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International Governance of Domestic National Security Measures: The Forgotten Role of the World Trade Organization

Carla L. Reyes
Southern Methodist University, Dedman School of Law

Author ORCID Identifier:

https://orcid.org/0000-0002-2448-8309

INTERNATIONAL GOVERNANCE OF DOMESTIC NATIONAL SECURITY MEASURES: THE FORGOTTEN ROLE OF THE WORLD TRADE ORGANIZATION

Carla L. Reyes[*]

The current perception of the United Nations as the only institution charged with governing international security issues was neither intended nor required. Although the historical development of the World Trade Organization (WTO) caused a significant shift in its governance focus, the WTO is uniquely situated to remedy several of the governance failures suffered by the United Nations and to act as an effective governor of national security in the economic sphere. Need for such an alternative governance mechanism is especially acute when nation-states refuse to recognize the authority of the United Nations over a security dispute or when a veto-holding Security Council member is the subject of international concern. I first examine the historical development of the international security governance system and uncover the substantive authority of the WTO to govern the economic aspects of national security issues. I then use the parallel proceedings brought by Nicaragua before the International Court of Justice and the General Agreement on Tariffs and Trade dispute settlement system to dispel common objections to

[*] J.D. and LL.M in International and Comparative Law, Duke University School of Law, Class of 2009; M.P.P., Terry Sanford Institute of Public Policy, Duke University. I would like to thank Professor Scott Silliman for his guidance and helpful feedback. I would also like to thank my husband, Mario C. Reyes, for his unconditional love and support.

WTO governance in the national security arena. Finally, I demonstrate how U.S. imposition of unilateral economic sanctions on Iran presents a current opportunity for WTO governance in the global war on terror.

INTRODUCTION

Military activity is rarely the only strategy governments employ to protect national security interests. For instance, the U.S. maintains a policy of imposing economic sanctions against Iran to curtail its nuclear program,[1] and France's foreign affairs minister warned Russia in August 2008 that continued violence in Georgia might lead to the imposition of economic sanctions.[2] Despite the fact that governments use such economic mechanisms to address national security concerns, the international community perceives the United Nations as the sole governance authority in the security arena. Unfortunately, enforcement difficulties plague the United Nations' governance record. The United Nations' effectiveness is especially limited when Security Council members such as China stall efforts to bring Iran into compliance with Security Council Resolutions, or when a Security Council member is the aggressor, as with Russia in the Georgia example. Arguably, the international governance system would benefit from an additional governance mechanism in the national security arena.

Although its role in the national security arena has been forgotten, the World Trade Organization (WTO) was designed to be the kind of supplementary governance mechanism the international community needs. The WTO governs a variety of international economic treaties that prohibit certain restrictive trade measures countries often employ in furtherance of their national security objectives. Of particular interest is the General Agreement on Tariffs and Trade (GATT), which prohibits embargos and quotas, two of the most frequently used economic tools for protecting national security interests. The WTO's failure to enforce these GATT provisions in national security cases stems from the controversy surrounding another GATT provision—the exception in Article XXI. WTO members claim that because national security issues are so sensitive and so closely related to a nation's sovereignty, the WTO Dispute Settlement Body (DSB) must accept a unilateral invocation of the national security exception without any objective inquiry into the matter. The WTO has refused to decide whether the exception in GATT Article XXI contains objective criteria for application and has traditionally avoided the issue. However, advances in WTO organization and jurisprudence have rendered the WTO's cautious approach to this area of trade disputes unnecessary.

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[1] Peter Baker, *Obama Signs into Law Tighter Sanctions on Iran*, N.Y TIMES, July 1, 2010, *available at* www.nytimes.com/2010/07/02/world/middleeast/02sanctions.html.

[2] Mark Tran, Julian Borger & Ian Traynor, *EU Threatens Sanctions Against Russia: Leading European Powers Losing Patience with Kremlin's Sabre Rattling in the Caucasus*, THE GUARDIAN, Aug. 28, 2008, *available at* http://www.guardian.co.uk/world/2008/aug/28/eu.russia.

The United Nations' defective mechanisms for governing economic aspects of international security and the WTO's failure to assume its role as co-governor strain the legitimacy of the international system. In disregard of United Nations processes and without fear of accountability to their GATT obligations, nations act unilaterally. The WTO's continued failure to bolster the legitimacy of international security dispute resolution can be rectified. The WTO's failure to exercise its authority over national security disputes that have entered the economic sphere is an unfortunate and unnecessary result of historical events, none of which should prevent the WTO from assuming its rightful role in the future. The WTO dispute settlement system should interpret the national security exception of GATT Article XXI as containing objective criteria for applicability and should assume the mantle of co-governor of international security.

This comment proceeds in four parts. Part I introduces the concept of the WTO as co-governor of national security issues by outlining the international governance system, the mission shift in each governance institution over time, and the difficulties faced by the United Nations in enforcing international security. Part II discusses the substantive authority of the WTO to govern the economic aspects of national security issues, particularly focusing on the unique features of the WTO dispute settlement system. Part III uses the parallel proceedings brought by Nicaragua before the International Court of Justice (ICJ) and the GATT dispute settlement system to dispel common objections to WTO governance in the national security arena, and Part IV uses the U.S. imposition of unilateral economic sanctions on Iran to demonstrate a current opportunity for WTO governance in the global war on terror.

I. THE MISTAKEN NOTION THAT THE UNITED NATIONS GOVERNS SECURITY, THE BRETTON WOODS INSTITUTIONS GOVERN DEVELOPMENT, AND THE WTO GOVERNS TRADE

Despite the common assumption that international governance is divided among three sets of institutions, each allotted its own substantive governance arena, the United Nations, the Bretton Woods Institutions (the International Monetary Fund and the World Bank), and the World Trade Organization were originally designed to be an interwoven international security governance system.[3] Over time, each of these governance institutions steadily evolved away from its original mandate, and the United Nations was left the sole arbiter of international security.[4]

[3] *See infra* Part I.A.

[4] *See infra* Part I.B. By international security disputes, this comment refers to conflicts

A. The Original Vision for International Governance Institutions

At the end of World War II, the international community rallied around a desire to ensure a "durable peace."[5] Based on the experiences of the first and second World Wars, the international community saw sustained international cooperation as the basic material for building lasting peace.[6] To facilitate such cooperation, world leaders envisioned a network of international institutions, which would include the United Nations, the International Monetary Fund, the International Bank for Reconstruction and Development, and an International Trade Organization.[7] Collectively, these institutions were intended to form a system of global governance charged with maintaining international peace and security.[8]

The creation of the United Nations in 1945 marked the first step toward creating the global governance system.[9] The United Nations was created in order "to save succeeding generations from the scourge of war . . . to maintain international peace and security, and . . . to employ international machinery for the promotion of the economic and social advancement of all peoples."[10] To that end, the international community endowed the United Nations with the power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression"[11] and to respond to such situations by imposing economic sanctions.[12] If economic sanctions proved

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between nations, internal conflicts that prompt international involvement, and other such events including "ethnic cleansing, civil war, transnational crime and terrorism." Elke Krahmann, *American Hegemony or Global Governance? Competing Visions of International Security*, 7 INT'L STUD. REV. 531, 531 (2005) [hereinafter Krahmann, *American Hegemony*]. By global security governance, this comment refers to the international organizations and processes with the power to check the sovereign discretion of nation states as they pursue their national security interests by making policy or enforcing existing international norms. *Id.* Notably, the ideas of global governance and international security are continually changing. *See generally* Elke Krahmann, *Conceptualizing Security Governance*, 38 COOPERATION & CONFLICT 5 (2003). This comment seeks to contribute to that literature by suggesting an active role for the WTO in the economic sphere of global security governance.

[5] *See* Mabel Newcomer, *Bretton Woods and a Durable Peace*, 240 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 42 (1945).

[6] Ervin P. Hexner, *Worldwide International Economic Institutions: A Factual Review*, 61 COLUM. L. REV. 354, 357 (1961).

[7] *Id.* at 358.

[8] *See id.*; John W. Pehle, *The Bretton Woods Institutions*, 55 YALE L.J. 1127, 1127 (1946).

[9] U.N. Charter introductory note.

[10] U.N. Charter pmbl. *See also* BARRY E. CARTER, PHILLIP R. TRIMBLE, & CURTIS A. BRADLEY, INTERNATIONAL LAW 977 (4th ed. 2003) ("The United Nations was created in 1945 primarily to prevent military conflict among its members and to settle international disputes.").

[11] U.N. Charter art. 39.

[12] U.N. Charter art. 41.

ineffective, its Charter authorizes the United Nations to use force "to maintain or restore international peace and security."[13]

However, the international community never intended the United Nations alone to mediate conflicts of members' domestic national security interests. Instead, it was thought that for the work of the United Nations to be successful, international economic institutions would have to take "a critical role in the new world that the members of the United Nations are beginning to build . . . [by] provid[ing] a favorable economic environment for maintaining world peace."[14] The vision for international economic institutions as global security governors stemmed from a recognition of "the role of international economic affairs in causing World War II and [the desire] to prevent a reoccurrence of such an event."[15]

The international community thus planned three complementary international economic governance institutions meant to aid the United Nations in providing international security governance: the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), and an International Trade Organization (ITO). The IMF and the World Bank came into existence in 1948. The IMF was "intended to repair the disintegration that had befallen the international monetary system after the War."[16] Specifically, the IMF's mandate centered on "shorten[ing] the duration and lessen[ing] the degree of disequilibrium in the international balance of payments of members."[17] To fulfill this mandate, the IMF provided loans for members to use in "correct[ing] maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity."[18] For its part, the World Bank was "designed to stimulate and support foreign investment, which had declined to insignificant amounts" after the War.[19] To that end, the World Bank's founding members contributed funds to be loaned for "development and reconstruction projects alike,"[20] with preference given to reconstruction loans.[21] Together the IMF and the World Bank formed two pillars of a three-

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[13] U.N. Charter art. 42.

[14] Pehle, *supra* note 8, at 1128.

[15] JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 217 (5th ed. 2008).

[16] Gerald M. Meier, *The Bretton Woods Agreement–Twenty-five Years After*, 23 STAN. L. REV. 235, 237 (1971).

[17] Articles of Agreement of the International Monetary Fund art. VI, Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39 [hereinafter IMF Agreement].

[18] *Id.* at art. V.

[19] Meier, *supra* note 16, at 237.

[20] International Bank for Reconstruction and Development Articles of Agreement art. III §1, July 22, 1945, 60 Stat. 1440, 2 U.N.T.S. 134 [hereinafter World Bank Agreement].

[21] *Id.* (emphasizing loans made "[f]or the purpose of facilitating the restoration and

pillar base for helping the United Nations achieve international security governance.

Despite a United Nations resolution in favor of its creation,[22] the intended third pillar of the Bretton Woods system, the International Trade Organization (ITO), never came into existence.[23] Two multilateral instruments for creating the ITO were drafted: an organizational charter and a General Agreement on Tariffs and Trade (GATT) containing the basic obligations of nations in a world trading system.[24] The GATT was adopted and implemented on a provisional basis by all of its contracting parties,[25] including the U.S.[26] Because the charter was more controversial and U.S. involvement so critical, most contracting parties waited to submit it to their national governments until its fate in the U.S. had been determined.[27] President Truman submitted the charter to Congress repeatedly over a two-year period, but it met rejection each time, ultimately causing plans for the ITO to fail.[28]

As a result of the ITO's failure, the international community relied on the GATT to fill the role of global governance in trade.[29] The contracting parties simply transposed the expectation that the ITO would work with the IMF and World Bank to the GATT. In particular, the "[IMF] and GATT were to collaborate on exchange policies and trade policies," and "[i]n combination, the [IMF], the [World] Bank, and GATT were designed to help the advanced industrial countries achieve the multiple objectives of full employment, freer and expanding trade, and stable exchange rates."[30] The United Nations remained tied to all three organizations. Membership in the

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reconstruction of the economy of members whose metropolitan territories have suffered great devastation from enemy occupation or hostilities").

[22] SUSAN A. AARONSON, TRADE AND THE AMERICAN DREAM: A SOCIAL HISTORY OF POSTWAR TRADE POLICY 62 (Univ. Press of Kentucky 1996).

[23] MITSUO MATSUSHITA, THOMAS J. SHOENBAUM & PETROS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY 2 (Oxford Univ. Press 2006).

[24] *Id.*

[25] Note that members of the 1947 General Agreement on Tariffs and Trade (GATT 1947) were referred to as "contracting parties." When the Charter for the ITO failed (see text at note 28), the nation-states that ratified GATT 1947 refrained from referring to themselves as "members" because no ITO organization actually existed. As a result, during the period of the GATT prior to the establishment of the WTO, the "members" continued to refer to themselves only as "contracting parties." When this comment uses the term "contracting parties," therefore, it refers to the members of GATT 1947 prior to the establishment of the WTO.

[26] MATSUSHITA ET AL., *supra* note 23, at 2; *see also* JACKSON ET AL., *supra* note 15, at 219.

[27] *Id.*

[28] *Id.*

[29] JACKSON ET AL., *supra* note 15, at 219 ("The death of the ITO meant that GATT was, by default, the central organization for coordinating national policies on international trade.").

[30] Meier, *supra* note 16, at 237.

IMF and World Bank is contingent upon membership in the United Nations.[31] Although the GATT placed no similar requirement on its contracting parties, it ensured that nothing in the GATT would "prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."[32] Thus, despite the fact that the global governance institutions charged with managing conflicts between domestic national security policies did not develop exactly as designed, the international community nevertheless expected all four organizations to work collectively to govern security threats in both the political and economic spheres.

B. The Evolution of Institutional Mission and the Division of Governance Arenas

Despite the intended interwoven nature of the global governance institutions, the United Nations is now perceived as the only institution charged with governing security issues. The IMF and World Bank are thought to specialize in international development, and the GATT, having expanded into the World Trade Organization, is charged with trade liberalization. These missions are thought to be distinct and only the United Nations is expected to intervene in national security situations. This current conceptualization of compartmentalized global governance stems from the unique history of each organization.

Originally, the IMF "was charged with preventing another global depression" through collective action to maintain international security.[33] Over time, and particularly during the 1980s, the IMF began to expand its mission.[34] While the IMF was "supposed to limit itself to matters of macroeconomics in dealing with a country," it defined the bounds of these matters broadly, finding that "since almost any structural issue could affect the overall performance of the economy, and hence the government's budget or the trade deficit . . . almost everything [was] within its domain."[35] When the Berlin Wall fell, the IMF further expanded its activities—finding a role for itself in managing transition economies.[36] As the IMF became

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[31] IMF members must be members of the United Nations. IMF Agreement, *supra* note 17, art. II. World Bank members must be members of the IMF. World Bank Agreement, *supra* note 20, art. II, §1. Thus, members of the World Bank must also be members of the UN, as membership in the IMF is contingent upon UN membership.

[32] General Agreement on Tariffs and Trade art. XXI(c), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

[33] JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 12 (2002).

[34] *Id.* at 12-13.

[35] *Id.* at 14.

[36] *Id.*

increasingly involved in shaping microeconomic policies, its actions began to focus more on the internal development of nations rather than international security.[37] Eventually, the IMF was viewed as a development arm of the United Nations, rather than as one of three pillars building a foundation for United Nations security governance.[38]

The evolving mission of the World Bank mirrors that of the IMF; despite its inception as an institution actively engaged in security governance, the World Bank is now largely viewed as a development institution. For most of its history, the Bank's lending focused on reconstruction projects. It was not until the 1980s that the World Bank expanded its work to include structural adjustment loans aimed at providing broad support to struggling economies.[39] The structural adjustment loans imposed market-oriented reform conditions on the borrowers.[40] Within a decade, the World Bank shifted these loan conditions from issues of economics to issues of development generally, insisting that obtaining a World Bank loan depended on proof of good governance or promises to develop the institutions necessary to achieve good governance.[41] The World Bank even expanded its mission to include defining and monitoring good governance for borrowing nations.[42] Ultimately, the World Bank's actions reformulated the common view of its mandate. The World Bank is now thought to be charged with the development of "government agencies, judiciaries, and legal frameworks . . . to secure meaningful movement towards better governance" in Third World nations.[43] Any understanding of

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[37] *Id.* at 206-08.

[38] This section only provides a brief synopsis of the mission shift which occurred in the IMF during its organizational lifetime. For a full discussion of the "mission creep" phenomenon as it plays out in the IMF, see generally STIGLITZ, *supra* note 33.

[39] *Id.* at 14.

[40] *Id.*

[41] Amanda J. Perry, *International Economic Organizations and the Modern Law and Development Movement*, *in* MAKING DEVELOPMENT WORK: LEGISLATIVE REFORM FOR INSTITUTIONAL TRANSFORMATION AND GOOD GOVERNANCE 19, 22 (Ann Seidman, Robert B. Seidman & Thomas W. Walde eds., 1999).

[42] *Id.* at 22-23. Notably, the elements of good governance resemble the common understanding of that phrase in western developed nations:

> First, legal systems should provide 'a set of rules known in advance' . . . Secondly, legal systems should rely upon rules which are actually implemented, and not just 'on the books.' Thirdly, legal systems should ensure that rules are applied consistently to all . . . Fourthly, the legal system must provide an effective, independent mechanism for dispute resolution. . . . Fifthly, there must be clear rules to govern the amendment of rules, to prevent the arbitrary introduction and rejection of rules, and to clear out irrelevant rules.

Id. at 23.

[43] *Id.*

the World Bank as an institution with security governance responsibility has evaporated.

Because the GATT was never intended to operate as an organization,[44] many difficulties in implementation emerged. Ultimately, a growing international consensus in favor of changing the GATT regime led to the adoption of a World Trade Organization in 1994.[45] The new World Trade Organization (WTO) would manage the GATT, as well as several new agreements regulating trade in services and intellectual property, among other areas.[46] The late emergence of the WTO, as compared to the IMF and World Bank, caused the WTO to never fully view itself as a third pillar of the security governance foundation underlying the United Nations. Because the GATT operated as a quasi-organization, but without the structure, staff, or resources of its IMF and World Bank counterparts, it adopted a limited, manageable focus on liberalizing trade in goods through the reduction of tariff barriers.[47] When the WTO emerged and provided an organizational structure for trade liberalization, it made the elimination of non-tariff barriers to trade part of its activities[48] but did not expand its agenda any further, having long forgotten its intended role in global security governance.

The gradual shift in the mission of the IMF, World Bank, and WTO left the United Nations the sole institution charged with security governance. As such, when international conflict breaks out, the main mechanism for checking the domestic discretion of sovereign nations is collective action approved by the Security Council with its Chapter VII powers.[49] Nations rely upon the ICJ as a secondary mechanism. As the principal United Nations judicial organ,[50] the ICJ is charged with adjudicating disputes between nations regarding "the existence of any fact which, if established, would constitute a breach of an international obligation," and determining "the nature or extent of the reparation to be made for the breach of an international obligation."[51] Because the United Nations and the ICJ were not intended to govern national security conflicts independently of the larger

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[44] *See supra* notes 22-28 and accompanying text.

[45] JACKSON ET AL., *supra* note 15, at 218-22.

[46] Marrakesh Agreement Establishing the World Trade Organization art. II, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter WTO Charter]. For a comprehensive introduction to all of the WTO covered agreements, see JACKSON ET AL., *supra* note 15.

[47] RORDEN WILKINSON, THE WTO: CRISIS AND THE GOVERNANCE OF GLOBAL TRADE 18 (2006).

[48] JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 131 (2006) [hereinafter JACKSON, SOVEREIGNTY].

[49] CARTER ET AL., *supra* note 10, at 979.

[50] Statute of the International Court of Justice art. 1, June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute].

[51] *Id.* art. 36.

international governance framework, their effectiveness has been limited, especially in the area of enforcement.

C. Difficulties in Enforcement: The United Nations and the International Court of Justice

Although it is now seen as "the only organization with a global focus on security, . . . in practice, the Security Council has a rather mixed record [in] solv[ing] problems of global security."[52] In particular, United Nations members severely undermine the Security Council's authority by taking unilateral action "whenever supportive to their national interests."[53] Furthermore, conflicts between permanent members of the United Nations cause stalemates in various United Nations organs, including the Security Council.[54] Both problems, unilateral action and Security Council stalemates, reduce the legitimacy of United Nations processes and limit its ability to adequately address questions of international security.

A specific institutional problem limiting the United Nations' ability to enforce Security Council decisions is that, although the United Nations Charter provides for the development of standing United Nations military forces, none was ever created. United Nations Charter Article 43 creates a mechanism by which United Nations member states would provide armed forces to serve as a United Nations standing army.[55] No United Nations

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[52] Emil J. Kirchner, *Regional and Global Security: Changing Threats and Institutional Responses*, *in* GLOBAL SECURITY GOVERNANCE: COMPETING PERCEPTIONS OF SECURITY IN THE 21ST CENTURY 3, 13 (Emil J. Kirchner & James Sperling eds., 2007).

[53] *Id.*

[54] *Id.* at 13-14. Stalemates also occur in the other UN organs, including the First Main Committee of the General Assembly, the United Nations Disarmament Commission, and the Geneva Conference on Disarmament.

[55] Article 43 states:

> 1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purposes of maintaining international peace and security.
>
> 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
>
> 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be conducted between the Security Council and the Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

U.N. Charter art. 43.

member concluded an Article 43 agreement with the Security Council,[56] which has left the United Nations without the forces necessary to enforce its decisions. To rectify this difficulty, the United Nations adopted an *ad hoc* approach, authorizing states to come together in a "coalition of the willing" in order to respond to specific security threats.[57] This system of *ad hoc* coalitions left nations feeling more in control of military enforcement actions than the United Nations Charter intended.[58]

United Nations enforcement faces further difficulty because its judicial organ is not endowed with compulsory jurisdiction. Although the United Nations Charter created the ICJ[59] and requires all United Nations members to join the court,[60] the United Nations did not succeed in creating worldwide compulsory jurisdiction.[61] Instead, ICJ jurisdiction is based primarily upon the consent of the parties.[62] Consent may either be given on a case-by-case basis or through a declaration accepting ICJ compulsory jurisdiction.[63]

The issue of jurisdiction has been a significant factor in the ineffectiveness of the ICJ. Because few nations submitted compulsory jurisdiction declarations, ICJ jurisdiction is overwhelmingly subject to the consent of the parties, resulting in only 125 cases coming before the court during its fifty-seven years of existence.[64] Even when a nation has agreed to compulsory jurisdiction, its compulsory jurisdiction declaration can be modified or terminated.[65] In fact, some states facing an adverse ICJ decision respond by withdrawing their compulsory jurisdiction declaration rather than implement the decision. The U.S. withdrawal after the adverse decision in

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[56] CARTER ET AL., *supra* note 10, at 1027.

[57] THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTIONS AGAINST THREATS AND ARMED ATTACKS 24-25 (Cambridge Univ. Press 2002).

[58] In particular, the United Nations faced difficulty in governing the Iraq situation after 1999. CARTER ET AL., *supra* note 10, at 1056-57. Ultimately, this culminated in the U.S. and United Kingdom abandoning the United Nations process with respect to Iraq, concluding that "[t]he United Nations Security Council has not lived up to its responsibilities " *Id.* at 1065 (quoting President George W. Bush).

[59] U.N. Charter art. 92.

[60] U.N. Charter art. 93.

[61] Ernst-Ulrich Petersmann, *The Doha Development Round Negotiations on Improvements and Clarifications of the WTO Dispute Settlement Understanding 2001-2003: An Overview*, *in* THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003 3, 6 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004).

[62] RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 903 cmt. a (1996).

[63] ICJ Statute, *supra* note 50, art. 36.

[64] CARTER ET AL., *supra* note 10, at 287.

[65] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, ¶ 61 (Nov. 26) (recognizing "the right to modify the contents of [a compulsory jurisdiction declaration] or to terminate it, a power which is inherent in any unilateral act of a State").

the *Nicaragua* case is the most notable example of such behavior.[66] Furthermore, even when the ICJ issues a decision on the merits of a case, it does not have the power to enforce its judgments, and a number of nations have openly refused to comply with ICJ decisions.[67] Although the Security Council may take action to enforce ICJ judgments,[68] because it has been "hampered in part by its veto-wielding members, [the Security Council] has yet to take [such] measures."[69] As a result of these difficulties, the ICJ "plays only a marginal role for the settlement of mainly bilateral disputes."[70]

Although these enforcement difficulties lead some to opine that global governance of national security issues has failed or is of limited value,[71] the real difficulty lies in the forgotten role of the supplementary international security governance institutions. The United Nations and the ICJ are, and will continue to be, the main mechanisms for governing international security conflicts, especially those involving the use of force.[72] However, the use of force is rarely the only tool used to advance national security objectives. The WTO was designed to play the governance role in situations where national security objectives are pursued via economic measures.

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[66] Letter from George P. Shultz, U.S. Secretary of State, to the U.N. Secretary General (Oct. 7, 1985), *reprinted in* 24 I.L.M. 1742 (1985).

[67] CARTER ET AL., *supra* note 10, at 288 (discussing a 1980 Iran refusal, the U.S. 1986 refusal in the Nicaragua case, and the refusal of the U.S. to comply with the *Breard* and *LaGrand* cases in the 1990s). *See also* Ben White, *Five Years After ICJ Ruling, Israel Expands its Illegal Wall onto More Palestinian Land*, WASH. REP. MIDDLE E. AFF., July 2009, *available at* http://www.globalpolicy.org/component/content/article/163-general/48068-five-years-after-icj-ruling-israel-expands-its-illegal-wall-onto-more-palestinian-land.pdf; BBC, *Q&A: International Court of Justice*, BBC NEWS, Feb. 26, 2007, *available at* http://news.bbc.co.uk/2/hi/europe/3879937.stm (last visited Apr. 9, 2010) (noting the 1977 *Argentina–Chile Beagle Channel* case as an example of the ICJ's limited ability to enforce its decisions).

[68] U.N. Charter art. 94, para. 2.

[69] CARTER ET AL., *supra* note 10, at 288.

[70] Petersmann, *supra* note 61, at 5. I note that there is a wealth of literature praising the advances of the ICJ. I do not suggest that the ICJ has completely failed or that the WTO dispute settlement system should replace the ICJ. The ICJ has a particularly successful record with regard to territory and boundary dispute cases, for example. Rather, I suggest only that the ICJ faces certain difficulties due to faults in its construction and implementation over time, and that in cases involving economic aspects of the national security disputes, the WTO can help fill the gap often left by the ICJ's inability to enforce its decisions. For a discussion of ICJ successes, see MOHAMED SAMEH M. AMR, THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS 216 (Kluwer Law Int'l 2003).

[71] Kirchner, *supra* note 52, at 13.

[72] Krahmann, *American Hegemony*, *supra* note 4, at 531 (quoting THE COMMISSION ON GLOBAL GOVERNANCE, OUR GLOBAL NEIGHBORHOOD 99 (1995)).

II. THE WTO AND NATIONAL SECURITY: RELEVANT AGREEMENTS AND UNIQUE FEATURES OF THE DISPUTE SETTLEMENT SYSTEM

The World Trade Organization (WTO) administers a variety of trade agreements, including the General Agreement on Tariffs and Trade (GATT). The GATT contains several provisions that potentially limit WTO members' ability to adopt restrictive trade measures for the purpose of furthering national security objectives. In fact, challenges to such measures have been brought before the WTO Dispute Settlement System (DSS) on a variety of occasions.[73] The WTO, however, has refused to reach the merits of any case involving measures taken for national security purposes.[74] This refusal stems from controversy surrounding the interpretation of the GATT exception for national security measures.[75] This result is unfortunate, given the uniquely successful dispute settlement system developed by the WTO. The compulsory jurisdiction of the WTO, the high rate of compliance, and the unique enforcement mechanisms available to the WTO DSS weigh in favor of the WTO casting aside the concerns surrounding the national security exception and instead reaching the merits of such cases.

A. Basic WTO Obligations Relevant to National Security

Domestic measures adopted in the name of national security could conceivably implicate many WTO covered agreements,[76] but the agreement historically invoked in this context is the GATT.[77] Historically speaking,

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[73] *See infra* Part II.A.

[74] *Id.*

[75] *See infra* Part II.B.

[76] For example, an action to block financial transactions might be challenged under the General Agreement on Trade in Services, which specifically requires "each Member [to] accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country." General Agreement on Trade in Services art. II, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1167 (1994) [hereinafter GATS]. The Agreement on Trade-Related Aspects of Intellectual Property might also be invoked to combat a measure undertaken in the name of national security; the U.S. compulsory license for anthrax during the anthrax attacks on Congress, for example, might have been challenged under the TRIPS compulsory license scheme encompassed under Articles 28-31. Agreement on Trade-Related Aspects of Intellectual Property arts. 28-31, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]. Due to space considerations and the historical reality that measures have, to date, only been challenged under GATT, this comment restricts its focus to that agreement.

[77] The GATT was at the center of each of the four disputes regarding national security measures brought to the GATT/WTO dispute settlement system to date. *See* Contracting Parties Decision, Article XXI–United States Export Restrictions, CP.3/SR22 (June 8, 1949),

nations recurrently resort to economic sanctions as a tool of international conflict.[78] Notably, total embargoes and selective export and import controls are among the most common measures unilaterally undertaken during international conflict.[79] Export controls, for example, are strategically used to limit another country's effective use of its military.[80] In undertaking such economic sanctions, the country adopting the measure must be cognizant of its GATT obligations, specifically the rules relating to most-favored-nation treatment, national treatment, and quantitative restrictions.

The GATT regulations concerning most-favored-nation treatment, national treatment, and quantitative restrictions are found in Articles I, III, and XI. GATT Article I requires that customs duties and charges levied on the exports and imports of one WTO member be no less favorable than those levied on the like exports and imports of any other country.[81] This provision, commonly referred to as the most-favored-nation provision, limits WTO members' ability to impose export restrictions to further national security objectives. GATT Article III imposes an obligation upon WTO members to refrain from adopting laws and regulations that treat products of other WTO

GATT B.I.S.D. (2nd Supp.) at 28; Contracting Parties Decision, Article XXI–United States Export Restrictions, GATT B.I.S.D. (2nd Supp.) at 36 (May 1952); Report of the Panel, *United States–Trade Measures Affecting Nicaragua*, L/6053 (Oct. 13, 1986) (unadopted) [hereinafter *U.S.–Nicaragua*]; Request for the Establishment of a Panel by the European Communities, *United States–The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/2 (Oct. 4, 1996).

[78] ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 925 (John H. Jackson ed., Oxford Univ. Press 2d ed. 2008) ("Well before the UN Security Council began to use economic sanctions as a primary tool, individual countries used economic sanctions as an important instrument of foreign policy, less dangerous than military force, but more serious – and sometimes more effective – than diplomacy alone.").

[79] *Id.* at 926. Note that at this juncture, the use of the term "international conflict" is meant to encompass both international situations which might escalate to war, and war itself.

[80] MATSUSHITA ET AL., *supra* note 23, at 217 (describing two common goals of export controls as "limit[ing] the military or economic capability of another country; and . . sanction[ing] a country or induc[ing] it to change its policies").

[81] GATT, *supra* note 32, art. I. Specifically, Article I provides:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Id. art. I(1).

members less favorably than similar domestic products.[82] Thus, this Article limits WTO members' ability to enact many common forms of import controls used to further national security objectives. Article XI is a "prohibition on quantitative restrictions."[83] This prohibition applies to all measures, whether affecting imports or exports.[84] Any embargo or prohibition would be facially inconsistent with this provision.[85] Each of these GATT obligations represents an opportunity for WTO governance of security issues.[86]

In the relatively few disputes that have arisen relating to measures undertaken for the purposes of national security, each involved one or more of these three GATT articles.[87] The GATT and WTO dispute settlement

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[82] GATT, *supra* note 32, art. III. The text of the provision specifically requires that:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied directly or indirectly, to like domestic products. . . .
>
> . . . .
>
> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws and regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.

Id. arts. III(2), III(4).

[83] LOWENFELD, *supra* note 78, at 916. Article XI reads, in pertinent part:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, *supra* note 32, art. XI(1).

[84] Report of the Panel, *Japan–Trade in Semi-Conductors*, ¶ 104, L/6309 (May 4, 1988), GATT B.I.S.D. (35th Supp.) at 116 (1988).

[85] LOWENFELD, *supra* note 78, at 916.

[86] A WTO panel has jurisdiction over any dispute arising under one of the WTO covered agreements, such as the GATT. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments–Results of the Uruguay Round, 33 I.L.M. 1226 art. 23.1 (1994) [hereinafter DSU]. When this comment refers to a WTO panel hearing on a national security dispute, it refers to a panel hearing on a dispute implicating one of the covered agreements and suggests that such a dispute will represent only the economic measures undertaken by a nation-state as part of a larger international security situation, other aspects of which may be addressed by the United Nations.

[87] In addition to the disputes discussed *infra*, a fifth dispute involving the European Community ("EC") and Yugoslavia was also brought before the GATT contracting parties. Communication from the European Communities, *Trade Measures Taken by the European Community Against the Socialist Federal Republic of Yugoslavia*, GATT Doc. L/6948 (Dec. 2, 1991), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91600060.pdf. The European Community defended on national security grounds. *Id.* at 1. The case was

panels, however, have consistently refused to issue findings on the merits, preferring instead to avoid national security issues. For example, in 1948, Czechoslovakia challenged export restrictions imposed by the U.S. against it during the Cold War as a violation of Articles XI(1) and XII.[88] This complaint came to the fledgling GATT before dispute settlement procedures were in place, and the complaint was summarily rejected.[89] When Argentina invaded the Falkland Islands in 1982, the European Community imposed an embargo on Argentinean imports.[90] Argentina filed a complaint against the European Community, alleging a violation of Articles I and XI(1).[91] The embargo was suspended shortly after the complaint was filed, and the case never proceeded to the merits.[92]

The case in which a panel came closest to findings on the merits involved the U.S.–Nicaragua controversy of the 1980s.[93] In 1985, as part of its overall opposition to the Sandinista government of Nicaragua, the U.S. instituted "a total embargo against trade with Nicaragua."[94] In explaining the rationale behind the measure, the U.S. President relied on the "unusual and extraordinary threat to the national security and foreign policy of the United

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suspended on procedural grounds and is not discussed at length here. For further discussion of this case, see Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM. J. INT'L L. 424, 436 (1999).

[88] LOWENFELD, *supra* note 78, at 918 (citing Contracting Parties Decision, Article XXI–*United States Exports Restrictions*, CP.3/SR22 (June 8, 1949), GATT B.I.S.D. (2nd Supp.) at 28 (1952)).

[89] *Id.* (describing how the contracting parties reject the complaint by vote in a normal session). As GATT dispute settlement procedures developed, the U.S. proactively sought a waiver of the most-favored-nation obligation with respect to Czechoslovakia to supplement its efforts against communism during the Cold War. *Id.* at 919. The GATT contracting parties adopted a declaration allowing the two countries to mutually suspend trade concessions with regard to the other. *Id.* (citing Declaration of 27 Sept. 1951: Suspension of Obligations between Czechoslovakia and the U.S. under the Agreement, GATT B.I.S.D. (2nd Supp.) at 36 (1952)).

[90] *Id.*

[91] Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons, GATT Doc. L/5317 (Apr. 30, 1982).

[92] LOWENFELD, *supra* note 78, at 920.

[93] This comment focuses its discussion on the case referred to in the GATT jurisprudence as *Nicaragua II*, involving the U.S. embargo against Nicaragua. This case was preceded by *Nicaragua I*, which involved a challenge to the U.S. reduction in Nicaraguan sugar quota. Report of the Panel, *United States–Imports of Sugar from Nicaragua*, ¶ 3.1, L/5607 (Mar. 13, 1984), GATT B.I.S.D. (31st Supp.) at 67, 72 (1985). In that case, the U.S. essentially did not submit any arguments on the merits but focused solely on jurisdictional issues. *See* Schloemann & Ohlhoff, *supra* note 87, at 433-34. As a result, it is of less value for the purposes of this comment and will not be further discussed here.

[94] LOWENFELD, *supra* note 78, at 922 (citing Exec. Order No. 12513, 31 C.F.R. 540 (May 10, 1985)).

States and . . . declare[d] a national emergency to deal with that threat."[95] Nicaragua challenged the embargo under the GATT, alleging violations of Articles I(1) and XI(1), among others.[96] Although a GATT panel was established to hear the dispute, it side-stepped any actual decision on the merits and merely commented that "the GATT could not achieve its basic aims unless each contracting party, whenever it made use of [measures undertaken to further national security objectives], carefully weighed its security needs against the need to maintain stable trade relations."[97]

The only national-security-related dispute to come before a WTO panel, rather than a GATT dispute proceeding, involved the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, generally referred to as the Helms-Burton Act.[98] The Helms-Burton Act achieved two objectives: first, it codified economic sanctions imposed on Cuba via executive orders, and second, it created liability for persons and companies of third-party countries that conducted business with Cuba and traded in property confiscated from U.S. nationals.[99] The evident purpose underlying the Helms-Burton Act "was to deter persons and companies that did business with the United States from doing business with Cuba—a classical secondary boycott."[100] The European Community, among others, was incensed by what was perceived as another U.S. attempt to extend its powers to regulate conduct extraterritorially.[101] The European Commission drafted a regulation preventing compliance with the Helms-Burton Act,[102] and the European Community filed a complaint in the WTO, alleging that the Helms-Burton Act violated GATT Articles I, III, and XI, among others.[103] Because the WTO Dispute Settlement Body (DSB) had compulsory jurisdiction, unlike under the prior GATT 1947 system,[104] it

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[95] *Id.*

[96] *U.S.–Nicaragua*, *supra* note 77, ¶ 4.3.

[97] *U.S.–Nicaragua*, *supra* note 77, ¶ 5.16. The failure to reach a final determination caused the dispute to remain ongoing until Nicaragua withdrew the complaint in 1990, after the Sandinistas lost power and the U.S. repealed the embargo. LOWENFELD, *supra* note 78, at 922 (citing Communication from Nicaragua, *United States–Trade Measures Against Nicaragua*, GATT Doc. L/6661 (Mar. 23, 1990), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91490156.pdf).

[98] Cuban Libertad and Democratic Solidarity Act, Pub. L. No. 104-14, 110 Stat. 785 (1996).

[99] LOWENFELD, *supra* note 78, at 923; Schloemann & Ohlhoff, *supra* note 87, at 426.

[100] LOWENFELD, *supra* note 78, at 923.

[101] Rene E. Browne, Note, *Revisiting "National Security" in an Interdependent World: The GATT Article XXI Defense After Helms-Burton*, 86 GEO. L.J. 405, 406-07 (1997).

[102] LOWENFELD, *supra* note 78, at 924.

[103] Schloemann & Ohlhoff, *supra* note 87, at 430. The European Community also raised claims that the Helms Burton Act was inconsistent with the GATS.

[104] *See* DSU, *supra* note 86, art. 23.1. It is also notable that the terms of reference (the scope of a panel's duties and powers when adjudicating a dispute) had been standardized at this point. *Id.* art. 7 (describing the standard terms of reference given to each panel). In the *U.S.–*

appeared that the WTO would finally rule on the validity of a measure related to national security concerns.[105] Instead, the European Community and the U.S. settled the dispute.

This review of GATT/WTO jurisprudence on measures undertaken to further national security objectives reveals that the WTO has refused to fulfill its role as a pillar of international security by sidestepping the most significant security issues to come before it. GATT Articles I, III, and XI give the WTO direct governance authority over the types of economic measures most likely to be undertaken in the name of national security. The drafters of the GATT believed they were negotiating an agreement to be administered by an International Trade Organization whose goal was to aid the United Nations and its judicial organ, the International Court of Justice, in maintaining international security. Although the historical evolution of the WTO has alienated WTO practice from its original mission of security governance, its mandate has not changed, and the WTO can and should use its governance authority to create a more effective international security governance regime by addressing the merits of security cases.

B. The National Security Exception

Part of the explanation for the DSB's failure to rule on the merits of any dispute involving the domestic national security of WTO members stems from another provision within the GATT. Although the GATT prohibits certain restrictive trade measures frequently used to advance national security interests, GATT Article XXI also contains an exception clause specifically for such measures.[106] As such, if a WTO member meets the

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Nicaragua dispute, the panel was given limited terms of reference, which rendered it unable to judge the validity of the U.S.' motivation for the measure. *U.S.–Nicaragua*, *supra* note 77, ¶ 5.3. This requirement in the terms of reference reflects the differing views of the GATT contracting parties as to the scope of the national security exception contained in GATT Article XXI. For a discussion of Article XXI, see *infra* notes 108-17 and accompanying text.

[105] Browne, *supra* note 101, at 408.

[106] GATT Article XXI, the national security exception, states:

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

requirements of Article XXI, an otherwise invalid trade measure may be valid. Every invocation of Article XXI has been controversial. Namely, there is disagreement about whether the Article contains objective requirements for its applicability in the same way as GATT Article XX (the general exceptions clause), or whether a WTO member's subjective claim of national security interest is sufficient to excuse an otherwise invalid trade measure.[107]

Although the national security exception, on its face, confines its use to five possible situations (disclosure of national security secrets, actions relating to fissionable materials, actions relating to the trafficking of arms and other military goods, circumstances of war or emergency, and Security Council-mandated action),[108] concern that the exception would be abused has remained.[109] In that regard, when the national security exception was discussed during the first *U.S.–Czechoslovakia* GATT dispute,[110] the GATT contracting parties noted that "every country must have the last resort on questions relating to its own security. On the other hand, the contracting parties should be cautious not to take any step which might have the effect of undermining the General Agreement."[111] In other words, the question remained whether the contracting parties possessed the power to decide, based on an objective assessment of the record, whether one of the five situations enumerated in Article XXI existed or whether the contracting parties must accept the subjective claim of one country that the pre-conditions for invoking the exception had been satisfied.

The U.S. and the European Community were the two parties that voiced the loudest support for the idea that the contracting parties must accept a claim of national security interests without conducting an independent review of the record. The European Community position, according to its ambassador to the GATT, was that "it is not the role of GATT to resolve disputes in the field of national security."[112] Similarly, in the 1985 *U.S.–*

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

GATT, *supra* note 32, art. XXI. Notably the GATS and TRIPS agreements contain exceptions clauses virtually identical to GATT XXI. *See* GATS, *supra* note 76, art. XIV bis; TRIPS, *supra* note 76, art. 73.

[107] *See infra* notes 116-26 and accompanying text.

[108] GATT, *supra* note 32, art. XXI.

[109] JACKSON, LAW OF GATT, *supra* note 90, at 748-52.

[110] *See supra* notes 88-89 and accompanying text.

[111] Contracting Parties Decision, Article XXI – United States Exports Restrictions, CP.3/SR.22, at 7 (June 8, 1949), GATT B.I.S.D. (2nd Supp.) at 28, *available at* http://www.wto.org/english/tratop_e/dispu_e/49expres.pdf.

[112] JACKSON ET AL., *supra* note 15, at 1081 (quoting the U.S. ambassador to the GATT).

Nicaragua GATT dispute, the U.S. explicitly invoked GATT Article XXI, arguing that such use of the provision rendered the GATT dispute settlement system unable "to question, approve, or disapprove the judgment of each Contracting Party as to what is necessary to protect its national security interests."[113] Because of its limited terms of reference in adjudicating the dispute, the panel declined to decide the matter but instead recommended that the GATT Council consider several general questions:

> If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the Contracting Parties ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in this provision? If the Contracting Parties give a panel the task of examining a case involving an Article XXI invocation without authorizing it to examine the justification of that provision, do they limit the adversely affected contracting party's right to have its complaint investigated . . . ?[114]

The first *U.S.–Czechoslovakia* GATT dispute and the 1985 *U.S.–Nicaragua* GATT dispute represent the only opportunities in GATT/WTO jurisprudence for the DSB to interpret GATT Article XXI.[115] In both instances, the panels declined to do so.

The resulting tension and ambiguity surrounding the national security exception caused the contracting parties to adopt a Decision Concerning Article XXI of the General Agreement, requiring any party invoking the exception in the future to provide notice to the GATT Council.[116] This decision noted that although the national security exceptions "constitute an important element for safeguarding the rights of Contracting Parties when they consider that reasons of security are involved . . . recourse to Article XXI could constitute, in certain circumstances, an element of disruption and uncertainty for international trade."[117] The decision did not offer an interpretation of GATT Article XXI as to the objective/subjective issue. As a result, the issue remains "whether the subsections of the Article have objective content or present open-ended exceptions that can be invoked

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[113] *Id.*

[114] *U.S.–Nicaragua*, *supra* note 77, ¶ 5.17.

[115] Outside of an actual dispute panel, in the EC–Argentina controversy (*see supra* notes 85-87 and accompanying text), Argentina sought an interpretation of Article XXI for six months after the embargo was lifted. The GATT Council declined the invitation. LOWENFELD, *supra* note 78, at 920.

[116] Decision Concerning Article XXI of the General Agreement, GATT Doc. L/5426 ¶ 1 (Dec. 2, 1982), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91000212.pdf.

[117] *Id.* at pmbl.

unilaterally."[118] In other words, no WTO jurisprudence definitively indicates whether the national security exception is limited to instances where one of the five situations listed in the text of the article exists as identified by objective criteria set forth by the DSB (as is the case with the GATT Article XX exceptions, for example) or whether the DSB must simply accept a WTO member's invocation of GATT Article XXI without further inquiry, as the U.S. and EC have consistently claimed.

In order for the WTO to fulfill its mandate as the third pillar of international governance supporting United Nations action in security governance, GATT Article XXI must possess objective content. The two main concerns preventing prior panels from giving Article XXI objective content include: (1) that doing so would be controversial and difficult, and (2) that the GATT Contracting Parties would not accept the decision and back out of the 1947 GATT Agreement.[119] Since the creation of the WTO, however, advances in the DSS and in WTO jurisprudence render these concerns insufficient to justify continued refusal to interpret GATT Article XXI as requiring an objective showing.

C. Success in Enforcement: Unique Features of the WTO Dispute Settlement System

The WTO Dispute Settlement System (DSS) "has been described as the most important and most powerful of any international law tribunal."[120] Several aspects of the DSS that make it unique among international courts have contributed to this claim of importance and stature. First, the DSS has compulsory jurisdiction over disputes arising under the WTO-covered agreements. Second, decisions issued by DSS panels or the Appellate Body enjoy a high rate of compliance. Third, even where WTO members disagree with a panel or Appellate Body ruling, members typically seek redress within the WTO system, rather than withdrawing from the WTO altogether. These three aspects of the DSS are of particular importance to global governance of domestic national security measures because they help avoid the three main difficulties faced by the ICJ and provide the WTO an opportunity to make an important contribution toward its forgotten role of securing peace through economic stability and non-discrimination. These three aspects of the DSS also render the prior excuses for avoiding the merits of security cases moot.

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[118] MATSUSHITA ET AL., *supra* note 23, at 221.

[119] LOWENFELD, *supra* note 78, at 916; *see also infra* notes 172-74 and accompanying text.

[120] JACKSON, SOVEREIGNTY, *supra* note 48, at 135.

One of the "birth defects" of the GATT system, corrected by the Contracting Parties during the Uruguay Round of negotiations that created the WTO, was that the lack of concrete dispute settlement rules in GATT Article XXIII allowed losing parties to block council decisions and thereby avoid accountability.[121] The Uruguay Round of negotiations resolved this deficiency by providing for compulsory jurisdiction.[122] The Dispute Settlement Understanding (DSU), which contains the binding DSS rules and procedures, provides in Article 23.1 that "[w]hen Members seek the redress of a violation of obligations . . . under the covered agreements . . . they shall have recourse to, and abide by, the rules and procedures of this Understanding."[123] The *U.S.–Section 301* case held that DSU Article 23.1 constitutes a compulsory jurisdiction provision.[124] The Appellate Body has held that its duty to hear a complaint as a result of this compulsory jurisdiction provision cannot be nullified or impaired, even if another international adjudicatory body is seized of the same issue.[125]

Compulsory jurisdiction would be meaningless, however, if WTO members refused to comply with DSS decisions and the DSS lacked enforcement power. Notably, WTO members comply with DSS rulings eighty percent of the time.[126] In those cases in which WTO members try to

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[121] JACKSON ET AL., *supra* note 15, at 266-67; MATSUSHITA ET AL., *supra* note 23, at 4.

[122] Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, *in* THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003, 499, 501 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004) ("Since the entry into force of the Marrakesh Agreement, dispute settlement has become a matter of compulsory jurisdiction for all WTO Members.").

[123] DSU, *supra* note 86, art. 23.1.

[124] Panel Report, *United States–Section 301-310 of the Trade Act of 1974*, ¶ 7.43, WT/DS152/R (Jan. 27, 2000).

[125] Appellate Body Report, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 6, 2006). This is also in accordance with DSU Article 3.2, which provides that Panels or the Appellate Body may not add to or diminish the rights of members under the covered agreements. DSU, *supra* note 86, art. 3.2. WTO members consider the compulsory jurisdiction of the DSS to be one of their rights, the right to be heard, under the covered agreements. Additionally, it should be noted that DSU Article 7 standardizes panel terms of reference, rectifying the loophole that prevented the contracting parties from ruling on the merits in the *U.S.–Nicaragua* proceedings. *See* DSU, *supra* note 86.

[126] Sharyn O'Halloran, *US Implementation of WTO Decisions*, *in* THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES 945, 946 (Merit E. Janow, Victoria Donaldson & Alan Yanovich eds., 2008); *see also* Werner Zdouc, *Features of the Appellate Body That Have Defined its Performance*, *in* THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES, *supra*, at 369, 381 ("In most cases, the losing party attempts to accomplish what it perceives to be full implementation and takes measures to comply with the DSB recommendations and rulings."); Gary Horlick & Judith Colemann, *A Comment on Compliance with WTO Dispute Settlement Decisions*, *in* THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES, *supra*, at 771 ("WTO Members normally comply with their WTO obligations.").

avoid compliance with an adverse ruling, however, the DSS possesses the power to enforce its decisions under DSU Articles 21 and 22.[127] Generally speaking, if the panel and Appellate Body recommendations are not implemented, Article 22 allows the winning party to seek compensation from the losing party.[128] If the parties cannot agree to an appropriate level of compensation, the winning party can seek an official finding of non-compliance from the DSS and receive permission to suspend certain WTO obligations with respect to the non-complying member (termed retaliation or 'cross-retaliation,' depending on the obligations suspended).[129] The purpose of these enforcement mechanisms is always to induce the non-compliant member to withdraw its measure.[130] Notably, in one study of 101 completed WTO cases, "retaliation was requested in only seven cases . . . and authorized by the DSB in only six cases (in one case, the WTO-inconsistent measure was withdrawn soon after the arbitration was completed, thus obviating the need for final DSB authorization of retaliation)."[131] In two of those six cases, the retaliation led to the withdrawal of the contested measure.[132] A third case led to amendments to the contested measure,[133] and the parties to the other three disputes opted to attempt settlement negotiations rather than actually impose retaliatory measures.[134] Ultimately, then, the compensation and retaliation enforcement mechanisms of the DSU

[127] *See* DSU, *supra* note 86, arts. 21-22. For an in-depth discussion of the operation of these articles, see PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES & MATERIALS (2005).

[128] DSU, *supra* note 86, art. 22.1.

[129] *Id.* art. 22.2. For more on retaliation and cross-retaliation, see JACKSON ET AL., *supra* note 15, at 348.

[130] Delphine de Mey, *The Effect of WTO Dispute Settlement Rulings in the EC Legal Order: Reviewing* Van Parys v. Belgishce Interventie-en Restitutiebureau *(C-377/02)*, 6 GERMAN L.J. 1025, 1027 (2005).

[131] Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings*, *in* THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES, *supra* note 126, at 777, 779.

[132] *Id.* at 781-82. The two cases referenced are: Appellate Body Report, *United States–Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R (Feb. 24, 2000), and Appellate Body Report, *United States–Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R & WT/DS234/AB/R (Jan. 16, 2003).

[133] Wilson, *supra* note 131, at 781. The case referenced is Appellate Body Report, *European Communities–Measures Concerning Meat and Meat Products*, WT/DS26/AB/R & WT/DS48/AB/R (Jan. 16, 1998).

[134] Wilson, *supra* note 131, at 781-82. The three cases referred to are: Appellate Body Report, *European Communities–Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 25, 1997), Appellate Body Report, *Canada–Aircraft Subsidies*, WT/DS70/AB/R (Aug. 20, 1999), and Appellate Body Report, *Brazil–Aircraft Subsidies*, WT/DS46/AB/R (Aug. 20, 1999).

are effective in achieving the aim of WTO dispute settlement: to bring the non-compliant parties into compliance with WTO obligations.

The third and final element of the WTO that makes it uniquely effective is that even when a member does not wish to implement a panel or Appellate Body ruling, the member seeks redress within the DSS, rather than withdrawing from the WTO altogether. A member may withdraw from the WTO upon six months' written notice.[135] Even in the most contested dispute, which concerned the European Community banana import regime, however, the losing party did not make use of this provision. A group of Latin American countries brought two different challenges to the EC banana import regime under GATT 1947, but the EC blocked the adoption of both panel reports.[136] When the DSS became operative, the U.S., Mexico, Ecuador, Honduras, and Guatemala instigated a third challenge, *EC–Bananas III*, in 1996.[137] The WTO panel found in favor of the U.S., and the European Community mounted an unsuccessful appeal.[138] As a result, the European Community made slight changes to the import regime. Believing such changes failed to make the regime WTO-compliant, Ecuador initiated compliance proceedings in 1998.[139] The European Community faced several more compliance panel proceedings before reaching an agreement on an appropriate banana import regime in 2001.[140]

Despite the European Community's obvious disagreement with the results of the successive *Bananas* dispute settlement procedures, the European Community continued to press its defense within the WTO governance system rather than withdraw. Although some banana-producing countries in the Caribbean became so frustrated with the *EC–Bananas III* dispute that they threatened to withdraw from the WTO, they never carried out the threat.[141] In fact, in 2008, further WTO dispute settlement proceedings were held regarding this dispute, as the parties seek a global governance resolution rather than withdrawal and unilateralism.[142] This can

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[135] GATT, *supra* note 32, art. XXXI.

[136] Bruce R. Hirsh, *The WTO Bananas Decision: Cutting Through the Thicket*, 11 LEIDEN J. INT'L L. 201, 202 (1998).

[137] *Id.* at 205.

[138] *Id.*

[139] Report of the Panel, *European Communities–Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador*, ¶ 1.2, WT/DS27/RW/ECU (Apr. 12, 1999).

[140] *European Communities–Regime for the Importation, Sale and Distribution of Bananas – Notification of a Mutually Agreed Solution*, WT/DS27/58 (July 2, 2001).

[141] VAN DEN BOSSCHE, *supra* note 127, at 119.

[142] *See* Appellate Body Report, *European Communities–Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador and Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW2/ECU,

be attributed in large part to the fact that, unlike the United Nations and ICJ, a WTO member cannot remain a party to the covered agreements while simultaneously withdrawing from the DSS. The Dispute Settlement Understanding is a part of the overall WTO agreement framework to which each WTO member must be a signatory. Thus, for a WTO member to reject the jurisdiction of the WTO DSS, it would have to withdraw entirely from the WTO; while possible, such withdrawal would mean the forfeiture of important trade preferences. By inextricably linking the DSS to the trade preferences in the other agreements, the WTO ensured that its compulsory jurisdiction provision was given the teeth necessary to remain intact.

Three unique elements of the WTO dispute settlement system perfectly situate the WTO to fill the international security governance gap left by the enforcement difficulties of the United Nations and the ICJ: compulsory jurisdiction, enforcement mechanisms leading to high levels of compliance, and the fact that WTO members choose to resolve disagreements about disputes within the DSS itself rather than through withdrawal. These three aspects of the WTO system directly mirror the three reasons often cited for the ICJ's enforcement failures: consent-based jurisdiction, lack of enforcement mechanisms, and the tendency of member states to simply withdraw jurisdiction rather than to continue to resolve the dispute in the United Nations system. The fact that these unique features of the WTO DSS fill the gaps left by the ICJ reveals an important reason why the WTO should assume the role for which it was originally designed and act as co-governor of national security conflicts. An examination of the *Nicaragua* case shows that these three unique features of the WTO DSS alleviate the concerns that have prevented panels from addressing the merits of security cases in the past.

III. EXAMINING THE POSSIBILITIES WITH A HISTORICAL EXAMPLE: THE *NICARAGUA* CASE

The WTO was created to be an active participant in the governance of international security issues and was given governance powers to supplement those of the United Nations. The Cold War rendered the United Nations Security Council less effective because of the ongoing conflict between two veto-holding members. The WTO supplementary governance powers were designed precisely for such situations—when the Security Council cannot act because of internal politics or because the situation is beyond its reach. When the Sandinistas came to power in Nicaragua, the tiny

WT/DS27/AB/RW/USA (Nov. 26, 2008).

Central American nation found itself the object of intense U.S. action against suspected communists. Nicaragua fought the actions of the U.S. through the international security governance system, asking the ICJ to rule the military activity instigated by the U.S. inside Nicaragua illegal under international law, and simultaneously asking the GATT Contracting Parties to rule the U.S. embargo against Nicaragua a violation of GATT obligations. Unfortunately for Nicaragua, it won on the merits in the forum lacking enforcement power, while the forum with the most power to enforce its decisions avoided the issue. While commentators argue that such evasion of controversial national security issues was necessary under the GATT regime, history has undermined the foundations of those critiques. As a result, the WTO should exercise its authority over national-security-related measures and fulfill its forgotten role in the international security governance system.

A. Nicaragua in the International Court of Justice

During the Cold War, the U.S. pursued national security objectives by opposing leftist regimes. Thus, when the Sandinista regime came to power in Nicaragua in 1979,[143] the U.S. brought its might to bear upon the small Central American nation. The U.S. strategy for ousting the Sandinistas contained two parts: (1) support military and paramilitary activity against the Sandinista regime in Nicaragua and (2) isolate the regime through economic sanctions.[144] Refusing to become a victim of the Cold War, Nicaragua proactively sought a remedy for the military activity pursued by the U.S. in the International Court of Justice. While Nicaragua succeeded on the merits, the ICJ remained powerless to enforce its judgment, and the U.S. continued to sponsor military operations within Nicaraguan borders. In this way, the *Nicaragua* case before the ICJ provides an example of one of the two situations for which the WTO's supplementary international security governance was designed to play a role: dispute resolution when the ICJ cannot enforce its judgments because politics within the Security Council prevents the adoption of a resolution to provide such enforcement.

In April of 1984, Nicaragua filed a complaint with the ICJ alleging that the U.S. was

> using military force against Nicaragua and intervening in Nicaragua's internal affairs. . . . The United States has created an 'army' of more than 10,000 mercenaries . . . installed them in more than ten base camps in Honduras along the border with Nicaragua,

[143] Manus I. Midlarsky & Kenneth Roberts, *Class, State, and Revolution in Central America: Nicaragua and El Salvador Compared*, 29 J. CONFLICT RESOL. 163, 180 (1985).
[144] William D. Rogers, *The United States and Latin America*, 63 FOREIGN AFF. 560, 563 (1984).

> trained them, paid them, supplied them with arms, ammunition, food and medical supplies, and directed their attacks against human and economic targets inside Nicaragua.[145]

Anticipating the suit from Nicaragua, the U.S. attempted to alter its declaration of acceptance of compulsory ICJ jurisdiction by excluding from its bounds any cases involving Central American states.[146] Although the U.S. retained the right to alter its declaration on compulsory ICJ jurisdiction, it had stipulated that any such change would only take effect after six months' notice.[147] Nicaragua filed its complaint before that six-month window had closed, and the ICJ ruled that it retained jurisdiction over the dispute.[148] The U.S. disagreed so strongly with the holding that it refused to participate in any further proceedings of the case.[149] One year after the ICJ ruled that it had jurisdiction to hear Nicaragua's complaint, and while the case continued to proceed on the merits, the U.S. withdrew its acceptance of compulsory jurisdiction altogether.[150]

The ICJ issued a ruling on the merits of Nicaragua's claim in 1986, finding the U.S. in violation of customary international law for "training, arming, equipping, financing, and supplying the *contra* forces."[151] The U.S., however, did not alter its activities in Nicaragua.[152] Nicaragua sought a damages judgment from the ICJ, while the U.S. continued to abstain from the proceedings.[153] The damages proceedings ended when a new regime was elected to power in 1990, and Nicaragua withdrew the action in 1991.[154]

As the ICJ's first effective interpretation of key aspects of the United Nations Charter,[155] the *Nicaragua* case set the tone for the court's future. The

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[145] Application Instituting Proceedings: Military and Paramilitary Activities (Nicar. v. U.S.), 1984 Gen. List No. 70 I.C.J. 2 (Apr. 9), *available at* http://www.icjcij.org/docket/files/70/9615.pdf?PHPSESSID=05fad554ae9feec6f32e8fcea282db53.

[146] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392 (Nov. 26).

[147] *Id.* ¶¶ 13, 61.

[148] *Id.* ¶ 65.

[149] U.S. Dep't of State, *Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice*, Jan. 18, 1985, *reprinted in* 24 I.L.M. 246 (1985).

[150] Letter from George P. Shultz, U.S. Secretary of State, to the U.N. Secretary General, Oct. 7, 1984, *reprinted in* 24 I.L.M. 1742 (1985).

[151] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 146 (June 27).

[152] CARTER ET AL., *supra* note 10, at 308.

[153] *Id.*

[154] *Id.*

[155] LOUIS HENKIN ET AL., RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 47 & n.22 (1991) (noting that "[t]he court concluded that it could not decide the case under the

ICJ has not lived up to expectations.[156] Its lack of worldwide compulsory jurisdiction, its inability to enforce judgments, and United Nations members' ability to simply withdraw from jurisdiction without other ramifications after having consented to a partially compulsory regime has resulted in the systemic lack of results exemplified in the *Nicaragua* case. One study seeking to improve the ICJ noted that "the basic barrier to increased acceptance of the Court's jurisdiction lies in State attitudes."[157] One possible reason states' attitudes toward the ICJ have not allowed the ICJ to act as the sole arbiter of international disputes regarding national security issues is that the ICJ was never intended to act as the sole arbiter. Instead, its work was to be supplemented by other institutions, such as the WTO. Nicaragua seemed to have insight into the WTO's potential in supplementary security governance and, while seeking redress in the ICJ, simultaneously sought a remedy under the GATT dispute settlement procedures.

B. Nicaragua and the GATT: Do the Reasons for Withholding a Decision Remain Tenable in the WTO Context?

Nicaragua brought a challenge to the U.S. embargo under the GATT dispute settlement procedures; however, as had become its custom in disputes concerning national security measures, the GATT avoided any decision on the issue.[158] One of the reasons suggested for the GATT/WTO refusal to decide disputes concerning national security matters is that the original attempts to bring such issues before the trade dispute settlement system were done during the era of the GATT, which was a fragile organization.[159] The Contracting Parties feared that if the GATT involved itself in such disputes, it might lose what little coherence it possessed, along with the support of its most vital member, the U.S.[160] As one scholar explains, "the infant GATT had neither the capacity nor the prestige to undertake a serious examination" of national security measures.[161]

After reviewing this history, some commentators have concluded that "[s]o long as the measures do not appear to be disguised efforts at economic

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Charter because of a reservation by the United States, and would therefore decide it only under customary international law. But the Court held that customary law and the law of the Charter were essentially congruent in relevant respects, in effect construing the Charter.").

[156] CARTER ET AL., *supra* note 10, at 287.

[157] D. W. Bowett et al., *The International Court of Justice: Efficiency of Procedures and Working Methods*, 45 INT'L & COMP. L.Q. S1, S22 (Supp. 1996).

[158] For a full discussion of the case, see *supra* notes 89-95 and accompanying text.

[159] LOWENFELD, *supra* note 78, at 916.

[160] *Id.*

[161] ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 77 (2d ed. 1990).

protectionism, the consensus has been that the GATT/WTO system is not the appropriate forum for resolving controversies about trade controls for political ends."[162] The claim that the WTO DSS is not the proper forum for determining the validity of national security measures stems from the argument, often raised by the U.S. and the European Community during the GATT era, that GATT Article XXI is a self-judging exception, under which each WTO member gets to decide for itself whether its measure satisfies the exception.[163] Although these theories suffice to explain the historical GATT refusal to decide disputes related to national security measures, they are insufficient reasons for the WTO to continue such a practice.

In fact, each of the explanations of the GATT's refusal to decide national security disputes can be refuted in light of the current WTO organization and jurisprudence. First, while the GATT may have been a fragile organization weakened by the failure of the International Trade Organization, the structure of the WTO was specifically designed to rectify those shortcomings. Notably, the DSS is now widely regarded as the most powerful international court.[164] Its worldwide compulsory jurisdiction extends to all disputes that come under WTO covered agreements, even those involving national security measures. To support the idea that so long as the measure is not disguised protectionism, the WTO is not the proper forum for hearing a dispute regarding the measure "is to implicitly endorse the security exceptions as a legitimate means of concealing illegitimate trade measures."[165] For precisely this reason, the idea that Article XXI is self-judging is now untenable because "GATT rules are not designed to be self-judging, and unilateral action is specifically excluded in the Dispute Settlement Understanding."[166]

Furthermore, the fact that the exercise of WTO authority over a disputed measure is controversial has not prevented the WTO DSS from evaluating claims that certain measures fall within exceptions for protecting public morals, protecting the environment, or other controversial issues of domestic importance to members. For example, when the U.S. defended a measure based on the Article XX exception for protecting the environment, the Appellate Body gave Article XX objective content and, therefore, gave itself the authority to evaluate the U.S.'s proposed justification for the measure.[167]

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[162] LOWENFELD, *supra* note 78, at 926.
[163] *See supra* notes 109-14 and accompanying text.
[164] JACKSON, SOVEREIGNTY, *supra* note 48, at 135.
[165] Andrew Emmerson, *Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse?*, 11 J. INT'L ECON. L. 135, 145 (2008).
[166] MATSUSHITA ET AL., *supra* note 23, at 223.
[167] Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *U.S.–Shrimp*].

While this decision was controversial, the parties to the dispute abided by the ruling.[168] In another case, the Appellate Body evaluated whether a measure to ban certain gambling services could be justified as a measure aimed at protecting public morals.[169] The WTO Appellate Body did not hesitate to give this controversial provision objective content, and its ruling was implemented by the parties involved.[170]

Similarly, although fleshing out the objective content of Article XXI's national security exception may be controversial, such controversy has been proven to no longer pose a threat to the foundations of the WTO and thus is no longer a sufficient reason for refusing to decide the economic aspects of a national security dispute. The exception in Article XXI should not be treated differently than the exceptions contained in Article XX, especially given the legislative history of these two provisions.[171] The national security exception was originally drafted as part of Article XX.[172] When it was later removed and made a separate, freestanding provision, the GATT drafters "generally agreed that this removal would not affect the application of the dispute settlement mechanism regarding the new article."[173] To treat the national security exception differently than the general exceptions would undermine the originally negotiated balance between members' rights to invoke an exception and the rights of other members under the agreements. As the Appellate Body stated in *U.S.–Shrimp*:

> To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members.[174]

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[168] J. Patrick Kelley, *Naturalism in International Adjudication*, 18 DUKE J. COMP. & INT'L L. 395, 411-15 (2008) (discussing the process by which the Appellate Body interpreted Article XX(g) and noting that the controversial nature of its decision did not prevent the Appellate Body from taking the decision or prevent the parties from considering it binding).

[169] Appellate Body Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *U.S.–Gambling*].

[170] *See generally* Federico Ortino, *Treaty Interpretation and the WTO Appellate Body Report in US–Gambling: A Critique*, 9 J. INT'L ECON L. 117 (2006) (critiquing the controversial interpretive approach taken by the Appellate Body).

[171] MATSUSHITA ET AL., *supra* note 23, at 223.

[172] Schloemann & Ohlhoff, *supra* note 87, at 440 n.92.

[173] *Id.*

[174] *U.S.–Shrimp*, *supra* note 167, ¶ 156.

Continued refusal to decide disputes concerning national security measures permits abuse of that exception to the detriment of other WTO members and the international community as a whole.

The harm to the international community at large is particularly acute given that continued refusal to decide national security disputes perpetuates the WTO's failure to perform its intended role as co-governor of international security. The WTO covered agreements have a role to play in international security governance. In fact, if it were given objective content, the national security exception itself could further such governance. As two scholars have suggested, "Article XXI(b)(iii) should be interpreted to support trade measures enacted as countermeasures that are proportioned to an illegal act committed by the target state and are designed to secure compliance with international legal norms."[175] When the WTO refuses to exercise its supplemental governance authority, as it did in the *Nicaragua* case, it weakens the overall international security governance system.

IV. EXAMINING THE POSSIBILITIES IN CURRENT EVENTS: FORESEEABLE CHALLENGES TO U.S. NATIONAL SECURITY MEASURES IN THE GLOBAL WAR ON TERROR

In times of international conflict, the U.S. often couples military strategy with economic sanctions as part of its overall national security strategy. In fact, "[t]he United States is the leading proponent of export sanctions to accomplish foreign policy and national security objectives."[176] The U.S. currently maintains economic sanctions of some form against Iran, Burma, Syria, Cuba, and North Korea.[177] The sanctions imposed against Iran are particularly sweeping, causing controversy in the international community and possibly giving rise to a claim under the GATT.

Four Security Council resolutions authorize member states to undertake increasingly stringent rounds of sanctions against Iran.[178] The last of these resolutions was issued in June 2010[179] and came only after a long stalemate in the Security Council with regard to the proper course of further action toward Iran. In early 2008, the U.S. was joined by the European Union in

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[175] MATSUSHITA ET AL., *supra* note 23, at 224 (citing Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558, 603 (1991)).

[176] *Id.* at 217.

[177] *See generally* Deloitte Financial Advisory Services, *Anti-Money-Laundering and Economic Sanctions Compliance: Looking Beyond Borders* 2 (2008).

[178] The resolutions are: S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 27, 2006), S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007), S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008), and S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010).

[179] S.C. Res. 1929, *supra* note 178.

seeking yet another round of sanctions through the United Nations; however, deteriorating relations between the U.S. and Russia caused those plans to fail.[180] Further protests by China, which engages in a large amount of oil and natural gas trade with Iran, ensured that the Security Council would not impose new sanctions.[181] Instead, in September 2008, the Security Council issued Resolution 1835, which repeated demands for an end to Iran's nuclear program but did not impose additional sanctions that year.[182] In the wake of Resolution 1835, the U.S. indicated that it would pursue harsher unilateral sanctions against Iran.[183]

Since assuming office, President Barack Obama has taken an increasingly tough stance toward Iran on the nuclear issue. In September 2009, the United Nations passed a U.S.-proposed resolution that called for all members to be mindful of its previous resolutions on the issue of nuclear disarmament, but it did not single out Iran.[184] Then, on October 1, 2009, the U.S., the other permanent members of the Security Council, and Germany held talks with Iran about its nuclear program.[185] The talks were intensified by the revelation several days earlier that Iran had been secretly operating an underground nuclear facility.[186] After the talks, Obama stated, "If Iran does not take steps in the near future to live up to its obligations, then the United States will not continue negotiating indefinitely, and we are prepared to move towards increased pressure. . . . [O]ur patience is not unlimited."[187] Indeed, as diplomatic efforts failed, the United Nations Security Council issued a new round of sanctions through Resolution 1929.

Resolution 1929 requires foreign inspection of ships or planes traveling to and from Iran when banned cargo is suspected to be present and imposes restrictions on military purchases, trade, and financial transactions by the Islamic Revolutionary Guards Corps.[188] Commentators are quick to point out

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[180] Peter Crail, *West May Seek Alternative Sanctions on Iran*, ARMS CONTROL TODAY (Nov. 2008) *available at* http://www.armscontrol.org/act/2008_11/west.

[181] Robert McMahon, *Iran, the United Nations and Sanctions*, BACKGROUNDER (Apr. 4, 2006), *available at* www.cfr.org/publication/10222/iran_the_united_nations_and_sanctions.html.

[182] S.C. Res. 1835, U.N. Doc. S/RES/1835 (Sept. 27, 2008).

[183] Crail, *supra* note 180, at 2.

[184] *See* S.C. Res. 1887, U.N. Doc. S/RES/1887 (Sept. 24, 2009); *see also Obama says 'Iran on Notice' in Nuclear Standoff*, FOX NEWS, Sept. 25, 2009, *available at* http://www.foxnews.com/politics/2009/09/25/accuse-iran-building-secret-nuke-plant/.

[185] *Obama in Iran inspection demand*, BBC NEWS, Oct. 2, 2009, *available at* http://news.bbc.co.uk/2/hi/middle_east/8285794.stm.

[186] *Id.*

[187] Press Release, Remarks by the President on the Meeting of the P5 + 1 Regarding Iran (Oct. 1, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-the-meeting-of-the-P5-plus-1-regarding-Iran/ (last visited Oct. 13, 2009).

[188] Neil MacFarquhar, *U.N. Approves New Sanctions to Deter Iran*, N.Y. TIMES, June 9, 2010, *available at* www.nytimes.com/2010/06/10/world/middleeast/10sanctions.html.

that Resolution 1929 "took months to negotiate and major concessions by American officials, but still failed to carry the symbolic weight of unanimous decision."[189] Despite participating in the Security Council proceedings, "the United States and Europe acknowledged before negotiations started that the they would not get the tough sanctions they were hoping for, promising to enact harsher measures on their own . . . ."[190]

In fulfillment of the promise of additional, stricter, unilateral action, President Obama signed into law new sanctions against Iran in June 2010.[191] Generally speaking, the sanctions "penalize companies supplying Iran with gasoline and international banking institutions involved with Iran's increasingly powerful Islamic Revolutionary Guard Corps or its nuclear program."[192] Companies supplying gasoline to the Iranian market risk being banned from the "U.S. banking system, property transactions and foreign exchange in the United States."[193] Suppliers of other goods to the Iranian market that might be used to assist Iran with its refining capacity also risk sanctions under the law.[194]

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[189] *Id.*

[190] *Id.*

[191] Ross Colvin, *Obama says new U.S. sanctions on Iran toughest ever*, REUTERS, July 2, 2010, *available at* www.reuters.com/assets/print?aid=USTRE66001Z20100702.

[192] *Id.*

[193] *Id.*

[194] Baker, *supra* note 1. Notably, these sanctions appear to be a softer version of legislation that Obama and Congress considered in both 2007 and 2008. The Iran Counter-Proliferation Act of 2007, which would have banned all imports and exports between the U.S. and Iran, prohibited the U.S. Trade Representative from extending preferential treatment to Iran, authorized the blockage of certain Iranian assets, and "extend[ed] these prohibitions to include foreign subsidiaries of U.S. companies by holding the U.S. parents responsible for the actions of their foreign subsidiaries." Deloitte, *supra* note 177; *see also* H.R. 1400: Iran Counter-Proliferation Act of 2007, § 201, *available at* http://www.govtrack.us/congress/bill.xpd?bill=h110-1400&tab=summary. Although the act passed the House as H.R. 1400 in September of 2007, and the Senate Finance Committee held hearings regarding the Senate version, S. 970, in April of 2008, no Senate action was taken on the legislation after that time. *See* H.R. 1400: Iran Counter-Proliferation Act of 2007, *available at* http://www.govtrack.us/congress/bill.xpd?bill=h110-1400 (last visited April 9, 2010); *The Iran Counter-Proliferation Act of 2007: Hearing on S.970 Before the U.S. Senate Comm. on Fin.*, (Apr. 8, 2008), *available at* http://finance.senate.gov/hearings/hearing/?id=dd22c3dd-9723-436a-ec5f-701744bdaeae (last visited Apr. 9, 2010); Library of Congress, Thomas, S.970, *available at* http://www.thomas.gov/cgi-bin/bdquery/z?d110:SN00970:@@@X (last visited Apr. 9, 2010). As pursuit of S. 970 appeared futile, a second version of the bill, S. 3227, retaining all the significant provisions of S. 970, was introduced to the Senate in July of 2008. Although placed on the Senate calendar, no further action was taken on S. 3227. Library of Congress, Thomas, S.3227, *available at* http://www.thomas.gov/cgi-bin/bdquery/z?d110:SN03227:@@@R (last visited Apr. 9, 2010). If this current round of U.S. sanctions fails to impact Iran's nuclear program, it is possible that a provision akin to the foreign subsidiaries provision of the Iran Counter-Proliferation Act could be re-considered. Such action would provide additional fodder for a potential claim in the WTO that the

Although the Obama administration speaks of these sanctions as though they are only a natural outgrowth of the United Nations action, the U.S. unilateral action remains an example of the U.S. taking issues of international security outside the bounds of Security Council-authorized action. Because the U.S. faces opposition from other Security Council members on the issue of Iranian sanctions,[195] it is unlikely that the United Nations can effectively govern this national security issue. The WTO was designed to provide supplementary international security governance in precisely this type of situation. The WTO, furthermore, would have jurisdiction to hear a complaint about the penalties imposed in the U.S. market upon foreign entities supplying gasoline and other goods to Iran. The most fruitful complaint would likely charge that the provision violates GATT Article XI.

GATT Article XI prohibits WTO members from enacting quantitative restrictions other than duties, taxes, or other charges.[196] A ban on imports and exports, even one conditioned on certain circumstances, is considered a form of quantitative restriction.[197] Thus, a nation such as Germany, which engages in substantial trade with Iran,[198] could argue that the U.S. sanctions violate Article XI when they prohibit German companies from importing or exporting goods to Iran. The U.S. would undoubtedly argue that the sanctions fall under the national security exception of GATT Article XXI.

If Germany were to win the hypothetical dispute, international governance would newly define the bounds of a nation's sovereign authority to impose unilateral economic sanctions for national security objectives. If the U.S. successfully defends the challenge, the WTO will finally have had the opportunity to flesh out the objective content of the national security exception and set the outer bounds of the defense. In either case, bringing the dispute before the WTO would provide the DSS an opportunity to engage in the weighing and balancing of trade considerations and national security concerns for which it is responsible. In so doing, the WTO might ease tensions between the major powers and pave the way for further collaboration to bring an end to Iran's nuclear program. Such a result would truly represent the WTO's reinstatement to its forgotten role in governing international security.

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measure violates the GATT.

[195] Notably, China and Russia blocked the stricter sanctions sought by the U.S. in the Security Council because of an insistence that "the sanctions not affect Iran's day-to-day economy." MacFarquhar, *supra* note 188, at 3.

[196] GATT, *supra* note 32, art. XI.

[197] VAN DEN BOSSCHE, *supra* note 127, at 441.

[198] Crail, *supra* note 180, at 2 ("Germany remains Iran's most significant Western trading partner.").

CONCLUSION

The framers of the WTO intended for it to play a role in international security governance: namely, to supplement the governance actions of the United Nations by parallel efforts in the economic sphere. Because the WTO has routinely avoided its responsibility to reach the merits of disputes involving national security matters, and the United Nations processes often end in stalemate or failures of enforcement, nation-states often take unilateral action without fear of reproach. This situation undermines the legitimacy of the international legal system as a whole.

To rectify this problem, the WTO should interpret the national security exception contained in GATT Article XXI as containing objective criteria for application and reach the merits of security cases that come before it in the future. Advances in WTO structure, especially from the Dispute Settlement Understanding, and in WTO jurisprudence, especially interpretations of GATT Article XX, the general exceptions clause, weaken the common objections to allowing the GATT to fulfill its role of supplementary international security co-governor. In fact, the WTO's unique dispute settlement features remedy the three primary failures of the ICJ, making the prospect of WTO security governance in economic matters more viable. Especially when the Security Council cannot act or when United Nations members undertake unilateral action, the WTO can, and should, assume its forgotten role as co-governor of national security conflicts.