GATT Article XXI: Trade Sanctions and the Need to Clarify the Security Exceptions

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I. Introduction

When a state defies international norms and threatens global peace and security, trade sanctions provide an opportunity for nations to influence the acts of others by non-violent means. By using economic diplomacy to negatively affect other economies, states can seek to deter aggression and motivate change. With the continued rise of globalisation and international free trade, utilising trade sanctions can interfere with a nation's other obligations—a World Trade Organisation (WTO) Member enacting trade sanctions against another Member would be in violation of the General Agreement on Tariffs and Trade 1994 (hereinafter, "GATT 1994")[1]—meaning that fulfilling trade obligations can be detrimental to achieving national security goals.

This article will argue that trade sanctions work and that because of this the interpretation and use of Article XXI,[2] "Security Exceptions", needs to be clarified so that WTO Members can properly use it to justify GATT 1994 violating trade sanctions made to support national security. Part II of this article will argue that trade sanctions work by demonstrating how they are an effective method for

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1 General Agreement on Tariffs and Trade (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3 (hereinafter, "GATT 1994").

2 ibid, Article XXI.

shifting a state's actions without the use of violence. It will do this by examining the Libyan Terrorism and WMD Sanctions and the Iranian Nuclear Sanctions. Part III of this article will examine the history of Article XXI, looking at its text and its invocations throughout history. In the pre-GATT 1994 context, it will look at invocations by Ghana, Sweden, and the United States (US); and in the post-GATT 1994 context, it will look at invocations by the US and Nicaragua. Part IV of this article will argue that Article XXI can play an important role regarding trade sanctions and as such its interpretation and use needs to be clarified. It will do this by first showing how trade sanctions violate the GATT 1994. Next, it will analyse the competing *Ultra Vires Perspective* and *Intra Vires Perspective* of Article XXI. Finally, it will show how the leading *Ultra Vires Perspective* of Article XXI is too broad to properly be utilised to justify trade sanctions and that the *Intra Vires Perspective* should be adopted.

II. Trade Sanctions Work

Trade sanctions are a form of economic diplomacy that seeks to alter a state's activities by non-violent means with the idea that economic hardship will lead them to change course. Defined by the Council on Foreign Relations as "the withdrawal of customary trade and financial relations" in either comprehensive form, such as "prohibiting commercial activity with regard to an entire country", or a more targeted form, such as "blocking transactions of and with particular businesses, groups, or individuals",[3] countries launch trade sanctions against other countries whose conduct are against their interests; these interests can be strategic, such as targeting a country's aggression towards another country, or moral, such as targeting a country's actions that are contrary to international norms. This sort of economic diplomacy has been utilised throughout modern history, such as the Embargo Act of 1807 which saw the US launch an embargo against goods from Great Britain during the Napoleonic wars,[4] and continues to be used today, such as Countering America's Adversaries Through Sanctions Act[5] which seeks to curb North Korea's nuclear ambitions, among other things. Although regularly used, a large question that is asked about sanctions is are they successful at forcing international actors to change course? This part of the article will argue that they are successful by examining the Libyan Terrorism and WMD Sanctions and the

[3] Jonathan Masters, 'What Are Economic Sanctions?' (*Council on Foreign Relations*, 7 August 2017) <https://www.cfr.org/backgrounder/what-are-economic-sanctions#chapter-title-0-9> accessed 4 September 2018.

[4] Embargo Act of 1807 (2 Stat 451).

[5] Countering America's Adversaries Through Sanctions Act of 2017 (Public Law No. 115-44).

Iranian Nuclear Sanctions. It will also examine failed sanction attempts, noting why they failed and how they are not indicative of sanctions' effectiveness.

A. Libyan terrorism and WMD sanctions

The success of the trade sanctions implemented by the US and the United Nations (UN) demonstrate that trade sanctions work. In the 1990s, important segments of Libya's economy were targeted by sanctions with the goal of altering Libya's support for terrorism and ending its chemical and nuclear weapon programs. When the Soviet Union fell and the Cold War ended, Libya lost one of its main financial allies, which, along with a jaded view of Pan-Arabism and the weakness of African economies, led to economic hardship and instability within Libya.[6] With Libya in a weakened state, the US sought to use economic diplomacy to further exacerbate Libya's woes to force Libya to end its chemical and nuclear weapons programs and its support for terrorism.[7] Continuing work done by the Bush Administration, in 1992 and 1993 the Clinton Administration successfully persuaded the UN to put forward two resolutions that resulted in comprehensive trade sanctions against Libya for its role in the destruction of Pan Am Flight 103 and UTA Flight 772.[8] Resolution 748 sought to impact Libya's economy by denying "permission of Libyan aircraft to take off from, land in or overfly their territory if it has taken off from Libyan territory"[9] and preventing the importation of aircraft parts,[10] while Resolution 883 sought to impact Libya's economy by damaging its oil industry[11] and further damage its airline industry.[12] In order for these sanctions to be lifted, Libya would have to allow investigations into the Pan Am Flight 103 and UTA Flight 772 crashes and allow the Libyan nationals who were suspected to have caused the crashes be extradited so that justice could be served.[13] As these sanctions succeeded in damaging Libya's economy, the US acted through its own agency to further impact Libya. In 1996, Congress passed, and President Clinton signed into law, the Iran and Libya Sanctions Act of 1996,[14] with the objective of driving Libya to "end all support for acts of international terrorism and efforts to

6 Martin S Indyk, 'The Iraq War Did Not Force Gadaffi's Hand' (*Brookings Institute*, 9 March 2004) <https://www.brookings.edu/opinions/the-iraq-war-did-not-force-gadaffis-hand/> accessed 4 September 2018.

7 Bruce Jentleson, 'Coercive Diplomacy: Scope and Limits in the Contemporary World' (*The Stanley Foundation*, 2006) Policy Analysis Brief 2 <http://stanleyfoundation.org/publications/pab/pab-06CoerDip.pdf> accessed 4 September 2018.

8 ibid 4–5.

9 UNSC Res 748 (31 March 1992) UN Doc S/RES/748 4(a).

10 ibid (b).

11 UNSC Res 883 (11 November 1993) UN Doc S/RES/883.

12 ibid.

13 UNSC Res 731 (21 January 1992) UN Doc S/RES/731.

14 Iran and Libya Sanctions Act of 1996 (Public Law No. 104-172).

develop or acquire weapons of mass destruction".[15] With regards to Libya, the paramount provision of this act targeted US and non-US people or institutions that:

> (A) contributed to Libya's ability to acquire chemical, biological, or nuclear weapons or destabilizing numbers and types of advanced conventional weapons or enhanced Libya's military or paramilitary capabilities;
>
> (B) contributed to Libya's ability to develop its petroleum resources; or
>
> (C) contributed to Libya's ability to maintain its aviation capabilities.[16]

This provision essentially barred Libya from being able to develop its petroleum resources, which as a petro-state was vital to its economy, or aviation industries, which heavily impacted its ability to import or export goods. These sanctions would be lifted in return for Libya ending its support of terrorism and ending its WMD programs.[17]

In 1998, six years after the initial UN sanctions were implemented, the economic effects the UN and US trade sanctions were having on Libya's economy brought Libya to the negotiating table; Libya agreed to turn over the suspects of the Pan Am bombing in return for the suspension of the UN sanctions with the caveat that the sanctions would fully end once "the terrorism case was fully settled".[18] In 2003, Libyan officials approached the US and the United Kingdom (UK), offering to end and reveal the full extent of its WMD program in return for the US lifting its sanctions;[19] after negotiations a settlement was made that brought Libya in line with the international community with regards to nuclear weapons, with Libya reaffirming its commitments to numerous international treaties including the Treaty on the Non-Proliferation of Nuclear Weapons, the Agreement on Safeguards of the International Atomic Energy Agency (IAEA) and

[15] ibid s 3(b).
[16] ibid s 5.
[17] ibid s 3(b).
[18] Jentleson (n 7) 5.
[19] Sean D Murphy, 'US/UK Negotiations with Libya Regarding Non-Proliferation' (2004) 98 AJIL 195.

the Convention on Biological Weapons.[20] The success that trade sanctions had on altering Libya's actions demonstrate that trade sanctions can succeed in bringing states to the negotiating table and alter their actions without having to resort to violent means.

B. Iranian nuclear sanctions

Like the Libyan Sanctions, the Iranian Nuclear Sanctions are an excellent case study on how trade sanctions can successfully alter a state's actions through non-violent means. For over two decades the international community led by the US had been using trade sanctions to damage Iran's economy with the goal of driving Iran to end its nuclear weapons program. In response to the "unusual and extraordinary threat to the [US'] national security"[21] that Iran's nuclear ambitions posed, in 1995 President Clinton signed Executive Order 12957, which prohibited all US trade in Iran's petroleum industry,[22] and Executive Order 12959, which prohibited all US trade with Iran.[23] In 1996, the US' economic diplomacy against Iran was further expanded with the passage of the Iran and Libya Sanctions Act of 1996,[24] which targeted foreign companies that were investing in Iran's petroleum industry with the goal of preventing the investment.[25] Although sanctions initially started to work, leading to a suspension of Iran's uranium enrichment program,[26] following President Ahmadinejad's electoral victory in 2005, Iran ended this suspension causing the US to push the UN to use its powers under Chapter VII of the United Nations Charter[27] to enact sanctions against Iran. These resolutions

[20] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (adopted 10 April 1972, entered into force 26 March 1975) 1015 UNTS 163 (Biological Weapons Convention); Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161; UNSC 'Letter dated 19 December 2003 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the Security Council' (2003) UN Doc S/2003/1196.

[21] The President of the United States of America, 'Executive Order 12959—Prohibiting Certain Transactions with Respect to Iran' (9 May 1995) 60(89) Federal Register 24757.

[22] The President of the United States of America, 'Executive Order 12957— Prohibiting Certain Transactions With Respect to the Development of Iranian Petroleum Resources' (15 March 1995) 60(52) Federal Register 14615.

[23] UNSC Letter (n 20) s 1.

[24] Now known as the Iran Sanctions Act. See Iran Sanctions Extension Act of 2016 (Public Law No. 114-277).

[25] Iran and Libya Sanctions Act of 1996 (n 14) s 5(a).

[26] Sten Rynning, 'Europe's Emergent but Weak Strategic Culture' in Kjell Engelbrekt and Jan Hallenberg (eds), *European Union and Strategy: An Emerging Actor* (Routledge 2010) 94.

[27] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Chapter VII (hereinafter, "United Nations Charter").

first started in 2006 with Resolution 1696, which demanded that Iran suspend its nuclear program[28] and Resolution 1737, which officially imposed trade sanctions,[29] and would continue to be implemented until 2014,[30] dealing considerable blows to the Iranian economy.[31] Throughout these resolutions American sanctions continued, most notably in Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010[32] and Executive Order 13590,[33] both of which targeted US and non-US persons and companies investing in or purchasing from Iran's petroleum industry.[34] Furthermore, the European Union (EU) also put forward sanctions during this period, targeting "Iranian crude oil imports to the EU, in the financial sector, including against the Central Bank of Iran, in the transport sector as well as further export restrictions, notably on gold and on sensitive dual-use goods and technology."[35]

With the effects of sanctions from the US, EU, and UN devastating its economy, Iran came forward to the negotiating table seeking an end to the sanctions. In 2013 the newly elected Iranian President, Hassan Rouhani, worked with the five permanent members of the UN Security Council and Germany, known as the P5+1, to create the agreement known as the Joint Plan of Action,[36] which saw the freezing of elements of Iran's nuclear program in return for a decrease in sanctions as both sides worked towards a long-term agreement. Following this, negotiators were able to reach a final agreement known as the Joint Comprehensive Plan of Action in July 2015.[37] Through the final agreement, Iran agreed to hand over large swathes of its nuclear weapons program and take steps that would prevent it from reinstating it for over a decade; in return for this, Iran received a loosening

[28] UNSC Res 1696 (31 July 2006) UN Doc S/RES/1696.

[29] UNSC Res 1737 (23 December 2006) UN Doc S/RES/1737.

[30] UNSC Res 2159 (9 June 2014) UN Doc S/RES/2159 (2014).

[31] Central Bank of the Islamic Republic of Iran, 'Economic Trends No 62' (2010/2011) Third Quarter 1389, 16.

[32] Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Public Law No 111-195) (hereinafter, "Comprehensive Iran Sanctions").

[33] The President of the United States of America, 'Executive Order 72609—Authorizing the Imposition of Certain Sanctions With Respect to the Provision of Goods, Services, Technology, or Support for Iran's Energy and Petrochemical Sectors' (23 November 2011) 76(226) Federal Register 72609.

[34] ibid s 1; Comprehensive Iran Sanctions (n 32) s 103.

[35] Council of The European Union, 'Council Conclusions on Iran' (23 January 2012) 3142th Foreign Affairs Council Meeting 2 <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/d-ir/dv/council_cnclsions_iran_/council_cnclsions_iran_en.pdf> accessed 14 September 2018.

[36] Geneva Interim Agreement between Iran and P5+1 (adopted 24 November 2013) (Joint Plan of Action).

[37] Joint Comprehensive Plan of Action between Iran and P5+1 (adopted 14 July 2015).

of sanctions from the US and the EU,[38] as well as the end of UN sanctions.[39] The success trade sanctions had on altering Iran's actions demonstrate that trade sanctions can succeed in bringing states to the negotiating table and alter their actions without having to resort to violent means.

C. Failed sanctions

Although the Libyan and Iranian sanctions demonstrate that trade sanctions can succeed in altering a state's actions, it is important to note that trade sanctions are not perfect as demonstrated by failed trade sanctions targeting Cuba and North Korea. The failures, however, can be explained through flaws in the implementation of sanctions, rather than flaws in the sanctions themselves.

The US trade sanctions towards Cuba is the leading example detractors of trade sanctions bring up when arguing for their ineffectiveness. Following the Cuban revolution which saw Cuba turn into a communist state under Fidel Castro in 1959, the US' relationship with Cuba deteriorated. With the main goal of pushing Cuba away from communism into what would amount to regime change and the secondary goals of punishing Cuba for its human rights abuses and intimidating it in response to the national security threat it posed,[40] the US has put forward numerous sanctions against the country amounting to a full "economic, commercial and financial embargo"[41] that have amounted to an estimated loss of over $100 billion over the years.[42] Although these sanctions have caused vast amounts of economic damage to Cuba's economy, they have been unsuccessful in altering Cuba's actions, which has drawn criticism towards the effectiveness of trade sanctions.

The US and international community's trade sanctions towards North Korea is another leading example which detractors of trade sanctions bring up when arguing for their ineffectiveness. In 2006, North Korea launched its first nuclear weapons test. In response, the UN passed Resolution 1695,[43] the first of many UN

[38] Ellie Geranmayeh, 'Explainer: The Iran Nuclear Deal' (*European Council on Foreign Relations*, 17 July 2015) <http://www.ecfr.eu/article/iran_explainer3070> accessed 4 September 2018.

[39] UNSC Res 2231 (20 July 2015) UN Doc S/RES/2231.

[40] See The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act) (Public Law No. 104-114). See also Cuban Democracy Act of 1992 (Public Law No. 102-484).

[41] UNGA Res 72/4 (10 November 2017) UN Doc A/RES/72/4.

[42] Daniel Trotta, 'Cuba Estimates Total Damage of U.S. Embargo at $116.8 Billion' *Reuters* (Toronto, 9 September 2014) <https://www.reuters.com/article/us-cuba-usa/cuba-estimates-total-damage-of-u-s-embargo-at-116-8-billion-idUSKBN0H422Y20140909> accessed 4 September 2018. See also Hildy Teegen, Hossein Askari, John Forrer, and Jiawen Yang, 'Economic and Strategic Impacts of U.S. Economic Sanctions on Cuba' (2002) Working Paper 13 <https://www2.gwu.edu/~clai/working_papers/Teegen_Hildy_02-03.pdf> accessed 4 September 2018.

[43] UNSC Res 1965 (15 July 2006) UN Doc S/RES/1695.

trade sanctions against the country. Although Resolution 1695 was more targeted towards the nuclear program, recent resolutions, such as Resolution 2375, put forward more comprehensive sanctions that target the country's whole economy.[44] During this time the US has also implemented sanctions against North Korea, including the North Korea Sanctions and Policy Enhancement Act of 2016, which targeted its export industries.[45] Even with this economic damage these sanctions have caused North Korea, including an estimate of $500 million a year,[46] North Korea has not stopped its nuclear program, once again drawing criticism towards the effectiveness of trade sanctions.

Although the trade sanctions implemented against Cuba and North Korea have not been successful, there are reasons that explain this ineffectiveness better than the conclusion that trade sanctions are ineffective. First and foremost, sanctions that put forward unrealistic requests will be unsuccessful. In the Cuban example, the US was effectively demanding regime change by demanding for the end of the communist, while in the North Korea case, the world is effectively asking it not to pursue the only tools that can assure its survival by asking the country to stop working towards nuclear weapons; as neither country would agree to these outcomes, the sanctions have been ineffective. With both Libya and Iran, the outcomes sought did not have such far reaching consequences for the decision makers in each respective country—obtaining nuclear weapons were not viewed essential to the respective regimes—making it a far more sensible request.

Secondly, as in Cuba's case, sanctions that are based on unreasonable premises will be ineffective. Whereas sanctions against Libya and Iran were based in national security and a desire to promote non-proliferation, sanctions against Cuba were based on an anti-communist ideology rather than a more substantive goal. When a sanctioned country cannot see the rationale behind trade sanctions, they are less likely to agree.

Lastly, in the North Korea case, sanctions take time to work—as noted by diplomat and Professor Victor Cha, "sanctions don't work until they do".[47] Looking to both Libya and Iran, it is important to note that it took years for these countries to come to the negotiating table following the imposition of sanctions. Although this may seem like a long time, alternatives to trade sanctions also require time. For example, using a means like war to alter a state's actions can last over a decade

[44] UNSC Res 2375 (11 September 2017) UN Doc S/RES/2375.

[45] North Korea Sanctions and Policy Enhancement Act of 2016 (Public Law No. 114-122).

[46] United States Mission to the United Nations, 'Fact Sheet: Resolution 2375 (2017) Strengthening Sanctions on North Korea' (11 September 2017) <https://usun.state.gov/remarks/7969> accessed 14 September 2018.

[47] Colin Quinn, 'The CSIS Podcast: Defusing North Korea' (7 July 2017) Center for Security Studies <https://www.csis.org/podcasts/csis-podcast/defusing-north-korea-1>.

such as is the case with the Iraq War. Even though UN sanctions have been in effect against North Korea since 2006, only recently have more comprehensive sanctions that have sought to impact all North Korea's economy come into effect, meaning that we must continue to wait before we can fully judge their effectiveness. The intricacies of the unsuccessful Cuban and North Korean sanctions described above demonstrate that trade sanctions are not ineffective, but how they are applied can have a large impact on their success.

III. History of Article XXI

Article XXI of the GATT 1994, titled "Security Exceptions", allows countries to violate their WTO obligations in the pursuit of national security. The text of the article 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
>
> 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.[48]

With its origin in the GATT 1994's original precursor, the General Agreement on Tariffs and Trade 1947,[49] the security exception was included to balance

[48] GATT 1994 (n 1) Article XXI.

[49] General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 187 (hereinafter, "GATT 1947").

"national security and national sovereignty on the one hand, and the need to promote commerce and to protect an open trading system on the other".[50]

The most important part of the security exceptions is Article XXI:(b)(iii) because of its broadness and vagueness and the controversy these attributes have attracted. It states that "nothing in this agreement shall be construed… to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests... taken in time of war or other emergency in international relations".[51] As Peter Lindsay notes, these attributes are rooted in the fact that the GATT 1994 has not defined terms such as "'considers necessary,' 'essential security interests,' 'time of war,' and 'emergency in international relations'",[52] creating ambiguity on how it should be invoked and applied. The controversy this fact has attracted include the view that the exception can be called to justify any measure a Member views as supporting national security, bestowing WTO Members the power to invalidate any WTO obligation and creating a hesitancy to challenge any country's use of the article as it would amount to challenging a country's ability to decide their own national security interests. Looking to the use of the Article XXI in pre- and post-GATT 1994 contexts demonstrates the variety of circumstances where Article XXI has been applied.

A. Pre-GATT 1994

Before the GATT 1994 there were only a handful of occasions where GATT 1947 signatories invoked Article XXI to justify their violation of their treaty obligations. One early instance was Ghana's invocation of it in 1961. Here, Ghana invoked the Article to justify its boycott of Portuguese goods; it was boycotting the goods under the belief that it would put pressure on Portugal and lessen the danger of the Angolan Independence War, which Ghana argued posed a danger to "the peace of the African continent".[53] When invoking this Article Ghana noted that, in its interpretation of it, "each contracting party was the sole judge of what was necessary in its essential security interest", and that as such there could "be

[50] Alan S Alexandroff and Rajeev Sharma, 'The National Security Provision—GATT Article XXI' in Patrick FJ. Macrory, Arthur E Appleton, and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer 2005) 1572.

[51] GATT 1994 (n 1) Article XXI:(b)(iii).

[52] Peter Lindsey, 'The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?' (2003) 52 DLJ 1277, 1278.

[53] GATT Contracting Parties, 'Summary Record of The Twelfth Session' (21 December 1961) SR 19/12, 196.

no objection to Ghana regarding the boycott of goods as justified by security interests",[54] demonstrating the view that one can utilise Article XXI unilaterally.

Another instance in the history of Article XXI in the pre-GATT 1994 context was Sweden's invocation of it in 1975 when they instituted a global import quota system for certain footwear under tariff headings ex 64.01 and ex 64.02.[55] Here Sweden argued that the quota was necessary because:

> [D]ecrease in domestic [footwear] production has become a critical threat to the emergency planning of Sweden's economic defence as an integral part of the country's security policy. This policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such a capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations.[56]

Many countries expressed concern with Sweden's decision, arguing that Sweden was not making this decision to further national security, but rather—noting the lack of economic justification in regards to national security—that its decision was to help deter the effects of the present global recession on its economy.[57] Although the invocation was never challenged and the decision was later revoked in 1977,[58] this provides an excellent example of an invocation of Article XXI to justify suspect national security measures.

One last important invocation of Article XXI in the pre-GATT 1994 context was when the US invoked it in 1985. It declared that it was prohibiting all imports from Nicaragua, with the purpose of undermining the Sandinista government.[59] On the day the embargo was declared, President Ronald Reagan stated that "the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and hereby declare a national emergency to deal with that threat."[60] In Council, Nicaragua argued that the US's measure violated Articles I, II, V, XI, XIII and Part IV of the GATT 1947, and that the actions were not being taken

[54] ibid.

[55] GATT Council, 'Minutes of Meeting' (10 November 1975) C/M/109, 8.

[56] ibid.

[57] ibid 9.

[58] Group of Negotiations on GATT Articles, 'Article XXI: Note by the Secretariat' (18 August 1987) MTN.GNG/NG7/W/16, 7.

[59] The President of the United States of America, 'Executive Order 12513—Prohibiting trade and certain other transactions involving Nicaragua' (7 May 1985) 50 Federal Register 18629.

[60] ibid.

in the name of national security.[61] Arguing that the actions taken were arbitrary, Nicaragua requested that a panel be set up to examine the issue, showing that countries believe Members can judge if other countries' security measures fall under Article XXI; the panel was however inconclusive.[62]

B. Post-GATT 1994

Since the GATT 1994 came into action, there have been two major instances where Article XXI has been invoked, but neither of them were reviewed by a panel. The first instance was when the US enacted the Helms-Burton Act on 12 March, 1996.[63] Launched in response to the Cuban government shooting down two civil aircrafts that were conducting a search and rescue mission,[64] the act increased sanctions against Cuba with the stated goal of bringing about a transition to a representative democracy and market economy in Cuba[65] to promote the US' national security.[66] One of its more contentious passages put forward "liability for trafficking in confiscated property claimed by [US] nationals".[67] In practice this section effectively punished any company doing business with Cuba, essentially forcing companies to choose between doing business with America or Cuba. The act was met with swift condemnation by the international community, including many of the US' allies like the EU and Canada, largely because of the effect it would have on "businesses that had recently entered, or were planning to establish, joint ventures in Cuba".[68] On 8 October, 1996, the EU requested a WTO panel to find the Helms-Burton Act inconsistent with the US' obligations under the GATT 1994,[69] and on 20 February 1997 a panel was called.[70] Initially indicating that it would put forward an Article XXI defence should the dispute go to a panel, the US argued that the WTO "lack[ed] competence to adjudicate a national security issue" and choose to reject any participation in the panel.[71] As the EU was preparing to

61 GATT Council, 'Minutes of Meeting' (28 June 1985) C/M/188, 4.
62 *United States – Trade Measures affecting Nicaragua* (1986) GATT BISD L/6053.
63 Helms-Burton Act (n 40).
64 UNSC 'Note by the Secretary General' (1 July 1996) UN Doc S/1996/509.
65 Helms-Burton Act (n 40) s 2(3), s 3.
66 ibid s 3.
67 ibid s 301.
68 Rene E Browne, 'Revisiting National Security in an Interdependent World: The GATT Article XXI Defense after Helms-Burton' (1997) 86 GLJ 405, 407.
69 WTO, *United States – The Cuban Liberty and Democratic Solidarity Act* (1996) WT/DS38/2 (Panel Request).
70 Browne (n 68) 407.
71 ibid 408.

schedule its first submission to the panel, an agreement was reached, preventing the need to analyse Article XXI.

The second post-GATT 1994 Article XXI instance took place in 2000 when Nicaragua enacted Law 325 of 1999, which enacted sanctions against Honduras and Colombia in the form of a tariff on goods and services.[72] These sanctions were put forward as part of a long, ongoing territorial dispute between the countries; Colombia and Honduras had just ratified a treaty on maritime boundaries that would impact areas claimed by Nicaragua.[73] In response to these sanctions, Colombia alleged that they were in violation of Articles I and II of the GATT 1994 and requested that the WTO set up a panel. Nicaragua subsequently invoked Article XXI as a defence for its sanctions, stating that this Article confirms "the inherent right of a State to protect its security and constitute an exception to the multilateral trade rules," meaning "these provisions cannot be subjected to an examination by a panel."[74] Although the Dispute Settlement Body (DSB) agreed to set up a panel, the Chairman of the DSB met with both parties and found a settlement, thus avoiding the need to analyse Article XXI through a WTO dispute mechanism.[75]

C. Recent context

Although the use of Article XXI has yet to be resolved at a panel in the post-GATT 1994 era, it is continued to be invoked today as justification for trade sanctions imposed between WTO Members. Most recently this has taken place regarding Russia and Qatar sanctions. In 2014 Russia invaded the Ukrainian Autonomous Republic of Crimea and started supporting separatists in Eastern Ukraine, moves that struck fear in many countries; drawing comparisons to Hitler's aggressiveness in the late 1930s to Eastern European countries including Czechoslovakia and Poland, many feared that the Crimea invasion would be a precursor to Russia attempting reassert control over former Soviet states.[76] These moves launched near universal condemnation by the West and the start of various

[72] WTO, *Nicaragua – Measures Affecting Imports from Honduras And Colombia* (2000) WT/DS188/2/Corr.1 (Panel Request).

[73] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Judgment) [2007] ICJ Rep 659, 683.

[74] WTO, *Nicaragua – Measures Affecting Imports from Honduras And Colombia* (Statements by Nicaragua) (2000) WT/DSB/COM/5/Rev.1, 2.

[75] Eric J Lobsinger, 'Diminishing Borders in Trade and Terrorism: An Examination of Regional Applicability of GATT Article XXI National Security Trade Sanctions' (2006) 13 ILSA JI&CL 99, 107.

[76] Steven Chase, 'Harper Compares Russia's Crimea Moves to Third Reich aggression' *Globe and Mail* (Toronto, 4 March 2014) <https://www.theglobeandmail.com/news/politics/canada-suspends-military-activities-with-russia/article17289679/> accessed 4 September 2018.

economic sanctions against Russia by parties such as the US, Canada, and the EU.[77] These sanctions included the banning of arms and arms related sales to Russia along with restrictions on financial services,[78] and have been viewed as *prima facie* violations of Article I and Article III of the GATT 1994[79] that could be defended by invoking Article XXI because they were enacted to deter Russian aggression. Although Russia has yet to request a panel to analyse these sanctions, they, along with Russia's responsive trade sanctions against the West, have brought Article XXI back to prominence.

In June 2017, the United Arab Emirates (UAE), Saudi Arabia, and Bahrain imposed trade sanctions against Qatar, contending that the move is to target Qatar's support of terrorism and goals of destabilising the region.[80] Qatar has since asserted that these sanctions are in violation of Articles I, V, X:1, X:2, XI, and XIII of the GATT 1994[81] and, following the UAE's decision not to participate in consultations with Qatar, has led Qatar to request a panel; a panel was set up on 22 November, 2017, to review the dispute.[82] Throughout this time the sanctioning countries have argued that their actions fall under Article XXI and that as such the matter did not fall under the competence of the WTO,[83] reviving questions on whether the WTO has jurisdiction to review Article XXI.

IV. Article XXI and Trade Sanctions

Article XXI can play a useful role regarding trade sanctions, but to properly play this role it needs to be clarified. As demonstrated by the Libyan Terrorism

[77] See Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L 78. See also: The President of the ited States of America, 'Executive Order 13660—Blocking Property of Certain Persons Contributing to the Situation in Ukraine' (10 March 2014) 79(46) Federal Register 13493.

[78] Rishika Lekhadia, 'Can the West Justify its Sanctions against Russia under the World Trade Law?' (2015) IJIEL 151, 157.

[79] ibid 159.

[80] Tamara Qiblawi, Mohammed Tawfeeq, Elizabeth Roberts and Hamdi Alkhshali, 'Qatar Rift: Saudi, UAE, Bahrain, Egypt Cut Diplomatic Ties' *CNN* (New York, 27 July 2017) <http://www.cnn.com/2017/06/05/middleeast/saudi-bahrain-egypt-uae-qatar-terror/index.html> accessed 4 September 2018.

[81] WTO, *United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* (2017) WT/DS526/1.

[82] WTO, *United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* (2017), WTO Doc WT/DS526/2 (Request for Panel) (hereinafter, "*UAE – Trade*").

[83] WTO Council for Trade in Goods, 'National Security Cited in Two Trade Concerns at Goods Council Meeting' (*WTO*, 30 June 2017) <https://www.wto.org/english/news_e/news17_e/good_10jul17_e.htm> accessed 4 September 2018.

and WMD Sanctions and the Iranian Nuclear Sanctions, trade sanctions can successfully alter a state's actions by non-violent means. When sanctions are enacted for national security purposes, Article XXI can play a vital role in supporting the violations of the GATT 1994 these sanctions cause. However, as demonstrated by the historical analysis of Article XXI in both the pre- and post-GATT 1994 contexts, the invocation of Article XXI has been utilised for both political and security reasons—the latter of which is okay, while the former is not—and in an opaque manner. As the world continues to move towards non-violent methods to solve strategic differences,[84] and globalisation and free trade continues to spread,[85] Article XXI can and should play a vital role in our world.

A. The GATT 1994 and trade sanctions

When trade sanctions are put against WTO Members, the GATT 1994 is violated. Although some sanctions can break multiple Articles, they all break Article I, the "General Most-Favoured-Nation Treatment" provision.[86] Article I:1 states:

> 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.[87]

As noted by the Appellate Body in *Canada – Certain Measures Affecting the Automotive Industry* (hereinafter, "*Canada – Autos*"),[88] when a country "has granted

[84] See Steven Pinker, *The Better Angels of Our Nature* (Viking 2011).

[85] See WTO, 'World Trade Statistical Review 2017' (WTO, 12 October 2017) <https://www.wto.org/english/res_e/statis_e/wts2017_e/wts17_toc_e.htm> accessed 4 September 2018. But see also Luke Kawa, 'Global Trade Growth is About to Roll Over' *Bloomberg* (New York, 3 May 2017) <https://www.bloomberg.com/news/articles/2017-05-03/global-trade-growth-is-about-to-slow-morgan-stanley-says> accessed 4 September 2018.

[86] GATT 1994 (n 1), Article I.

[87] ibid.

[88] WTO, *Canada – Certain Measures Affecting the Automotive Industry* (31 May 2000) WT/DS139/AB/R-WT/DS142/AB/R.

an 'advantage' to some products from some Members that [a Member] has not 'accorded immediately and unconditionally' to 'like' products 'originating in or destined for the territories of all other Members,'"[89] Article I:1 is violated. In practice, this means that countries cannot discriminate against other countries. As the nature of trade sanctions discriminate against one country, Article I is violated when they are enacted.

Looking to pre-GATT 1994 examples, sanctions like Ghana's boycott of Portuguese goods in 1961 and the US' boycott of Nicaraguan goods in 1985 represent clear discrimination. Here, the trade measures put forward by Ghana and the US discriminated against Portugal and Nicaragua respectively by according other WTO Members not subject to the sanctions more favourable trade treatment, meaning Article I is violated. Looking to the post-GATT 1994 example of the sanction enacted by Nicaragua against Colombia and Honduras in 1999, a similar conclusion can be made; Nicaragua's sanctions afforded other WTO Members more favourable trade treatment, thus breaching Article I.

Looking to the post-GATT 1994 example of the sanctions put forward by the US in the Helms-Burton Act in 1996, the breach is less clear. Through the Helms-Burton Act the United States was not sanctioning specific companies based on their origin, which would constitute a clear violation of the GATT 1994, but were sanctioning companies based on their actions. As the sanction is origin-neutral in law, the US could have tried to argue that it was not a violation. This distinction between *de jure* and *de facto* discrimination was however analysed in *Canada – Autos*, where it was ruled that Article 1 covers *de facto* discrimination.[90] As the act indirectly targeted nations that did business with Cuba, *de facto* discrimination would be present, and Article I would be violated.

Although Libya and Iran are not members of the WTO, if they were, the actions taken against them would have also violated the GATT 1994 because of their discriminatory nature. When looking at these sanctions it is important to note that the United Nations sanctions could have been justified under Article XXI:(c)[91] since they were put forward under the Chapter VII of the United Nations

[89] ibid 81.
[90] ibid 78.
[91] GATT 1994 (n 1) Article XXI(c).

Charter.[92] The non-UN sanctions, however, which played a vital role in bringing about change, would not have been.

As these numerous examples show, trade sanctions violate the GATT 1994. When faced with national security threats that do not amount to a breach "international peace and security",[93] such as the regional threats of Russia against Ukraine and Qatar against other gulf states, countries who choose to use economic diplomacy to deal with misbehaving WTO Members are faced with few options; they can either hope that their violations of the GATT 1994 can be justified by other means or open a proverbial can of worms and attempt to justify their acts under Article XXI:(b)(iii). Furthermore, as China and Russia, two states who have recently worked against international norms,[94] have veto power against any invocation of Chapter VII,[95] UN sanctions will not always be available thus removing the ability to use Article XXI:(c). As such, Article XXI needs to be clarified so countries can properly utilise trade sanctions to promote and reach national security objectives.

B. Competing Views of Article XXI

Article XXI:(b)(iii) needs to be clarified so that it can be properly invoked when WTO Members need to justify GATT 1994 violating trade sanctions they have enacted in the name of national security. As noted in the Decision Concerning Article XXI of The General Agreement, the contracting parties have not made a formal interpretation.[96] Looking to the history of Article XXI as analysed in Part III of this article, there are two main perspectives of Article XXI. The first, more popular perspective is the '*Ultra Vires Perspective*'. This perspective puts forward that the WTO does not have the jurisdiction to review the use of Article XXI. Also known as the self-judging perspective, the *Ultra Vires Perspective* states that each WTO Member is the sole judge of what actions are in their national security

[92] The UN Sanctions would have been justified because Chapter VII states that 'the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression' and can take action that 'may include complete or partial interruption of economic relations' in order to get them comply with the United Nations requests, and Article XXI:(c) states the GATT 1994 cannot "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".

[93] United Nations Charter (n 27) Chapter 29 Article 39.

[94] This is demonstrated by Russia's annexation of Crimea and China's island building in the South China Sea.

[95] This is because they are members of the United Nations Security Council.

[96] GATT, 'Decision Concerning Article XXI of The General Agreement' (1982) L/5426.

interest, essentially meaning that Article XXI can be used as a trump card to justify any GATT 1994 violation.

The *Ultra Vires Perspective* is first supported by interpreting Article XXI "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" as directed by Article 31 of the Vienna Convention on the Law of Treaties.[97] Although the purpose of the treaty is to promote trade, the purpose of the Article is to promote national security, and taken together, their purpose is to balance "national security and national sovereignty… and the need to promote commerce and to protect an open trading system."[98] With this object and purpose in mind, a plain reading of the text: "it considers… essential security interests",[99] supports the *Ultra Vires Perspective*. The phrase "it considers" suggests that only the invoking Member can judge what is in their national security interest, which supports the purpose of the act of calming any fears or doubts that the GATT 1994 would impact a Member's ability to defend its nation.

This reading of the text is supported by scholar Raj Bhala who notes that "the implication of the word 'it' indicates that no WTO Member, nor group of Members, and no WTO panel or other adjudicatory body, has any right to determine whether a measure taken by a sanctioning Member satisfies the requirements".[100] Furthermore, the lack of an Article XX *chapeau*,[101] which states that "such [Article XX] measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade"[102] further supports this reading of the text because its absence means that nations invoking the Article do not need to establish the absence of unjustifiable discrimination or a disguised appearance as they do when invoking Article XX.[103] In his piece "The Self-Judging WTO Security Exception",[104] Alford put forward why Article XXI

[97] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 31.

[98] Alexandroff and Sharma (n 50) 1572.

[99] GATT 1994 (n 1), Article XXI:(b).

[100] Raj Bhala, 'National Security and International Trade Law: What the GATT Says, and What The United States Does' (1998) 19 UPJIL 263, 268–269. See also: Raj Bhala, *International Trade Law: Interdisciplinary Theory and Practice* (4th edn, Carolina Academic Press 2015) 581.

[101] GATT 1994 (n 1), Article XX.

[102] ibid.

[103] See WTO, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos* (12 March 2001) WT/DS135/AB/R (EC – Asbestos).

[104] Roger P Alford, 'The Self-Judging WTO Security Exception' (2011) 3 ULR 697.

must be viewed as self-judging, noting that the lack of the *chapeau*[105] signifies an intention for the article to be self-judging.

The second reason why the *Ultra Vires Perspective* is supported is because the language used by nations invoking Article XXI. When Ghana invoked the Article in 1961, it noted that "each contracting party was the sole judge of what was necessary in its essential security interest".[106] Similarly, when the US invoked the Article in defence of the Helms-Burton Act, it noted that the WTO "lack[ed] competence to adjudicate a national security issue",[107] and more recently Bahrain noted that judging Article XXI did not fall under the competence of the WTO.[108] As three countries who have invoked the Article in different national security situations throughout the history of the WTO have come to the same conclusion on how Article XXI should be judged, these invocations suggest that WTO Members view Article XXI through the *Ultra Vires Perspective*.

Although the *Ultra Vires Perspective* is the leading view on Article XXI, there is support for the contrary '*Intra Vires Perspective*'. The *Intra Vires Perspective* puts forward the view that Article XXI is within the WTO's jurisdiction and as such the invocation of it can be reviewed by a panel. This view is split into two camps—the first camp argues that the WTO can only review if the Article was invoked in good faith, while the other argues that the WTO can review all elements of the invocation[109]—but both are part of the *Intra Vires Perspective*. This view is first supported by the language used by the drafters of Article XXI. During a session of the Committee for the United Nations Conference on Trade and Employment in 1947, specific language was chosen to ensure that the Article would not "permit anything under the sun",[110] suggesting that drafters wanted safeguards to prevent abuse, such as the ability for invocations to be reviewed.

This interpretation is also supported by the act of challenging violations of the GATT 1947 that have used Article XXI for justification. By requesting a panel to review impugned trade measures, states are essentially challenging a party's right to unilaterally justify GATT 1947 violations in the name of national security. Looking to the language used by challengers, this view is supported. When Nicaragua challenged the trade sanctions enacted against them by the US in 1985,

[105] ibid 705.
[106] Summary Record of The Twelfth Session (n 53) 196.
[107] Browne (n 68) 408.
[108] WTO Council for Trade in Goods (n 83).
[109] See Alford (n 104) 704.
[110] UN Preparatory Committee of the International Conference on Trade and Employment, 'Report of the 2nd Session of The Preparatory Committee of The United Nations Conference on Trade and Employment (24 July 1947) EPCT/A/PV/33, 20.

they noted that Article XXI could not be applied in an arbitrary fashion[111] and that since the matter at hand involved international trade the GATT 1947 "should express a view on this issue."[112]

Similarly, when the EU challenged the US' GATT 1994 violations stemming from the Helms-Burton Act, they viewed it as "an impermissible restriction on international trade",[113] demonstrating that Article XXI cannot be permissible at every invocation. Lastly, looking to the recent Qatari sanctions, in requesting a panel to investigate the trade sanctions put against them, "Qatar said [an Article XXI] defence could not be self-regulated as that would alter the balance of Members' rights under the WTO agreements."[114] These competing perspectives create difficulty when Article XXI is invoked as it leads to confusion on how they should be used. As such, Article XXI needs to be clarified.

C. The way forward

The *Ultra Vires Perspective* is flawed because having a pure self-judging view opens Article XXI up to abuse and devalues it when it is invoked for legitimate security reasons; as history has shown, the Article has been utilised in both legitimate and illegitimate contexts and as such needs to be clarified to the *Intra Vires Perspective* to ensure use for the former is protected while use for the latter is not. Looking to history, two main illegitimate uses of Article XXI come to mind. First is the US trade embargo against Nicaragua which was widely regarded as piece of economic coercion for political reasons, rather than defensive reasons. Stating that the sanctions were put forward "not a matter of national security but one of coercion",[115] Nicaragua pointed out the absurdity of the most powerful nation in the world being fearful of a small South American country and implied that the US simply trying to coerce Nicaragua away from its communist system of government. Another instance of an illegitimate use was the Helms-Burton Act. Although Cuba historically posed a national security threat to the US, notably during the Cuban Missile Crisis, when it invoked Article XXI in 1996 to justify trade sanctions this was no longer the case. Even though the US pointed to the downing of two search and rescue planes over Cuba as the reason for the act, in reality this was just used as a false pretence to enact the sanctions; the Helms-

[111] Minutes C/M/188 (n 61) 16.
[112] ibid.
[113] Browne (n 68) 407.
[114] WTO, 'Qatar Seeks WTO Panel Review of UAE Measures on Goods, Services, IP rights' (*WTO*, 23 October 2017) <https://www.wto.org/english/news_e/news17_e/dsb_23oct17_e.htm> accessed 4 September 2018.
[115] Minutes C/M/188 (n 61) 4.

Burton Act was simply a repeat of an earlier act that failed to pass congress in 1995 before the downing.[116]

Looking to history there are multiple examples of where Article XXI has been invoked or could have been invoked for legitimate national security purposes. One example is Nicaragua's invocation in 1999 in response to legitimate territorial threats put forward by Colombia and Honduras; the sanctioned nations' new treaty stated that parts of Nicaragua's maritime boundaries belonged to them, giving Nicaragua legitimate reason to utilise economic diplomacy to try to alter their actions. Although not invoked during the Libyan and Iranian sanctions as these states are not WTO Members, Article XXI could have been legitimately utilised to justify the trade sanctions the US put against them; both Libya and Iran were seeking nuclear weapons and the US had good reason to utilise economic diplomacy to prevent them from obtaining them.

As the current leading view of Article XXI allows states to justify these illegitimate sanctions, the *Intra Vires Perspective* should be adopted. This can be done several ways such as through bold jurisprudence in the upcoming Qatar panel[117] or through an amendment to Article XXI. This amendment would be instituted through the WTO amendment procedure put forward in Article X of the Marrakesh Agreement.[118] Every two years the WTO Ministerial Conference meets where any Member of the WTO may submit a proposal to amend the GATT 1994; for an amendment to be adopted a two-thirds majority of the Members are needed.[119] Yet, in practice this procedure is very difficult to complete.[120] Looking to the Doha Development Round, attempts to amend the GATT 1994 to lower tariffs have been unsuccessfully negotiated since 2001.[121]

Should an amendment successfully come to fruition, there are many options for how to change Article XXI. One idea would be adding an Article XX *chapeau* to Article XXI, which would ensure that measure neither led to arbitrary or unjustifiable discrimination, nor constituted a disguised restriction on international trade.[122] Another idea would be to add text to article XXI such as "All Article XXI

[116] Helms-Burton Act. The bill was introduced on 14 February 1995, and the Cuban plane crash occurred on 24 February 1996.

[117] *UAE – Trade* (n 82).

[118] Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154 (hereinafter, "the Marrakesh Agreement") Article X.

[119] ibid, Article X:1.

[120] See Macrory, Appleton, and Plummer (n 50) 85.

[121] WTO Ministerial Conference, 'Ministerial Declaration' (20 November 2001) WT/MIN(01)/DEC/1 (Ministerial Declaration).

[122] See *EC – Asbestos* (n 103). See also WTO, *European Communities – Measures Prohibiting The Importation and Marketing of Seal Products* (22 May 2014) WT/DS400/AB/R-WT/DS401/AB/R.

invocations are subject to review by the WTO. Article XXI invocations, however, are presumed to be legitimate and the onus is on the challenging Member to show otherwise." This text would essentially institute the *Intra Vires Perspective*, while also creating a significant safeguard for invokers and a barrier for challengers. A last idea would be to add a new section to Article XXI. Article XXI:(d) could state "to prevent any contracting party from enacting trade sanctions taken to deter territorial and cyber threats, the support of terrorism, and the development of weapons of mass destruction." This sort of language puts forward objective standards that the WTO can look to when judging an Article XXI invocation, while giving Member States significant leeway to violate the GATT 1994 through trade sanctions.

V. Conclusion

As demonstrated, trade sanctions work and as such the interpretation and use of Article XXI, "Security Exceptions", needs to be clarified so that WTO Members can properly use it to justify GATT 1994 violating trade sanctions made to support national security. By showing how trade sanctions can effectively shift a state's action without the use of violence through the examples of Libyan Terrorism and WMD Sanctions and the Iranian Nuclear Sanctions, this article showed that trade sanctions work. Drawing on the effectiveness of trade sanctions, this article argued that Article XXI needs to be clarified so that WTO Members can adequately use it to justify GATT 1994 violations made in the name of national security. By showing the opacity of Article XXI through historical examples of its invocation as well as the flaws of the leading *Ultra Vires Perspective*, this article has demonstrated that changes need to be made to Article XXI so that the better *Intra Vires Perspective* can be adopted.