

Economic Boycotts: The Interaction of National Security and International Economic Law

by

Bashar Malkawi*

*Professor of Business Law, College of Law, University of Sharjah

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I. INTRODUCTION

Free trade is a core component of the global governance architecture and recent decades have witnessed the legalization of international economic law.¹ Institutions that govern international economic relations today such as the World Trade Organization (WTO) grew out of an understanding that peace cannot flourish in a world with trade barriers.² Thousands of bilateral investment agreements and free trade agreements have been executed all intending to depoliticize economic relations and preclude discriminatory trade conduct. However, international economic law recognizes the right of states to invoke policies and trade barriers such as boycotts³ on the basis of national security.⁴ This inter-connection between trade and national security is not new.⁵

The underlying motivation of boycotts is national security. However, national security concepts have changed and consist of concerns like funding terrorism, developing and threatening nations with weapons of mass destructions, and cyber-security. In recent months, COVID-19 health crisis prompted countries, in the name of national security, to adopt restrictive measures to block exports of materials such as food and medical supplies.⁶ National security is not only military preparedness; but encompasses a wide range of important bulwarks in defense of the good of the nation such as peace, prosperity, stability and freedom.⁷ Thus, ironically, maintaining economic boycott may in fact harm the national security of all parties involved.

Given the sweeping regional and international changes and the importance of trade as a pillar of the global governance architecture, the timing of this issue is particularly germane. The interaction between national security and free trade has become an increasingly significant global

¹ Raj Bhala, *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part One of a Trilogy - Agricultural Tariffs and Subsidies*, 9 *University of Saint Thomas Law Journal* 5, 15-21 (2011).

² See Bashar H. Malkawi, *The WTO, Security and Peace: Are they Compatible, and if so, What is the Framework?* 8 *The Journal of World Investment and Trade* 303, 305 (2007).

³ See Julien Chaisse, *Demystifying Public Security Exception and Limitations on Capital Movement: Hard Law, Soft Law and Sovereign Investments in the EU Internal Market*, 37 *University of Pennsylvania Journal of International Law* 583, 599 (2015) (The GATS promotes market liberalization by imposing obligations upon the members, including the EU, while allowing the states to make exceptions, including the national security exception when there is a need for national protection)

⁴ See Raj Bahla, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 *University of Pennsylvania Journal of International Economic Law* 263, 182 (1998) (National security and international trade law are inextricably linked. By virtue of GATT Article XXI, the link is written into the constitution of modern international trade law)

⁵ National security and international trade law are closely linked, and this link has existed ever since the birth of modern international trade law in 1947. *Id.* at 265.

⁶ See Benjamin Laker, 3 *Sever Implications of Coronavirus on Global Trade*, *Forbes* (April 7, 2020), available at <<https://www.forbes.com/sites/benjaminlaker/2020/04/07/3-severe-implications-of-coronavirus-on-global-trade/#1d4bfa303d11>> (last visited July 3, 2020).

⁷ See Bashar H. Malkawi, *supra* note 2, at 315.

issue in our internationalized world since invoking the national security exception inherently involves both law and politics.⁸

The use of the national security exception must be evaluated on the bottom-line question of effectiveness.⁹ Continuing boycotts could undermine the WTO's commitment to free trade and prosperity which ultimately harms the boycotters and *their* national security.¹⁰ Furthermore, the boycott harms the greater global interest in international stability which is a major positive outcome of free trade.

II. HISTORICAL BACKGROUND OF GATT/WTO

Recognizing the devastation created by protectionist trade policies, the Allies held the Bretton Woods conference in 1944.¹¹ The Bretton Woods institutions initially envisioned to include the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), and the International Trade Organization (ITO). The ultimate goal for the Bretton Woods institutions was to abandon protectionist trade policies, rebuild the deteriorating world economy, and regulate the economic relationship especially among major economic powers at that time.¹²

In October 1945, the United Nations (U.N.) was established.¹³ The Bretton Woods institutions are part of the U.N system. In 1947, representatives of fifty-seven countries met in Havana, Cuba to negotiate the Havana Charter which was intended to create the ITO.¹⁴ The Havana Charter would have complemented the roadmap of the international economic order.¹⁵

⁸ See Tsai-fang Chen, *To Judge the "Self-Judging" Security Exception under the GATT 1994—A Systematic Approach*, 12.2 Asian Journal of WTO & International Health Law and Policy, 311, 315 (2017).

⁹ See Raj Bahla, *supra* note 4, at 279.

¹⁰ See Bashar H. Malkawi, *supra* note 2, at 325.

¹¹ On July 1-22, 1944, the Bretton Woods Conference was held in the resort town of Bretton Woods, New Hampshire. Some 700 delegates from 44 states participated in the Conference. The participants held a preparatory process for the Bretton Woods Conference in U.S. in cities such as Atlantic City, New Jersey. See Raymond F. Mikesell, *The Bretton Woods Debates: A Memoir* 30 (Princeton U. 1994).

¹² Harry D. White, a leading U.S. economist of that era, envisioned the IMF as an institution designed chiefly to prevent the disruption of foreign exchange, strengthen monetary and credit systems, and help in the restoration of foreign trade, whereas the World Bank was designed chiefly to supply huge volume of capital to the United Nations and associated nations needed for reconstruction, relief, and economic recovery. *Id.* at 30.

¹³ The charter of the U.N determined, among other goals, the establishment of international relations based on principles of equality among nations and cooperation to resolve the economic and social problems. Moreover, the charter established the Economic and Social Council. The purpose of the Economic and Social Council is to achieve prosperity, stability, and justice. See U.N Charter arts. 1, para. 3, art. 2, para. 1, 55, 60. The first meeting of the Economic and Social Council of the U.N was in 1946. The meeting called for an international conference on trade and employment, establishment of preparatory committee for a convention on promoting free trade, and the establishment of the ITO. See U. N. ESCOR, 1st Sess., Plenary Meeting, U.N. Doc. E/22 (1946).

¹⁴ The process of drafting a charter for the ITO passed through four stages: 1) the original American draft of Sept. 1946, 2) draft charter revised at the London meeting of the preparatory committee of the international conference for trade and employment between Oct.-Nov. 1946 (the London Draft), 3) further revised draft in Geneva in Apr.-Aug. 1947 (the Geneva Draft), and 4) the charter revised in Havana in Nov. 1947-Mar. 1948 (the Havana Charter). See Jonathan Reuvid, *A Handbook of World Trade: A Strategic Guide to Trading Internationally* 5 (Kogan Page 2001).

¹⁵ See U.S. Dept. State, *Havana Charter for an International Trade Organization* arts. 73 & 74 (Off. Pub. Affairs 1948). The Havana Charter provided commitments on Tariffs, Preferences, Internal Taxation and Regulation (arts. 16-19), Quantitative Restrictions and Related Exchange Matters (arts. 20-24), Subsidies (arts. 25-28), State Trading and Related Matters (arts. 29-32), General Commercial Provisions on Freedom of Transit, Anti-Dumping and

However, the U.S. Congress never ratified the Havana Charter.¹⁶ The ITO was pronounced dead in 1951.

In 1947, the General Agreement on Tariffs and Trade (GATT) was concluded in Geneva as an interim agreement until the creation of the ITO.¹⁷ Many provisions of the Havana Charter 1948 and GATT 1947 duplicated each other, though the Charter was more comprehensive. Since the ITO never came into existence from its inception, the GATT had to operate as an agreement and as a *de facto* organization for decades. GATT 1947 was negotiated by twenty three countries. As an agreement, it never itself came into force. GATT was always applied provisionally through the Protocol of Provisional Application.¹⁸ GATT 1947 was a code under which countries conducted their mutual commercial relations. The purpose of the GATT was to establish an open system of world trade between the contracting parties.

The non-discriminatory provisions of article I (Most-Favored-Nation Treatment) and article III (National Treatment on Internal Taxation and Regulation), article II (Schedule of Concessions), and article XI (General Elimination of Quantitative Restrictions) in GATT 1947

Countervailing Duties (arts. 33-39), Special Provisions for Free Trade Areas and Customs Unions and Consultation (arts. 40-45), Restrictive Business Practices (arts. 46-54), and Inter-Governmental Commodity Agreements (arts. 55-70).

¹⁶ The U.S. President submitted the ITO draft charter to Congress in 1948 but it did not move beyond a vote in the Senate. In 1951, the President announced that he would no longer seek approval. The death of the ITO was attributed to the domestic political situation in the U.S. The Truman administration confronted a new protectionist and isolationist Republican Congress. The U.S. refused to join the ITO because of perceived threats to national sovereignty and the danger of too much ITO intervention in markets. Congress feared that the ITO would be too much supranational. It was feared that there would be double delegation of power from Congress to the U.S. President and from the President to an international organization, thereby usurping the functions of Congress. In other words, an international organization would establish a World Government. Also, the U.S. Congressional support for the ITO was conditioned on dismantling of the British Imperial Preference system (Commonwealth system) devised at the Ottawa Conference in 1932; a system which was enacted partly in response to the U.S. Smoot-Hawley Act, because, as the U.S. contended, it contravened the most-favored-nation rule. Because of the British Commonwealth system, U.S. economic interests were excluded from the British market and its satellite countries or dominions, such as South Africa, Canada, and India. The British refused to yield their position unless they received assurances from Congress to lower American tariffs. However, the U.S. administration did not lower its tariffs and stood for its pledge to Congress by dismantling the British Commonwealth system [despite an earlier agreement between the U.S. and Britain, the Lend-Lease Agreement in Mar. 1941, which mandated dismantling trade barriers]. The linkage between the most-favored-nation rule and the Commonwealth system was a factor for loss of support for the ITO. Moreover, the U.S. constitution authorizes congress to regulate commerce with foreign nations. See U.S. Const. art.1, § 2. Therefore, the U.S. Congress considered the Executive had exceeded its mandate under the constitution. In the 1950s, there had been an agreement for the establishment of the Organization for Trade Co-operation (OTC) that would take over the GATT and police world trade. See George Bronz, *An International Trade Organization: The Second Attempt*, 69 Harvard Law Review 440, 447-449, 473-476 (1956). President Eisenhower asked Congress to allow the U.S. to become a member of the OTC. However, again, there was difficulty shepherding the OTC bill through Congress.

¹⁷ See General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. pts. 5,6, T.I.A.S. No. 1700, 55 U.N.T.S. 187. The GATT has no formal relationship to the U.N. The GATT is not a U.N agency. However, GATT maintains close relation with the U.N. For example, the Geneva-based International Trade Center is run jointly by GATT and UNCTAD.

¹⁸ In order to enter into force, article XXVI.6 of GATT 1947 requires governments with a minimum share of world trade to deposit their instruments of acceptance. However, only a few countries did so. Therefore, the GATT was applied through the Protocol of Provisional Application. See Protocol of Provisional Application to the General Agreement on Tariffs and Trade, signed Oct. 30, 1947, 61 Stat. A2051, 55 U.N.T.S. 308.

are the "key" provisions which express its basic structure.¹⁹ GATT 1947 included articles that support and extend articles I and III.²⁰ GATT 1947 includes other articles that qualify articles I and III.²¹ There are other articles concerned with special cases.²² GATT 1947 includes procedural articles that govern the application of the GATT.²³

The GATT 1947 was the beginning of a series of negotiations that ended up with the establishment of the WTO in 1994. Countries held eight rounds of negotiations which led ultimately to the birth of the WTO fifty years later with the successful conclusion of the Uruguay Round negotiations.²⁴

The WTO brought with it legalization of world trade politics after the GATT was considered a geopolitical document created to contain the spread of non-market ideology to other countries. In addition to all areas covered in the negotiations, the WTO institution was established. The functions of the WTO, as set out in Article III of the WTO Charter, are to provide the framework for the implementation of all the agreements that had been or might be negotiated. In addition,

¹⁹ Article I of GATT requires each contracting party to extend, immediately and unconditionally, any advantage, favor, privilege, and immunity given to a product of a contracting party to the "like product" of all other contracting parties. The GATT includes seventeen provisions using the words like product, like commodity, and like merchandise. Decisions on what constitutes like product are made on a case-by-case basis after applying a variety of criteria that GATT panels have found to be relevant, including product characteristics, consumer tastes and habits, and product end-uses in a particular market. In general, like product has a broader interpretation when it is used in GATT 1947 basic obligations, such as the MFN treatment, and a narrower interpretation in GATT 1947 exceptions, such as article VI regarding anti-dumping and countervailing duties. See Rex J. Zedalis, *A Theory of the GATT "Like Product" Common Language Cases*, 27 *Vanderbilt Journal of Transnational Law* 33, 45-51, 78-83 (1994). Article II requires each contracting party to apply to products of other contracting parties tariff concessions stated in its schedule. Tariffs concessions could be easily nullified if a contracting party was allowed to impose internal taxes, regulations, or laws on imported products different from those imposed on domestic products once imported products pass the borders of the importing country. Article III protects the "competitive opportunities" enjoyed by imports vis-à-vis like domestic products in the importing country. For illustrative cases under article III of GATT 1947 see Kevin C. Kennedy, *The GATT-WTO System at Fifty*, 16 *Wisconsin International Law Journal* 421, 432, 433 (1998). Article XI of GATT 1947 provides for tariffication of non-tariff trade barriers, except under specific conditions.

²⁰ Articles IV (Special Provisions Relating to Cinematograph Films), V (Freedom of Transit), VIII (Fees and Formalities Connected with Importation and Exportation), XIII (Non-Discriminatory Administration of Quantitative Restrictions), and XVII (State Trading Enterprises) support the non-discriminatory provisions of GATT 1947.

²¹ Articles VI (Anti-Dumping and Countervailing Duties), XII (Restrictions to Safeguard the Balance of Payments), XVIII (Government Assistance to Economic Development), XIX (Emergency Action on Imports of Particular products), XX (General Exceptions), XXI (Security Exceptions), XXIV (Customs Unions and Free-Trade Areas), and XXVIII (Modification of Schedules) qualify the operation of the non-discriminatory provisions of GATT 1947.

²² Articles VII (Valuation for Customs Purposes), IX (Marks of Origin), X (Publication and Administration of Trade Regulations), XXIII (Nullification or Impairment), and part IV (Trade and Development) address special circumstances. Part IV of GATT 1947 was added in the Kennedy Round to meet the interests of developing countries. See Raj Bhala, *International Trade Law: Cases and Materials* 104 (1996).

²³ Articles XXV (Joint Action by the Contracting Parties), XXVI (Acceptance, Entry into Force and Registration), XXX (Amendments), XXXI (Withdrawal), XXXIII (Accession), and XXXV (Non-Application of the Agreement between Particular Contracting Parties) govern procedural matters in GATT 1947.

²⁴ For a list highlighting the eight rounds of negotiations see Table 1 in appendix 1, page 332. For more on the Doha Development Agenda see *Doha and Beyond: The Future of the Multilateral Trading System* 68, 115 (Mike Moore ed., Cambridge U. Press 2004) (the study, conducted by the WTO Advisory group set up by former WTO Director General Mike Moore, addresses the challenges facing the WTO and the development dimension of the multilateral trading system).

the WTO provides the forum for future trade negotiations, administers the dispute settlement system, and conducts trade policy review mechanism for its members.²⁵ The function of the WTO as a forum for future trade negotiations allows for further evolution of the international trading system to include new multilateral agreements between its members.

The Uruguay Round results both clarified and extended existing GATT obligations in virtually every facet.²⁶ Many of the WTO Agreements establish specific treatment for developing and least developing countries. Special treatment for developing and least developing countries takes the form of a prolonged transitional period accompanied with lesser obligations normally imposed on countries participating in these agreements.²⁷

III. REASONS TO RESCIND ECONOMIC BOYCOTTS

A. The Benefits of Stopping Boycotts

International economic law is based upon economic benefits accruing to trading partners.²⁸ International economic law also focuses on the promise of ensuring the best value for the world's citizens. The notion of efficient and productive market forces is central to the international trade architecture.²⁹ Therefore, measures undertaken to undercut trade such as boycotts inherently conflict with efficient and productive markets. In addition, principles of non-discrimination and transparency are vested into international agreements and form central norms of international law.³⁰ The boycott is incongruent with these principles.

²⁵ The covered agreements of the Final Act of the Uruguay Round include, in addition to the WTO Charter, the Multilateral Trade Agreements. The Multilateral Trade Agreements are: the GATT 1994, which includes, with certain exceptions, GATT 1947, its subsequent agreements and many of its decisions and waivers, GATS Agreement, TRIPs Agreement, Dispute Settlement Understanding, and Trade Policy Review Mechanism (hereinafter the Multilateral Agreements). See *Marrakesh Agreement Establishing the World Trade Organization*, ann. 1A, 1B, 1C, 2 & 3 (Apr. 14, 1994), 1867 U.N.T.S. 3. Countries in the Uruguay Round concluded Plurilateral Trade Agreements. These were: Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement (hereinafter Plurilateral Trade Agreements). *Id.* ann. 4. The Plurilateral Trade Agreements create neither rights nor obligations for those countries who have not accepted them.

²⁶ GATT 1994, which incorporates GATT 1947, excludes the Protocol of Provisional Application, which limited GATT's application in national law. *Id.* Final Act 1125, at 1154.

²⁷ For example, under the Agreement on Subsidies and Countervailing Measures (SCM), export subsidy prohibition, as mentioned in article 3.1.a. of the Agreement, does not apply to least developing countries designated by the U.N. as such and some developing countries having GNP per capita less than one thousand dollar annually such as Bolivia, Egypt, and Morocco at the time the WTO came into effect. According to article 27.4, other developing countries have to phase out their export subsidies progressively within eight years from the date the WTO enters into force upon fulfilling certain conditions.

²⁸ See Bernard Hoekman, Aaditya Matto, and Philip English, *Development, Trade, and the WTO* 11-16 (2002).

²⁹ See Jagdish Bhagwati, *Political Economy and International Economics* 3-34 (Douglas A. Irwin ed., 1991). See also Ramesh Adhikari and Prema-Chandra Athukorala, *Developing Countries in the World trading System: The Uruguay Round and Beyond* 185-190 (2002).

³⁰ See Yehuda Z. Blum, *Economic Boycotts in International Law in Will "Justice" Bring Peace?* 182-184 (2016).

Free and efficient markets combined with the ability of talented individuals to work and trade without restrictions is the hallmark of the U.S. economy.³¹ One of the proximate causes of the unrivalled economic strength enjoyed by the U.S. is the mantra of open markets and employers' acceptance of the best employees no matter what their religious, ethnic or racial affiliation. Cross-cultural diversity brings substantial benefits and greatly enhances U.S. businesses and wealth creation.

Economic boycotts – which by definition are the antithesis of diversity – are harmful to the economic development and diversification of all countries involved.³² In line with the failure of boycotts to achieve the goal of economic isolation, rescinding economic boycotts may in fact bring great benefit by injecting new thinking, capital, technology transfer and employing talented individuals.

Enhanced trade brings substantial benefits. A positive correlation exists between trade and foreign direct investment (FDI) which benefits developing nations. Trade is an important catalyst of economic growth. Trade promotes more efficient and effective production of goods and services and higher standards of living.³³ For instance, free trade leads to greater national wealth and was a key factor fueling China's meteoric rise.³⁴ Accordingly, the boycotters own economic performance and thus the prosperity of their citizenry may be adversely impacted by restricting trade. In contrast, embracing free trade and rescinding boycotts does bring real economic benefits to all states involved.

B. Economic boycotts in the Context of International Economic Law

Boycotts are the most malicious trade barriers damaging efficient trade. Economic boycotts are the antithesis the objectives of GATT – the promotion of cooperative and peaceful relationships. Peace and prosperity through trade was the basic objective of the GATT.³⁵ Countries must build a world in which they use cooperation to pursue their mutual interests. Countries should recognize that they do better as trade partners, not rivals, which would create both peace and prosperity.

The issue economic boycotts have been intertwined with the GATT/WTO since its inception. The national security exception is found in the WTO agreements which preclude

³¹ See Harry N. Scheiber, *Regulation, Property Rights, and Definition of "The Market": Law and the American Economy*, 41.1 *The Journal of Economic History* 103, 105(1981). See also Thomas W. Zeiler, *Free Trade, Free World: The Advent of GATT* 3-5 (1999).

³² See Kilian Heilmann, *The Effectiveness of International Trade Boycotts* 34-35 (2014), available at < <https://econweb.ucsd.edu/~kheilman/pdfs/boycott062014.pdf> > (last visited July 2, 2020).

³³ See Preamble of General Agreement on Tariffs and Trade, pmbl., Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

³⁴ See Joel Slawotsky, *The Clash of Architects: Impending Developments and Transformations in International Law*, 3 *Chinese Journal of Global Governance* 104-107 (2017).

³⁵ See Julien Chaisse, *Assessing the relevance of multilateral trade law to sovereign investments: Sovereign Wealth Funds as "investors" under the General Agreement on Trade in Services*, 2015 *International Review of Law* 1, 8 (2015).

nations from taking actions counter to free and open trade unless the conduct's motivation is to protect national security interests.

[n]othing 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 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.³⁶

This inherent sovereign right to impose economic measures such as bans to protect national security is the *raison d'être* of the boycott. However, what is "national security" and is it applicable in this context?

National security is the idea that a state must keep its property safe in order to protect its citizens. This is a concept that a government, along with its law-making bodies (e.g., parliament(s)), should protect the state and its citizens against all kinds of 'national' crises through a variety of power projections. Projections of power may manifest itself in such ways as political power, diplomacy, economic power, military might, and so on.³⁷

The national security exception in WTO law and jurisprudence has rarely been invoked or interpreted. The meaning of national security remains unclear.³⁸ The invocation of the national security exception is the subject of broad questioning particularly the subjective self-judging aspect of it,³⁹ but also to the substantive extent and contours of the exception as well.⁴⁰ Since the

³⁶ See World Trade Organization, GATT Analytical Index, Article XXI "Security Exceptions", p. 600 available at <http://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf> (last visited Jan. 6, 2018).

³⁷ See Julien Chaisse, *Demystifying Public Security Exception and Limitations on Capital Movement: Hard Law, Soft Law and Sovereign Investments in the EU Internal Market*, 37 U. PA. J. INT'L L. 583, 596 (2015).

³⁸ Article XXI of the GATT has rarely been invoked in practice, and no GATT or WTO panel has exercised a meaningful standard of review in a litigation concerning this article. See Sophocles Kithardis, *The unknown territories of the national security exception: The importance and interpretation of art XXI of the GATT*, 21 Australian International Law Journal, 79, 83 (2014).

³⁹ In the international context this is described as the doctrine of self-judging: whether factual circumstances satisfy the requirements of the security exception is left to the sound discretion of the Member State invoking the exception. See Stephan Schill and Robyn Briese, *If the State Considers': Self-Judging Clauses in International Dispute Settlement*, 13.1 Max Planck Yearbook of United Nations Law 61, 64-65 (2009). See also Peter Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?* 52 Duke Law Journal 1277, 1282 (2003).

⁴⁰ See Julien Chaisse, *supra* note 37, at 601 ([T]he WTO has not clarified the scope of the national security exception. [And], there is inadequate case law to illustrate the correct use of the exception, to what extent, and to which service sectors the exception is applicable).

national security provision is exceptional inasmuch as the invocation is subjective and amorphous,⁴¹ some have noted that the exception could be subject to abuse.⁴²

The national security exception needs to be revised to reflect a globalized world.⁴³ The national security exception should be subject to certain norms such as reasonableness.

At the same time, however, implicit in clauses (i), (ii), and (iii), and in the words "necessary," "protection," and "essential security interests," *must be the concept of a credible threat from these dangers*. Simply "crying wolf" will not do, because Article XXI could not have been designed to protect a hyper-sensitive government any more than many standards of care in tort law do not protect the hyper-sensitive plaintiff. Rather, the test should be an objective one, namely, whether a "reasonable" government faced with the same circumstances would invoke Article XXI. *In sum, it is the implicit concept of a credible threat judged from the objective standpoint of a reasonable, similarly-situated government, coupled with the articulation of specific types of dangers that track one or more of the three clauses*, and not []'s unduly restrictive self-defense argument, that can be a restraint on "cowboy behavior."⁴⁴

Drawing on investment treaty law, one could comparatively note that arbitration tribunals have consistently interpreted national security concepts such as "exigent circumstances" or "national emergency" as enabling a host state to override a treaty guarantee *only if an security essential interest was in severe danger and the state's action was vital to defending the interest*.⁴⁵

It also seems reasonable to require in evaluating boycotts the concept of "good faith":

that the principle of good faith under Article 31 of the Vienna Convention on the Law of Treaties, a customary international law often read in line with the WTO Agreements, is an appropriate standard applicable to Security Exceptions as well.⁴⁶

Indeed, good faith has been suggested as an important factor in determining whether national security is a reasonable cause for a boycott.⁴⁷ Furthermore, the good faith argument is embodied in the international law concept of *abus de droit*.⁴⁸

⁴¹ Most authors agree that the phrase 'essential security interest' creates a degree of uncertainty regarding reliance on the exception. The causes of the uncertainty are that the WTO has not provided any clear definition in clarifying the scope of the term "essential security" and also because different states hold different notions regarding the phrase. *Id.*

⁴² See Locknie Hsu, *A Decade of Security-Related Developments*, 11 *Journal of World Investment and Trade* 697, 721 (2010).

⁴³ Security exceptions have been one of the core elements of international trade law since the genesis of the GATT, but without much needed modification addressing changed economic and political circumstances. See Ji Yeong Yoo and Dukgeun Ahn, *Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?* 19 *Journal of International Economic Law*, 417, 434 (2016).

⁴⁴ See Raj Bahla, *supra* note 4, at 275.

⁴⁵ See Joel Slawotsky, *supra* note 34, at 1081-110.

⁴⁶ See Ji Yeong Yoo and Dukgeun Ahn, *supra* note 43, at 435.

⁴⁷ See Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 *American Journal of International Law* 424, 447-448 (1999). See

Accordingly, in evaluating a draconian restriction such as a boycott, the key is balancing the legitimate need of defending national security with the global interest in encouraging free trade and preventing the harassment of another nation. This would militate in favor of evaluating boycotts from the perspective of whether the need is compelling -a good faith objectively- and whether the conduct is reasonable in proportion to the threat to national security.

Several precedents relating to trade boycotts exist.⁴⁹ The most notable trade boycotts include for instance the Falklands conflict between Argentina and the United Kingdom. The European Economic Community (EEC) imposed trade sanctions on Argentina.⁵⁰ The matter was brought before the GATT Council- not a GATT dispute panel- which was unable to make a decision on the merits of the trade sanctions.

In another instance, in the U.S.- Nicaragua case, the GATT panel decided that trade boycotts ran counter to basic aims of the GATT, namely to foster non- discriminatory and open trade policies, to further the development of the less developed contracting parties, and to reduce uncertainty in trade relations.⁵¹ There must a balancing act between the security interests of countries and the wider goal of open trade.

In another instance, the U.S. enacted the Helms-Burton Act which prohibited the importation of Cuban goods into the U.S.⁵² Section 110.a of Helms-Burton Act prohibits the entry into the U.S., not only of Cuban sugar or rum, but also goods of other countries which are made in part of Cuban sugar or rum.⁵³ The EC filed a complaint with the WTO challenging the secondary boycott provisions of Helms-Burton Act. The U.S. maintained that the boycott passed

also Dapo Akande and Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?* 43 *Vanderbilt Journal of International Law* 365, 390–91 (2003) (suggesting an interpretation of Article XXI that incorporates the principle of *abus de droit* under DSU art. 3.2).

⁴⁸ The *abus de droit* concept “refers to a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State. See Marion Panizzon, *Good Faith Interpretation and Fair Dispute Settlement: The Protection of Legitimate Expectations*, *Good Faith Interpretation* 33-34 (2006).

⁴⁹ In 1961, Ghana justified its boycott of Portuguese goods on the basis of the provisions of Article XXI, noting that each contracting party was the sole judge of what was necessary in its essential security interests and, accordingly, there could be no objection to the boycott. In 1975, to justify a global import quota system it had introduced for certain footwear, Sweden stated that this measure was in conformity with the spirit of Article XXI - that a decrease in domestic production of footwear had allegedly become a critical threat to the emergency planning of its economic defense, which was an integral part of the country's security policy. See *Multilateral Trade Negotiations, Negotiating Group on GATT Articles, Article XXI, MTN.GNG/NG7/W16, 5-8* (Aug. 18, 1987), available at <<https://docs.wto.org/gattdocs/q/UR/GNGNG07/W16.PDF>> (last visited June 9, 2020).

⁵⁰ See Roberts E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* 502-504 (1993).

⁵¹ The U.S. argued successfully that the terms of reference of the GATT Panel that examined the dispute precluded it from examining the validity of the U.S. invocation of Article XXI. See Panel Report, *United States - Trade Measures Affecting Nicaragua*, 5.1–5.17, L/6053 (Oct. 13, 1986).

⁵² The Cuban Liberty and Democratic Solidarity (Liberated Act of 1996, Pub.L. 104-114, 110 Stat.785, 22 U.S.C. 6021-6091.

⁵³ See John A. Spanogle, Jr., *Can Helms-Burton be Challenged under WTO?* 27 *Stetson Law Review* 1313, 1320, 1323 (1998).

on national security grounds.⁵⁴ After trade skirmishes between the U.S. and the EC, the matter was settled before the first submissions were due with the panel.⁵⁵ It seems that the U.S. and EC were not keen to deal with the boycott as a WTO issue.

While economic boycotts may at one time have served a perceived national security goal, there is no longer such a need – let alone a compelling one. At a minimum, boycotters should examine whether the motivation of national security is relevant in 2020 to protect their national security. Further, inasmuch as international economic law does not view "trade itself" as the sole benefit of free trade but rather views the beneficial effects of trade on employment and income as proximate causes of stability and peace, economic boycotts constitute a contravention of these core principles.

C. Promotion of Stability and Global Peace and Security

Separate from wealth creation, free trade brings the significant benefits of regional peace and stability.⁵⁶ Peace is the dividend that develops when free trade reins⁵⁷ because free trade makes nations busy, more prosperous with financial interests at risk should conflict arises.

The importance of trade in promoting peace is well-recognized and therefore actions which counter trading are prohibited. Trade regulation is an important component of foreign policy. Peace and security was absolutely central at the time that the General Agreement on Tariffs and Trade (GATT) was founded. It was not a peripheral issue at all.⁵⁸ The compelling benefit of the

⁵⁴ The U.S. Government's right to make decisions about our own foreign policy and our national security is absolute and cannot be abrogated or interfered with by any foreign entity...He [EC] who lives in a glass house should not throw stones [at the U.S.]". *Interfering with U.S. National Security Interests: The World Trade Organization and The European Union Challenge to the Helms-Burton Law*: Hearing before the House Subcomm. on International Economic Policy and Trade of the Comm. on International Relations, 105th Cong. 1st Sess. 2-3 (1997) (statement of Ileana Ros-Lehtinen, Chair, Subcomm. on International Economic Policy and Trade).

⁵⁵ See WTO, United States — The Cuban Liberty and Democratic Solidarity Act, Lapse of the Authority for Establishment of the Panel, WTO Doc. DS38 (Apr. 22, 1998).

⁵⁶ See Solomon Polachek and Carlos Seiglie, Trade, Peace and Democracy: An Analysis of Dyadic Dispute 1017, 1025-1028 in Todd Sandler and Keith Hartley (eds), *Handbook of Defence Economics*, Volume 2, (2007). See also Enrico Spolaore and Romain Wacziarg, War and Relatedness, National Bureau of Economic Research Working Paper No.15095, 4-5 (June 2009).

⁵⁷ See Timothy Hotze, *Laboring for Peace and Development: Evaluating the United States-Jordan Free Trade Agreement's Effects*, College of Liberal Arts & Social Sciences Theses and Dissertations, DePaul University 34-38 (2017). See also Daniel Griswold, *Trade, Democracy and Peace, The Virtuous Cycle* (April 20, 2007), available at < <https://www.cato.org/publications/speeches/trade-democracy-peace-virtuous-cycle> > (last visited May. 10, 2020). See also Craig VanGrasstek, The History and Future of the World Trade Organization 7-8, 42 (2013), available at < https://www.wto.org/english/res_e/booksp_e/historywto_e.pdf > (last visited July 2, 2020).

⁵⁸ See Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 Mich. J. Int'l L. 558, 581 (1991). See also Peter M. Gerhart, *The World Trade Organization and Participatory Democracy: The Historical Evidence*, 37.4 Vand. J. Transnat'l L. 897, 908-910, 926 (2004). See also Bruce W. Jentleson, Economic Sanctions and Post-cold war Conflicts: Challenges for Theory and Practice, 123-126 in National Research Council, *International Conflict Resolution after the Cold War* (2000).

promotion of nonbelligerent interactions among trading partners constitutes a primary motivation of the WTO.⁵⁹

The WTO also has other purposes that are directly frustrated by the use of boycotts as instruments of foreign relations. Free trade has always been understood to be an important method of discouraging war and promoting more amicable relations among nations. John Stuart Mill argued that "the economical advantages of [international] commerce are surpassed in importance" by its effects on international political relations. According to Mill, trade is "the principal guarantee of the peace in the world." Leading contemporary scholars echo this view. Indeed, fostering the conditions for international peace was as much in the minds of GATT's architects as was reaping the benefits of comparative advantage.⁶⁰

A growing literature has confirmed the positive correlations between free trade and the advancement of stability in international relations.⁶¹ Rescinding economic boycotts would allow for an exchange of goods and services. Without the opportunities to interact, people do not get to know neighbors and remain ensconced in a perception that may not reflect reality. Ironically, therefore, upholding economic boycotts impede full and peaceful relations and in fact run counter to the boycotting nations' own national security.

CONCLUSIONS

Countries should examine whether in 2020 national security is a reasonable excuse to restrict free trade with other countries, and furthermore, whether – assuming *arguendo* a good faith bona fide threat exists – whether the boycott even constitutes an effective tool to advance national security. Countries should also evaluate whether the primary boycott is reasonable and effective or whether the boycott is in fact contrary to their own national security interests (and the greater global interest) in promoting free trade. International trade law has always been about economic development – but also in the context of building a better world. Nations must build a world in which they use cooperation to pursue their mutual interests which would create both peace and prosperity - recognizing that they do better as trade partners, not rivals.

While the establishment of economic boycotts many decades ago may have served a perceived national security goal, there are doubts for such a need during these times. There are no military confrontations worldwide. To the contrary, there is a somewhat collaborative

⁵⁹ See Jim Chen, *Pax Mercatoria: Globalization as a Second Chance at 'Peace in Our Time*, 24 Fordham International Law Journal 217, 225 (2000) (WTO was consciously designed to keep the peace and remain[s] quite effective in this role).

⁶⁰ See Eugene Kontorovich, *The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions*, 4 Chicago Journal of International Law, 283, 300 (2003).

⁶¹ Trade agreements can strengthen inter-state relations and a large literature in political science has worked on international trade's role in promoting peace and interstate cooperation. See Gonzalo Villalta Puig and Vinci Chan, *Free Trade as a Force of Political Stability? The Case of Mainland China and Hong Kong*, 49.3 The International Lawyer 299, 332 (2016). See also Patrick J. McDonald, *Peace through Trade or Free Trade?* 48.4 The Journal of Conflict Resolution 547, 458 (2004). See also Edwin van de Haar, *The Liberal Divide over Trade, Peace and War*, International Relations 24 132, 135, 144 (2010).

relationship including trade, tourism, joint military training and budding diplomatic coordination, among countries. Therefore, with minor exceptions, economic boycotts cannot be justified on national security grounds.

Economic boycotts have never been adjudicated under the WTO. Both sides of the spectrum have their legal arguments that they can use to justify boycott or to invalidate it. WTO jurisprudence does not help advance the argument of either party. The few available GATT precedents are incomplete precedents in this regard provide no details as to the meaning of the words used and conditions associated with GATT article XXI. Additionally, it would be a worrisome precedent if the WTO, a trade institution, addressed sensitive issues with political ramifications.

Countries do not benefit from a stagnant economic relationship. The alternative to formally rescinding any boycott is for parties to adopt a pragmatic and business like approach. Parties would continue their relationships on an informal basis and conduct business through third parties. Businesses will continue to transact deals regardless of the political climate in the region, and help industries countries complement each other albeit secretly or some other indirect ways. There will be progress but following this path is a long journey and substantially limits the potential economic gains and peace dividends that formally rescinding the boycott would produce. Ultimately, however, the boycott will end. This development will ultimately lead to tourism, economic development, and educational and technological cooperation. Irrespective of whether an informal relation is maintained or whether the process is expedited through ending economic boycotts, this inextricable destiny will happen.