - Internal restructuring is the core to maintaining BOP equilibrium - Expansion, not contraction, of trade supports sound and long-lasting maintenance of BOP equilibrium - BOP problems inherently linked to exchange problems should be dealt under the IMF and resort to exchange restrictions upon IMF's approval - **Trade restrictions should be avoided at the maximum extent possible**
To deal with BOP concerns linked to macroeconomic management	- Discussed in Chapter II Employment and Economic Activity - ***Article 4 Removal of Maladjustments within the Balance of Payments***: when BOP deficit countries have difficulty achieving full employment objective due to maladjustments maintained in surplus countries, the surplus countries should initiate correct adjustment - ***Article 6 Safeguards for Members subject to External Inflationary or Deflationary Pressure***: the members are allowed to take action to safeguard their economies against inflationary or deflationary pressure from abroad – often caused by change in BOP position of other members
To deal with BOP problem linked to	- Discussed in in Section B Quantitative Restrictions and Related Exchange Matters of Chapter IV Commercial Policy

[119] London report, *supra* note 90, p. 14-15 (section C, para. 3(e)-(i)); Havana Charter, *supra* note 5, Annex K Exceptions to the Rule of Non-discrimination.

import demand rising from development needs	- ***Article 21 Restrictions to safeguard the Balance of Payments***: in case of serious decline in or low level monetary reserves, rising from high levels of import demand in the course of recovery or development, the members are allowed to impose quantitative restrictions which are generally prohibited in the ITO
To deal with BOP concerns linked to exchange arrangements	- Discussed in Section B Quantitative Restrictions and Related Exchange Matters of Chapter IV Commercial Policy - ***Article 23 Exceptions to the Rule of Non-discrimination*** and ***ANNEX K Exceptions to the Rule of Non-discrimination***: discriminatory application of quantitative restrictions for BOP purposes is allowed, if that is needed to protect common monetary reserves, has an equivalent impact with IMF approved exchange restriction or assists countries with inconvertible currencies

2. Transformation of BOP Provisions in the GATT Review Session

The original version of GATT was concluded in 1947 with a single BOP provision – Article XII – following the drafts of the Havana Charter. Since the 1954-55 review session, the GATT has carried two BOP provisions by transforming the previous version of Article XVIII. Understanding both practical concerns that stifled introduction of BOP measures in Article XVIII and ignored theoretical difficulties to distinguish Articles XII and XVIII:B provide a perspective to critically examine the past experience of applying BOP measures in the GATT system.

2.1. Amending Article XII

The expected standing of measures approvable under GATT Article XII was temporary even during the postwar transitional period with cyclical payments imbalances under the Bretton Woods system. Subsequently, Article XII:4(b) of the original GATT stated all existing measures to be reviewed by 1951[120] and discriminatory BOP measures approved under Article XIV:1(b) was meant to be subject to further justification in 1952, five years after the operation of the IMF.[121] Twenty countries were imposing quantitative restrictions, mostly discriminatory measures in 1951.[122] There had been an increase in restrictions from the UK and the Commonwealth economies especially after the sterling devaluation in 1949, facing inflationary pressures and in defense of their reserves against imports from the dollar area.[123] Other European countries also mainly implemented import restrictions against the dollar area, primarily due to the limitations of currency

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[120] *General Agreement on Tariffs and Trade, Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment* (GATT Final Act) (Geneva, dated 30 Oct. 1947), retrieved from http://worldtradelaw.net/document.php?id=misc/Final%20Act.pdf (visited Aug. 13, 2018), Article XII:4(b).

[121] Discriminatory application was mainly approved to cope with convertibility problems in managing reserves. *Ibid.*, Article XIV:3(a).

[122] The twenty countries are: Australia, Brazil, Ceylon, Chile, Czechoslovakia, Denmark, Finland, France, Greece, India, Indonesia, Italy, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Sweden, South Africa, UK, Austria, Germany and Turkey; Measures imposed by these countries were all discriminatory except for those applied by Indonesia, Philippines, and Czechoslovakia. Among the existing contracting parties only eight countries were not imposing any Article XII restriction: Belgium, Canada, Cuba, Dominican Republic, Haiti, Luxemburg, Peru, US and Nicaragua. GATT, *Report on Import Restrictions Applied under Article XII*, Draft Report recommended by Working Party 6, CP.6/12/Rev.2 (dated 22 Oct. 1951), para. 8.

[123] GATT*, Draft Report of Working Party K on Consultations under Article XII:4(b)*, CP.5/K/SECRET/16 (dated 5 Dec. 1950), para. 12.

convertibility.[124] Despite the hardships, there were calls for efforts towards relaxation of BOP restrictions, as the longer the restrictions, the greater likelihood the structure and prices of production would change in domestic industries.[125] Against the resistance from the safeguarding countries, the IMF statements on Article XII consultations in this period presented skepticism on the strict necessity of these restrictions.[126] However, new restrictions intensified well after 1952[127] and the decision on the hard-core time-limit of BOP restrictions was also extended to the following years.[128]

During the 1954-55 review session, the contracting parties focused on amending paragraph 3 of GATT Article XII, where the provision literally referred to postwar adjustment and development needs to impose such restrictive

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[124] *Ibid.*, para. 23.
[125] *Ibid*., para. 49.
[126] For example, *refer to* GATT, *Statement Made by the Representative of the International Monetary Fund at the First Meeting of Working Party "K" on Consultations under Article XII:4(b)*, CP.5/K/SECRET/1/SECRET/CP/12 (dated 14 Nov. 1950) and GATT, *Oral Remarks of the Head of the Delegation of the International Monetary Fund at the Seventh Meeting of Working Party "K" (20th November 1950, 3:00 P.M.)*, CP.5/K/SECRET/13 (dated 1 Dec. 1950).
[127] *Refer to* GATT Ad Hoc Committee on Agenda and Intersessional Business, *Additional Consultations under Article XII:4(b), Note by the Executive Secretary*, IC/W/4 (dated 2 Sep. 1952) and GATT, *Import Restrictions Applied under Article XII, A Note on the Intensification of Restrictions and on the Imposition of New Restrictions since the Eighth Session*, L/257 (dated 25 Oct. 1954).
[128] In Decision of 5 March 1955, the contracting parties aimed to cease existing restrictions by 1957 but was failed. *Refer to* GATT, *Expiry of Decision of 5 March 1955, Draft Decision Proposed by the Chairman*, W.12/12 (dated 31 Oct. 1957). Later, this was extended further in 1957, 1958, 1959, 1960 and 1961. *See* GATT, *Problems Raised for Contracting Parties in Eliminating Import Restrictions Maintained during a Period of Balance-of-Payments Difficulties, Decision of 19 November 1960*, L/1387 (dated 25 Nov. 1960) and GATT, *Problems Raised for Contracting Parties in Eliminating Import Restrictions Maintained during a Period of Balance-of-Payments Difficulties, Extension of the "Hard-core" Waiver, Decision of 8 December 1961,* L/1685 (dated 18 Dec. 1961). Documents on further extensions or decisions cannot be found in the following years.

measures.[129] In the revised text, there is no longer special attention towards postwar difficulties. Rather the provision emphasizes that the contracting parties should seek measures to expand, than to contract, trade in order to restore lasting BOP equilibrium.[130] While development and full employment remained as important domestic policy objectives, the legal text was reorganized to emphasize more on the principles of applying relevant restrictions in order to contain further spread of restrictive measures.[131]

Due to insufficient decline in the use of BOP restrictions, consultation procedure for Article XII was also amended. The original text of the provision included only notification and consultation obligations at the initiation stage of BOP measures. Through amendments, the establishment of a consultation committee was approved in 1956[132], basic documents provided for consultation were recommended to continue since 1957,[133] and periodic consultations on existing measures were to start by 1959.[134] Efforts to abolish Article XII faded and as a political compromise among the contracting parties, a set structure governing Article XII measures in the GATT system was established by 1958.

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[129] *Refer to* GATT Final Act, *supra* note 120, Article XIII:3(a) to compare with the current GATT provision.
[130] GATT 1947, *supra* note 25, Article XIII:3(a).
[131] *Compare* Articles XII:3(b)-(c) of GATT Final Act and GATT 1947.
[132] *See* GATT, *Final Report of the Working Party on Balance-of-Payments Restrictions*, L/597 (dated 16 Nov. 1956).
[133] GATT, *Final Report of the Working Party on Balance-of-Payments Restrictions*, L/931 (dated 20 Nov. 1958), para. 5. The practice of preparing Basic Document by the secretariat in 1957 was recommended to continue onwards.
[134] GATT, *Final Report of the Working Party on Balance of Payments*, L/769 (dated 30 Nov. 1957), paras. 17-18.

2.2. Restructuring Article XVIII

Concerning BOP safeguard provisions in the current GATT, it is natural to think of Articles XII and XVIII:B as a bundle. In the drafts of the Charter, however, the original versions of current GATT Article XVIII did not include a right to act specifically for BOP purposes.[135] The corresponding provisions of GATT Article XVIII in the negotiating drafts of the Charter put general consideration to the need of special governmental assistance and use of trade restrictions for economic development or reconstruction of particular industries. At the first Preparatory Committee meeting, it was ready noted that countries embarking on economic development programs can face BOP problems,[136] but that was not the prime concern for this specific provision at the drafting stage. BOP concerns directly linked with trade in goods were designed to be governed by a single exception provision to quantitative restrictions, the direct origin of GATT Article XII. The discussions regarding Article 13 "Governmental Assistance to Economic Development and Reconstruction" of the Havana Charter ranged on different methods and actions – such as preferential arrangements for developing

[135] The corresponding articles in the draft Charters were negotiated under the name of "Governmental Assistance to Economic Development" (Article 13 in London report, New York report, Geneva reports and the Havana Charter) while the GATT drafts developed Article XVIII under the name of "Adjustments in Connection with Economic Development." *See* GATT Final Act, *supra* note 120, Article XVIII; Article XVIII of the GATT transformed into the current form after the 1954-55 GATT Review Session. Currently Article XVIII is titled "Governmental Assistance to Economic Development" in the GATT 1947 text.

[136] London report, *supra* note 90, p. 7 (section D, para. 3).

countries,[137] quantitative restrictions[138] or increase in tariffs – that can support industrialization.

Meanwhile, the second Preparatory Committee introduced an interesting condition allowing imposition of restrictions to amend the level of imports, "should [there] be an increase or threatened increase in the importations of the product…so substantial as to jeopardize the plans of the…establishment, development or reconstruction of the industry…" due to the granted government assistance. [139] Such subparagraph was adopted in the final Charter as well. [140] In fact, consideration on a defense mechanism in sudden increase of imports in Article 13 is similar to how the general safeguard mechanism works. In other words, an unintended increase in imports threatening domestic industries in the course of implementing development programs was mentioned as a potential difficulty the members could face. In reflection of such negotiation history, the controversial phrase of "unforeseen development" in GATT Article XIX (replicated from Article 40 of Havana Charter)[141] seems to have been a meaningful modifier illustrating its

[137] Delegates participating in draft negotiations suggested rules on preferential arrangements for development purpose under Article 13. *See* New York report, *supra* note 93, p. 9. From the Geneva report, a rule on discriminatory preferential arrangements for development was separated into Article 15. *See* Geneva report, *supra* note 93, Article 15 and Havana Charter, *supra* note 5, Article 15.

[138] Quantitative restrictions were noted useful especially at the early stage of industrial development. *See* London report, *supra* note 90, p. 8 (section I, para. 3). Due to the general prohibitive rule on quantitative restrictions in the Commercial Policy chapter, the discussion for Article 13 centered on its justification for development purpose.

[139] Geneva report, *supra* note 93, Article 13.4(c).

[140] *See* Havana Charter, *supra* note 5, Article 13 A and C.

[141] *See* GATT Final Act, *supra* note 120, Article XIX:1(a); Havana Charter, *supra* note 5, Article 40.1(a); GATT 1947, *supra* note 25, Article XIX:1(a).

identity as an emergency clause.[142] Given specific defense mechanisms provided for each issue covered in the ITO Charter, the safeguard mechanism envisioned in the Commercial Policy chapter seems to be an exceptional safeguard operating at emergency cases that has been 'unforeseen' at the drafting stage.

In practice, classification of measures was often confused between Articles XII and XVIII in the GATT system. When BOP measures could provide protectionist effect on domestic industries and restrictions mainly pursued for development may also take BOP situation into consideration, the GATT insisted on the possibility of sorting out the principal reason of application for the categorization of measures.[143] In fact, many of the contracting parties more heavily resorted to Article XII measures. The working party also recommended the contracting parties to apply for Article XVIII-approval on the measures with dual purpose, once its control under Article XII terminates.[144] Until the early 1950s, only a few countries such as Cuba, Haiti and Ceylon were applying Article XVIII measures.[145]

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[142] Based on the interpretation in GATT *US – Fur Felt Hats* case, later in the WTO, the panel in *Argentina – Footwear* case concluded that the condition of "unforeseen development" is essentially read out of the text of GATT Article XIX:1(a). *Refer to* WTO, *Argentina – Safeguard Measures on Imports of Footwear* (Argentina – Footwear), *Report of the Panel*, WT/DS121/R (dated 25 Jun. 1999), para. 8.65. Further details on the application of WTO Safeguard Agreement can also be found in Dukgeun Ahn, "Restructuring the WTO Safeguard System," in *The WTO Trade Remedy System: East Asian Perspectives*, (eds.) Mitsuo Matsushita, Dukgeun Ahn and Tain-Jy Chen (Taipei: Cameron May Publisher, 2006); Alan O. Sykes, *The WTO Agreement on Safeguards: A Commentary* (Oxford, UK: Oxford University Press, 2006) and Petros C. Mavroidis, Patrick A. Messerlin and Jasper M. Wauters, *The Law and Economics of Contingent Protection in the WTO* (Cheltenham: Edward Elgar Publishing, 2008).

[143] GATT, *Report of Working Party 5 on Article XVIII*, CP.2/38 (dated 9 Sep.1948), paras. 9, 15.

[144] GATT, *Fourth Report of Working Party 2 on Article XVIII*, CP.3/60 (dated 26 Jul. 1949), p. 3, 4, 16.

[145] GATT, *Releases Granted by the Contracting Parties under Article XVIII, Expiration of Releases,* L/110 (dated 24 Aug. 1953), para. 4.

Prior authorization and the widespread of quantitative restrictions for BOP purposes with sufficient impact on promoting development plans were considered as two major reasons for unpopular invocation of Article XVIII.[146] At the review session, the Executive Secretariat suggested transfer of BOP provisions to Article XVIII and combine all provisions relating to economic development into a single provision for the "underdeveloped countries."[147] This was expected to generally reduce proliferation of Article XII measures imposed by both industrialized and late industrializing countries. Overall, the problem of GATT was that there were too many of redundant escape clauses which significantly hindered liberalization efforts in trade policy.

While Article XVIII was initially open to all contracting parties, eligibility of invocation has been restricted to those who can only support low standards of living and are in the early stages of development.[148] In Section B of Article XVIII, a BOP provision with lax condition compared to Article XII allowed more generous authorization of BOP measures to the underdeveloped countries.[149] Though muted in transformation, there had been concerns on how a restrictive measure for BOP purposes based on structural development needs and protectionist motivation could be distinguished in practice.[150] While procedural arrangements for notification and

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[146] GATT Review Working Party I on Quantitative Restrictions, *Proposed Secretariat Draft of Article XVIII,* W.9/40 (dated 26 Nov. 1954), p. 2.
[147] *Ibid.*, p. 3.
[148] GATT 1947, *supra* note 25, Article XVIII:1.
[149] For example, the objective of GATT Article XII is "to safeguard…external financial position and …balance of payments" (para. 1); whereas Article XVIII:B aims to "safeguard…external financial position *and to ensure a level of reserves adequate for the implementation of...program of economic development and control the general level of…imports*" (para. 9, emphasis added).
[150] GATT Review Working Party I on Quantitative Restrictions, *Quantitative Restrictions for*

examination were not clear in the original Article XVIII, Section B of the revised article adopted a similar procedure to that of Article XII. Later, consultation procedures of both Articles XII:4(b) and XVIII:12(b) were governed together by the Committee on Balance of Payments Restrictions (BOP Committee).[151]

2.3. Comparison of Revised GATT Articles XII and XVIII:B

Recalling the initial objective of creating a BOP provision in the Commercial Policy chapter of the Havana Charter, GATT Article XII started out as a single BOP provision in defense of high import demand when pursuing postwar recovery under the fixed exchange rate system. In split of two independent BOP provisions in the GATT, Article XVIII:B justified structural needs for special consideration to developing countries. Meanwhile, Article XII was left unclear with its utility when most of the industrialized countries seemed to have graduated from postwar transitional recovery and even established dollar convertibility by 1958.[152]

Languages directed towards easing the minds of the deficit-bound governments with a temporary relief mechanism when facing high levels of import demand were retained in the revised GATT Article XII.[153] Meanwhile, Section B of Article XVIII

Balance of Payments Reasons: Article XII, Statement by the Australian Representative at the meeting on Friday, 19 November 1954, W.9/25 (dated 22 Nov. 1954), p. 5-6.

[151] GATT Working Party on Balance of Payments, *Action and Procedures to Implement the Revised Provisions of Articles XII and XVIII:B, Note for Members of the Working Party,* Spec/145/57 (dated 24 Oct. 1957), paras. 2-4.

[152] The US specifically raised concerns on persisting import restrictions after the end of BOP difficulties. *See* GATT, *Import Restrictions Retained after the End of Balance-of-Payments Difficulties, Note from the United States Delegation,* W.16/13 (dated 2 Jun. 1960).

[153] For example, *see* GATT 1947, *supra* note 25, Articles. XII:3(a) and (d).

provided extra leniency by allowing imposition of "controls in the general level of imports" in order to ensure reserves "adequate for development."[154] In hindsight, two problems are apparent upon such revision: 1) lax conditions in Article XVIII:B to serve comprehensive needs on development could hamper distinguishing protectionist motivations and legitimate development objectives of BOP measures; 2) in transferring the development objective to Article XVIII:B, Article XII should have been terminated as it lost its identity and the developed countries have structurally graduated from postwar transitional needs. Nevertheless, the GATT was equipped with two BOP provisions after the review session.

Both GATT Articles XII and XVIII:B state that the contracting parties "may restrict the quantity or value of merchandise."[155] While these provisions only meant to allow exceptional application of generally prohibited quantitative restrictions, there have been increasing impositions of import surcharges and import deposit schemes later in the 1960s and 1970s.[156] The use of import surcharges or import deposit schemes were often neglected from notification, as it was unclear whether these measures were subject to BOP provisions.[157] When the use of price-based measures was ever on the table, it was highly dissented on whether it is an inconsistent measure of the GATT or it is a preferable measure for BOP purposes that less distorts trade.[158] Countries who resorted to price-based measures under

[154] *Refer to supra* note 149.
[155] GATT 1947, *supra* note 25, Articles. XII:1 and XVIII:9
[156] WTO (1998), *supra* note 100, p. 363-365.
[157] *Ibid.,* p. 363.
[158] For example, *refer to* discussions in GATT, *Report of the Working Party on the United Kingdom Temporary Import Charges,* L/2676 (dated 17 Nov. 1966).

Article XII noted that they prefer import surcharges to quantitative restrictions for more rapid response in the market as well as less administrative burden.[159] An inclusion of the use of price-based measures under Article XVIII:B were considered in the discussions for the preparation of the text in GATT Part IV for the developing countries, but it was deferred in 1966.[160] The contracting parties legally insisted on the primary use of quantitative restrictions until the adoption of a declaration on BOP trade measures in the Tokyo Round.[161]

The GATT finally equipped itself with a standardized agenda for BOP Committee consultations in 1970 and the difference in full and simplified consultation processes for the developing countries in 1972.

Table 2. Comparison of Articles XII and XVIII:B in Revised GATT 1947
* Difference in the two articles are presented with emphasis

	Article XII	Article XVIII:B
Eligibility	- Potentially ***all*** countries	- 4(a): economies who ***can only support low standards of living and is in the early stages of development*** - 8: condition in 4(a) and when it is ***in rapid process of development***
Objective	- 1: to safeguard its external financial position and its balance of payments	- 9: to safeguard its external financial position and to ***ensure a level of reserves adequate for the implementation of its program of economic development and control the general level of its imports***

[159] *Ibid*., p. 1.
[160] WTO (1998), *supra* note 100, p. 363.
[161] *See* GATT, *Declaration on Trade Measures Taken for Balance-of-Payments Purposes, Adopted on 28 November 1979* (1979 Declaration), L/4904 (dated 3 Dec. 1979).

Extent of Restriction	- 2(a)(i): import restrictions shall not exceed those necessary to forestall the ***imminent threat*** of, or to stop, a serious decline in its monetary reserves - 2(a)(ii): shall not exceed those necessary to achieve a reasonable rate of increase in its reserves, in the case with ***very low monetary reserves***	- 9(a): shall not exceed those necessary to forestall the ***threat*** of, or to stop, a serious decline in its monetary reserves - 9(b): shall not exceed those necessary to achieve a reasonable rate of increase in its reserves, in the case with ***inadequate monetary reserves***
Forms of Measure	- 1: may restrict the quantity or value of merchandise permitted to be imported - 3(b): can choose goods to restrict	- 9: may restrict the quantity or value of merchandise permitted to be imported - 10: can choose goods to restrict
Principles of application	- 3(a): while carrying out domestic policies, countries should ***avoid uneconomic employment of productive resources*** - 3(d): countries would not be required to withdraw their domestic policy - 3(c): should avoid unnecessary damage to other parties; not prevent unreasonably the minimum commercial quantities of trade; not prevent importation of commercial samples or prevent compliance to intellectual property right procedures	- 11: while carrying out domestic policies, countries ***assure economic employment of productive resources***; countries would not be required to withdraw their domestic policy - 10: should avoid unnecessary damage to other parties; not prevent unreasonably the minimum commercial quantities of trade; not prevent importation of commercial samples or prevent compliance to intellectual property right procedures
Relaxation and elimination condition	- 2(b): shall progressively relax restrictions as BOP conditions improve; shall eliminate restrictions when conditions no longer justify them	- 11: shall progressively relax any restrictions as conditions improve; shall eliminate them when conditions no longer justify such maintenance - *Ad 11*: ***countries are not required to relax or remove restrictions if those actions would thereupon produce conditions justifying the intensification or institution of***

		restrictions
Consultation Requirement	- 4(a): shall consult when applying new restrictions or raising level of existing restrictions – nature of BOP difficulties, alternative corrective measures, possible effect of the restrictions on other economies - 4(b): shall have ***annual review*** consultations - 4(c), (d): if inconsistent, can advise modification or withdrawal of measures and in case of incompliance, retaliation can be authorized - 4(e): shall have due regard to any special ***external factors*** adversely affecting the export of trade - 4(f): determinations shall be rendered expeditiously (preferably 60 days)	- 12(a): shall consult when applying new restrictions or raising level of existing restrictions – nature of BOP difficulties, alternative corrective measures, possible effect of the restrictions on other economies - 12(b): shall ***review periodically but not less than two years*** - 12 (c), (d): if inconsistent, can advise modification or withdrawal of measures and in case of incompliance, retaliation can be authorized - 12(f): shall have due regard to any ***factors referred to in para.2 – continued high level of demand for imports likely to be generated by development programs***; determinations shall be rendered expeditiously (preferably 60 days)
Fundamental disequilibrium	- 5: shall initiate discussions to consider other measures taken by the contracting parties or any appropriate intergovernmental organization to remove underlying causes of disequilibrium in the BOP	None

3. Trade Restrictive Practices under BOP Provisions in the GATT System

3.1. Ineffectiveness in the GATT-IMF Surveillance System

The BOP provisions in the GATT developed differently compared to their originally envisioned functions. The key premise in the operation of Article XII measures was the conditions of a strict par-value system and postwar recovery needs. However, during the operation of the GATT system, the Bretton Woods system collapsed in 1973 and adoption of floating exchange rates among the developed countries was facilitated. While Article XVIII:B transformed to provide support on structural concerns in the process of development, augmentation of permanent restrictions by developing countries throughout the GATT period blurred the boundary between legitimate concern and protectionist motivation.

The IMF clearly had a role in managing BOP measures at the transition to a flexible exchange rate system. Since the second amendment of the AA, exchange rate adjustments in case of fundamental disequilibrium in the payments were readily available without a concurrence by the IMF. Meanwhile, the IMF attempted steps to incorporate the commitments of the Committee of Twenty to avoid trade restrictions into the amendment of the AA.[162] If so, the decision to invoke a BOP safeguard measure would have been merged into the IMF jurisdiction with some

[162] *See* IMF, *Voluntary Declaration on Trade and Other Current Account Measures,* Decision No. 4254-(74/75) (dated 26 Jun. 1974).

potential restructuring on the relationship between the IMF and the GATT. However, the decisions at the Executive Board never reached an agreement for a formal decision.[163] Instead, the IMF adopted rough principles for surveillance in the *1977 Decision on Surveillance over Exchange Rate Policies* (the 1977 Decision) for "stability of the system."[164] Yet, the 1977 Decision was by far incomplete with little guidance on the Article IV surveillance mechanism, as the IMF was not sure of itself on what to monitor at the time.[165] The multilateral efforts to review the systemic risks after the collapse of the Bretton Wood system did not come orderly in any international regulatory setting.

Furthermore, unlike the attempted efforts to eradicate unnecessary trade restrictions through a formal obligation attached in the AA, in practice, the IMF remained passive in the consultation processes of GATT BOP measures.[166] The IMF included assessment on the developments in the real sector, financial sector, and macroeconomic situation relating to the BOP positions of the contracting parties,[167] but it still highly depended on drawing a direct link between the level of monetary reserves and the need of trade measures. Often times, the conclusion did

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[163] Richard Eglin, "Balance-of-Payments Measures in the GATT," 10(1) *The World Economy* 1 (1987), p. 8.
[164] *See* IMF, *Surveillance over Exchange Rate Policies*, Decision No. 5392-(77/63) (dated 29 Apr. 1977).
[165] IMF, *Review of the 1977 Decision on Surveillance over Exchange Rate Policies, Further Considerations and Summing Up of the Board Meeting* (The 1977 Decision) (dated 11 Jan. 2007), retrieved from https://www.imf.org/external/np/pp/2007/eng/fc.pdf (visited Aug. 19, 2018), p. 3.
[166] Based on GATT Article XV:4, the GATT should always consult with the IMF and accept information provided by the IMF. The GATT BOP consultation procedure involves IMF consultation.
[167] WTO Committee on Balance-of-Payments Restrictions (BOP Committee), *Reserve Adequacy, Note by the Secretariat*, WT/BOP/W/21 (dated 12 Sep. 2002), para. 10.

not clearly correlate with the reserve situation. For example, the IMF concluded that the existing trade restrictions do not seem excessive beyond the necessary level not only when gross reserves stood at 6 week's import cover but also at 10 month's import cover.[168] In short, the IMF rarely announced that the trade measure is beyond necessary to guarantee adequate payments needs.

When the efforts of the IMF to practically nullify the GATT BOP exception failed, the GATT provided with subtle commitments in 1979 through *Declaration on Trade Measures taken for Balance-of-Payments Purposes*[169] at the Tokyo Round. Despite the major transformation of the monetary system in 1973, trade restrictions for BOP purposes survived. The declaration presented its doubt in the prescriptive link between payments imbalances and trade restrictions applied under GATT Article XII. However, instead of re-writing the invocation condition of a measure, a call for avoidance of Article XII measures at the "maximum extent possible" framed the deterrence mechanism for the GATT contracting parties.[170] Principle-wise, the declaration formally inscribed the least trade-restrictive principle in choosing the form of an applicable measure. Price-based measures such as import surcharge and import deposit scheme were now formally under the Committee's monitoring scope. Simultaneous application of more than one type of trade measure for BOP purposes was repudiated. An obligation to announce a time-schedule for the removal of a measure aimed at disciplining the contracting parties on the temporary nature of the measure. Despite the expected voluntary restraint on

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168 *Ibid.*, paras. 15-16.
169 *Refer to* GATT, 1979 Declaration, *supra* note 161.
170 *Ibid.*, Preamble.

resorting to Article XII measures, the declaration was not to undermine the special and differential treatment principle towards developing countries invoking Article XVIII:B.

In the 1980s, the cumulative adverse effect on resource allocation due to persistent trade restrictions applied by the least developing countries (LDCs) plagued the long-run health of the world economy.[171] As most countries gained access to international capital markets for foreign borrowing by the end of 1970s, the IMF statements for BOP Committee consultations began to evaluate much broader issues on overall external stability than simply discussing the level of reserve stocks. The IMF factored in foreign debt liabilities into consideration and discussed more extensively on the alternative measures to restore BOP equilibrium.[172] The position of the IMF radically changed from the 1970s and its recommendation for those who invoked Article XVIII:B became more aggressive calling for fundamental macroeconomic policy adjustments.[173] While the third world countries subject to IMF lending mostly had to cope with macroeconomic policy adjustment conditions in the 1980s, the weak enforcement power of the GATT hampered facilitation of liberalization policies towards those not subject to IMF projects. The final decision made in the BOP Committee was based on consensus, which could always be difficult to obtain for political reasons. A simplified consultation procedure for developing countries also contributed to a

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[171] For a further overview, *refer to* Robert Guttmann, "Chronic Macro-economic and Financial Imbalances in the World Economy: A Meta-economic View," 35(2) *Revista de Economia Politica* 203 (2015), p. 215-217.
[172] WTO BOP Committee (2002), *supra* note 167, paras. 19-20.
[173] *Ibid.*, paras. 20-22.

general lack of strict surveillance by the GATT BOP Committee. The permanent nature of Article XVIII:B restrictions undermined tremendous efforts of tariff reduction through multilateral negotiation rounds at the GATT.

Lacking effective surveillance mechanism in the GATT-IMF system, BOP measures were utilized to cope with diverse nature of BOP problems, including those that are inherently non-treatable via trade measures. By categorizing different natures of BOP problems the contracting parties tried to combat via GATT BOP safeguard measures, abuses and misuses of trade measures would provide insights on how inadequate the GATT BOP safeguarding system has been.[174]

3.2. Divergent Purposes of the Use of Article XII-Relevant Measures

By the 1960s, trade restrictions applicable mainly on cyclical payments imbalances under the Bretton Woods system were structurally becoming less necessary to most of the industrial countries. A gradual opening of the US capital market provided buffer on international liquidity and many European countries fairly recovered from the war. Once suffered from dollar shortage, Europe was gradually facing a dollar glut with the establishment of dollar convertibility.[175] The

[174] Existing literature provide comprehensive survey on the practice of BOP measures and detailed analysis on surveillance problems during the GATT era. *Refer to* Bergsten (1977), *supra* note 78; Frieder Roessler, "The GATT Declaration on Trade Measures Taken for Balance-of-Payments Purposes – A Commentary," 12 *Case Western Reserve Journal of International Law* 383 (1980); Eglin (1987), *supra* note 163; Isaiah Frank, "Import Quotas, The Balance of Payments and the GATT," 10 *The World Economy* 307 (1987). In contrast, this study revisits selected characteristics of the use of GATT BOP measures and categorizes abuses and misuses of the measure compared to the original intention of the provision.

[175] For a brief background, *refer to* Douglas A. Irwin, "The Nixon Shock after Forty Years: The

use of quantitative restrictions for BOP purposes actually reduced to three by 1964 (Finland, New Zealand and South Africa).[176]

Despite the reduction in the use of BOP measures by industrial countries, the practice of Article XII relevant measures illustrates broad use of trade restrictions beyond its original objective. GATT Article XII can be conditionally invoked when it is necessary "(i) to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves or (ii) to achieve a reasonable rate of increase in reserves when facing very low monetary reserves."[177] In other words, the legal condition where GATT Article XII can be invoked is solely based on the situation of monetary reserves. While depletion in monetary reserves can evolve via many different causes, there is no explicit condition for invocation based on the nature of BOP difficulty. That given, three interesting motivations of trade restrictions (both quantitative and price-based) utilized by industrial countries outstand in characterizing the practice of BOP safeguard measures in the post-1958 GATT system: 1) to defend cyclical imbalance or pursue protectionist policies; 2) in effort to avoid currency crisis; 3) to manage BOP at a transitional period.

Import Surcharge Revisited," 12(1) *World Trade Review* 29, (2013), p. 30.

[176] Eglin (1987), *supra* note 163, p. 10.

[177] GATT 1947, *supra* note 25, Article XII:2(a).

Table 3. Purposes of the Use of Article XII-Relevant Measures

Motivation for measure	1) **To defend cyclical imbalance or pursue protectionist policy**	2) **Efforts to avoid currency crisis**	3) **To manage BOP at a transitional period**
Selected case example	- Finland 1957-1979 import licensing and import deposit schemes	- UK 1964-1966 import surcharge - US 1971 import surcharge	- Czech & Slovak Federal Republic 1990-1992 import surcharge

Due to strict capital controls and convertibility problems under the fixed par-value system, Article XII had a marginal role at adjusting liquid payment difficulties in trade. However, when more efficient alternative policy options were available with the collapse of the Bretton Woods system, resorting to trade restrictions for BOP purposes by developed countries largely served protectionist purposes. In fact, few countries like Finland[178] still maintained quantitative and non-quantitative restrictions even after the collapse of the Bretton Woods system. Instead of functioning to preclude critical disruption in payments, the general legal condition written in Article XII opened doors to use BOP measures towards protecting domestic industries in face of chronic deficits. Fortunately, as many developed countries kept fairly well to their commitments to avoid escalation in restrictions on trade and payments through the Rome communiqué, there has been a sharp

[178] Finland had BOP consultations upon its import license and import deposit schemes in 1957, 1958, 1959, 1962, 1965, 1966, 1967, 1970, 1972, 1973, 1975, 1976, 1977 and 1978. In the consultation reports, the IMF often stated that the monetary reserve position of Finland is not to the extent necessary to impose BOP measures later in the 1960s and 1970s. The measure was finally disinvoked in 1979. *See* GATT, *Disinvocation of Article XII, Finland,* L/4301 (dated 3 May 1979).

reduction in the use of Article XII measures in the 1970s and 1980s.[179]

Some other countries under the Bretton Woods system utilized price-based trade measures for BOP purposes to defend their monetary reserves from speculative attacks on currency. For countries who feared devaluation working even as a slight hint towards speculative attacks, trade restrictions could be chosen as a substitution policy. The UK imposition of import surcharges in 1964 is a prime example of such decision.[180] Avoidance of substantial exchange rate adjustment through imposition of import surcharges in the UK did not succeed in face of sterling crises during 1964-67.[181] If such restriction was ever to produce productive effects, major domestic restructuring should have followed the implementation of import surcharges. Without sufficient macroeconomic adjustment, this use of trade policy option only hampered long-run effects of British trade performance.[182] Eventually, a postponed devaluation happened in 1967.

On the other hand, when structural current account imbalance continued between the US and other industrialized countries due to their unsustainable US dollar hoarding in the 1960s, the US also decided to impose a game-changing 10% import surcharge to defend itself from currency crisis.[183] As the US could not unilaterally adjust the exchange rate when the dollar was linked to gold in the

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[179] *See* Eglin (1987), *supra* note 163, p. 12 (Table 1).
[180] *See* GATT, *Temporary Charges on Imports into the United Kingdom,* L/2285 (dated 27 Oct. 1964).
[181] For detailed analysis on the imposition of UK import surcharge in face of sterling crisis, *refer to* Richard Roberts, "'Unwept, Unhonoured and Unsung': Britain's Import Surcharge, 1964-1966, and Currency Crisis Management," 20(2) *Financial History Review* 209 (2013).
[182] *Ibid.*, p. 225-226.
[183] Irwin (2013) *supra* note 175, p. 30-34.

Bretton Woods system, the import surcharge was aimed to force other countries' revaluation of exchange rates and close the gold window on dollars. Unapproved for a waiver in the GATT at that time,[184] this measure lasted only for three months but was effective in accommodating global adjustment of exchange rates. Unlike in the case of the UK in 1964, this measure is appraised strategically successful, not through prolonging the necessary adjustment but through facilitating fundamental adjustment of the core problem in the international monetary system.[185] It was an exemplary case on how trade measures could positively have a role, but only when used towards marginal and temporary extent towards systemic BOP challenges.

The use of GATT Article XII measures by transitional economies in the early 1990s[186] can be regarded the most similar to their usage in the 1950s and early 1960s. Transitional economies facing options to choose a suitable exchange rate system least disruptive to their trade performances aimed to keep their buffer zone through Article XII measures from high demand of imports at sudden access to the international markets.[187] Across time and situational difference, the function aspired by Article XII measures during the postwar period and the market opening of transitional economies was essentially similar. What remains questionable, though, is why these economies chose to invoke Article XII instead of Article

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[184] *See* GATT, *Report of the Working Party on United States Temporary Import Surcharge,* L/3573 (dated 13 Sep. 1971).
[185] Irwin (2013), *supra* note 175, p. 53-54.
[186] Czechoslovakia and Poland invoked Article XII in 1990 and 1992, respectively. *See* WTO (1998), *supra* note 100, p. 395.
[187] Related concerns were heavily discussed even until the late 1990s after the establishment of the WTO. *Refer to* Zdenek Drabek and Josef C. Brada, "Exchange Rate Regimes and the Stability of Trade Policy in Transition Economies," *WTO Economic Research and Analysis Division Staff Working Paper*, ERAD-98-07 (1998).

XVIII:B, in attempts to establish a market economy and proceed in industrialization.

GATT Article XII measures have been effective only to a marginal level of alleviating payments burdens on the current account under the Bretton Woods system. It was never meant to cure the fundamental problems of BOP relevant to exchange relations, but had been sparingly misused. Especially after the collapse of the Bretton Woods system, as both current and capital accounts were gradually liberalized, there had to be initiatives to rethink of trade linkages to financial problems, if any function remains for Article XII. However, dependency on the initial legal design premised by the Bretton Woods system prolonged the biased historical perceptions on trade restrictive practices even in the newly developed monetary and trading environment. The text of Article XII remains practically intact even now at the WTO system.

3.3. Contradictory Purposes of the Use of Article XVIII:B-Relevant Measures

Many developing countries invoked GATT Article XVIII:B at accession. Towards the 1970s and 1980s, the practice of trade measures for BOP purposes centered under Article XVIII:B rather than Article XII.[188] For the use of GATT Article XVIII:B measures since the 1960s, two contradictory motivations for which the measures were utilized stand out: 1) to support BOP for economic development; 2) to defend BOP position in face of financial crisis.

[188] *See* WTO (1998), *supra* note 100, p. 395 and Eglin (1987), *supra* note 163, p. 12 (Table 1).

Following the postwar recovery of the Western European countries, the popularity of Article XVIII:B measures by the third world substituted the prior pattern of the usage of Article XII measures. A growing participation of developing countries in the GATT burdened the system with a proliferation of restrictive measures against trade liberalization efforts. In the Uruguay Round negotiations, it was noted that "85 percent of all quantitative restrictions in force were imposed under Article XVIII."[189] The number of countries notifying Article XVIII:B measures since 1958 averaged around fifteen each year.[190] As shown in examples of Brazil[191] and Korea[192] listed in Table 3, the measures once applied under GATT

[189] GATT Negotiating Group on GATT Articles, *Note on Meeting of 27-30 June 1988*, MTN.GNG/NG7/8 (dated 21 Jul. 1988), para. 17.

[190] Eglin (1987), *supra* note 163, p. 10-11.

[191] Brazil used to invoke unrevised Article XII for its BOP measure and held consultations under it until 1962. Since the 1964 consultation, Brazilian import deposit scheme was considered under Article XVIII:B. Consultations on this measure were held in 1964, 1966, 1969, 1970, 1971, 1976, 1978 (simplified). Brazil notified that it had suspended the import deposit requirement in 1980. *Refer to* GATT, *Brazil – Suspension of Import Deposit Requirement,* L/4963 (dated 31 Mar. 1980). Brazil introduced additional restrictions for BOP purposes, such as import license suspension and import prohibition in 1977 and import surcharges in 1980. *Refer to* GATT, *Brazil – Import Restrictions,* L/4591 (dated 15 Nov. 1977); GATT*, Brazil – Temporary Import Surcharges*, L/4985 (dated 23 May 1980). Consultations on these measures as a whole were held in 1978 (simplified), 1980 (simplified), 1981, 1983, 1984 (simplified), 1986, and 1988 (simplified). The BOP measures by Brazil were disinvoked in 1991. *Refer to* GATT, *Brazil – Disinvocation of Article XVIII:B,* L/6885 (dated 24 Sep. 1991). These measures were originally introduced to control imports for the purpose of maintaining BOP in face of development needs. However, after the first and second oil shocks, a series of BOP measures were also used to defend the country's highly indebted financial position. (For example, *refer to* GATT Committee on Balance-of-Payments Restrictions, *Report on the 1983 Consultation with Brazil*, BOP/R/135 (dated 15 Dec. 1983), paras. 4-6.) A series of these BOP measures ambiguously intended for both economic development and a defense in times of crisis.

[192] Korea accessed to the GATT in 1967 and was already maintaining quantitative restrictions on a list of products based on its chronic current account deficit and needs for economic development. Consultations were held in 1969, 1971, 1973, 1975 (simplified), 1976, 1978 (simplified), 1979, 1981 (simplified), 1983 (simplified), 1984, 1986 (simplified), 1987 and 1989. Korea submitted a time schedule for liberalization until 1997, while certain agricultural products were noted to be liberalized the latest on January 1, 2001. *Refer to* GATT, *Republic of Korea, 1995-1997 Programme of Liberalization,* L/7449 (dated 29 Apr. 1994). Korea's BOP was also affected by the

Article XVIII:B were often maintained for more than ten years.

Table 4. Purposes of the Use of Article XVIII:B-Relevant Measures

Motivation for measure	**1) To support BOP for economic development**	**2) To defend BOP position in face of financial crisis**
Selected case example	- Brazil 1964-1991 import controls - Korea 1967-1989 quantitative restrictions	- Brazil 1964-1991 import controls

Article XVIII:B measures could support both import-substitution and export-promoting policies for development. In fact, the LDCs were at the verge of a major economic collapse by the end of 1970s with mounted debts during the course of double oil shocks. Especially, the Latin American countries were drained with economic resources at their final stages of import-substitution policy of development and helpless from sudden collapse of petro-dollar recycling boom.[193] Criticisms rose that previously held trade restrictions which supported inefficient allocation of resources through import-substitution policies only aggravated the health of the economy in face of an external shock.[194] However, the LDC debtors facing serious payments difficulties further resorted to Article XVIII:B measures based on their condition of serious decline in monetary reserves. Economic contraction in times of crisis seemed rather contradictory to an adequate method

oil shock in the 1970s and other external factors such as the Japanese transition to the floating system, but Korean BOP measures were not applied to defend a debt crisis like in the case of Brazil. Korean import restrictions under Article XVIII:B buttressed economic development via export promotion policies.

[193] Guttmann (2015), *supra* note 171, p. 216-217.

[194] *Ibid*.

that can lubricate recovery, but it was a legally available option controversially debated both in the GATT and the IMF.[195] Brazil shows a representative case of which it utilized Article XVIII:B measures to support import-substitution policies that led to inefficient allocation of productive resources, and also to tame BOP difficulties under the debt crisis. It is ironic how the measure that set susceptibility to crisis can serve as a method to safeguard economic volatility without sufficient macroeconomic adjustment. However, when Brazil was not a recipient of IMF oil facilities, IMF expressed only minimum skepticism on the legitimacy of Brazilian trade measures.[196] Two decades of abusive practice on Article XVIII:B measures by the developing countries were called upon dismantlement of their permanency at the Uruguay Round.

4. BOP Provisions in the Uruguay Round and Beyond

Unlike a radical transformation of the international monetary system, the rules for BOP safeguards in the GATT/WTO was reformed only partially, still bound by the shadows of the Bretton Woods legacies. Subtle developments in declarations and commitments in the GATT brought about effective enforcement results, while the regulatory approach remains dependent on the initial framework designed for the Bretton Woods system. The development in the BOP safeguard rules in the

[195] Eglin (1987), *supra* note 163, p. 19-20.
[196] *Ibid*., p. 19.

GATT/WTO should be evaluated comparatively along with the groundbreaking transitions in the monetary system and multi-dimensional progress in global transactions. Recent developments in the IMF work for surveillance may find a role in amending the WTO BOP safeguard mechanism.

4.1. Uruguay Round Reform and GATT BOP Provisions

The developed countries argued in the Uruguay Round that the fundamental cure to any development problem is seldom a persistent trade restriction, but breeding business-friendly environment, resorting to sound macroeconomic and exchange policies as well as improving efficiency and competitiveness of industries.[197] For trade restrictions to be helpful, they argued that the legitimacy of these policies could only be for temporary reasons complementary to broader and more fundamental economic policy objectives.[198] Even particular cases of countries with resource curse were understood to find restrictions on trade helpful only when they are applied temporarily for the purpose of distributing biased growth towards neglected industries.[199]

The developing countries rebutted that their situation is structurally different from the developed countries as they often face difficulties in access to capital and

[197] GATT Negotiating Group on GATT Articles, *Note on Meeting of 20 and 23 September 1988*, MTN.GNG/NG7/9 (dated 28 Oct. 1988), para. 18.
[198] GATT, *Communication from the European Economic Community*, MTN.GNG/NG7/W/37 (dated 17 Nov. 1987), p. 2.
[199] IMF (2009), BPM6, *supra* note 107, p. 223.

many are still under managed or pegged system.[200] Because developing countries suffer from weak internal markets and lack of export industries that structurally lead to shortage in monetary reserves, a call for maintaining special and differential treatment on BOP measures was assured.[201] Priority on price-based measures instead of quantitative restrictions was also under confrontation due to developing countries' concern in taming inflation and market imperfections.[202]

After all, the Uruguay Round package on BOP problems was compromised to maintain both Articles XII and XVIII:B, but to bring procedural enhancement. Implementation of clear plan and schedule of the measure, tighter consultation requirements and application of price-based measures came aboard through the *Understanding on the Balance-of-Payments Provisions of the GATT 1994* (1994 Understanding).[203] Despite the lack of legitimacy and practical non-invocation of Article XII by the 1980s, its complete renouncement was hampered due to political reasons. The contracting parties aimed to ensure developing countries have the same safety valve even when they become developed country Members through trade liberalization.[204] Transparency requirements and reform in the surveillance system brought about stricter adherence to the principle of temporariness on trade restrictions.

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[200] GATT Negotiating Group on GATT Articles (1988), *supra* note 197, para. 33.
[201] GATT, *Communication from Egypt*, MTN.GNG/NG7/W/29 (dated 30 Oct. 1987), paras. 10, 20.
[202] GATT Negotiating Group on GATT Articles, *Note on Meeting of 21-23 May 1990*, MTN.GNG/NG7/18 (dated 7 Jun. 1990), para. 29.
[203] *Marrakesh Agreement Establishing the World Trade Organization* (Marrakesh Agreement), Annex IA *General Agreement on Tariffs and Trade* (GATT 1994), *Understanding on the Balance-of-Payments Provisions of the GATT 1994* (1994 Understanding).
[204] Eglin (1987), *supra* note 163, p. 18.

Except for twelve Article XII consultations with transitional economies from Eastern Europe that had been in place,[205] there has been no further Article XII invocation under the WTO system. Most of the developing countries' Article XVIII:B measures also phased out by 2002.[206] The BOP exception clause had been practically out of use for around fifteen years. In a few rare occasions, there have been recent updates related to Article XVIII:B measures: Bangladesh terminated its remaining measures in 2010;[207] Ukraine notified a measure in 2009[208] and disinvoked it in 2015;[209] and Ecuador, who re-invoked a terminated measure in 2015,[210] recently abandoned it in July 2017.[211]

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[205] Consultations under Article XII happened with Bulgaria in 1997 and 1998, Czech Republic in 1997, Hungary in 1995 and 1996, Poland in 1995, Romania in 1999 and 2000, and Slovak Republic in 1995, 1997, 1999, and 2000. Check WTO website: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=%40Symbol%3d+wt%2fbop%2fn%2f*&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true (visited Aug. 17, 2018).

[206] Bangladesh, Brazil, Egypt, India, Israel, Nigeria, Pakistan, Philippines, South Africa, Sri Lanka, Tunisia, and Turkey are those who have maintained Article XVIII:B measures for a long time since the GATT period and dis-invoked them by the 2000s. Check WTO website: Check WTO website: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=%40Symbol%3d+wt%2fbop%2fn%2f*&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true (visited Aug. 17, 2018).

[207] *See* WTO Committee on Balance-of-Payments Restrictions, *Notification under Paragraph 9 of the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade, Communication from Bangladesh,* WT/BOP/N/73 (dated 19 Feb. 2010).

[208] *See* WTO Committee on Balance-of-Payments Restrictions, *Report on the Consultations with Ukraine,* WT/BOP/R/93 (dated 29 Jun. 2009).

[209] *See* WTO Committee on Balance-of-Payments Restrictions, *Notification under Paragraph 9 of the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade, Communication from Ukraine,* WT/BOP/N/80 (dated 14 Jan. 2016).

[210] *See* WTO Committee on Balance-of-Payments Restrictions, *Notification under Paragraph 9 of the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade, Communication from Ecuador,* WT/BOP/N/79 (dated 7 Apr. 2015).

[211] *See* WTO Committee on Balance-of-Payments Restrictions, *Notification under Paragraph 9 of the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade, Communication from Ecuador,* WT/BOP/N/84 (dated 20 Jun. 2017).

Meanwhile, a proactive role of the WTO dispute settlement system seems to have contributed to a certain extent in the alteration of policy choices on BOP measures by the WTO members.[212] In *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (India–Quantitative Restrictions),[213] the US complained on an Article XVIII:B quantitative restriction applied by India since 1957. Whereas the IMF had been continuously expressing its dissent on the necessity of Indian trade measure, the permanence of the measure was left unattended due to the failed consensus on the removal of it in the WTO BOP Committee. Based on an independent review of the evidence furnished mainly by the IMF, the panel concluded that the Indian government is not warranted the imposition of quantitative restrictions under Article XVIII:B.[214] While India appealed, claiming that the decision by the BOP Committee, not the panel, should be final, the Appellate Body (AB) upheld the panel decision. The AB acknowledged

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[212] In the GATT there was *Korea-Beef* case which disputed over Korea's Article XVIII:B measures. Due to the improved position on Korea's BOP, the panel recommended Korea to hold a consultation to work out a timetable for the removal of import restrictions. *Refer to* GATT, *Republic of Korea – Restrictions on Imports of Beef – Complaint by the United States* (Korea-Beef)*, Report of the Panel adopted on 7 November 1989*, L/6503 – 36S/268 (dated 24 May 1989). The legal implication of *India-Quantitative Restrictions* under the WTO is different from the GATT case. The WTO panel directly declared a violation and abolishment of the measure according to the DSB compliance procedure, not through the BOP consultation process. To further understand the legal implications of the *India-Quantitative Restrictions* case, *refer to* Dukgeun Ahn, "Linkages between International Financial and Trade Institutions," 34(4) *Journal of World Trade* 1 (2000), p. 17-25; Chantal Thomas, "Balance-of-Payments Crises in the Developing World: Balancing Trade, Finance and Developing World: Balancing Trade, Finance and Development in the New Economic Order," 15(6) *American University International Law Review* 1249 (2000), p. 1265-1276; Ugochukwu Chima Ukpabi, "Juridical Substance or Myth over Balance-of-Payment: Developing Countries and the Role of the International Monetary Fund in the World Trade Organization," 26 *Michigan Journal of International Law* 701 (2005), p. 716-719.

[213] *Refer to* WTO, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (India – Quantitative Restrictions)*, Report of the Panel*, WT/DS90/R (dated 6 Apr. 1999).

[214] *Ibid.*, paras. V.714-715.

the competence of a panel for a review in help of technical advice and expert information, authorized under Article 13 of the DSU.[215] India had to remove its long-held quantitative restrictions earlier than the timeline submitted to the BOP Committee at the 1997 consultation, following a compliance procedure of the WTO dispute settlement mechanism.

On the one hand, strengthened compulsory jurisdiction of the WTO panel produced an effective conclusion of the problem that has been lingering for several decades. Supposedly, such decision has created a spillover effect towards future policy choice on BOP problems of other WTO members. On the other hand, this decision rendered legal questions in terms of institutional jurisdiction over a BOP restriction in trade. The role of the BOP Committee and its surveillance mechanism came under doubt in face of practical effectiveness of the dispute settlement mechanism for conflict resolution in the WTO. At the same time, should the conclusion of the WTO panel and the decision of the IMF on the state of a BOP position differ, how the obligation under GATT Article XV:2 and the DSU could be accommodated remains unanswered.

4.2. Limitations of the GATS BOP Provision

Besides, one of the major channels that led the WTO to be accounted for more responsibility to global macroeconomic challenges is the introduction of General

[215] WTO, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, Report of the Appellate Body*, WT/DS90/AB/R (dated 23 Aug. 1999), paras. 80, 147-152.

Agreement on Trade in Services (GATS) at the Uruguay Round. With an opening of services trade, GATS turned out to be a primary driving force of transfer-of-funds liberalization, even more than any other bilateral investment treaties (BITs), the *Organization for Economic Cooperation and Development Code of Liberalisation of Capital Movements* (OECD Code), or even the IMF AA.[216] Within such context, GATS also contains a BOP safeguard provision in Article XII that allows adoption of restrictions "in the event of serious balance-of-payments and external financial difficulties or threat thereof."[217] Due to the nature of services transactions, the range of measures the members can apply under GATS include restrictions on payments and transfers, causing an overlap with the jurisdiction of the IMF.[218] In fact, reading in combination of GATS Articles XI:2 and XII:2(b), GATS basically requires an approval from the IMF when applying relevant exchange restrictions on current or capital account. Sufficient limits on liberalization provided by the positive-list approach on market access and full prudential carve out in financial services seemed to have politically enabled adoption of special and differential principle within a single BOP provision in the GATS. Procedural and transparency requirements agreed in the 1994 Understanding for the GATT were built in the GATS provision. The basic principles and structure of this exception clause were reproduced from the GATT rules, but the outreach of a GATS BOP provision even allows hands on the movements of capital.

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[216] Claus D. Zimmermann, "The Promotion of Transfer-of-Funds Liberalization across International Economic Law," 12(5) *The Journal of World Investment & Trade* 725 (2011), p. 740.
[217] GATS*, supra* note 37, Article XII:1.
[218] Deborah E. Siegel, "Legal Aspects of the IMF/WTO Relationship," 96 *The American Journal of International Law* 561 (2002), p. 596-599.

Despite a potentially encompassing implication of GATS Article XII, the practical inference is still in doubt. The IMF asked the WTO in 1997 for confirmation whether the GATS Article XII invocation conditions were intended to cover difficulties caused by capital inflows.[219] While the members agreed that capital outflow is a principal cause of BOP deficits, the WTO failed to come up with a specified interpretation for the case of capital inflows.[220] GATS Article XII evidently cause confusion in the expected function and impact of BOP measures, as the invocation conditions are much replicated from the outdated GATT framework while lacking sufficient guidance on the application of exchange restrictions with trade effects. With a recent policy shift in the IMF on allowing deployment of capital controls for surveillance purposes,[221] exchange restrictions in sudden increase of hot money inflows could be now recommended by the IMF, but not necessarily in consistency with GATS Article XI:2.[222] GATS Article XII is also incomplete as it calls for further set up of periodic consultation and review procedures for a proper operation of the system.[223] Up to date, there has been no measure notified under GATS Article XII.

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[219] WTO Working Group on the Relationship between Trade and Investment, *Exceptions and Balance-of-Payments Safeguards, Note by the Secretariat,* WT/WGTI/W/137 (dated 26 Aug. 2002), para. 68.
[220] *Ibid.*
[221] IMF, *Liberalization and Management of Capital Flows: An Institutional View* (dated 14 Nov. 2012), retrieved from http://www.imf.org/external/np/pp/eng/2012/111412.pdf (visited Aug. 19, 2018).
[222] Gabriel Gari, "GATS Disciplines on Capital Transfers and Short-term Capital Inflows: Time for Change?," 17(2) *Journal of International Economic Law* 399 (2014), p. 410-412.
[223] GATS, *supra* note 37, Article XII:5(d).

4.3. Relevance of IMF Work on Reserve Adequacy to the Management of WTO BOP Measures

The IMF participation is still crucial to the WTO management of BOP measures. While the WTO clearly has the final authority to determine imposition and termination of the measure, the IMF recommendation upon adequacy of the level of reserves in relation to the external position of a consulting party pose a significant impact on the decision. Yet, in general weakness of the IMF surveillance system especially after the collapse of the Bretton Woods system, the role of the IMF on GATT BOP consultations has been crude and inconsistent. The lack of initiative to substantially enhance the surveillance system in the IMF for a long time has been one of the major reasons of lagged reform in the governance of GATT BOP measures. While the WTO managed to deter abusive practices to a certain degree through improving procedural and transparency conditions, the fundamental challenge on governing trade and BOP linkages remains clearly on the balanced division of labor between the WTO and the IMF.

Against such overdue reform, gradual progress in IMF work programs specifically on the issue of reserve adequacy stands out in terms of their relevance towards WTO management of BOP measures. The rule of thumb the IMF used to determine the status of monetary reserves in the past was the months of import cover, despite some gradual efforts to incorporate considerations on short-term debt by remaining maturity and other capital account measures.[224] This tool still had

[224] WTO, *Coherence in Global Economic Policy-Making: WTO Cooperation with the IMF and*

relevance in the context of GATT Article XVIII:B consultations in the 1970s and 1980s, as those consulting parties were mostly maintaining a fixed exchange rate peg with primary dependence on current account transactions. However, since the outbreak of 1997/1998 Asian Financial Crisis, reportedly the first modern twin crisis of currency and banking crises in the emerging economies, the IMF finally started to reconsider the issue of reserve adequacy against the context of floating exchange rates and active participation in international capital markets.[225] Since 2001, the IMF has been publishing *Guidelines for Foreign Exchange Reserve Management* to provide list of relevant factors that project external vulnerabilities and guide the adequate level of reserves.[226] The attention has been put on the crisis prevention function of adequate reserves, in light of financial volatility due to further exposure to capital account transactions and away from current account considerations even for most of the emerging markets. Meanwhile, no universal rule on the level of adequate reserves could be drawn from the limited number of experience and a list of country-specific factors of crisis.

After the 2008/2009 Global Financial Crisis, the IMF tried to reassess the framework on reserve adequacy for the IMF surveillance reports. It was to update the reflection of trends in over-accumulation of reserves among emerging economies and new systemic risks proven probable even to advanced economies.

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the World Bank, The Treatment of "Monetary Reserves" in WTO Balance-of-Payments Committee Consultation, Note by the Secretariat, WT/TF/COH/S/2 (dated 18 Jun. 1999), para. 53.

[225] WTO BOP Committee (2002), s*upra* note 167, paras. 63-65.

[226] *See* IMF, *Guidelines for Foreign Exchange Reserve Management* (dated 20 Sep. 2001), retrieved from https://www.imf.org/external/np/mae/ferm/eng/index.htm (visited Sep. 3, 2018). The guideline has been prepared annually. The most recent publication was in 2014.

Not only has the association of reserve adequacy broadened towards crisis prevention but also towards crisis mitigation perspectives.[227] Both precautionary and non-precautionary (mercantilist) motivations[228] for reserve accumulation as well as availability of reserves and near-reserves (e.g. central bank swap lines, sovereign wealth fund assets, etc.)[229] have been examined to build a sufficiently general metric[230] as well as a list of case-specific judgmental factors on reserve adequacy. The IMF came up with a *Guidance Note on the Assessment of Reserve Adequacy and Related Considerations* in 2016, providing categorical guidance in assessing the adequate level of reserves based on the types of economy – mature markets, deepening financial markets, and credit-constrained economies – closely related but different from the traditional income-based country groupings.[231] The IMF also developed a new statistical metric of emerging market countries on their reserve adequacy called Assessing Reserve Adequacy (ARA), beyond several traditional index such as import cover, ratio of reserves to short-term debt, and reserves to broad money.[232]

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[227] *See* IMF, *Assessing Reserve Adequacy – Further Considerations*, IMF Policy Paper (dated 13 Nov. 2013), retrieved from http://www.imf.org/external/np/pp/eng/2013/111313d.pdf (visited Sep. 3, 2018).

[228] *See* IMF, *Assessing Reserve Adequacy – Specific Proposals,* IMF Policy Paper (dated Apr. 2015), retrieved from http://www.imf.org/external/np/pp/eng/2014/121914.pdf (visited Sep. 5, 2018).

[229] *See* IMF (2013), *supra* note 227, paras. 15-17.

[230] *See* IMF, *Assessing Reserve Adequacy,* IMF Policy Paper (dated 14 Feb. 2011), retrieved from https://www.imf.org/external/np/pp/eng/2011/021411b.pdf (visited Sep. 6, 2018).

[231] *See* IMF, *Guidance Note on the Assessment of Reserve Adequacy and Related Considerations* (dated 2 Jun. 2016), retrieved from https://www.imf.org/external/np/pp/eng/2016/060316.pdf (visited Sep. 6, 2018).

[232] *See* IMF, *Assessing Reserve Adequacy* (ARA), IMF Data Mapper, check at http://www.imf.org/external/datamapper/datasets/ARA/1 (visited Sep. 5, 2018). This metric comprises four components of potential BOP drains: 1) export income; 2) broad money; 3) short-

These IMF works provide significant insights on new systemic risks different countries are facing and the role of adequate reserves in the modern economic environment. While the function of reserves is one part of defense mechanisms against shocks, the BOP measures manageable under the WTO is even a portion of ways to ensure the adequate level of reserves. Especially since most of the discussions took place in the realm of capital account transactions, the scope of GATT and GATS BOP measures, except certain portion within the GATS BOP measures potentially related to financial services, mostly maintains relevance only to the credit-constrained, low income countries for their risk management. While emerging economies also demonstrate susceptibility to the change in external demand conditions of their exports, whether a trade measure is appropriate as a safeguarding method against BOP problems or inadequate reserves is another concern. For matured markets or the advanced economies, it seems clear that they have far graduated from the needs to resort to trade measures for BOP purposes.

Unnecessary risk of supporting domestic protectionist demands based on politically powerful trade balance rhetoric lurks with GATT Articles XII and XVIII:B still available to the members in the WTO system. There should be institutional ways to bridge such belated development in the IMF to the WTO on restructuring the operation and existence of BOP provisions. The discussion to fundamentally reform the WTO BOP provisions in coherence with the IMF system is timely to strengthen the international trade and financial architecture.

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term debt; and 4) other liabilities.

5. WTO Challenges of Restructuring BOP Provisions

5.1. Establishing a Single GATT BOP Provision

GATT Articles XII and XVIII:B have different stringency level in invocation standards basically for developed and developing countries, respectively. However, the separation of these two provisions, unlike in the 1950s, lack sufficient reflection of the economic divide among the current Member states. While subparagraphs 4(a) and 8 of Article XVIII state that only economies who can support low standards of living, are in the early stages of development and face rapid process of development are eligible to invoke Article XVIII:B, the panel in *India – Quantitative Restrictions* did not seriously review these conditions. Rather, these conditions were restated to directly refer to "developing countries" as a whole.[233] In fact, under the self-designation system in the WTO, the level of income and market maturity of developing countries range over a broad spectrum. Consequently, this arbitrary distinction between two GATT BOP provisions only renders Article XII practically obsolete and ignores remaining possibility of abuses of Article XVIII:B measures.

One interesting example of a progressive BOP provision in trade agreements can be found in the North American Free Trade Agreement (NAFTA). Article 2104 of NAFTA in the Exception chapter prohibits the use of BOP restrictions in the form of "tariff surcharges, quotas, licenses or similar measures."[234] This practically

[233] WTO, *India-Quantitative Restrictions,* Panel report, *supra* note 213, paras. V.632-V.633.
[234] *North American Free Trade Agreement* (NAFTA) (dated Jan. 1, 1994), Article 2104:5(d).

nullifies the use of GATT BOP measures among the NAFTA members. Instead, this provision permits restrictions on payments and transfers on current and capital transactions covered in the agreement, when there is "serious difficulty on BOPs or the threat thereof."[235] Given that the US insisted on the inutility of GATT BOP provisions at the Uruguay Round, this NAFTA provision, which came into force a year before the WTO, seems to represent the progressive version the developed countries tried to pursue but failed at the multilateral negotiation. In reflection of past experience on inefficient trade measures, Article 2104 of NAFTA stands out as an exemplary BOP provision in trade agreements, especially for economies with less credit constraints.

However, such model did not proliferate much in the following FTAs.[236] There are FTAs the US concluded after the NAFTA, such as those with Singapore, Chile, and Korea, that do not include any BOP exception. These agreements potentially raise consistency problem of IMF-approved restrictions on payments or capital controls at the outbreak of financial crisis.[237] Among those FTAs with a BOP exception clause, recently concluded major ones such as the *Comprehensive and Progressive Trans-Pacific Partnership* (CPTPP)[238], *EU-Canada Comprehensive*

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[235] *Ibid*., Art. 2104:1.

[236] Rarely, FTA provisions such as the Korea-EU FTA follows a similar spirit with the NAFTA provision by allowing BOP safeguard measures on payments and transfers but none in the forms of GATT Article XII measures. *See Free Trade Agreement between the Republic of Korea, of the One Part, and the European Union and Its Member States, of the Other Part* (Korea-EU FTA) (dated 13 Dec. 2015), Article 8.4.

[237] Deborah E. Siegel, "Using Free Trade Agreements to Control Capital Account Restrictions: Summary of Remarks on the Relationship to the Mandate of the IMF," 10 *ILSA Journal of International & Comparative Law* 297 (2004), p. 301-303.

[238] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP) (dated Jan. 23, 2018), Article 29.3.

Economic and Trade Agreement (EU-Canada CETA)[239], and *EU-Japan Economic Partnership Agreement* (EU-Japan EPA)[240] all adopt GATT Article XII and the 1994 Understanding *mutatis mutandis*. While neglecting GATT Article XVIII:B, FTA negotiating countries, disregarding the level of their income and market maturity, are willingly securing at least the equivalent amount of policy space available in GATT Article XII of the multilateral agreement. It is incredibly surprising how this outdated provision lingers on even in the most progressive and updated trade agreements. It can be considered a dereliction of duty by the negotiating parties on constructing sound international economic rules. Even worse, the intention of adopting GATT Article XII instead of the progressive NAFTA BOP provision in the recently concluded United States-Mexico-Canada (USMCA) Agreement, a substitute of the NAFTA, is highly doubtful.[241]

Under a flexible exchange rate system with further financial deepening in many more emerging economies, positions of monetary reserves combated by trade restrictions could only involve costly economic distortions. If a country is interested in providing a cushion to industrial damages against abrupt increase in imports, WTO safeguard measures can readily provide an effect. Given such circumstances, it is reasonable for the GATT to carry a single provision authorizing BOP safeguard measures, excluding eligibility of the developed country Members for invocation.

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[239] *EU-Canada Comprehensive Economic and Trade Agreement* (EU-Canada CETA) (dated 24 Jul. 2018), Article 28.5.
[240] *EU-Japan Economic Partnership Agreement* (EU-Japan EPA) (dated 27 Jul. 2018), Articles. 2.20 and 9.4.
[241] United States-Mexico-Canada (USMCA) Agreement (concluded on 30 Sep. 2018), Chapter 32, Article 32.4 Temporary Safeguards Measures, para. 8.

It is true that the LDCs could often be sufficiently dependent on current account activities to defend their monetary reserve positions. Whereas, developing countries may, specific to country characteristics and circumstances, find use of trade measures for BOP purposes in rare occasions. For advanced economies, the multilateral trading system should eliminate unnecessary possibility of market distortion through sustaining their eligibility on the invocation of BOP trade restrictions.

A new single GATT BOP provision should basically follow the spirit of Article XII without extra leniency implied in invocation conditions as in Article XVIII:B. The provision would not necessarily refer to consider 'development' needs but will preferably focus on 'reserve adequacy.' Since the concept of 'reserve adequacy,' in specific reference to recent IMF works operates based on customized consideration of each country, special and differential treatment principle can be retained without an explicit language on lax legal conditions in the WTO. Furthermore, this concept could help clarify the limited purpose of WTO BOP measures as crisis prevention and mitigation aligned to the IMF surveillance mechanism. The GATS may implement the same approach in its single BOP provision for coherence. The provision in the GATT may be re-numbered along with other exception clauses such as the safeguard provision and general exceptions, instead of being a subsidiary clause to rules on quantitative restrictions. Further elaboration of the specific conditions and country designation system for the envisaged WTO BOP provision will be discussed in the following section.

5.2. Institutionalizing Coordination with the IMF

Initially designed for strict coordination with the IMF-based monetary system, the BOP safeguard derived in the GATT/GATS provisions do not specifically indicate technical standards for the assessment of a BOP position. It has been the role of the IMF to provide relevant statistical information and comments on the external situation and of the WTO to accept those opinions for a final determination. However, this *ad hoc* consultation process with inexplicit standards for determination obscures eligibility, predictability and objective of the use of BOP trade measures. To avoid future controversy in case of different claims, for instance, in IMF recommendation and the panel review, it would be beneficial to institutionalize minimum coordination between the WTO and IMF standards applicable in case of invocation of WTO BOP provisions.

One way to control prudent use of GATT BOP safeguards could be setting up a country designation system in the WTO to limit the eligibility of invocation for a re-established, single GATT BOP provision. The WTO BOP Committee may arrange its role to annually announce a list of Members who lack minimum eligibility for invocation of BOP measures, based on the IMF-developed assessment standards on reserve adequacy. Lack of reserves does not directly translate into the need of BOP trade safeguards; therefore, any Member who imposes a BOP measure should still follow the existing consultation process for a final determination by the BOP Committee. However, providing a preliminary restriction on the eligibility of BOP measures in the WTO could deter potential abuses and misuses in line with

the IMF standards.

The ARA metric prepared for the emerging economies by the IMF could provide useful guidance. A crude point that reflects adequate level of reserves in this index is the 100-150% point range. The WTO BOP Committee may want to annually review this index and announce a list of Members with the ARA metric above 100% point to be ineligible for any invocation of the single GATT BOP provision. In other words, the self-declared developed countries in the WTO and the emerging economies with the ARA metric above 100% point would be excluded from invocation of GATT BOP safeguard.[242] Certain Members classified as those with "capital flow management measures," "commodity-intensive economies" or "dollarized economies" based on the IMF standard used for determining reserve adequacy could be listed in the grey area for special consideration.[243] In this way, the GATT BOP measures would be still available for the LDCs and vulnerable developing country Members, while effectively disciplining developed and more resilient developing county Members to abandon an inefficient trade policy option. A Member who invokes BOP provisions despite its listing in the ineligibility list should be subject to inconsistency under the WTO. A regular update of this list by the WTO BOP Committee could enhance general predictability in the use of BOP

[242] The ARA metric is not a definitive standard to address reserve adequacy. It does require further consideration of country-specific qualitative factors for a comprehensive diagnosis. However, this metric can be sufficient to work as a crude standard to filter out eligibility of WTO developing country Members on the use of trade restrictions to safeguard the BOP. Because trade restrictions would rarely be the most preferred policy tool even to adjust inadequate level of reserves, the standard to filter out the eligibility could be as conservative as possible (100% point instead of 150% point, despite the adequacy level ranging from 100 to 150 per cent point).

[243] *Refer to* IMF (2016), *supra* note 231 for further explanation on the classifications of countries requiring special consideration.

trade measures, in line with a broader risk mitigating mechanism prepared by the IMF.

6. Concluding Remarks

Despite a rather clear direction towards the reform of GATT BOP provisions, consideration on the operation of the GATS BOP provision remains pending in different ways. On the one hand, GATS concession covers relatively limited range of trade in services; on the other hand, the nature of activities covered in the scope of GATS is relevant along the continuum of current and capital accounts. The relatively closed trade in services market due to the positive list approach in the GATS probably reduces the members' interest in setting a suitable trade remedy system[244] or a proper periodic consultations procedure for the BOP safeguard in the GATS at the moment. Meanwhile, mode 3 of services trade often involves investment and sometimes capital account transactions linked to financial services, opening up a broad scope of issues compared to the traditional realm of trade in goods. In fact, such extended scope of issues has been considered much more familiar in the FTAs that cover broader topics (e.g. investment). Certain recent FTAs combined issues of capital transfer and BOP concerns into one separate chapter and took a comprehensive approach on structuring BOP-relevant

[244] GATS Article X (Emergency Safeguard Measures) and Article XV (Subsidies) call for multilateral negotiation to properly establish these trade remedy systems.

provisions.[245] Further scrutiny on such approach would also be necessary for coherence in the development of international economic regulations.

More recently, concerns on extended linkages between trade and BOP have gone viral. Discussions on global trade imbalance and over-accumulation of foreign reserves have evolved to be linked with currency manipulation practices and the ways to regulate them under the WTO.[246] Studies identifying different factors that affect the level of reserves and its impact on domestic industrial structure for trade call for cautious macroeconomic policy prescription.[247] If countries pursue a mercantilist approach on reserve accumulation, a positive obligation upon a surplus country may be necessary to govern equilibrium of the BOP. While the current WTO BOP provisions only focus on defending the situation of a deficit country, a different approach requiring both deficit and surplus countries to adjust responsibly may be needed to create a sound management system on overall trade and macroeconomic policies.

Perspectives on BOP stability further questions the role of the WTO in face of

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[245] Some of the FTAs concluded by the EU carries a separate chapter related to capital movements, payments and transfers. While these issues used to reside partially in Investment chapters or Financial Services chapters, certain FTAs holistically approached monetary issues related to current account, capital account, prudential measures as well as BOP safeguard measures to be grouped in a single chapter. For example, *see*, Korea-EU FTA, *supra* note 236, Chapter Eight (Payment and Capital Movements) and EU-Japan EPA, *supra* note 240, Chapter 9 (Capital movements, payments and transfers and temporary safeguard measures).

[246] Discussions on trade remedy for currency manipulation and global imbalance problems can be referred to Staiger and Sykes (2010), *supra* note 79; C. Fred Bergsten and Joseph E. Gagnon, *Currency Conflict and Trade Policy* (Washington DC: Peterson Institute for International Economics, 2017).

[247] Woo Jin Choi and Alan M. Taylor, "Precaution versus Mercantilism: Reserve Accumulation, Capital Controls, and the Real Exchange Rate," *NBER Working Papers* 23341 (National Bureau of Economic Research, 2017), p. 42-48.

multiple endeavors in different economic regimes to establish sound risk mitigation system for financial crises. Global financial system has been putting efforts to strengthen prudential management against banking crisis.[248] The IMF has expanded its surveillance mechanism not only on the global, regional and national level but with featured focus on connecting the dots between finance, exchange rate and macroeconomic policies.[249] Trade has been one of the most intruded relations after the Global Financial Crisis, despite the standstill agreement committed by the G-20 members.[250] Under such environment, the first step the WTO could make is substantive synchronization in its rules with the existing economic regimes for practical coordination in global macroeconomic policy. Furthermore, it is now time to think of better approaches in securing the level of global trade at times of volatilities.

Negotiations for the ITO had to undermine trade liberalization in defense of the rigid monetary system. In the WTO system, the members should commit to taking reforms that support further expansion, not contraction, of trade against external vulnerabilities.

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[248] *Refer to* Chris Brummer, *Soft Law and the Global Financial System,* Second edition (New York: Cambridge University Press, 2015).

[249] *See* IMF, *The 2007 Surveillance Decision: Revised Operational Guidance* (dated 22 Jun. 2009), retrieved from https://www.imf.org/external/np/pp/eng/2009/062209.pdf (visited Aug. 19, 2018); IMF, *IMF Surveillance - Factsheet* (dated 8 Mar. 2018), retrieved from https://www.imf.org/en/About/Factsheets/IMF-Surveillance (visited Aug. 19, 2018).

[250] Simon Evenett, "Five More Years of the G20 Standstill on Protectionism?," CEPR VoxEU.org (dated Sep. 3, 2013), retrieved from https://voxeu.org/article/five-more-years-g20-standstill-protectionism (visited Aug. 5, 2018).

IV. Security Exceptions for 'Trade and Security' in the WTO System[251]

The WTO has fundamentally changed the realm and structures of many of the trade rules that evolved under the auspices of the GATT. International trade law now covers different aspects of trade ranging from agricultural products and information-technology products to financial services and even trade-related intellectual property protection. Additionally, the rights and obligations of the WTO Members have been clarified by more than 300 panel and Appellate Body rulings.[252] In fact, the WTO jurisprudence is the most active and extensively growing body of public international law.

The existing research largely presumes the precedence of national security concerns over free trade concerns. But the world's security and trade relationship has fundamentally changed since the end of the Cold War[253] with most of the

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[251] The chapter is largely adopted from Ji Yeong Yoo and Dukgeun Ahn, "Security Exceptions in the WTO System: Bridge or Bottle-neck for Trade and Security?," 19(2) *Journal of International Economic Law* 441 (2016) and is a restructured, amended and updated version of the published article. There are some parts of the chapter adopted from other publications as well. Those references are noted in specific footnotes.

[252] There are currently more than 500 cases registered before the WTO dispute settlement body. Those proceeded to panel and Appellate Body rulings are fewer as a significant portion of the cases are mutually agreed, withdrawn or terminated.

[253] The end of the Cold War "lifted the veil that obscured the relationship between domestic politics on the one hand and international economic and military affairs on the other." Henry R. Nau, *Trade and Security: U.S. Policies at Cross-Purposes*, (Washington DC: The AEI Press,

former communist countries having joined the WTO. The WTO system seems to have transformed the security and trade relationship into a trade and security relationship.

Apart from GATT Article XXI, which deals with trade in goods, the GATS and the TRIPS Agreement also incorporate national security exceptions that are applicable to the trade in services regime as well as to the protection of intellectual property rights. The study also finds that the previous WTO rules diverge from the body of national security exception texts that has been incorporated into and has evolved over time via FTAs. The study examines these legal developments in WTO/FTA provisions and diagnoses the systematic challenges of applying Security Exceptions in the current WTO system.

1. Evolution of Security Exceptions

It is important to look at the origins of the security exception clause in order to understand how inadequate such a provision is to address current challenges. The institutional and legal rationales underlying the ITO are helpful to analyze the structural limitation of Security Exceptions as a means to address the current problems in the WTO system. The chronological history of different facets of security exception clauses in the world trading regime is explained below, aiming

1995), p. 23.

to conclude with four unique characteristics of security exceptions and provide the basis for further analysis in the following sections.

1.1. Codification of Security Exceptions

At the initial stage of the drafting of the ITO Charter, there was no separate provision titled *Security Exceptions*. The origins of the current security exceptions sprouted from separate items listed in mere parallel with other contents of a broad *General Exceptions* clause. The draft US Proposal[254] published in November 1945 is the very first draft containing traceable remnants of the current security exceptions clause in a multilateral trading agreement. Indeed, the ultimate traces of the security exception clause are found in the general exceptions clause contained in the US proposal, under the Commercial Policy chapter, which resembles the exception provision in the US' reciprocal trade agreements in the 1930s.[255] The major contents related to the current security exceptions had developed in the "Suggested Charter" for an ITO of the UN, prepared by the US in September 1946, but the parallel structure of the General Exceptions clause remained intact throughout the London draft (Article 32)[256] and the New York draft (Article 37)[257].

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[254] Department of State, The United States of America, *Proposals for Expansion of World Trade and Employment* (1945 US Proposal), (dated Nov. 1945), retrieved from http://www.worldtradelaw.net/document.php?id=misc/ProposalsForExpansionOfWorldTradeAndEmployment.pdf (visited Nov. 24 2018).

[255] Rüdiger Wolfrum, Peter-Tobias Stoll and Holger P. Hestermeyer (ed.), *WTO: Trade in Goods*, (Leiden: Martunis Nijhoff Publishers, 2011), p. 574.

[256] *See* London report, *supra* note 90.

[257] *See* New York report, *supra* note 93.

The draft clause of the Suggested Charter is as follows:

> Article 32. General Exceptions to Chapter IV[258]
>
> 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 …

During the Geneva Conference, General Exceptions (Article 37) under the Commercial Policy chapter of the New York draft underwent a total restructuring. The US delegation first proposed to remove items (c), (d), (e), and (k) from Article 37 and create a new article to make these extracted items as general exceptions to the entire Charter, not solely to the Commercial Policy chapter.[259] This proposal was adopted and implemented as two separate provisions in the draft: the General Exceptions (Article 43) under the Commercial Policy chapter and the new General Exceptions (Article 94) under the General Provisions chapter.[260]

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[258] Department of State, The United States of America, *Suggested Charter for an International Trade Organization of the United Nations* (US 1946 Suggested Charter), U.S. State Department Proposal, (dated Sep. 1946), retrieved from http://www.worldtradelaw.net/document.php?id=misc/Suggested%20Charter.pdf (visited Oct. 1 2018), Chapter IV, Section I, Article 32.

[259] Geneva report, *supra* note 93, p. 5.

[260] *See ibid.*; *Draft of September 10 and 13,* E/PC/T/196 (dated 14 Sep. 1947).

Subsequently, the Geneva Draft (August 1947 draft) of the GATT went through a similar restructuring process with the Charter for the general exceptions provision. In this draft, the contents of Article 94 of the Charter were arranged as Part I of the GATT Article XIX and the contents of Article 43 of the Charter were arranged in Part II of the GATT Article XIX.[261] There is a clear distinction between the exception clauses relating to political and security issues and those governing all other matters, which once used to be listed up altogether. In the Verbatim Report of September 5, 1947, the discussions further aimed to separate Part I and Part II of Article XIX into two different provisions, Article XIX(A) and Article XIX, with a new title for Article XIX(A) as *Security Exceptions*.[262] In fact, this is the first time that the express title of *Security Exceptions* ever came into light. Consequently, in the following tariff negotiation sessions in Geneva, for the final elaboration of the GATT draft in October 1947,[263] the General Exceptions which used to be in two different parts, were completely divided into two separate provisions consistently with the ITO Charter. Ultimately, the final GATT draft was composed of *Article XX General Exceptions* and *Article XXI Security Exceptions*, as shown below:[264]

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261 *See Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, (Draft) General Agreement on Tariffs and Trade,* E/PC/T/189 (dated 30 Aug. 1947).

262 United Nations Economic and Social Council (UN ECOSOC), *Verbatim Report,* Eleventh Meeting of the Tariff Agreement Committee Held on Friday, 5 September 1947 at 2.30pm in the Palais des Nations, Geneva, E/PC/T/TAC/PV/11 (dated 5 Sep. 1947), p. 23-26.

263 *See* United Nations Economic and Social Council, *Final Act, GATT and Protocol of Provisional Application,* E/PC/T/214/Add.1/Rev.1 (dated 4 Oct. 1947).

264 *See* GATT 1947, *supra* note 25.

Article XXI *Security 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.

During the Havana Conference, Article 99 (formerly Article 94) of the final draft of the ITO Charter ended up with two different parts in the provision. Part I is very similar to the GATT Security Exceptions, as it articulates specific political circumstances in response to which Members can suspend their normal trade relationships and obligations as elaborated in other parts of the Charter. Part II clarifies how the Charter cannot override obligations of other UN peace treaties.[265]

With the demise of the ITO Charter, only Article XXI Security Exceptions of the GATT 1947 has survived up till today. No further amendment has ever been attempted for the Security Exceptions, even after the establishment of the WTO. The essentially same provision was included in the TRIPS Agreement in the form of Article 73 and also in the GATS as Article XIV*bis,* only with slight modifications.

[265] *See* Havana Charter, *supra* note 5.

One interesting point to note on GATS is that the security exceptions provision was incorporated not as a separate provision but as *bis* of Article XIV General Exceptions. Although, legally speaking, it does not make any difference in terms of interpretation and application of Security Exceptions, it seems to indicate the Uruguay Round negotiators' understanding to remind the intrinsic relationship between general and security exceptions clauses.

The multilateral development of Security Exceptions has been practically dormant ever since 1947; however, with an abrupt proliferation of FTAs, the security exceptions clauses in the world trading regime commenced to diverge little by little pursuant to the texts of the FTAs.

1.2. Development of Chapeau Language

Despite the common origin for their genesis, the current Article XX General Exceptions and Article XXI Security Exceptions of the GATT contain a fundamental difference in nature, mainly due to the chapeau.

The development of the chapeau was visible in the first full GATT draft, the New York draft of the GATT, prepared by the Drafting Committee. As the GATT was a subsidiary agreement to the ITO Charter, specialized in tariff concessions, the GATT provisions were mostly a replication from the Commercial Policy chapter of the ITO Charter. The same was the case for the general exceptions provision of the draft, except for a hint on the current chapeau of the GATT Article XX General Exceptions. The part 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 be applied under this exception clause.[266] This chapeau is an important invention which basically puts primary gravity on the maintenance of international trade order, by aiming to deter and regulate abusive means of "arbitrary or disguised restriction" in applying exception provisions. The provision with this chapeau in the New York draft covered not only the current General Exceptions components but also the components of the current GATT Security Exceptions, included in subparagraphs (c), (d), (e), and (k).

Subsequently during the Geneva Conference, the separation of Article 37 under the Commercial Policy chapter and Article 94 under the General Provisions chapter in the draft Charter became evident and it eventually resulted in two distinct chapeaux for each provision. The US delegation proposed a new chapeau for Article 94: "[n]othing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures," which eliminated the non-trade-distorting condition of General Exceptions under the Commercial Policy chapter.[267] This proposal was finally adopted in an even more simplified form in the final draft of the GATT: "[n]othing in this Charter shall be construed:"[268] This new chapeau

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[266] *Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, Draft General Agreement on Tariffs and Trade*, E/PC/T/C.6/85/Rev.1, (dated 20 Feb. 1947).

[267] Geneva report, *supra* note 93, para. 8.

[268] In fact, the exception clauses in the US' Reciprocal Agreements in the 1930s include subparagraphs that are partially and substantively relevant to those constituting current Security Exceptions and General Exceptions of the GATT with two different chapeau languages. For example, in Article XIV of The Reciprocal Trade Agreement between the United States of America and Switzerland, retrieved from

for Article 94 remained as it is for Part I of Article 99 in the final draft of the Havana Charter as well as Article XXI of the GATT which came into force even before the Charter was finalized.

The chapeau of the Security Exceptions clearly implies that the subjected provisions are aimed to be *all-encompassing* and *strong in nature*. It suited the objective for this exception clause under the General Provisions chapter, but how to constructively restrict and also include necessary concerns for immediate suspension of normal trade relations and obligations remained as complex puzzles to resolve for the drafters.

1.3. Development of Subparagraphs

Subparagraph 3 "relating to the traffic in arms, ammunition and implements of war, and, in exceptional circumstances, all other military supplies" and subparagraph 8 "undertaken in pursuance of obligations for the maintenance of peace and security" [269] of General Exceptions from the US draft proposal are clearly attributable as guiding elements of what constitutes the current Security Exceptions. The vague description of the subparagraphs from the US draft proposal

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http://babel.hathitrust.org/cgi/pt?id=coo.31924014047330;view=1up;seq=3 (visited Mar. 24 2018)), paragraph 2 has a chapeau language similar to that of GATT Article XX but different in the emphasis on "no arbitrary [']discrimination… under like circumstances[']" This difference in language carries much implications relating to the stipulated non-discrimination principle in the multilateral system, but it will not be discussed further in this paper. The remnants relevant to Security Exceptions are visible in paragraph 1 of Article XIV of this bilateral agreement between the US and Switzerland. *Refer* to R. Wolfrum et al. (2011), *supra note* 255, p. 574.

[269] *See* 1945 US Proposal, *supra* note 254.

was materialized and rearranged into four components in the "Suggested Charter" for an ITO. Subparagraphs (c), (d), (e), and (k) are those directly attributable to the current components of the GATT Article XXI Security Exceptions.

Prime attention to war, military establishments, and peace constitutes the essence of the past and current security exceptions provisions. Reflecting on the experience on two world wars, it seems plausible that the drafters from the beginning shared common understanding on how trade and economic interests could be considerably yielded under certain political emergency situations.[270]

A specific mention on fissionable materials reflects concern on the devastating nuclear experience during the World War II. A call for coherence with the UN Charter identifies how the ITO was supposed to function as a UN organization like the other Bretton Woods institutions. The elements of subparagraphs (c), (d), (e), and (k) remained until the final drafts of the GATT and the ITO Charter, while they were restructured and rephrased throughout the subsequent conferences and sessions.

Descriptive elaborations of the subparagraphs from the previous drafts were significantly rearranged for a separate security exceptions clause with particular consideration on each political and military concern. The final GATT draft as well as the 1947 Geneva Conference draft of the Charter were organized to exceptionally permit measures relevant to three main components: (a) not to allow disclosure of information related to essential security interest, (b) to allow action necessary to

[270] Foreign policy motivations for the GATT negotiation are well expounded in Irwin, Mavroidis a nd Sykes (2008), *supra* note 10, p.188-197.

protect essential security interest, and (c) to uphold obligations under the UN to maintain international peace and security. This reorganization process combined both abstraction and concretion of the components from the previous drafts. Consequently, the recurring theme of this provision became the protection of "essential security interests" of the Members through (a) and (b). The sub-subparagraphs (i), (ii), and (iii) of (b) specifically guide the type of actions eligible for exceptional treatment when utilized for the protection of essential security interests of the Members.[271]

More particular concerns related to the aftermath of the World War II and precautions on future wars were actively raised in the Article 94 sub-committee meetings during the Havana Conference. The result was the development of Part II, eventually incorporated into Article 99 of the final Charter, regarding peace treaties and special regimes established by the UN.[272] Concurrently, subparagraph (c) of Part I of Article 99 was revised not to restrict the efficacy of other inter-governmental agreements established for the purpose of protecting essential security interests, and the former elements of subparagraph (c) were separately incorporated into Article 86 (Relations with the United Nations). Altogether, the new subparagraph (c) of Part I and Part II as a whole imposed a restriction on the ITO not to override other governmental and UN treaties, tightly limiting the scope of the political concerns that the ITO can intervene and decide upon.

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[271] Subparagraphs (i) to (iii) were listed as independent items (c) to (e) in the previous drafts.
[272] United Nations Economic and Social Council, *Committee VI: Organization, Subcommittee I (Article 94), Report of Working Party on Exceptions concerning "Peace Treaties" and "Special Regimes"*, E/CONF.2/C.6/W.44 (dated 15 Jan. 1948), p. 1.

Despite such efforts to elaborate the final Charter, the demise of the ITO left only the textual developments in GATT Article XXI. Without clear jurisdictional division and clarification of the provision, the GATT Security Exceptions clause has lived on with its embedded ambiguity that gives Members an open-ended discretion and a potential power to abuse it.

With regard to the subparagraphs of Article XXI, nothing much has been added to reflect the fundamental change in economic and technological circumstances even after the establishment of the WTO system. The languages of the GATT Security Exceptions were incorporated into the texts of the TRIPS and the GATS, with only slight modifications.

Yet, what is intriguing is the existence of incomprehensible anomaly only developed in the text of GATS Security Exceptions as compared to that of the GATT or the TRIPS. The GATS national security exception includes the word "fusionable materials" in addition to fissionable materials in subparagraph (b)(ii). In fact, specific disciplines on "fusionable" materials are rare especially in the international context. For example, Article 3 of the Statute of the International Atomic Energy Agency provides that it is "authorized to establish and administer safeguards designed to ensure" non-military uses of "special fissionable and other materials". The inclusion of "fusionable materials" only in the context of the GATS security sxceptions raises puzzling questions as to why that element is not included in the GATT, and more importantly in the TRIPS.[273] There is no particular reason or

[273] The sudden inclusion of the word "fusionable materials" in GATS Security Exceptions is found in the Dunkel Draft, while it is unclear why and how that addition has taken place. It also lacks reasonable explanation of why that specific wording was crucial in the context of trade in services

plausible explanation for an unbalanced protection of fissionable and fusionable materials.

Other than that, despite the increasing diversity and new legal developments in the FTA provisions, there has been no significant progress in terms of textual elements as regards Security Exceptions in multilateral trade agreements.

1.4. Relation with the UN Concerning Security Exceptions

The provision that must be dealt with in relation to Article 99 (General Exceptions) of the ITO Charter is Article 86 (Relations with the United Nations), created during the Havana Conference. As explained in Section 4.2.C, the former subparagraph (c) of Article 94 in the draft Charter, which noted supremacy of the obligations of the UN Charter over the ITO Charter, was extended into a full provision that elaborates institutional arrangements between the ITO and the UN. This provision is important not merely because it was born out of an element from Article 94, but also because it clarified the division of labor between the ITO and the UN over the jurisdiction on political decisions and indirectly set out a prospective procedural flow on how to proceed for a review in case of invocation of Article 99.

The clear intention for the division of labor on trade versus political matters between the ITO and the UN was presented in paragraph 3 of Article 86:[274]

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but not others. Nevertheless, this language has been often adopted in latter FTAs, especially those signed by the EU. For further elaboration, refer to section 4.4 of this chapter.

[274] The intentions of the drafters to establish Article 86 can be referred to United Nations

> "… 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."[275]

The sub-committee for Article 94 noted that paragraph 3 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."[276] 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.[277]

The basic premise for this compatibility in division of labor is that the ITO was 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

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Economic and Social Council (UN ECOSOC), *Sixth Committee: Organization, Sub-Committee I (Article 94), Notes of the First Meeting*, E/CONF.2/C.6/93 (dated 9 Jan. 1948), paras. 13-15.

[275] Havana Charter*, supra* note 5, Article 86:3.

[276] UN ECOSOC (1948), *supra* note 274, para. 15.

[277] *Ibid*. para. 3.

specialized agencies are ought to be in agreement with the UN ECOSOC,[278] being this agreement subject to approval by the General Assembly[279]. 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 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.

Additionally, it is important to note that despite the transfer of jurisdiction to the UN for political matters, the interpretative note to paragraph 3 of Article 86 secured the right of Members to file a case when it observes an impairment of its expected trade benefit, even though it is a third party to the relevant political circumstance.

These provisions of Article 86 and its interpretative note along with Article 99, however, were not entered into force as a consequence of a complete collapse of the ITO. During the whole GATT period, there was no formal effort to revive or amend the ITO framework of operating the security exceptions clause.[280] The

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[278] The United Nations Charter, Chapter VIII, Article 57, paragraph 1 specifies which specialized agencies can be in agreement to be referred as UN specialized agencies.

[279] *Ibid.*, Chapter IX, Article 63.

[280] Neither did the elaboration of Article 86 of the ITO Charter survive, nor was there a new arrangement prepared for the GATT during the GATT Review Session (1954-55). What barely linked the GATT and the UN at least in an administrative sense was the Interim Commission for the ITO (ICITO), which was established during the UN Conference on Trade and Employment and "was never abolished" (United Nations, General Assembly, *Note by the Secretariat, Relations of the General Agreement on Tariffs and Trade with the United Nations, from the Ad hoc committee*

GATT was either intentionally or inadvertently kept deficient to deal with economic sanction matters of political motivation. In the meantime, there has been repetitive debate on the identity and the jurisdiction of the GATT over innately political matters whenever Article XXI has been invoked. Amid all the controversial debates and unsolved ambiguity on the application of Article XXI, there was one addendum on Article XXI made in the 1982 ministerial meeting[281] after the *EC, Canada, Australia – Trade Measures Affecting Argentina Applied for Non-Economic Reasons* case. The decision basically encouraged more transparency of the procedure for invoking Article XXI. But other than that, nothing much has practically enhanced the applicability of the provision or alleviated its ambiguity.

Later in the Uruguay Round, there seemed to be some efforts to work on Article XXI.[282] But nothing was further amended even after such scrutiny and the establishment of the WTO in 1994. The establishment of the WTO as an international organization could have been a good opportunity to fill out the missing gap caused by the failure of the ITO almost seventy years ago. It is unfortunate to find that there is no articulation in the Marrakesh Agreement that clearly explains the institutional arrangement between the WTO and the UN and clarify the limits

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on the restructuring of the economic and social sectors of the United Nations System, A/AC.179/5 (dated 9 Mar. 1976), 1). 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, 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; *See* United Nations, *Letters between the Executive Secretary of GATT and the then Secretary-General of the United Nations in August 1952*, E/5476/Add.12 (dated 24 May 1974).

[281] *See* GATT, *Decision Concerning Article XXI of the General Agreement, Decision of 30 November 1982* (1982 Decision), L/5426 (dated Dec. 1982).

[282] *See*, e.g., GATT, *Article XXI Note by the Secretariat*, MTN-GNG/NG7/W/16 (dated 18 Aug. 1987).

and scope of their jurisdiction over WTO security exceptions.

1.5. Debates on Legal Interpretation of Security Exceptions

The all-embracing and seemingly omnipotent Security Exceptions of Article XXI has, in effect, been largely considered inapplicable throughout the GATT/WTO history due to its ambiguity in review standards. Knowing these inherent loopholes the provision may create, the original founding members of the ITO were keen on clarifying minute wordings and nuances in the text of the ITO Charter, as they firmly believed in their substitution for crude and adjunctive structure of GATT provisions.

Their concerns included, for example, what the "military establishment" in subparagraph (b)(ii) should mean, whether that referred only to the actual establishment as a final consequence or the process of the establishment as a whole, which then included concerns on strategic goods and relevant raw materials;[283] how to clarify the scope of the exception for a Member when it "either singly or with other states" take action necessary for essential security interests;[284] and how subparagraphs (i), (ii), and (iii) of (b) should condition the characteristics of an action instead of the alleged essential security interests of the Member.[285] Yet, the unfortunate demise of the ITO led the insufficient GATT text to survive alone with

[283] United Nations Economic and Social Council, *Sixth Committee: Organization, Sub-Committee I (Article 94), Notes of the First Meeting*, E/CONF.2/C.6/W.26 (dated 9 Jan. 1948), p. 1.
[284] *Ibid*.
[285] United Nations Economic and Social Council, *Sixth Committee: Organization, Sub-Committee I (Article 94), Notes of the Third Meeting*, E/CONF.2/C.6/W.40 (dated 13 Jan. 1948), p. 3-4.

critical deficiencies.

The self-judging language at the beginning of subparagraph (b) basically overwhelmed the debates relating to Security Exceptions in both GATT and WTO, as it served as a basis for the responding parties to claim that neither GATT nor WTO has the jurisdiction over the provision. In fact, academics have also confirmed that the language of Article XXI is written in a manner that characterizes the nature of the provision as self-judging.[286] It is agreed on the fact that the language "it considers" in subparagraph (b) of Article XXI provides grounds on how the provision allows Members to invoke it "free from any judicial review."[287] However, whether this nature directly confers a total discretionary right to the contracting parties to act upon politically motivated sanctions is another concern. Referring to *Sweden – Import Restrictions on Certain Footwear* (Sweden – Footwear), which was not a dispute but a decision by the GATT Council on a state measure, it does seem clear that Article XXI does not accept states' arbitrary declaration on the need to protect security interests.[288] The Council concluded that the import ban on footwear, which was claimed to be military strategic goods by Sweden, was an

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[286] *Refer* generally to John H. Jackson, *World Trade and the Law of GATT,* (Charlottesville: The Michie Company, 1969); Raj Bhala, "National Security and International Trade Law: What the GATT Says, and What the US Does", 19(2) *University of Pennsylvania Journal of International Economic Law* 263 (1998); Dapo Akande and Sope Williams, "International Adjudication on National Security Issues: What Role for the WTO?", 43 *Virginia Journal of International Law* 365 (2003); Roger P. Alford, "The Self-judging WTO Security Exception", 2011(3) *The Utah Law Review* 697 (2012).

[287] Bhala (1998), *supra* note 286, p.268-269.

[288] *See* GATT*, Minutes of Meeting held in the Palais des Nations, Geneva, on 31 October 1975*, C/M/109 (dated 10 Nov. 1975), p. 8; GATT, *Sweden – Import Restrictions on Certain Footwear* (Sweden – Footwear), L/4250 (dated on 17 Nov. 1975).

example of abuse and misuse of the GATT security exceptions.[289] Upholding the founding fathers' initial aim to balance the rights and obligations of the world trading regime, the Council clearly noted that there were cases not eligible for the application of the security exceptions, despite its all-embracing and overarching power over the other provisions of the Agreement.[290] The Council also clarified that the security exception clause was to be applicable only in rare and imminent circumstances and it was the last resort for the Members to ensure its policy sphere in case of international emergency.[291]

Yet even after the establishment of the WTO, the jurisdiction of the panel over Security Exceptions is an ongoing debate. In fact, the application of good faith principle has been sufficiently dealt in the existing literature as an appropriate and relevant standard in interpreting such broad and ambiguous Security Exceptions.[292] There are also different groups of scholarly debate on whether Article XXI should be amended in order to strengthen the good faith principle or left as it is in order to

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[289] Also Raj Bhala mentions that this Swedish case should have rather sought to invoke Article XIX Safeguards clause to meet its intentions of guaranteeing temporary relief from competition: Bhala (1998), *supra* note 286, p.278.

[290] Minutes of Meeting held in the Palais des Nations, Geneva, on 31 October 1975, *supra* note 288, p. 9.

[291] *Ibid.*

[292] Generally *refer* to Michael J. Hahn, "Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception," 12 *Michigan Journal of International Law* 558 (1991); Hannes L. Scholemann and Stefan Ohlhoff, "Constitutionalization and Dispute Settlement in the WTO: National Security as an Issue of Competence," 93 *American Journal of International Law* 424 (1999); Wesley A. Cann, Jr., "Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Base Relations and Establishing a New Balance between Sovereignty and Multilateralism," 26 *Yale Journal of International Law* 413 (2001); Akande and Williams (2003), *supra* note 286; Regis Bonnan, "The GATT Security Exception in a Dispute Resolution Context: Necessity or Incompatibility?," XIX(1) *Currents International Trade Law Journal*, 3 (2010); Shin-yi Peng, "Cybersecurity Threats and the WTO National Security Exceptions," 18 *Journal of International Economic Law* 449 (2015).

amplify the benefits of its constructive ambiguity. [293] One group considers the need for having objective criteria as through the Article XX-like chapeau with a necessity and trade-restrictiveness test.[294] The other has argued that the problems arising from the ambiguity of the GATT Security Exceptions language is not a real concern.[295] This stream of literature basically argues that the invocation of the security exceptions has the limited role of providing political excuse because states do not want such complicated political questions to be answered and rather try to utilize less formal methods to solve problems.[296] However, no longer does this premise seem to ensure peaceful bargaining, as Security Exceptions seems to have now become a real trade concern. Within a couple of years, the invocation of Security Exceptions has been on the rise along intensification of trade tensions among the WTO Members.[297] Invoking parties continue to act without good faith and complaining parties do not seem to willingly forgo of their trade interest for political reasons anymore.

All in all, the peculiarities of the security exceptions in the initially-envisioned multilateral trading system can be summarized in four points. Firstly, despite identical roots with General Exceptions, Security Exceptions is identified by its chapeau language as an all-encompassing and non-conditional provision. Secondly,

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[293] Generally *refer* to Lindsay (2003) and Emmerson (2008), *supra* note 84.
[294] Refer to Hahn (1991) and Cann, Jr. (2001), *supra* note 292; Susan Rose-Ackerman and Benjamin Billa, "Treaties and National Security," 30(437) *N.Y.U. Journal of International Law and Politics* 437 (2008).
[295] Refer to Alford (2012), *supra* note 286; Emmerson (2008), *supra* note 84.
[296] Lindsay (2003), *supra* note 84, p.1310-1314; Alford (2012), *supra* note 286, p. 725-745.
[297] *Refer* to section 4.3 for further explanation and a detailed case study.

the scope of security issues that can be dealt with via the security exceptions was intended to be only roughly relevant to legacies of the postwar experience. Thirdly, in balancing the establishment of such a powerful exception in the trade regime, the political decisions were strictly to be adhered to the UN decisions, through complete division of jurisdictions, though it was never completed with the intention to apply it in the GATT system that survived the fall of the ITO. Lastly, divergent perspectives on the ambiguity of the language in Security Exceptions have been widened over the course of the GATT/WTO history.

It can be understood that the initial purpose of permitting Security Exceptions in the early multilateral trade agreement was to provide policy space to each state to diverge from the agreed obligations under exceptional emergency situations which deserved political understanding under the UN umbrella. It was part of the design to coherently maintain peace and control political stability in the post-war UN way, along with strong economic ties among the contracting parties. The circumstances, however, have significantly changed in multifaceted ways by the time of the establishment of the WTO.

2. Application of Security Exceptions in the GATT System during the Cold War Era

There were a total of seven disputes[298] in the GATT era where Article XXI was invoked as a defense.[299] Perhaps as a reflection of the ambiguity and controversial nature of Article XXI, the panel report of *US – Imports of sugar from Nicaragua* was the only one adopted by the GATT contracting parties. Yet, even this report does not include a review directly on Article XXI.[300]

Table 5. GATT Disputes that Invoked Security Exceptions

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)
1954	Peru – Prohibition of	L/2844	Czechoslovakia	Art.XXI (b)(iii)

[298] For detailed accounts of each dispute, *see* generally to Jackson (1969), *supra* note 286; WTO (1998), *supra* note 100, p. 599-610; Andreas F. Lowenfeld, *International Economic Law*, (Oxford University Press; 2002), p. 755-763; Patrick F.J. Macrory, Arthen E. Appleton, Michael G. Plummer (eds.), *The World Trade Organization: Legal, Economic, and Political Analysis*, Vol. I, (New York: Springer, 2005), p. 1571-1579; Raj Bhala, *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade*, Vol. II, (London: Sweet & Maxwell, 2013), p. 187-202.

[299] There were also incidents where Article XXI was invoked to justify trade actions, despite the absence of a formal complaint in the dispute settlement system. They include 1961 *Ghana – Ban on imports of Portuguese goods*, 1962 *US – Embargo on trade with Cuba*, 1970 *Egypt – Boycott against Israel and secondary boycott* and 1975 *Sweden – Import quota system for footwear*. *Refer* to GATT (1987), *supra* note 282, p. 5-7.

[300] GATT, *United States – Imports of Sugar from Nicaragua* (US – Sugar Quota)*, Report of the Panel adopted on 13 March 1984*, L/5607 – 31S/67 (dated on 2 Mar. 1984).

	Czechoslovakian imports			
Apr. 30, 1982	EC, Australia, Canada – Trade restrictions affecting Argentina applied for non-economic reasons	L/5319	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)

** indicates the existence of a panel report*

Source: Data compiled based on information from the WTO website, https://www.wto.org/english/docs_e/gattdocs_e.htm; "Table 1" from Ji Yeong Yoo and Dukgeun Ahn, "Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?," 19(2) *Journal of International Economic Law* 417, (2016), p. 431.

2.1. Legal Debates in GATT Disputes

From the crude GATT Article XXI text, most of the controversies tended to focus on the languages of 1) "…which 'it' considers necessary to protect its essential security interests" at the beginning of subparagraph (b); and 2) "taken in time of war or 'other emergency in international relations'…" in sub-subparagraph (b)(iii). While theoretically every subparagraph of Article XXI could be invoked; surprisingly, only subparagraph (b) was often utilized.[301] Subparagraph (a) was

[301] For a summary of case titles and basic information matched with invoked provisions, refer to [Table 5.] in section 4.3. for GATT cases and [Table 6.] in section 4.4. for WTO cases.

never invoked and subparagraph (c) is rather clear in the required reference of UN obligations that nobody bothered to challenge it. Subparagraph (b)(i) was also never invoked while (b)(ii) was used only once in *US – Issue of Export Licenses,* the very first GATT case dealing with security exceptions. In other words, the GATT contracting parties and WTO Members depended solely on Article XXI(b)(iii) for the most of the time, trying to take advantage of the controversial and ambiguous scope of the language. Consequently, the debates in the GATT centered at the self-judging nature of Article XXI(b) and the lack of proper definition on "emergency in international relations" in subparagraph (b)(iii).

The invoking parties consistently claimed that the panel does not have the jurisdiction on Article XXI in the GATT system. In the *US – Issues of Export Licenses* case, the UK as a third party stated that "every country must be the judge in the last resort on the questions relating to its own security."[302] The delegate from the European Economic Community (EEC) in the *EEC, Australia, Canada – Trade restrictions affecting Argentina applied for non-economic reasons* (*EEC, Australia, Canada – Argentina*) also claimed that a measure for national security does not require any procedure of notification, justification or approval.[303] Canada, Australia and the US also agreed that the GATT was not the right forum to discuss security issues since it does not have the right to question sovereign nation's decisions on security concerns.[304] In *US – Trade measures affecting Nicaragua*

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[302] GATT, *Summary Record of the Twenty-Second Meeting on Wednesday, 8 June 1949, at 3:15pm*.(US-Issues of Export Licenses), GATT/CP.3/SR.22 (dated 8 Jun. 1949), p. 3.
[303] WTO (1998), *supra* note 100, p. 600-601.
[304] *Ibid.*

(*US–Nicaragua*) case, the US invoked Article XXI claiming that it has applied a trade restriction due to a threat on security and international relations from the Nicaraguan government and insisted that the panel does not have the jurisdiction to review the application of Article XXI.[305]

In fact, the controversial nature of this self-judging language in GATT Security Exceptions can be illustrated in an exemplary case ruled in both the International Court of Justice (ICJ) and the GATT. Upon a US' sanction measure against Nicaragua, the ICJ ruling explicitly stated that the ICJ has full jurisdiction and authority over the review of cases concerning essential security interests,[306] while the GATT could not effectively defend its authority over the provision because its Security Exceptions had the wording "it considers," implying a room for state discretion.[307]

On the other hand, there have been contracting parties who consistently argued for a need of assurance on panel jurisdiction over GATT Security Exceptions. In *US – Issues of Export Licenses* case, the delegate from Czechoslovakia insisted that Security Exceptions is not a carte blanche that any sovereign nation's decision on security interest can be exempted from GATT obligations.[308] Brazil, who participated as a third party in *EC, Australia, Canada–Argentina*, argued that the EC has the prerogative to decide on its own essential security interest, but it is still

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[305] GATT, *United States – Trade Measures Affecting Nicaragua – Communications from the United States* (US-Nicaragua - communications), L/5803 (dated May 29, 1985).
[306] Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), Judgment, 1986, I.C.J. Rep. 14 (dated on 27 Jun. 1986), paras. 221-222.
[307] GATT, *United States – Trade Measures Affecting Nicaragua, Report by the Panel,* (US-Nicaragua Panel Report), L/6053 (dated 13 Oct. 1986), para. 4.6.
[308] US – Issues of Export Licenses, *supra* note 302, p. 6.

obliged to explain whether an imposed action is consistent to the specific conditions of Security Exceptions.[309] It emphasized that the invocation of Article XXI does not guarantee an automatic relief through an exception clause.

In *US-Nicaragua* case, Nicaragua argued that Article XXI should not be applied arbitrarily and contended that the application of subparagraphs of (b) should be reviewed by the panel.[310] India as a third party of the dispute expressed its concern on the need to prove significant relationship between the US' measure and essential security interest that the US aims to protect for an application of the exception clause.[311] Nonetheless, the panel could not provide an official review over Article XXI in *US-Nicaragua* case due to US' rejection of the panel's terms of reference.[312] In effect, the panel questioned in the report how abuses and misuses of trade measures for security reasons can be managed without any applicable review.[313] Additionally, the panel noted that it could infringe the rights of the complaining parties who may claim for a review under GATT Article XXIII on their nullification or impairment of trade benefits.[314] Such opinion is in line with the 1982 Decision, which clarified that any measure invoking Security Exceptions should be notified and that the rights of any affected contracting parties be fully ensured.[315]

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309 Hahn (1991), *supra* note 292, p. 573-574.
310 WTO (1998), *supra* note 100, p. 603.
311 GATT, *Minutes of Meeting Held May 29, 1985*, GATT/C/M/188 (dated 28 Jun. 1985), p. 7
312 US-Nicaragua Panel Report, *supra* note 307, para. 3.1.
313 *Ibid*., para. 5.17.
314 *Ibid*.
315 *Refer* to GATT, 1982 Decision, *supra* note 281.

2.2. Governance of Security Exceptions in the GATT during the Cold War

Despite frequent imposition of economic sanctions on the enemy bloc during the Cold War, the actual number of GATT disputes involving sanction measures is far less than expected. Two principal reasons can be pointed out for this relative insignificance of GATT era to the politically-motivated sanctions.

First, the GATT contracting parties were mostly Western US-allied states, so the contracting parties were not incentivized to impose economic sanctions on each other. The GATT was essentially a binding contract among countries of the Western bloc of the Cold War, who were cooperating to internally maintain the economic and political stability of the bloc, yet containing the Eastern communist bloc externally. While the GATT insisted on the multilateral non-discrimination principle and presumably aimed for limiting the specific circumstances that could be examined under the security exceptions, in practice, it was the GATT contracting parties (who shared a common rationale for security interests) discriminating against the other half of the globe, without regard to such provision.

In that sense, it is rather odd to see Czechoslovakia, Cuba, and Nicaragua joining the GATT, when the treaty membership was mainly constituted of non-communist countries. In fact, the two disputes between Czechoslovakia and the US are examples of how the jumbled historical order of events ended up in an unintended complication of conflicts. Those two cases were triggered by the cancellation of US' grant under the European Recovery Program (ERP – also

known as the Marshall Plan) to Czechoslovakia, right after the communist coup in February 1948. While Czechoslovakia was in favor of accepting the Marshall Plan as its government was restoring democracy,[316] ultimately the communist coup led to the exclusion of Czechoslovakia from the US' Foreign Assistance Act on April of 1948 and to the imposition of a separate export control against Czechoslovakia. Suddenly the most-favored nation principle of the GATT became an obstacle for the US in pursuing its foreign policy against the communist bloc. As the US did not lift up its export control measure, Czechoslovakia again filed a suit in 1951 and claimed that it would want to normalize economic relations with the US and other Western European countries, based on the principle of equality enshrined in the General Agreement.[317] This dispute ended by the parties adopting the US' unilateral declaration, which stated that "the government of the US and Czechoslovakia shall be free to suspend, each with respect to the other, the obligations of the GATT."[318]

Secondly, the GATT remained too weak and controversial, legally and institutionally, to handle political motivations and rationales of economic sanction measures. Legally, consensus was required for both the establishment of the GATT panel and adoption of panel reports. The procedural consensus requirement as well as the absence of an independent DSB rendered panels to be easily influenced by

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[316] Ivo Duchacek, "The February Coup in Czechoslovakia", 2(04) *World Politics* 511 (1950), p. 511-514,; The Cold War Museum, "The Czechoslovakia Coup," retrieved from http://www.coldwar.org/articles/40s/czech_coup.asp (visited Aug. 11, 2018).
[317] GATT, *Summary Record of the Thirteenth Meeting,* GATT/CP.6/SR.13 (dated 28 Sep. 1951), p. 1.
[318] *Ibid.*, p. 3.

strong powers like the US. For example, in the *US-Nicaragua* case, because the US had agreed to the establishment of the panel only under the condition that the panel should have no authority "to examine or judge the validity of or the motivation for the invocation of Article XXI(b)(iii) by the United States,"[319] the panel could not actually determine the legality of the US invocation of Article XXI. The panel only examined whether there was nullification or impairment of economic benefits accruing to Nicaragua. This finding, therefore, had no case-resolving impact on either the US or Nicaragua.

At the same time, GATT was institutionally weak as an international agreement, implemented only through the Protocol of Provisional Application,[320] that it was often feared that mishandling of a politically controversial case might cause its contracting parties, especially key constituents such as the US and the EEC, to turn their back on the institution. Therefore, the GATT contracting parties seemed to avoid direct engagement with security related disputes as much as possible.[321]

Nevertheless, disputes relating to Security Exceptions were occasionally filed to the GATT and featured clear systematic power imbalance between the respondents and complainants, who were sanction-sender and target countries respectively. Because politically motivated trade sanction measures aim to punish target countries and induce change in their behaviors, in order to generate a desired consequence, it is often only an economically or/and politically powerful country

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[319] GATT, US-Nicaragua Panel Report, *supra* note 307, para. 5.3.; GATT, Minutes of Meeting, C/M/192 (dated 24 Oct. 1985), p. 6.
[320] *Protocol of Provisional Application of the General Agreement on Tariffs and Trade*, E/PC/T/202 (dated 18 Sep. 1947).
[321] Lowenfeld (2002), *supra* note 298, p. 755.

who can utilize trade sanction measures effectively as a foreign policy tool. Then the irony occurs when the sanction target country challenges such measures under the GATT. The responding party who invokes the security exceptions is often a more powerful, in many dimensions, country than the complaining party. The original drafters of the ITO Charter expressed their concerns in respect of the potential abuse of the security exception clause for commercial purposes,[322] but still neglected to address the issue of power imbalance. Only later in complaints of Nicaragua against the US measures could the GATT contracting parties sufficiently discuss the nature of sanction policies and the irony of invoking Security Exceptions provision.[323] The question of what kind of a threat would constitute a legitimate threat to the essential security interests of contracting parties has lingered throughout the GATT experience as the text of Article XXI does not contain a definition thereof.

Even with a low volume of disputes, Article XXI was still not free from controversies and complications for application. One distinctive problem found in a GATT case was that relevant parties of political circumstances do not nicely match with the interested parties in trade disputes. For example, in *EEC, Australia, Canada-Argentina,* the relevant political conflict occurred directly between the UK and Argentina upon sovereignty of the Falkland Islands, but what motivated

[322] UN ECOSOC (1947), *supra* note 262, p. 20-21.
[323] Nicaragua argued 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." *See ibid.,* p. 3; Arguments by Peru, Czechoslovakia, Egypt and Iceland agreeing to Nicaragua's claim can be found as well. *Ibid*.

Argentina to initiate this GATT case were the plurilateral sanctions that the EEC, Australia and Canada had imposed against it. Although this conflict was addressed by the UN SC Resolution 502, there was no UN mandatory sanction order putting an end to the dispute. As a result, the question of whether the imposition of unilateral trade sanctions[324] for an indeterminate amount of time is legally justified under Article XXI is a question that remains unanswered.[325]

To sum up, the iron curtain ironically acted out in many ways as a shield that sustained the deficient Security Exceptions relatively well even under the feeble GATT system. The loopholes of the provision appeared to be tolerated by the contracting parties who mostly shared common security goals. Nonetheless, the disputes that were actually filed in the GATT dispute settlement system proved the systematic incompatibility of both treating political matters as simple trade disputes and ignoring concerns rising from the framework of trade disputes as pure political matters.

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[324] *Refer* to the lists of measures imposed by EEC, Canada, and Australia in GATT, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons* (EEC, Canada, Australia – Argentina), L/5336 (dated 15 Jun. 1982).

[325] *See* GATT, *Trade Measures Affecting Argentina Applied for Non-Economic Reasons, Draft Decision*, C/W/402 (dated 2 Nov. 1982).

3. Application of Security Exceptions in the WTO System during the Post-Cold War Era

There have only been five WTO disputes where Article XXI has been invoked as a defense, three of which were settled during consultations and two are recently on the way for formal litigations.[326] No Security Exceptions has been yet officially invoked in the context of the GATS or the TRIPS Agreement, while United Arab Emirates (UAE) recently displayed general consideration over existence of Security Exceptions in the WTO agreements.[327] Its claims echo from the GATT era, that the panel should not be established to review political matters. Establishment of the panel had been deferred for a while due to UAE's objection, but the panel is currently composed for the dispute,[328] potentially marking a prelude over comprehensive debates regarding governance of Security Exceptions not only of the GATT but also of the GATS and TRIPS.

Table 6. WTO Disputes that Invoked Security Exceptions

Request for Consultation	Dispute Name	Dispute Number	Complainant	Invoked Provision
May 13,	US – The Cuban Liberty and	DS38	EC	Art.XXI

[326] For detailed account of each dispute, refer to the GATT/WTO documents noted in table 2 or/and refer generally to Lowenfeld (2002); Macrory et al. (2005); Bhala (2013), *supra* note 298.
[327] WTO, "Qatar Seeks WTO Panel Review of UAE Measures on Goods, Services, IP Rights," WTO News, Dispute Settlement (dated 23 Oct. 2017), retrieved from https://www.wto.org/english/news_e/news17_e/dsb_23oct17_e.htm (visited Dec. 4, 2018).
[328] WTO, *United Arab Emirates – Measures relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, Constitution of the Panel Established at the Request of Qatar, Note by the Secretariat*, WT/DS526/3 (dated 3 Sep. 2018).

1996	Democratic Solidarity Act			
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
Sep. 14, 2016	Russian Federation – Measures Concerning Traffic in Transit	DS512	Ukraine	Art. XXI(b)(iii)
Aug. 4, 2017	United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights	DS526	Qatar	General reference to Security Exceptions in WTO Agreements (GATT Art. XXI; GATS Art. XIV*bis*; TRIPS Art. 73)

Source: Data compiled from WTO website at https://www.wto.org/english/docs_e/gattdocs_e.htm; Updated version of "Table 2" from Ji Yeong Yoo and Dukgeun Ahn, "Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?," 19(2) *Journal of International Economic Law* 417, (2016), p. 434.

3.1. Post-Cold War Dynamics on Invocation of Security Exceptions in the WTO

By the fall of the Iron Curtain, the governance of the security exceptions provision, which has never been amended since 1947, faced even further strenuousness in ensuring soundness of applying trade sanctions. In fact, the extended linkage between politico-military alliance and commercial interests that

sustained the Cold War has been ready experiencing discordance within the Atlantic Alliance since the 1980s. The Soviet Gas Pipe incident in 1982 marks an explicit diversion of national security interests between the Western European countries and the US over the communist bloc.[329] The project to construct a gas pipeline that flows gas from Siberia to West of the European continent was the largest commercial transaction across the East and West at the time.[330] Yet, the Reagan administration in the US tried to reject the idea, in order to strengthen its policy of trade denial with the Soviet after a failure of the détente in the 1970s.[331] The collision within the Western allies seemed imminent as the US put a ban on pipeline equipment manufactured by Western European firms under licenses from US companies.[332] However, the US failed to persuade the European countries as they were committed to proceed with the contract formed with the Soviet Union.[333] Based on the informal agreement, the US lifted the ban without being able to alter the European behavior.[334] Concerned with losing the power to accommodate collective security goals as in the past, the US kept trying other economic sanctions

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[329] Kristin M. Vajs, "Soviet Pipeline," LC14.2/2:IP0219S, Congressional Research Service, The Library of Congress (dated Oct. 22 1982), retrieved from https://www.everycrsreport.com/files/19821022_IP0219S_d8bc44c63e6d2816a3fc8cbe261e4338ac65de49.pdf (visited Dec. 5, 2018), p. 1.

[330] Gary H. Perlow, "Taking Peacetime Trade Sanctions to the Limit: The Soviet Pipeline Embargo," 15(2) *Case Western Reserve Journal of International Law* 253, (1983), p. 253-254.

[331] Patrick J. DeSouza, "The Soviet Gas Pipeline Incident: Extension of Collective Security Responsibilities to Peacetime Commercial Trade," 10(1) *The Yale Journal of International Law* 92, (1984), p. 98-99.

[332] Clyde H. Farnsworth, "Collision is Near on Soviet Pipeline," *New York Times* (dated Aug. 12, 1982).

[333] Leslie H. Gels, "Pipeline: An Impasse with No End in Sight," *New York Times* (dated Aug. 31, 1982).

[334] Perlow (1983), *supra* note 330, p. 265.

like that on Nicaragua to test the viability of the norm to contain communist regimes.[335] Yet, concerns over US intention to assert extraterritorial application of its domestic jurisprudence only aggravated among its traditional allies. When collective norms and security goals no longer automatically converged in trade policy, the US seemed to grow further interest in ensuring its unilateral power in foreign policy. Nullifying panel authority to review a Member's security interest was accordingly a stance the US kept asserting further in the WTO.

The first WTO case invoking Security Exceptions was raised by the European Community (EC) against extraterritorial application of sanctions by the US on Cuba.[336] The US only referred to the 'spirit' of Security Exceptions for its defense, instead of referring to a particular subparagraph of the provision. It was a manifestation of the US opinion that Security Exceptions should be directly applicable by invocation. Apart from the WTO, the US embargo against Cuba drew much attention from non-WTO forums as well, including the UN General Assembly, although none of these forums effectively incentivized the US to end the embargo.[337] *United States – The Cuban Liberty and Democratic Solidarity Act* (US-LIBERTAD Act) actually set a good chance for the panel to confirm its

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[335] DeSouza (1984), *supra* note 331, p. 112.

[336] WTO, *United States – The Cuban Liberty and Democratic Solidarity Act*, *Request for Consultations by the European Communities* (US-LIBERTAD Act – request for consultation), WT/DS38/1 (dated 13 May 1996).

[337] There was a UN General Assembly (GA) resolution calling for US suspension of Cuban sanctions (UN GA, *Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba*. A/RES/51/17 (dated 21 Nov. 1996)). However the US did not suspend its sanction only until recently in 2015. US' non-compliance to the UN GA resolution in 1996 is noted in WTO Trade Policy Review of the US in 1996 as well (*refer* to https://www.wto.org/english/tratop_e/tpr_e/tp46_e.htm).

renewed jurisdiction based on the DSU and clarify interpretation of Security Exceptions.[338] Unfortunately, the opportunity was forgone as the US and EC settled the case again through an informal agreement.[339] The panel's authority lapsed in April 1998 after the EC requested the panel to suspend its work in April 1997.[340]

Studies show that there has been an ample number of domestic disputes resulting in fines and punishment to business sectors who have not complied with US trade sanction measures, even after the mutual agreement between the US and the EC in *US-LIBERTAD Act*.[341] Likewise, domestic regulations in EC, Canada, UK, Mexico and Norway had been developed and amended as countermeasures to protect and secure their sovereign rights.[342] This clearly reaffirmed a changed world order in the post-Cold War era where political concerns do not automatically incentivize the states to forgo their trade interests.

Scholarly debates mounted to ensure that, should the disputes continue to the panel proceedings, WTO jurisdiction on Security Exceptions should be automatically valid, unlike in the GATT.[343] There has been arguments that under the WTO system, Security Exception cases are procedurally ensured to be subject to judicial review and the panel and the Appellate Body should examine whether a Member's explanation is reasonable or whether the measure constitutes an apparent

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338 The panelists appointed for this case include Arthur Dunkel as the chair, Tommy Koh and Edward Woodfield. WT/DS38/3 (dated 20 Feb. 1997).
339 *Refer* to WTO summary for *United States – The Cuban Liberty and Democratic Solidarity Act* case at https://wto.org/english/tratop_e/tpr_e/tp46_e.htm (visited 20 Apr. 2018).
340 *Ibid.*
341 Harry L. Clark and Lisa W. Wang, "Foreign Sanctions Countermeasures and Other Responses to U.S. Extraterritorial Sanctions" (Dewey Ballantine LLP, Aug. 2007), p. 8-11.
342 *Ibid*.
343 Akande and Williams (2003), *supra* note 286, p. 399-380.

abuse.[344] Scholars have distinguished the "authority to define" and "authority to interpret" between the states and the panel, claiming that the states may have the right to self-define what their essential security interests are and declare the necessity of protection, but the panel also reserves the right to review whether those definitions are in conformity with the interpretations of the provision.[345]

However, there have actually been very limited disputes invoking Security Exceptions in the WTO, until recently. The avoidance of WTO litigation seems to have been engendered by a learning effect on the Members, based on the impression that the WTO dispute settlement body (DSB) is still not much different from the GATT in its capacity to address national security matters. In fact, the numbers of economic sanctions and consequent conflicts in the trade arena regarding sanction policies do not seem to have reduced in the post-Cold War years, which roughly overlap with the WTO era. According to Hufbauer and Schott, the number of economic sanctions has not decreased in the post-Cold War era.[346] In fact, there has been a persistent application of unilateral and plurilateral economic sanctions as well as an increase of UN mandatory sanctions. For over fifteen years, Members seem to have been deliberately avoiding direct accusation over security matters in the WTO either by not bringing up the dispute or avoiding invocation of Security

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[344] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, Third edition (Cambridge: Cambridge University Press, 2013), p. 596.

[345] *See* Scholemann & Ohlhoff (1999), *supra* note 292, p. 426-427.

[346] *Refer* to Gary Clyde Hufbauer and Jeffrey J. Schott. *Economic Sanctions Reconsidered*, Third edition, (Washington DC: Peter G. Peterson Institute for International Economics, 2007); Gary Clyde Hufbauer, Jeffrey J. Schott, Kimberly Ann Elliott, and Julia Muir. "Case Studies in Economic Sanctions and Terrorism, Post-2000 Sanctions Episodes" (Peterson Institute for International Economics; May 2012).

Exceptions. For some scholars, this was considered effective operation of good faith principle, voluntarily checking abuses and taming direct conflicts in the international community.[347]

Some of the exemplary cases that did not involve invocation of Security Exceptions in WTO disputes, despite some national security objectives behind the measure at issue, are as the following. In *United States - Measures Affecting Government Procurement,* the US sanctions against Burma (Myanmar) was challenged by the EC and Japan under the Agreement on Government Procurement (GPA) in 1998.[348] While the case in the WTO was suspended through a settlement by the US Supreme Court decision on the violation of Massachusetts State law against the federal law,[349] it is imaginable that the US could have claimed for an application of Article VIII:1 Exceptions to the Agreement of GPA and allege some room for its sanction measure as a tool for US foreign policy. *United States - Section 211 Omnibus Appropriations Act of 1998* was another dispute which the EC challenged extraterritorial application of US domestic law on Cuban embargo for trademarks.[350] While the dispute proceeded to Panel proceedings, the US never invoked Article 73 Security Exceptions under TRIPS for its defense. It was proceeded plainly as a commercial dispute despite the US' hindered political motivation of such measure.

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[347] *Refer* to Minutes of Meeting held in the Palais des Nations, Geneva, on 31 October 1975, *supra* note 288.
[348] *See* WTO, *United States – Measure Affecting Government Procurement*, *Request for Consultations by the European Communities*, WT/DS88/1 (dated 26 Jun. 1997).
[349] *Refer* to Clark and Wang (2007), *supra* note 341, p. 19-20.
[350] *See* WTO, *United States – Section 211 Omnibus Appropriations Act of 1998*, *Report of the Panel*, WT/DS176/R (dated 6 Aug. 2001).

Ever since China and Russia became WTO Members in 2001 and 2013, respectively, the relationship between the Members have become even more complicated. There have been signals of rising tensions early on when China unofficially considered invoking Article XXI in both *China – Measures Related to the exportation of various Raw Materials* and *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* cases.[351] The Chinese export control on essential raw materials has been allegedly reported in the media to be a leverage over Members related to Senkaku/Diaoyu Islands boat collision incident,[352] which can provide a basis for a state interest to invoke Article XXI. But even then, China seemed to have been unsure of the political tensions the invocation of Security Exceptions might aggravate in the international community and voluntarily withdrew such choice. Meanwhile, the US' restrictions against China on governmental procurement of certain federal departments from China and the Australian restriction against Chinese national infrastructure in 2015, repeatedly heated up the debate on Security Exceptions in the WTO.[353] In fact, China did not officially accuse the US or Australia before the WTO in respect of such measures.

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[351] Peng (2015), *supra* note 292, p. 21.

[352] Keith Bradsher, "Amid Tension, China Blocks Vital Exports to Japan," *The New York Times* (dated Sep. 22, 2010), retrieved from https://www.nytimes.com/2010/09/23/business/global/23rare.html (visited Dec. 5, 2018); The Japan Times, "China Losing Rare-Earth Diplomatic Leverage over Japan; Exports Hit Lowest Level in 10 Years" (dated Oct. 25, 2012), retrieved from https://www.japantimes.co.jp/news/2012/10/25/business/china-losing-rare-earth-diplomatic-leverage-over-japan-exports-hit-lowest-level-in-10-years/#.XAfMN-RRdPY (visited Dec. 5, 2018).

[353] Peng (2015), *supra* note 292, p. 451-453.

The sanctions by the US, the European Union (EU) and Ukraine against Russia and vice versa, in connection with the Crimean conflict, has been ongoing since 2013.[354] These cases have been dealt only as commercial disputes for several years.[355] But interestingly, the Russian Federation proposed at the Nairobi Ministerial Conference in December 2015 to elaborate on the interpretation and implementation of Article XXI based on the "Addendum to Article XXI" from the 1982 Ministerial Conference.[356] Then in the *Russian Federation – Measures Concerning Traffic in Transit* case, one of the disputes registered at the WTO on sanctions regarding Crimean conflict, Russia decided to invoke Article XXI as defense in 2016.[357] It was a gunshot that broke the ice over contemplation on how to deal with Article XXI in the dispute settlement process of the WTO system after almost twenty years. Serially, a diplomatic crisis of Qatar with the Arab League

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[354] *See* Rostam J. Neuwirth and Alexandr Svetlicinii. "The Economic Sanctions over the Ukraine Conflict and the WTO: 'Catch-XXI' and the Revival of the Debate on Security Exceptions," 49(5) *Journal of World Trade* 891 (2015).

[355] *Refer* to news articles Benjamin Fox, "EU demands WTO ruling on Russian trade tariffs", EU Observer (dated 27, Feb. 2015), retrieved from https://euobserver.com/economic/127817 (visited Mar. 20 2018); FARS News Agency, "Russia files WTO complaint against US sanctions," (dated 21 Jun. 2014), retrieved from http://en.farsnews.com/newstext.aspx?nn=13930331000441 (visited Mar. 20 2018); RU EXPATICA, "EU files WTO complaint over Russian pork embargo," (dated 27 Jun. 2014), retrieved from http://www.expatica.com/ru/news/EU-files-WTO-complaint-over-Russian-pork-embargo_427099.html (visited Mar. 20 2018); RAPSI, Russian Legal Information Agency, "EU files WTO complaint against Russia," (dated 31 Oct. 2014), retrieved from http://www.rapsinews.com/judicial_news/20141031/272506004.html (visited Mar. 20 2018); Sputnik International, "Ankara to file complaint against Moscow for imposed sanction in court, WTO," (dated 4 Jan. 2016), retrieved from http://sputniknews.com/business/20160104/1032654254/russia-turkey-wto-court.html (visited Mar. 20 2018); RT, "Ukraine to file complaint with WTO over Russia's trade embargo," (dated 19, Jan. 2016), retrieved from https://www.rt.com/business/329450-ukraine-wto-russia-embargo/ (visited Mar. 20 2018).

[356] WTO (2015), Proposal on MC10, *supra* note 82, p. 2.

[357] WTO, *Russian Federation – Measures Concerning Traffic in Transit (DS512) – First Integrated Executive Summary of the Russian Federation* (dated 17 Feb. 2018), paras. 35-60.

reopened the historical conflict in the region and even fueled a comprehensive Security Exceptions debate, far reaching to the context of GATS and TRIPS as well.

Former communist countries' accession to the WTO and the generally widened and deepened spectrum of economic exchange among much broader membership are further complicating the relationship between trade and security in the post-Cold War era. It is a difficult task for the WTO to determine the legitimacy of economic sanctions when the issue is intertwined mainly with political, military, and diplomatic considerations. However, arbitrary applications and lack of standards for any review of the current security exceptions provisions pose high risk of enlarging a crucial loophole in managing rights and obligations of the WTO Members.

3.2. Legal Claims in WTO Disputes

The debate on applying Security Exceptions in the WTO is back on stage through the *Russian Federation – Measures Concerning Traffic in Transit* case. Interestingly, what concerns more than the actual claims of Ukraine and Russia in the dispute are stark oppositions of the US and the EU contending to each other's claims on the nature of an alleged self-judging language of Security Exceptions in the third party statements. The implication of this dispute is especially high at stake when the US imposed a Section 232 measures on steel and aluminum products in March 2018, based on controversial reasons of national security.[358] The measure

[358] *See* The White House, "Presidential Proclamation Adjusting Imports of Steel into the United

has been contested by a number of affected Member states, including the EU and China, and it is highly likely for the US to soon defend its position by invoking Security Exceptions.[359] In the third party statements of *Russian Federation – Measures Concerning Traffic in Transit* (Russia-Traffic in Transit), the US, as anticipated, emphasized the discretionary power the invoking party solely has over what constitutes an action necessary for the protection of essential security interest. On the other hand, the EU emphasized the jurisdiction of the panel over the covered agreements and clarified how Security Exceptions is clearly subject to interpretation, application, and review for a case.

The US stated that the ordinary meaning of "considers" is "to regard," "believe" or "think" of something "as having a specified quality."[360] In other words, the US insisted on the discretionary power laid upon the imposing party to regard a sanction to have a necessary quality.[361] At the same time, the absence of a phrase "it considers" in GATT Article XX to condition the word "necessary" in contrast to Article XXI was argued as evidence for Article XXI not requiring a review of a Member's action.[362] The US supported its argument from other similar phrases

States" (dated Mar. 22 2018); The White House, "Presidential Proclamation Adjusting Imports of Aluminum into the United States," (dated Mar. 22 2018).

[359] As of December 2018, Canada, China, EU, India, Mexico, Norway, Russia, Switzerland, Turkey have filed a request for consultation to the US on Section 232 measure.

[360] United States Trade Representative (USTR), *Russia – Measures Concerning Traffic in Transit (DS512) – Third-Party Oral Statement of the United States of America* (dated Jan. 25 2018), retrieved from https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Stmt.%28as%20delivered%29.fin.%28public%29.pdf (visited Dec. 5, 2018), para. 12.

[361] *Ibid.*

[362] *Ibid*., para. 14.

within the text of Annexes of WTO Agreements. For example, Article 26 of DSU carries a phrase "where and to the extent that such party considers and a panel or the Appellate Body determines…," which specifies the disparate role between the party and the panel or the Appellate Body.[363] Since Article XXI of the GATT does not mention a separate role for the panel or the Appellate Body, but only ensures party's discretionary power, the US claims this provision is a self-judging one of which the Members never agreed for a review.[364] Additionally, the US pointed to the negotiation history of the ITO Charter, when General Exceptions and Security Exceptions were first separated into two distinct provisions, as proof for intentional distinction in their chapeaux languages.[365] The US claimed that Security Exceptions should be excluded from panel review in order to avoid different interpretation from the provision's objective and intention.[366]

Furthermore, the US introduced separate concepts of "jurisdiction" and "justiciability"[367] in order to argue how the panel has the jurisdiction over a dispute based on the terms of reference ensured under Article 7.1 of the DSU, but that Article XXI of the GATT is non-justiciable.[368] The US claimed that performing an objective assessment based on Article 11 of the DSU over a self-judging clause that actually does not require any recommendation can rather be a violation the DSU.[369] According to the US, no measure constitutes a violation of the GATT

[363] *Ibid*., para. 17.
[364] *Ibid*., para. 18.
[365] *Ibid*., paras. 23-25.
[366] *Ibid*., para. 33.
[367] *Ibid.*, para. 3.
[368] *Ibid*., para. 4.
[369] *Ibid*., para. 7.

when Security Exceptions is invoked; therefore, even though the panel retains a jurisdiction over a dispute case under Article 7.1 of the DSU, the panel should end the process by stating that its review on the application of Article XXI of the GATT is a violation of Article 11 of the DSU.[370] This interpretation seems to lie in between the acknowledgement of the panel's terms of reference stated in the 1982 Decision and the US' self-interested position over its discretionary power on unilateral sanctions.

On the other hand, the EU asserted that the panel has both the jurisdiction and justiciability over Article XXI of the GATT. The EU clarifies that the DSU states the obligations of the panel and the Appellate Body to be equally applicable when reviewing any provision in the covered agreements and emphasized the absence of an exception clause in the DSU.[371] As Article 11 of the DSU states the panel to perform an objective assessment over a "matter," the EU claims that the invocation of Article XXI is a relevant "matter" that should be reviewed by the panel.[372] Moreover, the EU emphasized that Article 23 of the DSU requires any inconsistency to the WTO Annexes to be in recourse to the obligations and processes stated in the DSU and that no determination should be made outside the dispute settlement mechanism.[373] Consequently, the EU claimed that the Members' self-determined application of non-justiciable Security Exceptions could actually

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370 *Ibid.*
371 WTO, *Russia – Measures Concerning Traffic in Transit (DS512) – European Union Third Party Written Submission* (Geneva; dated 8 Nov. 2017), para. 14.
372 *Ibid*., para. 18.
373 *Ibid*., para. 20.

be a violation of Article 23.2 of the DSU.[374] The EU added that nullifying the justiciability of the panel could be also conflict with Article 3.2 of the DSU, which states that the WTO dispute settlement procedure is a core mechanism that ensures stable operation of a multilateral trading system through clear and consistent interpretation of the covered agreements in parallel to international customary law.[375]

Furthermore, the EU referred to the Appellate Body statement over Article XX in *US – Wool Shirts and Blouses* case to claim that the burden of proof for Article XXI should also lie on the invoking party who actively imposes a measure, despite the legal defense it formally undertakes.[376] This argument directly refutes the US claim on how an invocation of Security Exceptions itself automatically ensures non-violation of the GATT. Unlike the US, the EU emphasized the invoking Member as well as the right of the panel to review the application of Security Exceptions burden of proof on the in the WTO system.

The specifics on the minimum standards of review may differ, but except Russia and the US, all the other parties who submitted the third party statements to *Russia-Traffic in Transit* case generally agreed that the panel should be able to review the application of Security Exceptions.[377] This certainly characterizes a fierce political battle among the Member states in the WTO and tensions may

[374] *Ibid*.
[375] *Ibid*., para. 19.
[376] Ibid., paras. 22-29.
[377] Members who submitted the third party statements to this case include Australia, Brazil, Canada, China, the EU, Japan, Moldova, Singapore, and the US.

escalate further in either situation when the WTO DSB displays excessive judicialization or incompetent politicization.

The issue is under keen attention especially because of the direct implications to reviewing the US' Section 232 measure on steel and aluminum products in the WTO. Nine Members have currently accused the US for an unjustifiable measure before the WTO.[378] The effectiveness of implicit good faith commitment in operating Security Exceptions in the WTO system seem to have been terminated, due to puzzling dynamics of both political and economic interests among the Members jumbled in the realm of trade and security.

The traditional dimension of military security issues linked with trade policy tools is not absolutely passé, but there is equally a dynamic dimension where economic interests drive political tensions and set security concerns in this new world. In that sense, the scope of the trade and security nexus has been substantially broadened with increasing economic interdependence and the significance of economic capacity as power; whereas essential security interests relevant to the context of WTO Security Exceptions have practically shrunk. There is a critical demand for a sound operation of appropriately designed security exception provision in the WTO to distinguish ostensible security measures mainly targeting

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[378] *Refer* to WTO, *United States – Certain Measures on Steel and Aluminum Products*, *Request for Consultations by China*, WT/DS544/1 (dated 5 Apr. 2018); *Request for Consultations by India*, WT/DS547/1 (dated 18 May 2018); *Request for Consultations by EU*, WT/DS548/1 (dated 1 Jun. 2018); *Request for Consultations by Canada*, WT/DS550/1 (dated 1 Jun 2018); *Request for Consultations by Mexico*, WT/DS551/1 (dated 5 Jun 2018); *Request for Consultations by Norway*, WT/DS552/1 (dated 12 Jun. 2018); *Request for Consultations by Russian Federation*, WT/DS554/1 (dated 5 Jul. 2018); *Request for Consultations by Switzerland*, WT/DS556/1 (dated 9 Jul. 2018); *Request for Consultations by Turkey*, WT/DS564/1 (dated 15 Aug. 2018).

unjustifiable trade benefit. The current Security Exceptions, built based on post-war premises, stands at its limits in reflecting such transition of economic and political contexts. A detailed case study on US Section 232 investigation and measures also provides substantial reference to how both stagnant domestic and international regulations applied out of context can cause unnecessary muddle in the world economic system.

3.3. Case Study: US Section 232 Investigation and Implementation of Measures on Steel and Aluminum Products[379]

3.3.1. Overview of US Section 232 of Trade Expansion Act of 1962

The relevant domestic regulation appeared for the first time in Trade Agreements Extension Act of 1955 which was drafted to implement the GATT domestically in the US.[380] The initial provision of this Act vaguely described an investigation to be followed when the Director of the Office of Defense Mobilization reasonably thinks there is a threat to national security due to imported articles and that the President could act upon the basis of such investigation[381]. The provision was amended in the Trade Agreement Extension Act of 1958 by introducing much more specific factors that should be investigated in the sub-

[379] This section is largely adopted from Ji Yeong Yoo, "Issues of US Section 232 Import Measures on National Security in International Trade Law," 138 *International Trade Law* 9 (2017, *In Korean*). This is a translated version of an updated, trimmed and edited draft of the published article.

[380] Trade Agreements Extension Act of 1955, retrieved from https://www.gpo.gov/fdsys/pkg/STATUTE-69/pdf/STATUTE-69-Pg162-2.pdf (visited 5 Dec. 2018).

[381] *Ibid*., Public Law 86, Chapter 169, Sec. 7.

clauses.[382] The scope of investigation on "the effects on national security of imports of articles" ranged from the effect of imports on the domestic capacity to provide national defense requirements to the effects of imports on the overall strength of national economy.[383] The final version of Section 232 that is referred today is from the Trade Expansion Act of 1962, as amended.[384] Despite the broad spectrum of investigation on how imports can threaten national security, the regulation neither carries a clear definition of what is national security nor a threshold for a determination on the existence of threat on national security. In application of such investigation and measure, Section 232 is highly discretionary.[385]

Table 7. Investigations & Measures based on US Section 232

Initiation Year	Product at Issue	Initiator	Threat Determination	Measure Imposed
1963	Manganese and chromium ferroalloys	Industry Association	Negative	None
1964	Tungsten mill products	Industry Association	Negative	None
1964	Antifriction bearings	Industry Association	Negative	None
1965	Watches, watch movements and parts	President	Negative	None
1968	Manganese, silicon and chromium ferroalloys and	Private Industrial Committee	Negative	None

[382] Trade Agreements Extension Act of 1958, retrieved from https://ww.gpo.gov/fdsys/pkg/STATUTE-72/pdf/STATUTE-72-Pg673 (visited 5 Dec. 2018).
[383] *Ibid*., Public Law 85-686, Sec. 8.
[384] 19 U.S.C. § 1862, as amended.
[385] *Refer* to Yoo (2017, *In Korean*), *supra* note 379, p. 11-19 for further details on the legal conditions of applying US regulation of Section 232.

	refined metals			
1969	Miniature and instrument precision ball bearings	Industry Association	Negative	None
1972	Extra high voltage power circuit breakers, transformers, and reactors	Industry Association	Negative	None
1973	Petroleum	Policy Committee	Positive	Quantitative restriction & import license fee
1975	Petroleum	Secretary of Treasury	Positive	Additional surcharge
1978	Iron and steel nuts, bolts and large screws	President	Negative	None
1978	Petroleum	Secretary of Treasury	Positive	Conservation Fee
1979	Petroleum	Secretary of Treasury	Positive	Embargo on petroleum originating from Iran
1981	Glass-Lined chemical processing equipment	Industry Association	Negative	None
1981	Manganese, silicon and chromium ferroalloys and related materials	Industry Association	Negative	None
1982	Iron and steel nuts, bolts and large screws	Secretary of Defense	Negative	None
1982	Crude Oil from Libya	President	Positive	Boycott on petroleum originating from Libya
1983	Metal-cutting and metal-forming machine tools	Industry Association	N/A	Voluntary export restraints (VER)
1987	Antifriction bearings	Industry Association	Negative	None
1987	Petroleum	Government Body	Positive	Structural Reform Plan for Energy Industry
1988	Plastic injection molding machinery	Industry Association	Negative	None

1988	Uranium	Secretary of Energy	Negative	None
1991	Gears and gearing products	Industry Association	Negative	None
1992	Ceramic semiconductor packaging	Industry Association	Negative	Department of State-Department of Commerce Cooperative Plan
1994	Crude oil and Petroleum products	Industry Association	Positive	None
1999	Crude oil	Secretary of Commerce	Positive	None
2001	Iron ore and semi-finished steel	Congressman	Negative	None
2017	Steel	President	Positive	Additional 25% tariff except certain countries
2017	Aluminum	President	Positive	Additional 10% tariff except certain countries
2018	Automobiles and automotive parts	President	N/A	N/A
2018	Uranium ore and products	President	N/A	N/A

Source: Updated version of "Table 2" from Ji Yeong Yoo, "Issues of US Section 232 Import Measures on National Security in International Trade Law," 138 *International Trade Law* 9, (2017, *In Korean*), p. 20; data originally compiled from Bureau of Industry and Security (BIS), *Section 232 Investigations Program Guide* (dated Jun. 2007), retrieved from https://www.bis.doc.gov/index.php/forms-documents/section-232-investigations/86-section-232-booklet/file (visited Sep. 15, 2018) and BIS website at https://www.bis.doc.gov/index.php/other-areas/office-of-technology-evaluation-ote/section-232-investigations (visited Dec. 20, 2018).

There has been a total of 30 cases that the US Department of Commerce (DOC) has initiated the Section 232 investigation based on the 1962 Trade Expansion Act. The number of investigations that resulted in an affirmative determination on the

existence of threat on national security are 10, and a total of 7 cases, including those on steel and aluminum products in 2018, have been resulted in trade restrictions up to date. The products subject to investigation has been centered around crude oil, petroleum products, steel products, metals, uranium and some other machineries that have close relationship with national defense industries and energy supplies. Actual tariffs were adopted only for oil and petroleum products, until recently when the US unprecedentedly acted upon steel and aluminum products in March 2018.

This US domestic regulation, introduced during the Cold War to control the dependence on foreign imports for the sake of national security, intentionally handed much discretion towards the investigating authority and the President in the language of Section 232. However, this broad language in the regulation without clear definition of national security and threshold level on the existence of threat on impairment of national security have been highly abused in recent investigations. Additional investigations on automobiles and uranium have been consecutively initiated, posing further threat of exploitative tariff measures to US trading partners.

3.3.2. Comparison of Section 232 Investigations on Steel in 2001 and 2017

Allegedly, the Section 232 investigation on steel in 2017 has been initiated in order to adjust the damages of US industry "against unfair trade practices and other abuses."[386] As the US steel industry does not seem to have been helped even

[386] Donald J. Trump, "Memorandum on Steel Imports and Threats to National Security," Government Publishing Office (dated Apr. 20, 2017), retrieved from https://www.gpo.gov/fdsys/pkg/DCPD-201700259/pdf/DCPD-201700259.pdf (visited 6 Dec.

through more than 150 antidumping and countervailing duty measures imposed, the Trump administration claimed a need for a more effective measure to defend domestic industries.[387] The determination on the threat of national security due to steel and aluminum imports has been ready predicted to result in an affirmative, due to such a strong will to impose a measure expressed from the US executive body. Such determination has been possible only because the regulation hands over much discretion to the investigating authority without specific standards and threshold for a determination and the investigating authority took full advantage of it. Even the recent investigation report on steel, publicly available since February 2018, states that the previous investigations have been overly considerate on determining the existence of threat and that the determination in this report is legitimate accordingly with the legal conditions of Section 232 itself.[388]

The most striking part of the 2017 investigation is the contrasting standards and conclusions to the 2001 investigation both on steel. The Bush Administration invoked both Section 232 and Section 201 investigations on steel products in 2001.[389] In those separate investigations, the increase of imports of steel was determined to have some damaging effect on domestic industry, but not to the extent

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2018), p. 1, Section 1.

[387] *Ibid*.

[388] United States Department of Commerce (USDOC), *The Effect of Imports of Steel on the National Security – An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, As Amended* (Section 232 Steel Investigation, 2017) (dated Jan. 11, 2018), p. 17.

[389] *Refer* to United States International Trade Commission (USITC), *Steel Investigation No. TA-201-73*, Volume I: Determinations and Views of Commissioners, Publication 3479 (dated Dec. 2001) for the Section 201 Investigation on steel held in 2001; *Refer* to United States Department of Commerce (USDOC), *The Effect of Imports of Iron Ore and Semi-finished Steel on the National Security* (dated Oct. 2001) for Section 232 investigation on steel held in 2001.

of threatening national security. Consequently, a measure was imposed based on Section 201,[390] a traditional safeguard measure of the trade remedy system, but not based on Section 232.[391] A direct comparison of the logic and proof for such different conclusions in the effect of steel imports in Section 232 investigations in 2001 and 2017 provides implications on the risk of discretionary standards.

First of all, the investigation in 2017 referred to the definition of "national security" that was also used in the 2001 investigation.[392] The scope of national security included the national defense requirements, general security and welfare of certain industries.[393] There have been 28 critical industries listed in the 2001 investigation,[394] but in the recent investigation, it referred to 16 critical industries based on the Presidential Policy Directive 21 under the Trump administration.[395]

Secondly, according to the Code of Federal Regulations (CFR) on Section 232, the US DOC is required to consider "the impact of foreign competition on the economic welfare of any domestic industry" essential to national security;[396] "displacement of any domestic products causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects";[397] and "any other relevant factors

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390 *Refer* to USITC (Dec. 2001), *supra* note 389, p. 1.
391 *Refer* to USDOC (Dec. 2001), *supra* note 389, p. 37.
392 USDOC (2018), Section 232 Steel Investigation, 2017, *supra* note 388, p. 1.
393 *Ibid*., p. 23.
394 USDOC (Dec. 2001), *supra* note 389, p. 5-7; for further discussion on the broadness of the definition used in the 2001 investigation compared to other previous Section 232 investigations, *refer* to Yoo (2017, *In Korean*), *supra* note 379, p. 22-25..
395 USDOC (2018), Section 232 Steel Investigation, 2017, *supra* note 388, p. 23-24.
396 15 C.F.R. §705.4(b)(1) (1982).
397 15 C.F.R. §705.4(b)(2) (1982).

that are causing or will cause a weakening" of national economy.[398] However, the regulation does not specifically mentions a particular quantity or the circumstances of imports as a threshold for determining the effect of imported articles to threaten national security.[399] The DOC claims in the report that if there is any "effect" of imported articles, it is sufficient to determine there is a threat to national security, according to the current language of Section 232.[400] Specifically, the 2017 report states that the domestic steel industry has been shrinking due to steel imports, facing decrease in general welfare through unemployment and deterioration of technology.[401] At the same time, global overcapacity of steel production led especially by China is been pointed out as the main culprit for a constant threat in maintaining domestic capacity of steel production for national security requirements.[402]

Despite a similar definition adopted in both 2001 and 2017 investigations on national security, the threat determination has resulted in different conclusions. The main reason for such result is different interpretation on the domestic capacity to provide the product at issue necessary for the protection of national security. In the 2001 investigation, the US DOC considered that only 3% of domestic production is required to fully meet national defense requirements and that the problem of global overcapacity of steel production practically eliminates the risk for the US to

398 15 C.F.R. §705.4(b)(3) (1982).
399 USDOC (2018), Section 232 Steel Investigation, 2017, *supra* note 388, p. 14.
400 *Ibid*.
401 *Ibid.,* p. 27-54.
402 *Ibid.,* p. 53-54.

depend only on unreliable trading partner for steel imports.[403] In other words, the US DOC concluded that it is unreasonable to claim a threat on national security. On the contrary, in the 2017 investigation, the DOC directly rebutted the conclusion made in the 2001 report by alleging that there is no explicit condition in Section 232 that requires to evaluate reliability or the nature of the importing country at investigation.[404] The DOC stated in the report that whether or not the country where the imported articles are originating from is an ally or a reliable trading partner does not discriminate in weakening domestic industry and economy.[405] It concluded that "the fact that some or all of the imports causing the harm are from reliable sources does not compel a finding that those imports do not threaten to impair national security."[406] Such conclusion is logical only when premised by a self-sufficient closed economy model, unreasonably denying the basic terms of trade gains in a liberalized world. The logic of investigation on aluminum products in 2017 also generally followed that of the investigation on steel in 2017.[407]

3.3.3. Consequences of 2018 Implementation of Section 232 Tariffs on Steel and Aluminum Products

The 2017 report states that the objective of trade restrictive measures on steel products under Section 232 is to increase the capacity utilization rate of US steel

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403 USDOC (Dec. 2001), *supra* note 389, p. 37.
404 USDOC (2018), Section 232 Steel Investigation, 2017, *supra* note 388, p. 17.
405 *Ibid*.
406 *Ibid*.
407 *Refer* to United States Department of Commerce (USDOC), *The Effect of Imports of Aluminum on the National Security* (Section 232 Aluminum Investigation, 2017) (dated Jan. 17, 2018) for further details.

industry.[408] For legitimacy of such claim, the DOC argues in the report that it "requires commercially viable steel producers to meet defense needs…. The commercial revenue supports [activities]…required to continue to supply defense needs in the future."[409] Additionally, the DOC calculated that the capacity utilization rate of domestic steel industry that can ensure sufficient commercial revenue is 80%.[410] The US plans to increase its domestic industry's capacity utilization rate up to 80% by meeting US steel demands based on national infrastructure reconstruction plans and increase in defense budget mostly through domestic steel production.[411]

The report recommends three options for an action on steel and aluminum products: 1) global quota; 2) global tariffs; and 3) selective tariff increase and quota based on 2017 import volume.[412] While the DOC actively recommended an action towards steel imports in order to protect national security, the Department of State, in fact, has been displaying rather considerate opinions on the imposition of trade restrictions.[413] The Secretary of State stated in the memorandum that the total defense requirements of steel constitute only 3% of total domestic production that any trade restriction would not give an effect in securing further national security.[414]

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[408] USDOC (2018), Section 232 Steel Investigation, 2017, *supra* note 388, p. 5; *Ibid*., 6.
[409] USDOC (2018), Section 232 Steel Investigation, 2017, *supra* note 388, p. 23.
[410] *Ibid*., p. 6; USDOC (2018), Section 232 Aluminum Investigation, 2017, *supra* note 407, p. 6.
[411] USDOC (2018), Section 232 Steel Investigation, 2017, *supra* note 388, p. 58.
[412] *Ibid.*, p. 59-60; USDOC (2018), Section 232 Aluminum Investigation, 2017, *supra* note 407, p. 107-109.
[413] Secretary of Defense, *Memorandum for Secretary of Commerce – Subject: Response to Steel and Aluminum Policy Recommendations*, retrieved from https://www.commerce.gov/sites/commerce.gov/files/department_of_defense_memo_response_to_steel_and_aluminum_policy_recommendations.pdf (visited Dec. 6, 2018).
[414] *Ibid.*

In addition, a concern on the application of global quota or tariff in confusing bilateral relationship with major allies was presented in the memo.[415] If any measure is considered necessary, the Secretary stated that the measure should be selectively imposed on specified trading partners who export much steel to the US and that the tariff rate to be discussed further between the Departments of Commerce and State.[416] The Secretary clarified that the measure should be focusing on adjusting unfair trade practices of China through overproduction and circumvented dumping practices, not aggravating bilateral relationships with the allies.[417] Furthermore, the Secretary recommended the measure to be ordered carefully in response to the sensitivity of the market, in order to avoid unnecessary market distortions.[418] The memorandum reminded that a Section 232 measure based on the DOC recommendation could disrupt maintaining a fair and reciprocal world trading regime, which is actually one of the US strategies mentioned in National Security Strategy.[419]

Yet, the President has released its executive order to impose 25% of tariff on steel and 10% of tariff on aluminum products,[420] except on several countries like Korea whom it negotiated on a quota instead.[421] EU, Canada and Mexico were on

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[415] *Ibid.*
[416] *Ibid.*
[417] *Ibid.*
[418] *Ibid.*
[419] *Ibid.*
[420] The White House, Presidential Proclamations on Steel and Aluminum, *supra* note 358.
[421] *Refer* to U.S. Customs and Border Protection, *Section 232 Tariffs on Aluminum and Steel*, retrieved from https://www.cbp.gov/trade/programs-administration/entry-summary/232-tariffs-aluminum-and-steel (visited Dec. 6, 2018) for updates on tariffs and quotas based on Section 232. Recently, Korea has been even exempted from the specific quota on steel.

the exemption list for about a month but eventually they also became subject to the measure.[422]

Controversy over such US Section 232 measure has resulted in a number of lawsuits at different levels. Severstal Export GMbH (SSE), a Swiss national steel company, and its US subsidiary, Severstal Export Miami (SSE) have filed a local case at the US Court of International Trade in March 2018.[423] EU, India, Russia and Turkey sought consultations with the US even under the WTO Agreement on Safeguards, claiming that such US measure is in fact a wrongfully administered safeguard measure that aims for domestic protection of steel and aluminum industries.[424] Currently, a total of nine Members of the WTO, including China, EU, India, Canada, Mexico and Norway, have requested consultation with the US on its Section 232 measure at the WTO.

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[422] Spencer Toubia, Cherie Walterman and Edward Goetz, "President Imposes Section 232 Steel and Aluminum Duties on Imports from the European Union, Canada, and Mexico," International Trade Law, Crowell Morning (dated Jun. 4, 2018), retrieved from https://www.cmtradelaw.com/2018/06/president-imposes-section-232-steel-and-aluminum-duties-on-imports-from-the-european-union-canada-and-mexico/ (visited Dec. 6, 2018).

[423] Isabelle Hoagland, "Swiss Steel Exporter Sues U.S. for 'Unconstitutional' Section 232 Tariffs," *Inside U.S. Trade* (dated Mar. 26, 2018).

[424] EU, India, Russia, and Turkey brought about request for consultation under Article 12.3 of the Safeguards Agreement; *refer* to WTO, *Imposition of a Safeguard Measure by the United States on Imports of Certain Steel and Aluminum Products – Request for Consultation Under Article 12.3 of the Agreement on Safeguards – European Union*, G/SG/173 (dated 16 Apr. 2018); WTO, *Imposition of a Safeguard Measure by the United States on Imports of Aluminum – Request for Consultation Under Article 12.3 of the Agreement on Safeguards – India*, G/SG/176 (dated 17 Apr. 2018); WTO, *Imposition of a Safeguard Measure by the United States on Imports of Steel and Aluminum Products – Request for Consultation Under Article 12.3 of the Agreement on Safeguards – Russian Federation*, G/SG/181 (dated 19 Apr. 2018); WTO, *Imposition of a Safeguard Measure by the United States on Imports of Steel and Aluminum Products – Request for Consultation Under Article 12.3 of the Agreement on Safeguards – Turkey*, G/SG/183 (dated 20 Apr. 2018).

3.3.4. Limitations of Applying Security Exceptions in the WTO

Since the US Section 232 measure is based on national security grounds, it is reasonable to predict the US to defend its position by invoking GATT Article XXI. However, there are still a number of burdens in interpreting and applying Security Exceptions at the WTO. It is apparent that the US is actively arguing for a self-judging nature of GATT Article XXI, in order to prepare its defense in prospective panel reviews. This section aims to provide reasons on the need for clear jurisdiction for panel and Appellate Body on Security Exceptions at least with minimum objective standards. The operation of Security Exceptions should ensure sound management in the world trading system by filtering out arbitrary national security measures, such as the US Section 232 measure ordered in the Trump administration.

When the panel carries on with the review, there can be concerns whether the US' measure fits into the conditions of GATT Article XXI(b)(ii) or Article XXI(b)(iii). The review of subparagraphs of (b) should be an objective one, similar to that of a review on subparagraphs in the GATT General Exceptions.[425]

The US claims the importance of steel and aluminum products for their relevance to national defense supplies. Some scholars have reminded that GATT Article III:8(a) has been a basis of domestic controls on the provision of defense supplies; however, import restrictions under Section 232 involves further issue than national treatment.[426] The US may consider a claim under Article XXI(b)(ii) that the measure is "relat[ed] to…traffic in other goods and materials as is carried on

[425] *Refer* to section 4.1.3 and section 4.1.5 of this chapter and *supra* note 285.
[426] Hahn (1991), *supra* note 292, p. 581.

directly or indirectly for the purpose of supplying a military establishment." This clause has been invoked twice in the past dispute history – *US – Issues of export licenses* and *EEC – Trade measures taken by the EC against the Socialist Federal Republic of Yugoslavia* – in order to justify 'export controls' of strategic goods. In Article 99 of the ITO Charter, the clause used to be written as "… a military establishment *of any other country*" (emphasis added). Accordingly, the originally intention of this clause seems to have supported trade restrictions not for 'domestic' military establishment but only to contain external military establishments that can threaten a Member. Nevertheless, the current GATT language does not explicitly contain a phrase "of any other country," that subparagraph (b)(ii) of GATT Security Exceptions may not effectively halt the US invocation.

The nature of 2018 US Section 232 measure, in effect, echoes that of the 1975 Sweden's quota on footwear, which has been dealt in the GATT and recommended a repeal. The Swedish government notified its imposition of quantitative restriction on footwear under Article XXI, claiming that the damage in domestic footwear industry due to import penetration has been extensive to threaten even the supply of footwear as defense supplies.[427] In the GATT meetings, the contracting parties agreed that it is difficult to consider footwear as major defense supplies, if not steel, heavy machineries or defense food supplies, and asked to repeal the measure.[428] Additionally, the contracting parties clarified that Article XXI is not to defend commercial interests but only measures with political motivations of national

[427] WTO (1998), *supra* note 100, p. 605.
[428] *Ibid.*

security needs.[429] In reference to such discussion, steel and aluminum products seems relevant to national defense supplies under Article XXI(b)(ii). However, as the Section 232 investigation included the supplies for critical industries as well as other commercial sales when calculating the appropriate capacity utilization rate of domestic industries as basis of trade restrictions, the rationale seems to outstep the scope of "military establishment" under Article XXI(b)(ii). A full commercial motivation lingers in the US measure, which should not be justified under Security Exceptions.

On the other hand, the US may also consider invoking Article XXI(b)(iii) as a defense, since this clause has been the most popular in the GATT/WTO dispute history on invocation of Security Exceptions. For most of the time, the clause has been invoked in imminent situations comparable to a war. For example, the clause was invoked in *EEC, Australia, Canada-Argentina* case by the EC when there was a Falkland Islands war between Argentina and the UK that even led to an issuance of UN SC resolution. However, the language "in time of war or *other emergency in international relations*" (emphasis added) also confused the invoking parties to justify comprehensive circumstances. For example, the US invoked the clause in 1985 to impose economic sanctions against Nicaragua, in time absent with any military confrontation but based on its own political motivation to contain the communist government. The UN SC resolution tried to remind that sovereign states have the right to live in peace and security free from outside interference[430] and the

[429] *Ibid*.
[430] United Nations Security Council, *Nicaragua-USA, Resolution 562* (1985) (dated 10 May 1985), retrieved from http://unscr.com/en/resolutions/562 (visited Dec. 6, 2018).

General Assembly resolution directly recommended the US to repeal its excessive sanction measures.[431] Nevertheless, the US maintained the measure, claiming an emergency in international relations, as the GATT panel did not have the power to review without an approval on the terms of reference by the contracting parties.

The political background of recent US Section 232 measure can hardly be claimed as an "emergency in international relations." The 2017 report on the investigation seldom refers to political imminence that requires import restrictions. Furthermore, any preparation of emergency situations cannot be justified as an action "taken *in* time of war or other emergency in international situation" (emphasis added). There seems to be a lack of evidence to prove US measure under Article XXI(b)(iii), under an objective review on the application of subparagraphs.

Still, the main controversy on the application of Security Exceptions lies in interpreting the phrase "…it considers necessary to protect essential security interest." The good faith review, in accordance to international customary law and Vienna Convention on the Law of Treaties, on the discretionary power of the Members could assess the nature of essentiality of security interest the state aims to protect and the necessity of the consequent measure.[432] The DOC claims that correcting unfair trade practices for the strength of domestic industry is relevant to the overall national security in the 2017 report; while the Department of State has

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[431] *Refer* to United Nations General Assembly, *Trade Embargo against Nicaragua*, 119th plenary meeting, A/RES/40/188 (dated 17 Dec. 1985), retrieved from http://www.un.org/documents/ga/res/40/a40r188.htm (visited Dec. 6, 2018).

[432] *Refer* to Stephan Schill and Robyn Briese, ""If the State Considers": Self-Judging Clauses in International Dispute Settlement", 13 *Max Planck Yearbook of United Nations Law* 61, (2009), p. 108; Cann, Jr. (2001), *supra* note 292, p. 452.

been concerned with a conflict of interest in pursuing other national security strategies, such as the bilateral relationship with the allies and securing fair and reciprocal world trading system. In other words, applying the proportionality principle in a good faith review could deny the objective of Section 232 measure as an essential security interest of the US.

Furthermore, the US practice of Section 232 measure can be subject to good faith review to determine the necessity of such measure. A good faith review can be constituted of 1) assessing genuine relationship between essential security interest and the applied measure; 2) assessing "proportionality" in the necessity of the measure; as well as 3) assessing arbitrariness, unjustifiability and disguisiveness of a trade measure, similar to the standards of the chapeau in General Exceptions.[433] Most importantly, there is lack of clear standard for the US on exempting the measure to countries like Brazil and Korea, as they rank second and third in the volume of steel they export to the US.[434] The practice of US Section 232 measure itself is embedded with much arbitrariness to be justified in a good faith review process. There is also much room for countries like China, who has allegedly been the main target of the measure, to effectively argue that the US measure is in fact a disguised trade restriction for commercial purposes.

Nonetheless, such review is only possible when the panel secures its terms of reference to review the application of Security Exceptions. It would be necessary for the Members to assure burden of proof to the invoking party and, at least, insist

[433] Schill and Briese (2009), *supra* note 432, p. 104.
[434] *Refer* to USDOC, Section 232 Steel Investigation, 2017, *supra* note 388, p. 28.

on minimum review process in order to sustain the integrity of the multilateral trading system.

4. Developments of Security Exceptions in FTAs

Meanwhile, the identity of security exceptions clauses in the realm of FTAs has been diverging to a various degree. There can be four categorical types of FTAs sorted by the type of security exceptions provision embedded in them: 1) FTAs that do not contain security exceptions; 2) FTAs that similarly reproduce the language of the WTO security exceptions; 3) FTAs that have increased the objectivity of the language of security exceptions; and 4) FTAs that have broadened the scope of security exceptions.

Not all FTAs contain security exceptions. For example, the Korea and European Free Trade Association (EFTA), the Korea and India FTA, and the Korea and the Association of Southeast Asian Nations (ASEAN) FTA, to name a few, do not contain security exceptions. In fact, the content of these FTAs is short and simple, which does not necessarily require a comprehensive exception provision. At the same time, the parties that sign these FTAs have little relevance in terms of security concerns against each other.

On the other hand, many FTAs simply have replicated the WTO security exceptions as a default template. Despite a plethora of concerns and debates on the interpretation of the WTO security exceptions, the WTO format has been the most

prevalent form of security exceptions even in the FTAs. In the meantime, the way different FTAs reproduce the WTO language has also created hardly understandable anomalies which lead to question the intention or negligence of the drafters. For example, the Korea-China FTA includes Article 21.2 (Essential Security), which reads "[f]or the purposes of this Agreement, Article XXI of GATT 1994 and Article XIV*bis* of GATS are incorporated into and made part of this Agreement, *mutatis mutandis*." It has implicitly left out TRIPS Article 73, while this FTA contains a relatively thorough and comprehensive Chapter 15 (Intellectual Property) that is composed of 31 articles. Chapter 15 does not even mention security in a separate clause despite the convoluted technology rivalry between Korea and China. If the agreement was to follow the WTO structure, the intention of leaving out TRIPS Article 73, while expressly incorporating GATT Article XXI and GATS Article XIV*bis*, is of curiosity.

For those FTAs that contain security exception clauses that are different to those of the WTO treaty, there are two different tracks parties have taken. Firstly, there are developments of comparably objective language, especially in FTAs that have been signed by small developing countries. Alford (2012) has found that the Canada-Israel FTA[435] and the Caribbean Community's FTA[436] signed with Costa Rica have deleted the term "it" from the phrase "it considers necessary" as it reads in subparagraph (b) of the GATT security exceptions, which eliminates the confusion on whether the application of such a provision should be self-judging.[437]

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[435] Canada-Israel FTA (entered into force on 1 Jan. 1997), Article 10.2.
[436] CARICOM-Cost Rica FTA (entered into force on 15 Nov. 2005), Article XVI.02
[437] The absence of the word "it" has proven important especially in ICJ rulings (e.g. in Military

Likewise, the FTA between the Caribbean Community and the Dominican Republic[438] adopted a combined form of GATT Articles XX and XXI that was designed with a precondition that any subjected measure should first overcome the threshold of a 'necessity test.' Moreover, the Security Exceptions text in the EU-South Africa FTA includes very similar language compared to the chapeau of Article XX in so far as it mentions that security measures "shall not, however, constitute a means of arbitrary or unjustifiable discrimination" or a "disguised restriction on trade between the Parties."[439]

Secondly, there are FTAs mainly led by big developed economies where parties have intentionally and gradually broadened the arbitrary scope of the security exception clauses. There are two different versions to this. The EU version is less drastic than the North American one. The EU-led FTAs incorporate the GATS-based security exceptions language which refers to "fissionable and fusionable materials" in subparagraph (b)(ii). Australia and Singapore also tend to follow the EU-led version in their FTAs.[440] In addition, the EU-Korea FTA specifically eliminated the obliged reference to the UN Charter in Article 15.9(c) and generalized the wording of the provision to allow broader state discretion in

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and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), Judgment, 1986, I.C.J. Rep. 14 (dated on 27 June 1986) and Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, 2003 I.C.J. Rep. 161 (dated on 6 Nov. 2003)), based on the text language in U.S. Treaties of Friendship, Commerce and Navigations with Nicaragua and 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States, respectively.

[438] CARICOM-Dominican FTA (dated 22 Aug. 1998), Article VII.

[439] Agreement on Trade, Development and Cooperation Between the European Community and Its Member States, of the One Part, and the Republic of South Africa, of the Other Part, Article 27, L311/3 (dated 4 Dec. 1999). *See* also Alford (2012), *supra* note 286, p. 736.

[440] Korea-Australia FTA (entered into force on 12 Dec. 2014), Article 22.2; Korea-Singapore FTA (entered into force on 2 Mar. 2006), Article 21.3.

invoking the security exceptions and to widen policy space.[441] It is also noteworthy that the EU-Canada Comprehensive Economic and Trade Agreement (CETA) enunciates measures related to the maintenance of international peace and security to include the protection of human rights.[442]

As regards the North American version, the language of the security exception clause in the North American Free Trade Agreement (NAFTA) is different from the text settled in the Uruguay Round. Attention to the language in Article 2102(b)(i) of NAFTA[443] finds an added phrase "or other security establishment" to the corresponding text of GATT Article XXI(b)(ii), which originally limits the condition to "military establishment." Considering that the term "military establishment" and the criteria to determine "other emergency situations in international relations" were already under heated debate during GATT discussions, the insertion of the phrase "or other security establishment" suggests the drafters' intention to allow a broader scale of political situations to fit into the conditions to invoke the national security clause. The Canada-Korea FTA, which entered into force on 1 January 2015, contains an additional slight modification by eliminating in Article 22.2(c) the specific notion on the obligations under the UN Charter, as foreseen in GATT Article XXI(c), and refers only generally to obligations under

[441] Korea-EU FTA, *supra* note 236. Article 15.9(c) reads as follows: "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."
[442] EU-Canada CETA, *supra* note 239, Annex8-E Joint Declaration on Articles 8.16, 9.7, and 29.6; reference to "Article 29.6 (National Security)" in the Annex8-E must be a drafting error since it should be Article 28.6 instead of 29.6.
[443] NAFTA, *supra* note 234, Article 2102. Some of the detailed discussions related to the security exception clause of NAFTA can be found in Lindsay (2003), *supra note* 84, p. 1300-1302.

"international agreements".[444]

The simplest version of the security exceptions clause, following the 2004 US model BIT[445] language, has become a standard these days.[446] In Korea-US FTA (KORUS FTA), for example, Article 23.2(b) is a combined form of GATT Article XXI(b) and (c) that features a complete elimination of the three subparagraphs of Article XXI(b). The part retrieved from GATT Article XXI(c) is modified through the elimination of the phrase "obligations of the UN Charter" which has been replaced by "obligations with respect to the maintenance or restoration of international peace or security." The unclear wordings seem to simply aggravate the ambiguity problem.

Furthermore, the most striking part of KORUS FTA is the footnote of Article 23.2(b) reading: "[f]or greater certainty, if a Party invokes Article 23.2 in an arbitral proceeding initiated under Chapter Eleven (Investment) or Chapter Twenty-Two (institutional Provisions and Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies." This footnote is also included in recently signed US FTAs with Peru, Panama, and Colombia.[447] While some literature highlights how the self-judging clauses "do not [necessarily] oust the

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[444] Canada-Korea FTA (entered into force on 1 Jan. 2015), Article 22.2.

[445] 2004 Model BIT, retrieved from http://www.state.gov/documents/organization/117601.pdf (visited Mar. 16, 2018). The more recent 2012 Model BIT includes the same language of the 2004 version for security exception clause.

[446] The same language can be found in, for example, US-Chile FTA (entered into force on 1 Jan. 2004), Article 23.2; US – Singapore FTA (entered into force on 1 Jan. 2004), Article 21.2; US - Australia FTA (entered into force on 1 Jan. 2005), Article 22.2; KORUS FTA (entered into force on 15 Mar. 2012); TPP, *supra* note 52, Article 29.2.

[447] US – Peru Trade Promotion Agreement (TPA) (entered into force on 1 Feb 2009), Article 21.2; US – Colombia TPA (entered into force on 15 May 2012), Article 22.2; U.S. – Panama TPA (entered into force on 31 Oct. 2012), Article 21.2.

jurisdiction of international Courts or Tribunals",[448] such footnote mandates the tribunal or panel to automatically apply the exception without a review. This clearly signals the weight given to state discretion over an international authority for review. In fact, some argue that the nations have informally checked perceived abuses of Article XXI and that the ambiguity of Article XXI has not necessarily frustrated implementation of the GATT.[449] However, in a holistic picture of the development of security exceptions provisions in FTAs, it is doubtful if the Member countries are still checking and balancing each other from abuse of Security Exceptions and if the FTAs are promoting better adherence to good faith principle in terms of resolving conflicts related to trade sanction measures.

The Trans-Pacific Partnership (TPP), or the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), includes a security exceptions clause that is identical to the US' 2004 Model BIT, yet without a footnote on subparagraph (b). The most recently concluded USMCA Agreement, which will replace NAFTA, includes the same security exceptions clause with the TPP in Article 32.2.[450] Others like the Transatlantic Trade and Investment Partnership and Regional Comprehensive Economic Partnership, are also coming ahead without any clue of how certain diversification in the language could harm the prospects of governing politically motivated trade sanctions in the world trading regime. Expecting the rules set in these mega-FTAs would have even greater impact than those of bilateral FTAs, more attention to the changing language of the security

[448] Schill and Briese (2009), *supra* note 432, p. 62.
[449] Lindsay (2003), *supra* note 84, p. 1312.
[450] USMCA Agreement, *supra* note 241, Chapter 32, Article 32.2 Essential Security.

exceptions provisions would be quintessential in prospecting the future trading environment.

Table 8. Example of FTAs by Categorical Types of Security Exception Clauses

(A) No security exceptions clause	(B) Security exceptions clause as in the WTO	(C) Security exceptions clauses with clarified objectivity standards	(D) Security exceptions clauses with further ambiguity
Korea-EFTA; Korea-India FTA; Korea-ASEAN FTA	Most of the FTAs including Korea-China FTA	Canada – Israel FTA Caribbean Community-Costa Rica FTA Caribbean Community-Dominican Republic FTA EU-Republic of South Africa FTA	EU-led FTAs including Korea-EU FTA, Canada-EU CETA Most of the US-led FTAs including NAFTA, USMCA, and the TPP US-led FTAs including KORUS FTA; US-Peru FTA; US-Colombia, US-Panama FTA

Source: Translated and updated version of "Figure 1" from Ji Yeong Yoo, "Analysis on Consistency of Economic Sanction Measures against North Korea with WTO/FTA Security Exceptions Provisions," 25(2) *Review of International and Area Studies* 1, (2016, *In Korean*), p. 18.

5. WTO Challenges of Restructuring Security Exceptions

Doubting the capability of the WTO DSB on security concerns, Members have mostly refrained from utilizing the WTO as a forum to deal with measures adopted for national security interest purposes. Yet concerns and questions regarding the use

of security exceptions are recently reviving. Panel and Appellate Body rulings for the time being would be crucial to signal the Members that the WTO is also prepared to deal with such issues; yet, the linkage between trade and security is a fundamental problem that systematic challenges should be eventually reconsidered for a reform of the provision. Suggestions range over both institutional and legal restructuring in order to resuscitate the practicality of security exceptions clauses.

5.1. Need for Institutional Rebalancing of WTO and UN

The establishment of the WTO was a groundbreaking event which created an independent organization fully responsible for trade matters, especially through strengthening an effective DSB with its jurisdiction over the 'covered agreements.' While the ITO aimed to maintain its identity purely as an economic organization by transferring the authority over political issues totally to the UN, the WTO as a separate organization outside the UN umbrella has firmer grounds on its jurisdiction over essentially all *trade* matters. It is no longer a pseudo-UN agency but a fully structured independent entity. There was an arrangement for effective cooperation with the WTO and the UN in November 1995[451], granting both organizations mutual observer status. The arrangement, however, also stated that the WTO and the UN would extend the former *de facto* relationship of the GATT and the UN,[452]

[451] *See* WTO, *Arrangements for Effective Cooperation with Other Intergovernmental Organizations*, WT/GC/W/10 (dated 8 Nov. 1995).
[452] *Ibid.* In exchange of letters between the head of the organizations 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. Despite the

which technically confuses the relationship of the current two permanent organizations and their identity.

The current institutional arrangement for the coexistence of the two organizations indefinitely blurs the scope of authority between the WTO and the UN, especially as regards security exceptions matters. Because the nature of economic sanctions of political motivation is inherently linked to both trade and politics, both the WTO and the UN may share their expertise and authorities to advise and consult over the matter at issue. However, at the same time, when the conflicts are framed as *trade* disputes and lead to panel procedures under the WTO DSB, the characteristics of the dispute naturally induces conflicts in *trade* interests that should be sufficiently dealt within the WTO and be developed through case rulings. Reminding how the panel retained its compulsory jurisdiction over Article XVIII of the GATT in *India – Quantitative Restrictions* case, despite the IMF expertise on macroeconomic policy and determining BOP status, can provide a reference to establishing clear panel jurisdiction over Security Exceptions in the WTO as well.[453]

Especially under the WTO era of post-Cold War period, the trade realm has been expanding ever since, as there is no conceptually absolute ally or enemy among nations and thereby security objectives no longer absolutely overrule trade

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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.

[453] *Refer* to WTO, India – Quantitative Restrictions*,* Report of the Panel, *supra* note 213; Ahn (2000), *supra* note 212.

policies. In contrast to what could be called *security and trade* relations under which security concerns prevail over trade interests, matters have evolved to *trade and security* relations which further require more rational and balanced considerations of trade interests.

Moreover, the challenging issue of how much UN comity over WTO security exceptions should be legitimized would also require rigorous consideration, especially in respect of secondary sanctions (which often involve extraterritorial application) beyond the UN SC resolutions. It is clear that subparagraph (c) of the Security Exceptions, which refers to UN SC sanctions would not be subject to further questions in accepting it as an exceptional circumstance in the trade regime. But in case a national security dispute arises between WTO Members due to an extended sanction measure that goes beyond the measures approved in the SC resolution of a given political circumstance, there is still no criteria whatsoever as to how those nullified and impaired trade benefits of the complainant should be examined. In other words, there should be clear delineation of authority between the WTO and the UN over which part of the whole conflict does each organization has jurisdiction. Otherwise, forgone trade interests arbitrarily ignored by uncensored political concerns would not meet the opportunity for legal review and reasonable decisions.

Besides, handling the UN SC resolutions has become much more complicated in the trade realm, as the UN SC has included "non-military sources of instability in the economic, social, humanitarian and ecological fields…"[454] in the definition

[454] UN Security Council, *Note by the President of the Security Council*, S/235000 (dated 31 Jan.

of threats to peace and security. Accordingly, the realm of security is keep expanding[455] and has developed to the point where the UN SC responses to health crises due to HIV epidemic in 2011[456] and Ebola virus in 2014[457]. These SC resolutions raise questions on how they should be treated under the security exceptions clause, should any trade measure related to the resolutions is brought up for a WTO dispute.

The very first step to be taken at the current stage is clarifying the formal cooperative relationship between the WTO and the UN. Second, the scope of UN comity over WTO security exceptions should also be clearly defined in order to ensure trade-specific legal concerns of the conflict to be effectively dealt within the WTO jurisdiction, while being respectful of UN consultations and opinions on the political matter.[458]

1992), retrieved from http://www.francetnp.gouv.fr/IMG/pdf/Declaration_CSNU_1992.pdf (visited Apr. 6, 2018), p. 3.

[455] The expansion of the concept of threat to international peace and security in the UN especially in relation to public health is explained in Gian Luca Burci, "Ebola, the Security Council and the securitization of public health," 10 *Questions of International Law* 27 (2014).

[456] UN Security Council, *Resolution 2177 (2014), Adopted by the Security Council at its 7268th meeting, on 18 September 2014*, S/RES/1983 (dated 7 Jun. 2011), retrieved from http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_RES_2177.pdf (visited Mar. 24, 2018).

[457] UN Security Council, *Resolution 1983 (2011), Adopted by the Security Council at its 6547th meeting, on 7 June 2011*, S/RES/2177 (dated 18 Sep. 2014), retrieved from http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/HIV%20SRES%201983.pdf (visited Mar. 24, 2018).

[458] For further reasoning on the need for institutional comity between the WTO and UN law, *refer* to Antonio F. Perez, "WTO and U.N. Law: Institutional Comity in National Security, 23(2) *Yale Journal of International Law* 301 (1998). However, details on how to manage the institutional comity between the WTO and UN requires further research.

5.2. Need for Legal Restructuring of Security Exceptions

5.2.1. Reform of the Outdated Text

Subparagraphs (b)(i) and (ii) of GATT Article XXI have been barely raised by a responding party as a positive defense, while only subparagraph (b)(iii) has been used more often. The GATT/WTO jurisprudence has examined subparagraph (b)(iii) without following any specific guide and has neglected subparagraphs (i) and (ii), all of which has broadened the scope of the security exceptions in a manner contrary to the initial intention of the drafters in 1947.

Even more popularity of broadening the scope of (b)(iii) language in FTAs is attributed to the outdated texts of (b)(i) and (ii) which do not clearly embrace newly emerged security concerns like terrorism or cyber-security issues.[459] The easiest way to broaden the material applicability of the security exception clause in FTAs would have been to slightly modify the existing language of the WTO security exceptions.

The WTO would eventually need to consider how to embrace different modern-day security issues with reasonable standards and make the provision more workable. Evolutionary interpretation by the AB, if there can be any, would partially have a role in reviving such arcane language and concepts. However, the huge difference between the circumstances that existed at the time when the original

[459] For the time being, discussions on how to apply terrorism issue in the current language of Security Exceptions have been presented in Eric J. Lobsinger, "Diminishing Borders in Trade and Terrorism: An Examination of Regional Applicability of GATT Article XXI National Security Trade Sanctions," 13 *ILSA Journal of International and Comparative Law* 99 (2006).

security exceptions were drafted and the present circumstances can only be overcome through amendments not only in the wording but also in the structure of the provision.

5.2.2. Objective Criteria and Standards

Firstly, for a specific domestic measure that is claimed to have been adopted for national security purposes, it is proved by the discussions in the previous sections that not every case is subsequently eligible for a concession through Security Exceptions. It has been clearly confirmed in the academic literature that the principle of good faith under Article 31 of the Vienna Convention on the Law of Treaties, a customary international law often read in line with the WTO Agreements, is an appropriate standard applicable to Security Exceptions as well.[460]

Since the chapeau of Article XX is known to be a detailed written description of what good faith principle should constitute,[461] it seems to be better to have a written Article XX-style good faith condition as chapeau for Article XXI as well. The purpose of sanction measures as pertaining to protecting essential security interests can be handed to state discretion, while the measure itself should be governed by objective criteria. In order to stop proliferation of intentional enlargement of state discretion without clear reference to good faith principle in certain FTAs, it would be necessary to come up with an elaborated chapeau instead of application of tacit reference to good faith principle in the multilateral trading

[460] Generally *refer* to *supra* note 292.
[461] Van den Bossche and Zdouc (2013), *supra* note 344, p. 573.

system. Some other FTAs that experimented new criteria in the chapeau of security exceptions clauses might be useful guidelines to restructure the WTO Security Exceptions.

Secondly, there are also many other issues in need of standards that should be clarified to actually make this provision applicable. For example, in *US – The Cuban Liberty and Democratic Solidarity Act*, one of the interesting issues that could have been dealt by the panel was not only what the sufficient level of threat is to justify a politically motivated sanction, but also to what extent of a sanction measure can be justified when applied extraterritorially.[462]

It would be indispensable to establish objectivity through legal restructuring as well as case rulings in order to make such exception clause operable.

5.2.3. Consideration of Different Modes of Trade and Sectoral Issues

The WTO Members should restructure the security exceptions in a number of dimensions. There is a clear need to revisit the language and structure of the security exceptions embedded in the WTO agreements, including but not limited to GATT, GATS, and TRIPS.[463] The compatibility between the purpose and languages of security exceptions clauses in different agreements should be thoroughly examined

[462] Related concerns were also raised in Cann Jr., (2001), *supra* note 292, p. 460-463; Alford (2012), *supra* note 286, p. 746; Further discussions on how to compensate the winning party when the responding party loses its defense based on Article XXI can be also found in Neuwirth and Svetlicinii (2015), *supra* note 354, p. 911.

[463] For example, it is noted that GPA incorporates a security exceptions clause in Article III but the Agreement in Civil Aircraft does not have it despite the strategic importance of aircraft industries. It is necessary to contemplate on which Agreements actually need or need not a security exceptions provision in a similar or totally different structure. TBT Agreement does not have a separate essential security exception clause while the idea of it is incorporated in the preamble.

in order to refine applicability of the clause in respect of particular industries or modes of trade.[464] Despite the lack of actual legal rulings on GATT Article XXI, the understanding of the security exceptions in the world trading regime has been developed only in the realm of trade in goods. It should be noted that it is inevitable for structural differences in the objectives of the rules on trade in services and intellectual property protection to render Security Exceptions designed initially for market access of trade in goods practically ineffective in the GATS and TRIPS context. A need for a review on the application of Security Exceptions other than that of GATT is foreseeable in the *United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* case.

In fact, unlike GATT or GATS essentially addressing market access, TRIPS deals with fundamentally different private intellectual property rights, ranging from copyrights to layout-designs of integrated circuits. Thus TRIPS stipulates specialized exceptions or limitations corresponding to individual intellectual property rights[465], instead of GATT/GATS-style general exception provisions applicable to all intellectual property rights. Given that such a peculiar nature of TRIPS does not fit with general exception, TRIPS Article 73 *Security Exceptions*

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[464] Considerations many include, for example: 1) whether the replication of GATT Article XXI is applicable to other Agreements; 2) what does the imbalance of wordings such as the inclusion of "fusionable" materials in GATS but not in TRIPS; 3) if the general exception clause on security issues make practical sense in the TRIPS, while the Security Exceptions itself is historically a very unique concept incorporated among conventions related to protection of intellectual property rights.

[465] For example, IP specific exceptions are provided in Article 13 for copyright and related rights, Article 17 for trademarks, Article 24 for geographical indications, and Article 30 for patents.

essentially copied from GATT Article XXI raises systemic problems for applicability.

Accordingly, there should be multilateral endeavors to restructure the WTO Security Exceptions provisions so as to make them workable in real cases. While the deadlock of the Doha Round is disappointing to everyone and it is even unclear how further multilateral discussions would proceed in the near future, concerns to modernize the language and structure of the WTO Security Exceptions should also be one important agenda in any future negotiation. That would be the only way to revive the almost obsolete provisions under the *modern* WTO system and institutionally maintain a proper world trade order.

6. Concluding Remarks

Security exceptions have been one of the core elements of international trade law since the genesis of the GATT, but without much needed modification addressing changed economic and political circumstances. The drafting history of GATT Article XXI shows that there is a lack of proper regulatory structures in this provision, particularly preambles to guide implementation. It is also noted that even the new security exceptions featured in the GATS and the TRIPS Agreement include clearly inconsistent and incoherent elements. New provisions adopted in recent FTAs show slight modifications, but not yet in any significantly meaningful way.

Considering all those remarkable developments from GATT to WTO in terms of jurisprudence as well as rules themselves, the fact that security exceptions remain essentially intact is indeed puzzling. It is even more perplexing to observe that many provisions in FTAs still try to embrace legacy of Article XXI often in incoherent ways.

It is obvious that national security concerns can no longer categorically prevail over free trade concerns in the post-Cold War era. However, it is also unequivocal that security issues will continue to become very controversial problems in relation to trade sanctions or policy measures even after many former communist countries volunteered to join the WTO system. For example, when North Korean sanctions adopted under the Chapter VII of the UN Charter is less of a concern,[466] unilateral secondary economic sanctions, if employed in the future in an extraterritorial way by a Member to other Members, may complicate potentially insurmountable legal conflicts.[467] Furthermore, the world trading system has to deal with wholly different dimensions of national security nowadays such as terrorism, energy security and cyber-security. This situation raises an imminent question on how to make those arcane security exception provisions effectively workable legal

[466] Currently, UN sanctions against North Korea is still ongoing and the mandate has been extended further until April 24, 2019. *See* United Nations Security Council, *Resolution 2407 (2018) – Adopted by the Security Council at Its 8210th Meeting on 21 March 2018*, S/RES/2407 (dated 21 Mar. 2018), retrieved from http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2407%282018%29 (visited Dec. 6, 2018).

[467] For further analysis on the application of secondary sanctions within trilateral relationship between the US, Korea, and China over UN sanction on North Korea can be referred to Ji Yeong Yoo, "Analysis on Consistency of Economic Sanction Measures against North Korea with WTO/FTA Security Exceptions Provisions," 25(2) *Review of International and Area Studies* 1 (2016, *In Korean*).

disciplines. The WTO Members need to address this issue as early as possible to avoid imposing an unnecessary and inappropriate burden to the WTO dispute settlement system.

V. Conclusion

This study started out with an aim to modify the outdated structures of the WTO that have withered throughout the process of globalization. Despite notable developments the GATT brought about towards the establishment of the WTO, many of the legal structures in the WTO are still based on the approaches and conditions that made sense in the 1940s. Amongst plethora of problems that rise under the debate, this study focused on the most fundamental linkages the multilateral trading system tried to secure at its inception, in relation to the UN and the IMF. The two linkages this study explored are 'trade and finance' and 'trade and security' relationships embedded in the WTO system. The commonality of these two relationships is that the relevant legal provisions in the WTO lack sufficient reform, still haunted by the Bretton Woods legacies.

For trade and finance relationship, the study specifically delved into the origin, evolution and challenges regarding the BOP safeguard provision. The study revisited the ITO origins and GATT amendments of BOP provisions to highlight the failure of WTO BOP provisions in redeeming their structural deficiencies. Through legal analysis and case studies on the use of BOP measures during and after the collapse of the Bretton Woods system, the study pinpointed the legal obscurity of the provision and a need for clear and consistent surveillance standard in the WTO. The study suggested a reform agenda for the GATT BOP safeguard

provision, including ways to substantively coordinate the WTO and the IMF on BOP problems. The study believes that the process of refining the BOP safeguard provision will even help the WTO identify its modern role and function in global economic governance on risk mitigation against chronic financial crises.

For trade and security relationship, the study examined the origin, evolution and challenges of Security Exceptions. The study revisited the ITO origins and GATT declarations of Security Exceptions to highlight the failure of WTO security exceptions provisions in redeeming their structural deficiencies. By structurally comparing the changed conditions between the Cold War and the post-Cold War period, this study emphasized that the vague legal conditions of the provision no longer sustains stability of the multilateral trading regime. Recent invocations of Security Exceptions in WTO dispute cases, including those related to US practice of applying Section 232 measure, are overly pressuring the WTO for conflict resolution based on ambiguous legal provisions. Only in absence of such systematic loophole, would clarification of other WTO rights and obligations become meaningful.

One of the common lessons from the study is that the changes in external conditions driven by globalization forces have been revolutionary to the point that interpretation and application of existing legal conditions could only hamper sustainability and soundness of the current multilateral trading regime. In that sense, the study on the two fundamental trade relationships with finance and security marks a prelude to a load of further research that is required to cope with the remaining challenges. As briefly outlined in Chapter II, there are, for example,

issues on the trade remedy system which the WTO should reform to meet the changing conditions in both the demand and supply side of the market. Maintaining the current structure to devise electoral support from national constituencies would only feed old-fashioned protectionism. Issues on investment and competition policy should also be dealt ultimately within the context of digital trade and fill in the missing links the current institutional setting lacks. Complications of other trade relationships with environment, labor and human rights will only extend further in the future, demanding much more cooperative efforts for regulatory coherence and policy coordination.

Hopefully, this study has laid a groundwork towards further research that can contribute to sustainable reform of the WTO at the dawn of the fourth industrial revolution. It would be meaningful if this study could signify even the smallest step forward towards building cooperative global economic governance.

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국문 초록

세계화에 따른 WTO 규범의 과제: 국제수지예외조항과 안보예외조항을 중심으로

본래 브레튼우즈 체제의 세 번째 기둥으로 구상된 세계 통상 체제는 전후 세계의 평화와 안정을 도모하는 역할로써 무역 활성화를 추구하였다. 전쟁을 최소화하도록 협의 및 결정하는 UN 안전보장이사회와 경제 대공황과 같은 사태를 방지하도록 고정환율제도를 관리·감독하는 IMF를 주축으로 세계체제가 운영되던 시대적 배경은 ITO 헌장 및 GATT의 여러 조항에도 반영되었다. WTO 협정의 국제수지예외조항과 안보예외조항은 1940 년대에 성립된 세계체제와의 연계를 고려한 흔적이자, 이후 크게 개정이 되지 않은 채 오늘날까지 남아있는 대표적인 조항들이다. GATT 체제에서 여러 협상 라운드를 통해 많은 조항들이 개정되고 특히 우루과이 라운에서는 새로운 다자 통상규범들이 대거 도입되었음에도 불구하고, 국제수지예외조항과 안보예외조항은 급격하게 변화한 국제 통화 규범, 통상 환경, 그리고 세계 정치적 상황이 무색하도록 근본적인 개정이 제대로 이루어지지 않은 채 남아있다. 특히나 최근 21세기 통상 이슈들에 발맞춰 선진 규범이 도입되는

선진국 간 FTA 에서도 해당 조항들에 대한 혁신적인 개정 노력이 부족하게 나타나며 WTO 에 남아있는 조항을 그대로 옮겨놓는 경우가 여전히 많다.

국제수지예외조항과 안보예외조항의 쓰임이 WTO 설립 이후 상대적으로 매우 적은 것은 관련 이슈들이 사라진 것이 아니라 통상 규범 내에서 현대 사회에 알맞은 무역과 금융 및 무역과 안보의 관계에 대한 정립이 부족함을 반영한다. 본 연구는 국제수지예외조항과 안보예외조항의 역사적 발전 과정과 과거와 현재의 규범 적용이 야기하는 통상 관계의 왜곡을 살펴본다. 궁극적으로 현대 세계 경제의 위험요소를 최소화하는 데에 이바지 할 수 있는 무역과 금융의 관계와 경제적 힘을 필두로 발생하는 21 세기 국가 안보와 통상 관계의 건전한 관리를 도모하는 무역과 안보의 관계를 정립하기 위한 WTO 체제의 구조적인 과제들을 제시한다.

주요어 : WTO, 브레튼우즈 체제, 무역과 금융, 무역과 안보, FTA, 세계경제 거버넌스

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