Justifying Trade Sanctions: Exceptions and Defenses Under WTO Law

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This Article explores the defenses available to States for justifying unilateral economic sanctions that appear *prima facie* inconsistent with World Trade Organization (WTO) rules. It focuses on two key types of sanctions: those imposed in the context of armed conflicts and those aimed at inducing compliance with non-WTO international obligations. This Article first examines whether such sanctions can be justified under the WTO's general and security exceptions. Contrary to the prevailing assumption that these sanctions can be straightforwardly accommodated within these exceptions, this Article argues that their justification is considerably more complex and nuanced. While some sanctions may clearly fall within these exceptions, others require significant legal creativity to fit within their scope. In view of this, this Article investigates whether the defense of countermeasures under the general international law of State responsibility can be invoked by respondents in WTO disputes. It argues that this defense is residually available under WTO law and can be employed to justify trade sanctions adopted as a means of implementing the target State's international responsibility.

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Introduction

This Article discusses the legality of unilateral[1] economic sanctions under WTO law. Although not a term of art, some scholars broadly define economic sanctions as restrictive measures of commercial or financial character, aiming to harm the economic interests of another State or key persons, with a view to achieve specific foreign policy objectives.[2] Throughout their long history, economic sanctions, or the threat thereof, have emerged as a core foreign policy tool. They have gradually transformed from exclusively a wartime practice to a versatile institution[3] used not only as a weapon of war, but also

1. Sanctions adopted by States without the involvement of the U.N. Security Council, either individually or jointly with other States. These are also sometimes described as "autonomous," *see* Matthew Happold, *Economic Sanctions and International Law: An Introduction*, *in* Economic Sanctions and International Law 1,1 (Matthew Happold & Paul Eden eds., 2016).

2. Andreas Lowenfeld, International Economic Law 850 (2d ed. 2008). Note, however, earlier objections to the use of the term "sanctions" to characterize unilateral restrictions and the proposal to reserve its use solely for measures imposed by a competent international organ (i.e., the United Nations Security Council) in Linos-Alexandre Sicilianos, *Sanctions Institutionnelles et Contre-Mesures : Tendances Recentes*, *in* Les sanctions économiques en droit international 3, 4-5, 96 (Laura Picchio Forlati & Linos-Alexander Sicilianos eds., 2004).

3. Nicholas Mulder, The Economic Weapon: The Rise of Sanctions as a Tool of Modern War 3 (2022).

as a prophylactic against war, a response to crises or illegality, and a tool to exert pressure towards a change in policy or activity. Although the efficacy of economic sanctions is far from uncontroversial,[4] many consider their imposition as an equally powerful but less aggressive alternative to military action.[5] Currently, States widely use economic sanctions in the context of international disputes or crises. To name a few, the European Union (EU) maintains over 40 sanctions regimes; the United States (U.S.) sanctions list includes 38 programs; the United Kingdom (U.K.) administers 8 "thematic" and 29 "geographic" sanctions; Canada has imposed sanctions in relation to the situation in or activities of 24 foreign States, on top of restrictions relating to terrorist entities and corrupt foreign officials; and Australia operates 23 sanction regimes.[6]

However, despite the prevalence of their use, the legal regime governing the legality of economic sanctions is far from well-defined. There are no international rules dedicated specifically to the legality of economic sanctions. Economic sanctions, as acts of "unfriendly unilateralism,"[7] can be acts of retorsion: these are lawful, yet unfriendly, economic measures that nevertheless do not run afoul of any international obligation of the imposing State, such as the withdrawal of voluntary development assistance or financial benefits.[8] However, more often than not, economic sanctions consist of the non-performance of State obligations in the field of economic relations owed to the target State. In such cases, the "law of economic sanctions" can be effectively summarized in one sentence: to the extent that an economic sanction is, *prima facie*, inconsistent with a State's international obligations in the field of economic

4. Target regimes are often able "to insulate themselves from the harsh impact [of sanctions] even if the general population suffers" as aptly put in Gary Clyde Hufbauer et al., Economic Sanctions Reconsidered 1 (3d ed. 2007). In the same comprehensive study last published in 2007, the researchers concluded on the basis of 174 case studies that economic sanctions were only partially effective in 34 percent of the documented cases. *Id.* at 158.

5. Mulder, *supra* note 3, at 4.

6. For an overview of these sanctions regimes, see *Overview of Sanctions and Related Resources*, Eur. Comm'n, https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/overview-sanctions-and-related-resources_en [https://perma.cc/FQ4E-KUH5] (last visited June 16, 2025); *Sanctions Programs and Country Information*, U.S. Dep't of the Treasury, https://ofac.treasury.gov/sanctions-programs-and-country-information (last visited June 16, 2025); Current UK sanctions regimes, Gov.uk, https://www.gov.uk/government/collections/uk-sanctions-regimes-under-the-sanctions-act [https://perma.cc/5ZZB-R7VN] (last visited June 16, 2025); *Current Sanctions Imposed by Canada*, Gov't of Can., https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/current-actuelles.aspx?lang=eng [https://perma.cc/5R3H-3NH2] (last visited June 16, 2025); *Sanctions Regimes*, Austl. Dep't of Foreign Affs. & Trade, https://www.dfat.gov.au/international-relations/security/sanctions/sanctions-regimes [https://perma.cc/LB7A-LSVN] (last visited June 16, 2025).

7. Term coined in Monica Hakimi, *Unfriendly Unilateralism*, 55 Harv. Int'l L.J. 105 (2014).

8. Lowenfeld, supra note 2, at 850; *see also Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries thereto*, [2001] 2 Y.B. Int'l L. Comm'n 31, 128, U.N. Doc. A/CN.4/SER.A/2001/Add. 1 (Part 2) [hereinafter ARSIWA with Commentaries].; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, at ¶ 276 (June 27).

relations,[9] it must be justified on the basis of an applicable defense, or it will result in international responsibility.[10]

This Article focuses on the legality of trade-restrictive unilateral economic sanctions under WTO law. The deliberate withdrawal of "customary" trade or financial relations, i.e., the levels of trade and financial activity that would probably have occurred in the absence of the adopted measures, lies at the heart of economic sanctions.[11] Trade-restrictive economic sanctions include measures such as quantitative restrictions on the importation and exportation of certain goods, tariff increases, restrictions on trade in services, and limitations on traffic in transit. For example, in response to Russia's military operations in Ukraine, the United States has imposed a ban on the importation of several products, including oil, petroleum, natural gas, coal, fish, seafood, alcoholic beverages, and diamonds.[12] It has also imposed a trade embargo on all goods, services, or technology from the Donetsk and Luhansk regions of Ukraine.[13] Similarly, the EU has imposed an import ban on crude oil and refined petroleum products, coal and other solid fossil fuels, steel, iron, gold and diamonds, cement, asphalt, wood, paper, synthetic rubber and plastics, seafood, liquor, cigarettes, and cosmetics.[14] It has also prohibited Russian and Belarusian road transport operators from providing services in the EU, including transportation of goods in transit. Both sanctions regimes further prohibit the exportation of certain goods to Russia. These trade restrictions inevitably "spill into the WTO"[15] as they are, *prima facie*, contrary to core obligations relating to market access and non-discrimination enshrined in the WTO Agreements,[16]

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9. These are primarily under a treaty on economic cooperation, as States have no obligation to continue economic relations under general international law in the absence of treaty commitments or other specific obligations. *See* Nicar. v. U.S., 1986 I.C.J. at ¶ 276.

10. *See* Antonios Tzanakopoulos, *We Who Are Not as Others: Sanctions and (Global) Security Governance*, *in* The Oxford Handbook of the International Law of Global Security 773, 779 (Robin Geiß & Nils Melzer eds., 2021).

11. *See* Hufbauer et al., *supra* note 4 at 3.

12. Exec. Order No. 14,066, 3 C.F.R. 344 (2023), and Exec. Order No. 14,068, 3 C.F.R. 357 (2023).

13. Exec. Order No. 14,065, 3 C.F.R. 340 (2023).

14. For the comprehensive list of EU sanctions against Russia, *see EU sanctions against Russia explained*, Eur. Council & Council of the Eur. Union, https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/ [https://perma.cc/X8FG-NSCK] (last accessed Mar. 31, 2025).

15. Kimberley Trapp, *WTO Inconsistent Countermeasures - A View from the Outside*, 104 Proc. Ann. Meeting (Am. Soc'y Int'l L.) 264,265 (2010).

16. *See, e.g.,* the core non-discrimination principle of most-favored-nation treatment in the General Agreement on Tariffs and Trade art. 1, ¶ 2, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947]; General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 (incorporating by reference the 1947 GATT under the modern WTO framework) [hereinafter GATT]; General Agreement on Trade in Services art. II, ¶ 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS]; the prohibition of quantitative restrictions on imports or exports under GATT, *supra,* at art. XI; specific state commitments regarding market access under GATS, *supra,* at art. XVI; and freedom of transit under GATT, *supra*, at art. V.

which are currently binding on 164 members.[17] It is thus trite to examine their legality under WTO law.[18]

The Article focuses on the WTO legality of two broad categories of unilateral trade-restrictive sanctions. The first category encompasses sanctions imposed in the context of, or as a response to, international or non-international armed conflicts. States often impose trade restrictions as a means of self-defense, or as a means to pressure warring parties to cease hostilities and negotiate peace, to weaken military capabilities, to protect civilians, or to prevent the conflict from escalating or spreading across borders. For instance, the mutual sanctions imposed by Russia and Ukraine in view of the former's military operations in Ukrainian territory, as well as sanctions imposed by third States against Russia in this context, fall within this category. Similarly, Türkiye's total export and import ban against Israel, in response to its military operations in Gaza, also belongs to this category.[19]

The second category includes sanctions aimed at inducing a State to comply with its international obligations, which may span various areas of international law, such as human rights, humanitarian law, counterterrorism, nuclear disarmament, intellectual property law, environmental protection, the law of the sea, diplomatic law, and immunities. Examples of such sanctions include those imposed pursuant to the US Global Magnitsky Human Rights Accountability Act[20] and the Justice for Victims of Corrupt Foreign Officials Act in Canada,[21] both of which target individuals and entities connected to serious human rights abuses and corruption. The EU also has trade-restrictive measures in place in relation to serious human rights violations in foreign countries, such as its sanctions regimes against Iran, Myanmar, and Venezuela,[22] as well as in relation to other international law violations, such as Türkiye's unauthorized drilling activities in the Eastern Mediterranean.[23]

Several important caveats apply to these two categories of sanctions. First, as previously mentioned, economic sanctions are employed in a wide range of situations beyond those discussed here, so the analysis in this Article

17. Current membership as of April 2024, including the EU. The WTO also has 25 observer governments. The term "WTO Agreements" is used to describe the agreements that resulted from the Uruguay Round of Multilateral Trade Negotiations (Marrakesh Agreement and Annexes).

18. Note that trade-restrictive economic sanctions may also be *prima facie* inconsistent with the provisions of bilateral or multilateral preferential trade agreements. This is not within the purview of the present study, which focuses on the legality of economic sanctions under WTO law.

19. *See* T.C. Ticaret Bakanlığı [Republic of Türkiye Ministry of Trade] (@ticaret) X (May 2, 2024, 4:13 PM), https://twitter.com/ticaret/status/1786126879763599797 [https://perma.cc/JXZ4-Q74F].

20. Global Magnitsky Human Rights Accountability Act, Pub. L. No. 114-328, Subtitle F, 130 Stat. 2533 (2016).

21. Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law), S.C. 2017, c. 21 (Can.).

22. Council Regulation 267/2012, 2012 O.J. (L 88) (concerning restrictive measures against Iran); Council Decision (CFSP) 2018/655, 2018 O.J. (L 108) (concerning restrictive measures against Myanmar); Council Regulation 2017/2063, 2017 O.J. (L 295) (concerning restrictive measures in view of the situation in Venezuela).

23. Council Regulation 2019/1890, 2019 O.J. (L 291) (concerning restrictive measures in view of Türkiye's unauthorized drilling activities in the Eastern Mediterranean).

is not exhaustive. However, by exploring the scope of available defenses under WTO law, the analysis reveals their limitations and sheds light on their potential applications in other contexts. Second, there is often overlap between these two categories. Sanctions imposed during armed conflicts frequently aim to enforce international obligations, particularly those relating to the use of force and the conduct of hostilities. Nonetheless, armed conflicts "unlock" a broader set of legal defenses due to the unique challenges they pose to States' essential interests and international relations. States also enjoy a degree of flexibility in framing their legal defenses and choosing which rules to invoke in the context of an international dispute. Third, sanctions can only be categorized based on the reasons that States provide at the time of imposition and the surrounding circumstances. These reasons are often vague or noncommittal, allowing States flexibility in shaping arguments for future disputes. This Article, therefore, examines the potential legal defenses available to States for sanctions that fall within the two selected categories, while also addressing the limits of States' flexibility in reframing arguments to fit within the scope of WTO defenses.

The Article addresses two critical questions: first, whether the two categories of unilateral trade-restrictive sanctions outlined above fall within the scope of the general and security exceptions of the WTO Agreements; and second, whether the defense of countermeasures under the general law on State responsibility[24] can be invoked by respondents in WTO disputes to justify trade sanctions that fall outside the regulatory scope of the WTO exceptions.

Why is it important to address these questions? It is true that trade-restrictive economic sanctions have largely gone unchallenged within the WTO dispute settlement framework. Although there are a few notable exceptions, the volume of sanctions in place far outweighs the limited case law on their legality, even within a system of compulsory jurisdiction like the WTO. It is thus fair to say that States are reluctant to litigate the imposition of economic sanctions.[25] This lack of litigation has fostered the assumption that WTO exceptions apply straightforwardly to sanctions. As a result, the applicability of these exceptions to sanctions and the availability of alternative defenses in the context of WTO disputes remain significantly under-theorized. Despite some scholarly contributions on specific aspects of this issue,[26] no comprehensive

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24. Draft Articles on Responsibility of States for Internationally Wrongful Acts arts. 22, 49-54, *in* Report of the International Law Commission on the Work of its Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001) adopted by G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Dec. 12, 2001), corrected by U.N. Doc. A/56/49(Vol.I)/Corr.4 [hereinafter ARSIWA].

25. Anna Ventouratou, *Litigating Economic Sanctions*, 21 L. & PRAC. INT'L CTS. & TRIBUNALS 593, 638 (2022).

26. *See generally* Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1 (1996); Sarah Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 J. INT'L ECON. L. 133 (2002); Carlos Manuel Vazquez, *Trade Sanctions and Human Rights—Past, Present and Future*, 6 J. INT'L ECON. L. 797 (2003); BRADLY CONDON, ENVIRONMENTAL SOVEREIGNTY AND THE WTO: TRADE SANCTIONS AND INTERNATIONAL LAW (2006); Robert Howse & Jared Genser, *Are EU Trade Sanctions on Burma Compatible with WTO Law?*, 29 MICH. J. INT'L L. 165 (2008); Rostam Neuwirth & Alexandr Svetlicinii, *The Economic Sanctions over the Ukraine Conflict and the WTO: "Catch-XXI" and the Revival of*

study currently examines the full range of defenses available for *prima facie* WTO-inconsistent trade sanctions.

This gap in the literature is significant for two reasons. First, in an increasingly polarized international community, States may soon be compelled to formally defend their economic sanctions. Second, even if the legality of sanctions is not explicitly challenged in a judicial context, the legal basis on which such sanctions would be justified matters. Rather than allowing sanctions to operate under a cloud of legal uncertainty, it is important to assert the rules that govern the legality of sanctions that are otherwise inconsistent with international obligations of States. This would assist in clarifying the conditions for their legality and serve as a safeguard against abuse.

This Article argues that the application of WTO exceptions to economic sanctions is far more nuanced and context-specific than commonly recognized. Through a step-by-step analysis of the applicable tests as they emerge from existing WTO case law, it demonstrates that, despite recent efforts by Respondents to stretch the boundaries of these exceptions, many sanctions imposed today cannot be easily accommodated within their scope. This realization forces a reconsideration of how such sanctions fit within the broader WTO legal framework. The Article challenges the view of the WTO as a closed legal system and offers an alternative approach to conceptualizing and assessing the legality of trade-restrictive sanctions, using the law on State responsibility as a complementary framework. In doing so, it contributes to the limited academic literature on countermeasures and the law on State responsibility within the WTO[27] and offers a fresh perspective on how sanctions can be reconciled with the architecture of the WTO Agreements.

The Article is organized as follows: Part II discusses the legality of trade sanctions imposed in the context of, or in connection with, an ongoing armed conflict and explores to what extent such sanctions can be justified under the WTO security exceptions. It argues that most sanctions imposed in this context could, in principle, fall within the scope of the security exceptions. However, the current interpretation of the term "emergency in international relations" and the ordinary meaning of the term "essential security interests" may present challenges to States that adopt economic sanctions in the context of an armed conflict that is geographically remote to their territory and does not present any direct security risks. Part III discusses the legality of trade sanctions

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the Debate on Security Exceptions, 49 J. World Trade 891 (2015); Iryna Bogdanova, *Targeted Economic Sanctions and WTO Law: Examining the Adequacy of the National Security Exception*, 48 Legal Issues Econ. Integration 171(2021); Iryna Bogdanova, *Reshaping the Law of Economic Sanctions for Human Rights Enforcement: The Potential of Common Concern of Humankind*, *in* The Prospects of Common Concern of Humankind in International Law 247 (Thomas Cottier & Zaker Ahmad eds., 2021); Maarten Smeets, *Economic Sanctions and the WTO*, *in* Research Handbook on Economic Sanctions 280 (Peter Van Bergeijk ed., 2021).48 {\\scaps Leg. Issues Econ. Integr.} (2021

27. *See* Joost Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law 232 (2003); Anastasios Gourgourinis, Equity and Equitable Principles in the World Trade Organization: Addressing Conflicts and Overlaps between the WTO and Other Regimes 203–210 (2015); Anna Ventouratou, *The Law on State Responsibility and the World Trade Organization*, 22 J. World Inv. & Trade 759, 796–798 (2021); Danae Azaria, *Trade Countermeasures for Breaches of International Law Outside the WTO*, 71 Int'l & Comp. L.Q. 389, 392-95 (2022).

imposed as countermeasures in response to a prior internationally wrongful act. It examines whether such sanctions could fall within the scope of either the security or the general exceptions in the WTO Agreements. It argues that certain trade-restrictive countermeasures could fall within the scope the WTO exception clauses, but certainly not all of them. The Article argues in favor of the direct applicability of the defense of countermeasures under general international law for trade-restrictive economic sanctions that do not fall within the scope of the WTO exceptions. This is because the subject matter of implementing international responsibility and inducing compliance with non-WTO international obligations is not regulated at all under the WTO Agreements, and thus, the intention of the drafters to exclude reliance on countermeasures under general international law cannot be established through interpretation. Moreover, the Article offers important normative reasons suggesting that applying the defense of countermeasures is more practical and desirable than attempting to shoehorn a broader range of economic sanctions within the terms of the WTO exceptions.

I. Trade Sanctions Imposed in the Context of an Ongoing Armed Conflict

This Part examines the defenses available under WTO law to justify *prima facie* WTO-inconsistent economic sanctions imposed in the context of, or in response to, an armed conflict. While the WTO security exceptions explicitly reference "war," and it is commonly assumed that sanctions related to armed conflicts are easily justified under these provisions, the analysis reveals that this is far from straightforward.

The security exception in GAAT Article XXI(b)(iii) allows a State to take "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."[28] The scarce WTO caselaw on this provision suggests that measures must comply with a four-step test. First, the situation must be one of "war or other emergency in international relations." This step is subject to objective determination by the Panel based on the facts of the case.[29] Second, in view

28. GATT, *supra* note 16, at art. XXI(b)(iii). *See also* GATS, *supra* note 16, at art. XIVbis(1)(b)(iii); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS]. This Article uses GATT Article XXI as an example for the purposes of analysis, but all relevant findings also apply by analogy to the interpretation of the exception clauses in the GATS and TRIPS. The use of the same analytical framework in the application of the identical exception clauses in other WTO agreements was confirmed in Panel Report, *Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/R, at ¶¶ 7.230–7.231, 7.241 (adopted June 16, 2020) [hereinafter *Saudi Arabia—IPRS*].

29. Panel Report, *Russia—Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R, ¶¶ 7.66–7.77 (adopted Apr. 5, 2019) [hereinafter *Russia—Traffic in Transit*]; *Saudi Arabia—IPRS*, *supra* note 28, at ¶¶ 7.244-7.246; Panel Report, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS564/R, at ¶¶ 7.163–7.164 (adopted Dec. 9, 2022) [hereinafter *US—Steel and Aluminium Products (Turkey)*]; Panel Report, *United States—Origin Marking Requirement*, WTO Doc. WT/DS597/R, at ¶¶ 7.89, 7.256 (adopted Jan. 26, 2023) [hereinafter *US—Origin Marking*].

of the term "in time of," there must be a "chronological concurrence" between the war or other emergency invoked and the adoption of the measures in question.[30] Third, States enjoy discretion in defining the specific "essential security interests" that are considered "directly relevant to the protection of a state from [the identified] external or internal threats," but they must articulate such interests "sufficiently enough to demonstrate their veracity."[31] Fourth, the term "which it considers" was interpreted as qualifying the term "necessary,"[32] and thus, the determination of the necessity of an action is left to the sole discretion of the invoking State.[33] However, the State must meet a minimum good faith requirement, which is to demonstrate that the measures in question are "not implausible" as protective of the proffered interest.[34]

In view of this test, we must determine whether trade sanctions imposed in the context of an armed conflict could be justified under the terms of the security exceptions. Indeed, the reference to "war" readily attests to the relevance of the exception in such cases. Relevant case law confirms that, despite the fact that the term has, since the drafting of the GATT, fallen into desuetude in public international law,[35] it translates today into "armed conflict," whether international or non-international.[36] The Panels offered a dictionary definition of the term "war" as "hostile contention by means of armed forces, carried on between nations, states, or rulers, or between parties in the same nation or state; the employment of armed forces against a foreign power, or against an opposing party in the state" and concluded that it generally refers to "a state of conflict characterized by the use of force."[37] Moreover, the term "in time of" requires that the measures in question are taken *during* the war or other emergency invoked in order to qualify for the exception.[38] Thus, sanctions adopted in the context of an ongoing armed conflict seem to fall, *prima facie*, within the regulatory scope of the WTO exceptions.

However, this context gives rise to two important questions that require further investigation. First: whether the right to invoke such exception extends to all States involved in an armed conflict or is rather confined to those exercising their inherent right to self-defense as enshrined in U.N. Charter Article 51;[39] and second, whether the right to invoke such exception also extends to third States that are not directly involved in the armed conflict. Would

30. *Russia—Traffic in Transit, supra* note 29 at ¶ 7.70; *Saudi Arabia—IPRS*, *supra* note 28, at ¶ [7.247].

31. *Russia—Traffic in Transit*, *supra* note 29, at ¶¶ 7.130-7.135; reaffirmed in *Saudi Arabia—IPRS*, *supra* note 28, at ¶¶ 7.249-7.251, 7.279-7.282.

32. *Russia—Traffic in Transit*, *supra* note 29, at ¶ 7.146; similar conclusion reached *in US—Steel and Aluminium Products (Turkey)*, *supra* note 29, at ¶ 7.140 and *US—Origin Marking, supra* note 29, at ¶¶ 7.60-7.69, 7.160.

33. *Russia—Traffic in Transit*, *supra* note 29, at ¶¶ 7.146-7.147

34. *Russia—Traffic in Transit*, *supra* note 29, at ¶¶ 7.146-7.138; reaffirmed in *Saudi Arabia—IPRS, supra* note 28, at ¶¶ 7.230, 7.285.

35. Christine Gray, International Law and the Use of Force 9 (4th ed. 2018).

36. *Russia—Traffic in Transit*, *supra* note 29, at ¶ 7.72; *US – Origin Marking*, *supra* note 29, at ¶ 7.294.

37. *US—Steel and Aluminium Products (Turkey)*, *supra* note 29, at ¶ 7.156; *US – Origin Marking*, *supra* note 29, at ¶ 7.294.

38. *Russia—Traffic in Transit*, *supra* note 29, at ¶ 7.70.

39. U.N. Charter art. 51.

any armed conflict, no matter how remote to the invoking State, justify the imposition of trade restrictions under GATT Article XXI(b)(iii)? The following two sections discuss these two questions in turn.

A. WTO Security Exceptions and the Law on Self-Defense: Whether the Security Exceptions are Only Available to a State Victim of an Armed Attack

The WTO security exceptions can be used to justify measures taken "in times of war." But who can benefit from this justification? In the oft-cited *Oil Platforms* case, the International Court of Justice (ICJ), faced with the task of interpreting the security exception in Article XX of the Treaty of Amity, concluded that the conditions for the lawful exercise of self-defense under general international law inform the terms of the treaty exception.[40] This interpretation results in the limited availability of the treaty exception only to the party that is lawfully defending itself against an armed attack. Does the context of the WTO Agreements warrant a similar interpretation? Can an aggressor properly invoke the WTO security exceptions?

There is no doubt that the WTO security exceptions extend to situations that would fall within the scope of individual self-defense under general international law.[41] Self-defense, as a circumstance precluding wrongfulness, may justify not only forcible measures within the scope of Article 2(4) of the UN Charter but also non-forcible measures consisting in the non-performance of other international obligations, "provided that such non-performance is related to the breach of Article 2(4) of the UN Charter."[42] This includes non-forcible measures of "economic warfare"[43] such as trade embargoes and other trade restrictions. These lawful measures of self-defense are responses to a prior armed attack, i.e., "in time of war" *stricto sensu*. Thus, the victim State would certainly be entitled to invoke the WTO security exceptions to justify the imposition of non-forcible measures that would otherwise be inconsistent with its WTO obligations, when such measures are taken in response to an armed attack.

However, the existence of an armed conflict ("war") is independent of the question of legality of the use of force. The ICTY defined armed conflict as a situation where "there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[44] The definitions of the term "war"

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40. Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 40 (Nov. 6); Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, art. XX, Aug. 15, 1955, 8 U.S.T. 900.

41. *See* ARSIWA, *supra* note 24, at art. 21; U.N. Charter art. 51.

42. ARSIWA with Commentaries, *supra* note 8, at art. 21, commentary 2. For support of this claim, *see generally* Russell Buchan, *Non-Forcible Measures and the Law of Self-Defence*, 72 Int'l & Comp. L. Q. 1 (2023). *Cf.* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 215-16, ¶ 35 (separate opinion by Higgins, J.); Iain Scobbie, *Smoke, Mirrors and Killer Whales: The International Court's Opinion on the Israeli Barrier Wall*, 5 Ger. L.J. 1107, 1128–29 (2004).

43. Vaughan Lowe & Antonios Tzanakopoulos, *Economic Warfare*, in Max Planck Encyclopedia of Public International Law (2013).

44. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory

offered in the relevant WTO reports also refer more generally to situations of conflict involving use of armed force.[45] Thus, the wording of the WTO security exceptions suggests that States involved in an armed conflict can take action even if they are the attacking State and not solely in the exercise of their right to self-defense. It seems that the security exceptions kick in in a fashion similar to international humanitarian law: regardless of the legality of the use of force (*ad bellum*), once States are in a situation of armed conflict (*in bello*) they are entitled to make use of the security exceptions.[46]

The analysis of the Panel in *Russia—Traffic in Transit* provides further support for this argument. The Panel stipulated that that "it [was] not relevant to the determination [of the applicability of GATT Article XXI] which actor or actors bear international responsibility for the existence of [the] situation to which Russia refer[red]."[47] Similarly, in *US—Origin Marking*, the Panel stipulated that what matters is the gravity of the impact of an emergency rather than the underlying circumstances.[48] Thus, even the attacking State would be able to justify trade sanctions imposed "in time of war."

Is there another plausible reading of the WTO security exceptions that could lead to a restriction of their protective scope? Inspired by the ICJ judgment in *Oil Platforms*, one could argue that the criteria for the lawful exercise of self-defense under general international law can inform the interpretation of the term "war" as "relevant rules of international law applicable between the parties" under Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[49] Such a reading could lead to the conclusion that the security exceptions are only available to a State that has been a victim of a prior armed attack as per Article 51 of the U.N. Charter and ARSIWA Article 21.

However, there is an important difference between the Treaty of Amity, interpreted and applied by the ICJ in *Oil Platforms*, and the WTO Agreements, which suggests that the ICJ reasoning cannot be properly transplanted in the WTO context: the parties to the Treaty of Amity intended for Article XX to cover measures involving a use of armed force. And the measure that the US purported to justify under this exception in *Oil Platforms* was indeed an armed measure. On this basis, the ICJ stipulated that armed measures must always be consistent with the conditions for the legality of the use of force under international law, i.e., the conditions of self-defense.[50] This is because the nature of the prohibition of the use of force, as a rule of *jus cogens* character[51]

Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

45. See *supra* note 37 and accompanying text.

46. *See* First Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Preamble, June 8, 1977, 1125 U.N.T.S. 3; *see also* indicatively, Keichiro Okimoto, *The Relationship between Jus Ad Bellum and Jus In Bello*, *in* The Oxford Handbook of the Use of Force in International Law 1209, 1211-14 (Marc Weller ed., 2015).

47. *Russia—Traffic in Transit, supra* note 29, at ¶ 7.121.

48. *US—Origin Marking*, *supra* note 29, at ¶ [7.308].

49. Vienna Convention on the Law of Treaties, at art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

50. Iran v. U.S., 2003 I.C.J. at 183, ¶ 40.

51. *See generally* Andre de Hoogh, *Jus Cogens and the Use of Armed Force*, *in* The Oxford Handbook of the Use of Force in International Law 1161 (Marc Weller ed., 2015); Sondre Torp Helmersen, *The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent*

suggests that no deviation from the customary requirements would be acceptable.[52] Even if the exception clause would only justify an armed measure as far as treaty breaches are concerned and would not affect the (il)legality of said measure under the general international law on the use of force, there is a strong presumption that States would not intend to allow for armed measures contrary to a *jus cogens* prohibition. This is arguably underlying the Court's interpretation of Article XX in *Oil Platforms*,[53] together with the context of the provision and the object and purpose of the Treaty of Amity.[54]

The WTO context would not warrant this approach. The WTO exceptions only cover trade measures regulated by the WTO Agreements. They do not extend to any measures involving a use of armed force. Thus, there is no legal reason to assume that the parties intended to incorporate into the treaty text the requirement of a prior armed attack under the law of self-defense given that the language used in the relevant provision ("in time of war or other emergency in international relations") is evidently more permissive. Besides, reference to "war" and armed conflict in general, rather than self-defense, in exception clauses is not unknown to international law. For example, Article 15 of the European Convention on Human Rights[55] also allows derogations "in time of war" and does not seem to restrict its scope to the exercise of lawful self-defense. Circumstances have not yet required the European Court of Human Rights to interpret the term "war."[56] However, parties understand the term as referring to a situation of "armed conflict," and there is no indication that only a defending State may invoke the clause.[57] Similarly, General Comment No. 29 on ICCPR Article 4[58] stipulates that even during an armed conflict, derogations are "allowed only if and to the extent that the situation constitutes a threat to the life of the nation,"[59] but still does not qualify the right by reference to the requirements of self-defense.

Derogations, 61 NETH. INT'L L. REV. 167 (2014). *Cf.*, *generally*, James Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. INT'L L. 215 (2011).

52. Articles 53 and 64 of the VCLT prescribe that a treaty norm in conflict with *jus cogens* is or becomes void. VCLT, *supra* note 49, at arts. 53, 64. *See also* Report of the Study Group of the Int'l L. Comm'n, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. "A/CN.4/L.682, (2006), at ¶ 64 (discussing limits of the application of *lex specialis*) [hereinafter Fragmentation Report].

53. Iran v. U.S., 2003 I.C.J. at 324, ¶¶ 6, 9 (separate opinion by Simma, J.); *Id.* at ¶ 19 (separate opinion by Rigaux, J.). *Cf,* Jörg Kammerhofer, *Oil's Well That Ends Well? Critical Comments on the Merits Judgement in the Oil Platforms Case*, 17 LEIDEN J. INT'L L. 695, 705 (2004); Sir Frank Berman, *Treaty "Interpretation" in a Judicial Context*, 29 YALE J. INT'L L 291, 320, n 23 (2004).

54. Iran v. U.S., 2003 I.C.J. at 182, ¶ 41.

55. Convention for the Protection of Human Rights and Fundamental Freedoms November 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

56. REGISTRY OF THE EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 15 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: DEROGATION IN TIME OF EMERGENCY ¶ 8 (2024).

57. *See* WILLIAM SCHABAS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY 594–95 (2015). Note, however, that, as stipulated in ECHR Article 15, any measure adopted under the derogation clause would still be subject to the requirements of necessity and proportionality and the obligation to observe other obligations under international law.

58. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

59. Human Rts. Comm., General Comment No. 29, Article 4: Derogations during a State of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶ 3 (Aug. 31, 2001).

B. WTO Security Exceptions and Geographic Limitations: Whether the Security Exceptions are Available to States That are Not Involved in Hostilities

The second question we need to investigate further is whether the right to invoke the WTO security exceptions also extends to third States that are not directly involved in the armed conflict. States can impose trade-restrictive sanctions in the exercise of their right to collective self-defense under Article 51 of the U.N. Charter: these are measures adopted for the benefit of a third State that declared itself the victim of an armed attack and requested assistance.[60] Or, States can impose them in response to or in connection with the hostilities more broadly. Sanctions can be imposed, for example, to put economic pressure on the warring States to reach a ceasefire agreement or to reduce their military capabilities. Based on existing WTO case law, it is unclear whether the law considers trade restrictions as "taken in time of war or other emergency in international relations" when the armed conflict does not take place "in the invoking Member or in its immediate surroundings."[61] Moreover, trade-restrictive measures by third parties are arguably not necessary "for the protection of [*their*] essential security interests", especially if the armed conflict is geographically distant. Some have raised similar considerations with respect to the scope of derogation clauses in human rights treaties: it is unclear whether a State that is acting extra-territorially (e.g., in the context of an overseas peacekeeping operation) can demonstrate that the situation is "threatening the life of the nation" for the purposes of activating the derogation clause.[62]

On whether the circumstances of adopting such sanctions would fall within the scope of the term "war," it must first be noted that GATT Article XXI(b)(iii) does not seem to include any condition that the war takes place in the territory or in the vicinity of the invoking State. There is only a temporal requirement that the measures are taken *at the time* that a war takes place. Thus, trade-restrictive measures adopted during an ongoing armed conflict could be considered as measures "taken in time of war" within the ordinary meaning of the security exceptions, even if the war is geographically remote from the invoking State, provided that States take such measures in response to or in connection with said armed conflict.

However, even if we were to take a restrictive approach to the term "war" and confine it to States directly involved in hostilities, measures adopted by third States in connection with an armed conflict may still fall within the scope of the term "other emergency in international relations" in GATT Article XXI(b)(iii). As acknowledged by the Panel in *US—Origin Marking*, "war will affect conflicting parties directly, but may also affect international relations more broadly."[63] Thus, we need to determine whether similar geographical or other limitations may prevent a State from successfully arguing

60. Nicar. v. U.S., 1986 I.C.J. at 103-05, ¶¶ 195–99; Iran v. U.S., 2003 I.C.J. at 186-87, ¶ 51.

61. *Russia—Traffic in Transit*, *supra* note 29, at ¶7.135 (emphasis added).

62. *See, e.g.*, R (on the application of Al-Jedda) (FC) v. Sec'y of State for Defence, [2007] UKHL 58 ¶ 38.

63. *US—Origin Marking*, *supra* note 29, at ¶7.297.

that measures they adopt in the context of an armed conflict unfolding in the territory of a third State occur during an "emergency in international relations."

The terms "war" and "other emergency in international relations" impart meaning to each other as the immediate context under VCLT Article 31(1) and (2) and must be read together. In view of the conjunction "or" and the adjective "other" in GATT Article XXI(b)(iii), it becomes clear that war is one example of the larger category of "emergency in international relations."[64] Reading the two terms together, the Panel in *Russia—Traffic in Transit* concluded that only "a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability *engulfing or surrounding a State*" would constitute an "emergency."[65] Later in the same report, the Panel again refers to "a situation of breakdown of law and public order (whether in the invoking Member *or in its immediate surroundings*)."[66] The Panel's analysis seems to suggest here that GATT Article XXI(b)(iii) extends only to situations of emergency, including "war" (as the ultimate example of emergency),[67] that are unfolding at the territory or in the vicinity of the invoking State.[68] This understanding could exclude from the scope of the security exception trade-restrictive measures adopted by third States that are far from the conflict.

However, the Panel in *US—Origin Marking* took a different approach to this matter. It found that the open reference to "international relations" in GATT Article XXI(b)(iii) suggests that "the emergency does not necessarily have to originate in the invoking Member's own territory and bilateral relations."[69] Accordingly, "a war taking place between two or more countries, could also give rise to an emergency in international relations affecting other countries" as long as the resulting situation meets the threshold of gravity implied in the term "emergency."[70] According to this interpretation, the fact that an armed conflict is not "engulfing or surrounding" the invoking State does not constitute a hurdle in successfully invoking GATT Article XXI(b)(iii). However, a new hurdle emerges: would such circumstances meet the required threshold of gravity to be qualified as emergencies in international relations?

According to the Panel in *US—Origin Marking*, an "emergency" represents "a breakdown or near-breakdown" of the international relations of the States concerned, of a gravity or magnitude near-comparable to war.[71] In such situations, WTO Members "may not, in relation to another Member or Members, be expected to act in accordance with the relevant GATT obligations that would normally apply outside of such war or "other emergency in international relations."[72] This interpretation of emergency as "a breakdown or near-breakdown"

64. *Russia—Traffic in Transit*, *supra* note 29, at ¶ 7.71.
65. *Id.* at ¶¶ 7.75–7.76 (emphasis added).
66. *Id.* at ¶ 7.135 (emphasis added).
67. *US—Origin Marking*, *supra* note 29, at ¶ 7.296.
68. *See* Bogdanova, *Targeted Sanctions*, *supra* note 26 at 195.
69. *US—Origin Marking*, *supra* note 29, at ¶¶ 7.296–7.297.
70. *Id.*
71. *Id.*
72. *Id.* at ¶¶ 7.296–7.298.

of the international relations of the States in question suggests that the invoking State would need to demonstrate that its relations with the target State are on the brink of a total collapse. In other words, the State imposing a trade sanction cannot otherwise continue to conduct business as usual with the target State.

As case law on this issue is still scarce, we do not have a sufficient sample to determine how States apply this requirement in practice and what the threshold of deterioration of international relations is. Would it be sufficient for States to demonstrate that there is heightened tension between them and the State targeted by the trade sanctions in the form of public statements of condemnation or processes in international fora such as the U.N. Security Council or General Assembly? Or would they need to show that things have escalated to the highest degree, such as total cessation of diplomatic relations, removal of diplomatic representatives from their territory, and calling for the closure of diplomatic missions? Depending on the approach that WTO bodies (and the WTO's membership) will take on this issue in future disputes, there might be additional restrictions preventing States from successfully invoking the security exceptions to justify trade sanctions imposed in the context of an armed conflict that is unfolding in foreign territory.

On top of the above, a State imposing a trade-restrictive sanction under GATT Article XXI(b) would also need to demonstrate that it does so "for the protection of its essential security interests" to satisfy the requirements of the introductory part (chapeau) of this provision.[73] The threshold for States to prove that their essential security interests are engaged has only been discussed so far in *Russia—Traffic in Transit* and was later reaffirmed in *Saudi Arabia—IPRS*. In all other cases, the Panels found that the measures in question were not taken in time of war or other emergency in international relations, and thus, they did not proceed in examining any other elements of the test under GATT Article XXI. According to the Panel in *Russia—Traffic in Transit*, the invoking State should "articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity."[74] This articulation should be "minimally satisfactory" in the circumstances.[75] Then the actions under consideration should meet a "minimum requirement of plausibility": they must be "not implausible as measures protective of [the proffered] interests."[76]

Can a State geographically distant from an armed conflict demonstrate in a minimally satisfactory manner that it its trade-restrictive measures were plausibly adopted to protect its essential security interests? States can argue that their essential security interests are engaged any time that there is a threat to the peace, breach of the peace, or act of aggression within the meaning of the U.N. Charter.[77] This broad interpretation of "essential security interests" in GATT Article XXI(b) is well-supported by the context of the provision.[78]

73. *Russia—Traffic in Transit*, *supra* note 29, at ¶ 7.62.
74. *Id.* at ¶ 7.134.
75. *Id.* at ¶ 7.137.
76. *Id.* at ¶ 7.138.
77. U.N. Charter art. 39.
78. VCLT, *supra* note 49, at arts. 31(1)–(2).

GATT Article XXI(c), the subsequent sub-paragraph of the security exception clause, allows States to take "any action in pursuance of [their] obligations under the United Nations Charter for the maintenance of international peace and security."[79] This provision refers to the obligation of States to apply any "measures not involving the use of armed force", including the "complete or partial interruption of economic relations" with a target State, mandated by the UN Security Council as a response to any threat to the peace, breach of the peace, or act of aggression under Chapter VII of the U.N. Charter.[80] While GATT Article XX(c) cannot serve as an independent defense for *unilateral* trade sanctions, since the adoption of such measures independently of the Security Council is not a State "obligation" under the U.N. Charter, its content provides valuable context for interpreting GATT Article XXI(b).[81] Article XXI(c) explicitly refers to the U.N. Charter, which embraces the concept of collective security throughout its provisions, not merely in relation to the authority of the Security Council under Chapter VII.[82] This includes Article 51 of the U.N. Charter that explicitly confirms the right of Members to take collective action at the request of a State victim of an armed attack until the UNSC takes any measures necessary to maintain or restore international peace and security.[83] Thus, a State's "essential security interests" encompass its interest in upholding international peace and security under the provisions of the U.N. Charter, which are also rules of international law applicable between all parties to the WTO and are thus undoubtedly relevant to the interpretation of the security exceptions under VCLT Article 31(3)(c).[84] Accordingly, trade sanctions

79. GATT, *supra* note 16 at art. XXI(c).

80. U.N. Charter arts. 39, 41.

81. *See* acknowledgment of the relevance of GATT Article XXI(c) as context for the interpretation of GATT Article XXI(b) in *US – Origin Marking*, *supra* note 29, at ¶ 7.302 (acknowledging the relevance of GATT Article XXI(c) as context for the interpretation of GATT Article XXI(b)).

82. Hans Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, 42 Am. J. Int'l L. 783, 785-87 (1948).

83. Note also that some States have undertaken additional obligations under bilateral or multilateral treaties to take any action that is deemed necessary in response to an armed attack against any other State party to the treaty, most relevantly *see* North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

84. The Panel in Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, at ¶ 7.68 WT/DS291/R, WT/DS292/R, WT/DS293/R [hereinafter *EC—Approval and Marketing of Biotech Products*], interpreted the term "between the parties" as *all* parties to the WTO Agreements, essentially restricting the scope of the interpretative rule to only customary law or universally ratified conventions. Note, however, the more ambiguous findings in Appellate Body Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, ¶ 845, WT/DS316/AB/R (adopted June 1, 2011) and in Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 308, WT/DS379/AB/R (adopted Mar. 25, 2011), as well as instances of use of various international treaties in determining a term's ordinary meaning *e.g.,* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, at ¶¶ 130–31, WT/DS58/AB/R (adopted Oct. 12,1998) [hereinafter *US—Shrimp (ABR)]*; Appellate Body Report, *United States—Tax Treatment for "Foreign Sales Corporations"—Recourse to Article 21.5 DSU by the European Communities*, at ¶¶ 141–45, WT/DS108/AB/RW (adopted Jan. 29, 2002). Moreover, the finding in *EC—Approval and Marketing of Biotech Products*, though not yet reversed or discredited in WTO practice, has been criticized. *See*, *e.g.*, Fragmentation Report, *supra* note 52, at ¶ 471.

imposed by third States in the context of an ongoing armed conflict will likely meet the minimum plausibility requirement to be considered as protective of "essential security interests".

In sum, this Part of the Article applied the 4-step test, as developed in the limited WTO case law on security exceptions, to explore whether trade sanctions imposed in the context of, or in response to, an ongoing armed conflict could be justified under GATT Article XXI(b). The analysis reveals that satisfying all steps of the test is more complex than it might initially appear. Several gray areas remain in the interpretation of the terms in Article XXI(b) which will require States to craft careful and nuanced arguments to ensure the exception applies to trade-restrictive measures adopted in the context of armed conflicts.

The analysis presented arguments supporting the applicability of the security exceptions to all parties involved in an armed conflict, regardless of the legality of the use of force, as well as to third States that impose sanctions in response to such conflicts, even if they are geographically distant. It addressed why arguments inspired by ICJ case law, which might seek to limit the exceptions to the victim State, are not well-founded and instead advocated for a broader interpretation that allows all States involved in hostilities to adopt trade-restrictive measures for security reasons. Regarding the imposition of sanctions by third States, the discussion highlighted the complexities arising from the interpretation of the term "war or other emergency in international relations." This term, as interpreted in some of the recent WTO reports discussing the applicability of the security exceptions, may preclude invoking the exception if the conflict does not directly affect the adopting State or if the relations between the adopting and target States are not in a state of "breakdown or near-breakdown." Future case law will likely further clarify the scope of this exception, shaped by the arguments raised by the parties, which must carefully address the nuances discussed in the analysis above. As for the term "for the protection of its essential security interests," the analysis suggested an interpretation in light of States' rights and obligations under the U.N. Charter, supporting the argument that essential security interests are engaged whenever there is a threat to peace, breach of peace, or act of aggression, regardless of geographical proximity or direct involvement.

II. Trade Sanctions Imposed as Countermeasures

The imposition of trade sanctions is often used to react to illegality and exert pressure on States to comply with their international obligations. Under general international law, "the wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure," i.e. a measure consisting of the temporary non-performance of international obligations towards a State which is responsible for an internationally wrongful act in order to induce that State to comply with its international obligations. However, whether and to what extent any action that would be a lawful countermeasure under general international law would also be legal under the rules of the WTO Agreements has not been clarified as of yet.

The WTO security exceptions provide a potential legal avenue for justifying unilateral trade restrictions adopted in response to prior unlawful conduct of the targeted State. For instance, in *Saudi Arabia—IPRS*, Saudi Arabia invoked Article 73 of the TRIPS Agreement to justify *prima facie* WTO-inconsistent aspects of its trade embargo on Qatar in response to alleged prior internationally wrongful acts, claiming that the measures were necessary to protect its essential security interests.[85] Moreover, depending on the nature of the alleged prior internationally wrongful act, some countermeasures may also relate to the subject-matter of the WTO general exceptions. For example, countermeasures in response to breaches of obligations relating to the protection of the environment or exhaustible natural resources are *prima facie* related to GATT Article XX(b) and (g). We have also seen attempts to justify trade sanctions that aim to secure compliance with international obligations on the basis of "public morals" under GATT Article XX(a). For example, the US in *US—Tariff Measures* asserted that its trade restrictions protected its public morals because they were adopted to put an end to Chinese practices that violate US standards of right and wrong, including "the prohibition of theft, extortion, cyber-enabled theft and cyber-hacking, economic espionage and the misappropriation of trade secrets, anti-competitive behavior, as well as the regulation of governmental takings of property."[86] Some of these practices may also constitute internationally wrongful acts resulting in the international responsibility of China. Lastly, the wording of GATT Article XX(d) which relates to measures aiming "to secure compliance" is strongly reminiscent of the intended operation of countermeasure under general international law.

In view of the above, this Part of the Article discusses first whether the WTO security exceptions can be used to justify trade restrictive measures imposed as countermeasures in response to prior breaches of non-WTO international obligations in Section A. It then explores the extent to which the WTO general exceptions can accommodate certain non-security related trade countermeasures in Section B. Finally, in Section C, it explores the direct applicability of the defense of countermeasures under general international law in the context of WTO disputes.

A. Countermeasures Justified Under the WTO Security Exceptions

The broad reference to "emergencies in international relations" in GATT Article XXI(b)(iii) clearly suggests that the security exceptions extend beyond wartime measures. Therefore, certain measures, including those aiming to induce compliance with international obligations, taken in the context of such emergencies may fall within the scope of these exceptions. But just how broad is the term "emergency in international relations?" Can it accommodate situations unrelated to military or defense interests, such as human rights violations? Could such violations be considered as giving rise to "essential security interests?" The following analysis offers an overview of how the limited WTO

85. *Saudi Arabia—IPRS*, *supra* note 28, at ¶¶ 2.19–2.29.

86. Panel Report, *United States—Tariff Measures on Certain Goods from China*, ¶ 7.113, WTO Doc. WT/DS543/R (circulated Sept. 15, 2020) [hereinafter *US—Tariff Measures*].

case law has interpreted these terms, shedding light on the challenges of justifying sanctions imposed as countermeasures in response to prior internationally wrongful acts. The earlier discussion on applying the security exceptions to sanctions related to armed conflicts already highlighted some of these challenges. This section delves deeper into the scope of "emergency" beyond war, testing the boundaries of the WTO security exceptions.

1. *Security Exceptions Beyond Defense and Military Interests: Whether GATT Article XXI(b)(iii) Can Accommodate Broader Considerations of Justice and the Rule of Law*

Russia—Traffic in Transit and *US—Steel and Aluminium Products* defined "emergency" as a "situation, especially of danger or conflict, that arises unexpectedly and requires urgent action," "a condition requiring immediate treatment," and a "pressing need . . . a condition or danger or disaster throughout a region."[87] *US—Origin Marking* defined the term as "a juncture or situation, involving danger or conflict, that can be understood to be one outside the ordinary course of events" and involving "a degree or magnitude of seriousness, as reflected by the need for urgent or immediate action."[88] According to the Panel, "the seriousness of the state of affairs requiring urgent action can be best understood as referring to situations of the utmost gravity."[89] According to the ordinary meaning of the relevant terms, this emergency "must directly concern" the invoking States' international relations.[90]

US—Steel and Aluminium Products defined the term "international relations" as "relations between nations, national governments, international organizations, etc., esp. involving political, economic, social, and cultural exchanges" or "[t]he various ways by which a country, State, etc., maintains political or economic contact with another."[91] It was further stipulated that the open reference to "international relations" suggests that the clause was not intended to apply only with respect to "some specific types of international relations, for example the exclusively bilateral relations between the invoking Member and the Member affected by the action."[92]

The greatest challenge for the Panels was to interpret these two terms together and delimit the scope of the term "emergency in international relations." As discussed in the previous part, the Panels seem to agree that, based on the wording of the provision, the term "war" informs the content of the term "other emergency in international relations."[93] In this light, such an emergency would not be simply a political or economic difference between

87. *Russia—Traffic in Transit*, *supra* note 29, at ¶ 7.72; *US—Steel and Aluminium Products (Turkey)*, *supra* note 29, at ¶ 7.155; The same definition was used as a basis for analysis in *Saudi Arabia – IPRS*, *supra* note 28, at ¶ 7.257 (using the same definition as a basis for analysis).

88. *US—Origin Marking*, *supra* note 29, at ¶ 7.279.

89. *Id.* at ¶ 7.289.

90. *Id.* at ¶ 7.281.

91. *US—Steel and Aluminium Products (Turkey)*, *supra* note 29, at ¶ 7.155; *US—Origin Marking*, *supra* note 29, at ¶ 7.280.

92. *US—Origin Marking*, *supra* note 29, at ¶ 7.280.

93. *See* analysis accompanying notes 64-68, *supra*.

States, even if urgent. The Panel reports suggest that the emergency must be "if not equally grave or severe, at least comparable in its gravity or severity to a "war" in terms of its impact on international relations."[94] In other words, it must represent "a breakdown or near-breakdown" of such relations and reflect a gravity or magnitude near-comparable to war.[95] This was further confirmed by recourse to the context of the clause. The rest of the enumerated subparagraphs of GATT Article XXI(b) "are clearly related to the defence and military sector"[96] and indicate that the provision is meant to encompass circumstances of "a certain gravity and severity."[97] In view of this, one "would expect defence and military matters to normally be implicated" in an "emergency in international relations."[98] As suggested in *Russia—Traffic in Transit*, such situations of heightened tension "give rise to particular types of interests. . . . *i.e.,* defence and military interests, or maintenance of law and public order interests."[99]

This interpretation appears to narrow the scope of the security exceptions, limiting their application to sanctions that address security-related concerns, and making it less likely that the exceptions would accommodate sanctions responding to international law violations unrelated to these areas. Nevertheless, it has not been consistently upheld in the limited existing case law. The Panel in *US—Origin Marking*, differentiating its view on this point from *Russia—Traffic in Transit*, argued that "each situation will need to be considered on its individual merits" and that it would "refrain from suggesting that an emergency must necessarily involve defense and military interests."[100] In this light, it underscored in its findings that important values such as "the protection of human rights and democratic principles, or other values or interests [that States] consider important . . . may find reflection in their articulation of their essential security interests" and thus, measures taken to advance such interests may be justified under GATT Article XXI provided that they meet the rest of the requirements of the provision.[101] This line of reasoning suggests that what matters is not what values or interests are at stake but rather the existence of an emergency and the gravity of its impact.

Tempting as this interpretation may be, it is important to delve deeper in order to assess to what extent GATT Article XXI(b)(iii) can truly accommodate measures adopted in response to concerns that fall outside the realm of defense and military interests. The terms "for the protection of its essential security interests" in the chapeau of Article XXI(b) and the title of the provision as "*Security* Exceptions"[102] seem to set explicit limitations to the scope of this defense. A holistic interpretation of the provision under VCLT Article 31 clearly suggests that essential security considerations must be involved for the exceptions to apply in any given situation. Although each State enjoys broad

94. *US—Steel and Aluminium Products*, *supra* note 29, at ¶ 7.157.
95. *US—Origin Marking*, *supra* note 29, at ¶¶ 7.296–7.297.
96. *Id.* at ¶ 7.301.
97. *US—Steel and Aluminium Products (Turkey)*, *supra* note 29, at ¶ 7.159.
98. *US—Origin Marking*, *supra* note 29, at ¶ 7.301.
99. *Russia—Traffic in Transit*, *supra* note 29, at ¶ 7.76.
100. *US—Origin Marking*, *supra* note 29, at ¶ 7.301.
101. *Id.* at ¶ 7.359.
102. GATT, *supra* note 16, at art. XXI (emphasis added).

discretion to define what it considers to be "its essential security interests," the term "may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally."[103] As explained by the Panel in *Russia—Traffic in Transit*, the State is not "free to elevate any concern to an "essential security interest" but is rather confined by the obligation to interpret the security exceptions in good faith.[104] Even if this good faith requirement is "not particularly onerous,"[105] the State must still "articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity" and meet a minimum requirement of plausibility.[106] Thus, for the security exceptions to be engaged, the State must be able to demonstrate in a "minimally satisfactory manner"[107] that essential security interests "directly relevant to [its] protection from … external or internal threats" are at stake in the particular situation in question and that the adopted measures are "not implausible" as measures protective of such interests.[108] So how can broader consideration of justice and the rule of law "find reflection" in a State's articulation of its essential security interests, as per the Panel's report in *US—Origin Marking*?[109]

To circumvent this challenge, it has been suggested that there is a "human-rights-security linkage" that may allow States to invoke security exceptions for measures aimed at protecting human rights. This argument rests on the idea that severe human rights violations pose a threat to international peace and security, as they can be a precursor to aggression against other States, cause significant international repercussions such as mass refugee flows, and, in cases of extreme violations like genocide, offend the international community as a whole.[110] Indeed, the practice of the Security Council, which has frequently cited serious violations of human rights and humanitarian law as elements of a "threat to the peace" under Article 39 UN Charter, lends further support to this connection between security and human rights.[111]

However, this is highly dependent on the facts of each case and does not absolve the invoking State of the responsibility to "articulate" the essential security interests that are at stake. Besides, according to the Panel in *Russia–Traffic in Transit*, the threshold of what constitutes "sufficient level of articulation" of a State's essential security interests is set higher when the situation is a "less characteristic" example of "emergency in international relations."[112] The Panel

103. *Russia—Traffic in Transit*, *supra* note 29, at ¶¶ 7.130-7.131.
104. *Id.* at ¶ 7.132.
105. *Saudi Arabia—IPRS*, *supra* note 28, at ¶¶ 7.281-7.282.
106. *Russia—Traffic in Transit*, *supra* note 29, at ¶¶ 7.134, 7.138.
107. *Id.* at ¶ 7.137.
108. *Id.* at ¶ 7.131.
109. *US—Origin Marking*, *supra* note 29, at ¶ 7.359.
110. Ryan Goodman, *Norms and National Security: The WTO as a Catalyst for Inquiry*, 2 Chi. J. Int'l L. 101, 105–14 (2001).
111. *See* Daphne Shraga, *The Security Council and Human Rights—from Discretion to Promote to Obligation to Protect*, *in* Securing Human Rights? Achievements and Challenges of the UN Security Council 8, (Bardo Fassbender ed., 2011).
112. *Russia—Traffic in Transit*, *supra* note 29, at ¶ 7.135.

stipulated that "the further [the situation] is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defense or military interests, or maintenance of law and public order interests, that can be generally expected to arise."[113] In such cases, the State is required to articulate the essential security interests involved "with greater specificity."[114] Thus, it seems that in order to fit a broader range of countermeasures within the purview of "essential security interests" one would need to resort to legal acrobatics, still with little possibility of success. Moreover, this argument could only work with respect to countermeasures that respond to human rights violations, but it would be of no use with respect to other countermeasures, where a security linkage could not be easily established, even with legal acrobatics.

2. *Economic Sanctions Beyond the Notion of "Emergency": The Threshold of Gravity for a Situation to Fall Under GATT Article XXI(b)(iii)*

An additional challenge in the justification of trade sanctions adopted to induce compliance with a State's international obligations under the exception for "emergencies in international relations" arises from the threshold of gravity required for a situation to qualify as an emergency. As mentioned above, even in the case of *US—Origin Marking*, where the Panel was open to the idea that broader concerns such as the protection of human rights can find reflection in the articulation of a State's essential security interests, it was stipulated that the situation must still meet the requisite level of gravity. According to *US—Origin Marking*, the assessment of the gravity of the situation must be made by the Panel based on certain objective parameters which "could be conceptualized in a spectrum covering friendly and peaceful interaction between Members, at one end, and the breakdown of relations between two or more countries, or Members, at the other end."[115] According to the Panel:

An emergency in international relations on that spectrum lies closer to the extreme of a breakdown in relations between two or more countries, or Members. In contrast, most political tensions and differences among countries, even those that may appear to be of a quite serious nature, would . . . normally not be situated close enough to that end of the spectrum and would therefore not necessarily constitute an emergency.[116]

Based on this definition, it is doubtful that any situation where a State is invoking another State's international responsibility for internationally wrongful acts would meet the required threshold of gravity to qualify as an "emergency in international relations." For example, in the case of *US—Origin Marking*, the Panel observed that although the events in Hong Kong, China presented by the United States as evidence of an emergency, i.e. human rights violations, including limitations on freedom of the press, freedom of speech, democratic elections, and independence of the judiciary, and arbitrary detention "are, and remain, the subject of tensions and expressions of concern at

113. *Id.* at ¶ 7.135.
114. *Id.*
115. *US—Origin Marking*, *supra* note 29, at ¶¶ 7.309-7.310.
116. *Id.* at ¶ 7.311.

the international level" and "have impacted on international relations between China, Hong Kong, China and a range of WTO Members," the situation did not meet "the requisite level of gravity to constitute an emergency in international relations under Article XXI(b)(iii)."[117] The Panel grounded this conclusion, among others, on the fact that the US measures in question targeted "only certain areas of their relations and not others" and that cooperation between Hong Kong and the US in a number of policy areas, including in the area of trade, seemed to be continuing as usual, with the exception of the trade dispute over origin marking that was under discussion in the relevant proceedings.[118]

Echoing the relevant analysis in the previous part of the Article regarding sanctions imposed by third States in the context of an ongoing armed conflict,[119] it seems that targeted countermeasures in certain key areas of trade relations that aim to put pressure on a foreign government to comply with its international obligations, such as those in the field of human rights, may not be covered by GATT Article XXI(b)(iii) unless the invoking State escalates the situation further by completely cutting off ties with the target State. Paradoxically, it seems easier to justify under the WTO exceptions the more radical response of imposing a total embargo[120] on a foreign State than to justify more limited and targeted trade restrictions. This point is illustrated in the *Saudi Arabia—IPRS* case, where Qatar challenged certain aspects of the comprehensive embargo that Saudi Arabia, Bahrain, the United Arab Emirates, and Egypt (also known as "the Quartet") imposed against it for allegedly supporting and harboring terrorist individuals and organizations. The Panel there found that the complete severance of diplomatic and economic ties with another State constitutes "the ultimate State expression of the existence of an emergency in international relations."[121] Thus, the imposition of such a radical measure automatically placed the situation within the regulatory scope of the WTO security exceptions.

However, as Qatar noted, the Panel's reasoning was at least partially circular: the severance of all diplomatic and economic relations constituted both the 'emergency in international relations' and the 'action which [Saudi Arabia] consider[ed] necessary for the protection of its essential security interests'.[122] In other words, the very same measures that disrupted bilateral relations and were challenged before the Panel, were used as evidence to establish the existence of the emergency which ostensibly justified them. This logical flaw in the Panel's reasoning highlights a broader issue: States appear to enjoy a wide margin of discretion under WTO law when completely cutting off ties with another State but face stricter limitations when employing targeted trade sanctions to exert pressure in specific strategic areas. The latter are less likely to be

117. *Id.* at ¶ 7.353.
118. *Id.* at ¶ 7.354.
119. *See supra* analysis accompanying notes 71-72.
120. What is sometimes referred to as "comprehensive" sanctions, as opposed to targeted sanctions. *See e.g.*, Thomas Biersteker, Marcos Tourinho & Sue Eckert, *Thinking about United Nations Targeted Sanctions*, *in* Targeted Sanctions 11, 13-14 (Thomas Biersteker, Sue Eckert, & Marcos Tourinho eds., 2016).
121. *Saudi Arabia—IPRS, supra* note 28, at ¶ 7.259.
122. *Saudi Arabia—IPRS*, *supra* note 28, at ¶ 7.264.

seen as indicative of a sufficiently severe deterioration in international relations to qualify as an "emergency" under the WTO security exceptions, whereas the former is treated as a self-evident case of such an emergency.

In sum, it is doubtful that all instances where a State imposes trade restrictions to implement another State's international responsibility and compel compliance with its obligations would qualify as an "emergency", unless the situation escalates into a "breakdown or near-breakdown" of relations between the States involved.[123]

3. *Security Exceptions vs. Countermeasures: The Risks of Shoehorning Countermeasures Within the Scope of GATT Article XXI(b)(iii)*

Beyond the practical challenges of justifying economic sanctions imposed as countermeasures under the WTO security exceptions, an important normative issue arises: there is a notable disparity between the requirements for invoking countermeasures under general international law and those for invoking the security exceptions. This disparity suggests that attempting to broaden the scope of the security exceptions to accommodate a wider range of measures may not only be analytically difficult but also normatively undesirable.

First, in the case of countermeasures, the invoking State must demonstrate that a prior internationally wrongful act was committed by the target State. When imposing a countermeasure, each State weighs the available evidence and makes its own determination regarding the international responsibility of the target State acting as *judex in causa sua*.[124] But it does so at its own risk: if said countermeasure is subsequently challenged, the State must be able to demonstrate that the customary requirements for the applicability of the defense were met. If the State has erred in its application of the law, then its error would engage its own international responsibility.[125] On the contrary, from the case law on the WTO security exceptions so far, it becomes clear that their successful invocation requires only tentative evidence that an essential security interest of the invoking State is affected and that the measure in question plausibly addresses this concern. The invoking State does not need to prove that the target State has acted in breach of its obligations.

This disparity between the requirements under the security exceptions and under general international law became abundantly clear in *Saudi Arabia—IPRS*. The Quartet imposed its embargo in response to Qatar's alleged wrongful acts, including support for terrorists and meddling in foreign States' internal affairs, in breach of the so-called Riyadh Agreements, a series of agreements concluded in 2013-2014 within the Gulf Cooperation Council aiming to ensure stability in the region and restore the relations amongst Council members. The Quartet had itself characterized its measures as "lawful countermeasures" in the context of other legal proceedings.[126] Qatar repeatedly denied these

123. *US—Origin Marking*, *supra* note 29, at ¶¶ 7.296-7.297.

124. Antonios Tzanakopoulos, Disobeying the Security Council: Countermeasures against Wrongful Sanctions 116 (2011).

125. *Id.*

126. *E.g.,* Saudi submissions in Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain,

allegations and challenged several aspects of the embargo before different judicial fora,[127] including the WTO. Nonetheless, Saudi Arabia was not required to provide any evidence of Qatar's alleged wrongdoing for successful invocation of the WTO security exceptions in *Saudi Arabia—IPRS*. The Panel found that some of the Saudi measures were justifiable under WTO law based solely on the evident existence of an emergency, which, as explained above, was proven by the complete disruption of international relations between the two States, and Saudi Arabia's unilateral assertion that the situation raises concerns relating to its essential security interests. If its trade restrictions were treated as "lawful countermeasures" under general international law, such an assertion would not suffice for successful invocation of the defense—Saudi Arabia would need to demonstrate that all the customary requirements were met, including a prior breach of Qatar's international obligations.

Secondly, a countermeasure under general international law must "be commensurate with the injury suffered."[128] This requirement of proportionality entails both a quantitative and a qualitative element: its assessment takes into account not only the damage caused by the act but also "the importance of the interest protected by the rule infringed and the seriousness of the breach."[129] Proportionality aims to ensure that the adoption of countermeasures does not lead to inequitable results.[130] Under the WTO security exceptions, there is no need to demonstrate that an injury has been suffered[131] or that the response was proportionate. In fact, according to the Panel in *Russia—Traffic in Transit*, the seminal WTO report on this issue, the State is free to determine unilaterally whether the measure is necessary and appropriate to respond to the identified security concern.[132] The Panel found that the term "which it considers" in the chapeau of GATT Article XXI(b) qualifies the term "necessary."[133] It interpreted this to mean that the determination of the necessity of an action is left at the sole discretion of the invoking State, without any further conditions.[134] In

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Egypt and United Arab Emirates v. Qatar), (Judgment, of 14 July 2020) 2020 I.C.J. 172 (July 14); and Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar) (Judgment of July, 14 2020), 2020 I.C.J. 81 (July 14). (hereinafter ICAO Council) [24]. The two judgments are almost identical.

127. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, 2021 I.C.J. 71 (Feb. 4); Effective Protection and Remedy Against any Act of Racial Discrimination—Discrimination on the Ground of National or Ethnic Origin (Qatar v. Saudi Arabia, United Arab Emirates), Jurisdiction of the Committee in Respect of Inter-State Communication, CERD/C/99/3 (June 18, 2020); PCA Arbitrations pursuant to Article 32 of the Constitution of the Universal Postal Union, (Qatar v. Saudi Arabia), 2020-27 (Perm. Ct. Arb. 2018); ISDS in beIN Corporation v. Saudi Arabia; Qatar Pharma v Saudi Arabia; Qatar Airways v Bahrain/Egypt/Saudi Arabia/UAE. Note, however, that the resolution of the political dispute led to discontinuation of these proceedings.

128. ARSIWA, *supra* note 24, at art. 51.

129. *Id.* and commentary thereto.

130. *Id.*

131. Within the meaning of ARSIWA, *supra* note 24, at art. 42.

132. *Russia—Transit, supra* note 29, at ¶¶ 7.146-7.147.

133. *Id.* at ¶ 7.146.

134. *Id.* at ¶¶ 7.146-7.147.

other words, the WTO security exceptions are at least "partly self-judging."[135] Accordingly, and coming back to the example of *Saudi Arabia—IPRS*, Saudi Arabia did not need to show before the Panel that the several aspects of its total embargo were "commensurate with the injury suffered." The Panel found that most Saudi measures, including radical measures such as denying Qatari nationals access to civil remedies through Saudi courts and preventing law firms from representing them,[136] were aspects of Saudi Arabia's "umbrella policy of ending or preventing any form of interaction with Qatari nationals" and thus met the minimum requirement of plausibility to be covered by the security exceptions.[137] It is, to say the least, doubtful that such measures would meet the requirement of proportionality if they were assessed under the general international law of countermeasures.

The absence of a proportionality requirement in the WTO security exceptions, at least as interpreted in case law so far, combined with the stipulation that the "emergency" in question must reflect a breakdown or near-breakdown of the international relations of the States involved near-comparable to war, seems to encourage an "all or nothing" approach to economic sanctions under WTO law. If a State wants to use the security exceptions to justify its trade-restrictive measures it will have to go for a full disruption of relations, which would then provide it with a very wide margin of discretion to impose almost any measure it wants. While this approach to the interpretation of the WTO security exceptions may appear odd at first, it is not entirely unreasonable; it operates under the assumption that States would not resort to such drastic measures unless there is a clear situation of emergency. A total embargo is less likely to constitute a disguised restriction on international trade compared to a targeted economic measure, as an embargo imposes significant consequences not only on the target State but also on the imposing State, indicating that such decision would not be taken lightly. Thus, setting the bar for what constitutes "an emergency in international relations" very high minimizes the risk of abuse of the security exceptions, which have, otherwise, very lenient requirements compared to a lawful countermeasure under general international law.

However, from a broader perspective on international law, promoting an "all or nothing" approach in all instances where States seek to respond to illegality and enforce international obligations through targeted economic pressure is undesirable. It would be more prudent to differentiate between "emergency" situations and "routine" inter-State tensions where States may wish to impose strategic economic restrictions to ensure compliance with international law. This could be achieved by recognizing the residual applicability of the defense of countermeasures under general international law for trade restrictions not adopted in an "emergency" context or those unrelated to security considerations. The analytical and normative arguments supporting this approach are further examined in Section C below.

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135. *US—Origin Marking*, *supra* note 29, at ¶ 7.160.

136. Known as "anti-sympathy measures," criminalizing expressions of sympathy for Qatar or objections to the measures adopted against it by the Quartet.

137. *Saudi Arabia—IPRS*, *supra* note 28, at ¶¶ 7.286-7.288.

In sum, this section has highlighted both the analytical and normative challenges of justifying trade sanctions imposed as countermeasures under the WTO security exceptions. Only limited measures taken in situations of utmost gravity that raise security-related concerns can readily fit within the scope of these exceptions. The current interpretation of "emergency in international relations" and "essential security interests" does not support the shoehorning of a broader range of countermeasures under this provision, while also raising important normative questions about the desirability of such practices. In view of these conclusions, the following sections discuss whether and to what extent the WTO general exceptions could be used to justify certain types of countermeasures (Section B); and, whether the defense of countermeasures under general international law may be directly applicable in the context of WTO disputes (Section C).

B. Countermeasures Justified Under the WTO General Exceptions

While the analysis above suggests that many trade restrictions imposed as countermeasures may not fit within the protective scope of the WTO security exceptions, the general exceptions under WTO law may offer an alternative path for justifying such measures. GATT Article XX[138] provides that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party" of certain types of measures that are exhaustively enumerated in the text of the provision. The list of measures includes, among others, those necessary to protect public morals (a) and human, animal or plant life or health (b); those necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT (d); and those relating to the products of prison labor (e) or the conservation of exhaustible natural resources (g). The introductory clause of the provision (*chapeau*) further stipulates that these measures are 'subject to the requirement that [they] 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." The purpose of the WTO general exceptions is to "enumerate the various categories of government acts, laws or regulations which WTO members may carry out or promulgate in pursuit of differing legitimate State policies or interests outside the realm of trade liberalization."[139] They provide "proof of the agreed hierarchy between trade commitments and (national) social preferences," and

138. This section uses GATT Article XX as an example for the purposes of the analysis, but all findings apply by analogy to the equivalent sub-paragraphs under GATS Article XIV. For the analogous application of findings under the GATT to the GATS General exceptions, *see* Panel Report, *US—Gambling*, ¶ 3.254, WTO Doc. WT/DS285/R (adopted Nov. 15, 2004) [hereinafter *US—Gambling*]. Note however the differences in the list of enumerated objectives under the two Agreements. *See also* note 28, *supra*.

139. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline,* 19, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996) (hereinafter *US—Gasoline*); Similarly, Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 121, WTO Doc. WT/DS58/R (adopted May 15, 1998) [hereinafter *US—Shrimp*].

acknowledge that certain agreed objectives need not "be set aside in the name of trade liberalization commitments."[140]

The question that arises in this context is two-fold. First, whether the implementation of international responsibility for internationally wrongful acts in other (non-WTO) areas of international law can be properly classified under any of the enumerated categories of measures included in the WTO general exceptions. Second, whether trade-restrictive measures adopted as countermeasures in response to prior internationally wrongful acts would meet the requirements of the "two-tiered test" to assess a measure's consistency with the general exceptions.[141]

This section addresses, first, the possibility of justifying certain countermeasures in response to breaches of international obligations relating to specific subject matters under GATT Articles XX(b), XX(e), or XX(g) GATT (sub-section 1). Second, it discusses whether certain countermeasures can be justified as measures protective of a State's "public morals" under GATT Article XX(a) (sub-section 2). Last, it examines whether there is any room to interpret GATT Article XX(d) in a manner that encompasses countermeasures as measures "necessary to secure compliance with laws or regulations" (sub-section 3).

1. *Countermeasures Relating to the Subject-Matter of GATT Articles XX(b), XX(e), or XX(g)*

The first tier of the two-tiered test followed to assess whether a measure falls under the protective scope of GATT Article XX, is the measure's "provisional justification" under one of the enumerated subparagraphs of the provision.[142] This tier requires *two* separate sub-steps. The first sub-step is "an initial, threshold examination. . . to determine whether there is a relationship between an otherwise GATT-inconsistent measure and the protection" of one of the exhaustively enumerated objectives.[143] The Respondent should present evidence that the measure at issue is "designed" to serve the particular objective.[144] The examination of a measure's design includes its content, structure and expected operation[145] and, is not "a particularly demanding

140. Petros Mavroidis, The Regulation of International Trade: GATT 415 (2016).

141. *US—Gasoline*, *supra* note 139, at 22.

142. *Id. US—Gasoline, supra* note 139, at 22.

143. Appellate Body Report, *Colombia—Measures Relating to the Importation of Textiles, Apparel and Footwear*, ¶ 5.68, WTO Doc. WT/DS461/AB/R, (adopted June 7, 2016) [hereinafter *Colombia—Textiles*]. The exhaustive nature of the list was confirmed in *US—Gasoline, supra* note 139, at 22.

144. E.g., Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 6.20, WTO Doc. WT/DS2/R (adopted Jan. 29, 1996); *Panel Report, European Communities—Measures Affecting Asbestos and Asbestos Containing Products*, ¶¶ 8.184–8.186, WTO Doc. WT/DS135/R, (adopted Sept. 18, 2000) [hereinafter *EC—Asbestos*]; Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries,* ¶¶ 7.198–7.199, WTO Doc. WT/DS246/R (adopted Dec. 1, 2003); *Colombia—Textiles*, *supra* note 143, at ¶ 5.67.

145. *See* similarly, Appellate Body Report, *Japan—Taxes on Alcoholic Beverages,* WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Oct. 4, 1996) [hereinafter *Japan—Alcoholic Beverages*] in the context of national treatment.

step" in the analysis of GATT Article XX.[146] The threshold is relatively low as the measure should be "not incapable of" contributing to the interest invoked.[147] Accordingly, our query must start with an examination of whether trade-restrictive measures imposed as countermeasures could meet this first sub-step of provisional justification under any of the sub-paragraphs of GATT Article XX.

At first sight, some countermeasures may relate to some of the objectives enumerated in GATT Article XX. This would be the case if the international obligations previously breached by the target State affect the attainment of these objectives. For example, countermeasures taken in response to a breach of obligations relating to the protection of the environment or the conservation of exhaustible natural resources are closely relevant to the subject-matter of GATT Articles XX(b) or XX(g). Moreover, it has been suggested that GATT Article XX(e) relating to "products of prison labour" can be interpreted generously to encompass products produced by means of forced or exploitative labour more broadly, which could accommodate countermeasures to induce compliance with certain obligations relating to labour or, more broadly, human rights.[148] One could also argue that certain human rights obligations relate to the protection of human life or health under GATT Article XX(b).

However, the aim of a countermeasure is "to induce [a State responsible for an internationally wrongful act] to comply with its obligations"[149] and not "to protect human, animal or plant life or health," for example. Thus, even if the countermeasure meets the requirements for an "initial, threshold examination," which seeks to determine the existence of "a relationship between [the] otherwise [WTO]-inconsistent measure and the protection" of one of the enumerated objectives, it would be harder to prove that it is actually "designed" to serve that particular objective.[150] The link between the countermeasure and the final objective of protecting public health or the environment, for example, would be rather oblique. The measure would aim at prompting the target State to implement measures "designed" to protect the objective in question. It is unclear whether this would be sufficient to establish a relationship between the adopted trade-restrictive measure and the protection of said objective. Thus, already the application of the first sub-step in a measure's provisional justification under the general exceptions presents some challenges to the justification of countermeasures. However, in view of the low threshold of this sub-step

146. *Colombia—Textiles, supra* note 143, at ¶ 5.70. But *see contra*, Panel Report, *US—Tariff*, *supra* note 143, at ¶ 7.151.

147. *Colombia—Textiles*, *supra* note 143, at ¶ 5.68; Panel Report, *Brazil—Certain Measures Concerning Taxation and Charges*, ¶ 7.570, WTO Doc. WT/DS472/R, WT/DS497/R (adopted Aug. 30, 2017) [hereinafter *Brazil—Taxation*]; Appellate Body Report, *India—Certain Measures Relating to Solar Cells and Solar Modules*, ¶ 5.58, WTO Doc. WT/DS456/AB/R (adopted Sept. 16, 2016).

148. Janelle Diller & David Levy, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 Am. J. Int'l L. 663, 683–685 (1997); Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, 36 JWT 353, 355 (2002).

149. Int'l L. Comm'n, *Responsibility of States for Internationally Wrongful Acts*, art. 49, U.N. Doc. A/56/10 (2001).

150. *See supra* notes 141-45.

and the possible link between the countermeasure and the protection of the enumerated objective ("not incapable" of protecting said objective) one could argue that the relevant exceptions could be invoked, at least in principle.

However, the second sub-step of the measure's provisional justification under GATT Article XX "entails a more in-depth, holistic analysis" of the relationship between the measure and the stated objective.[151] The Respondent must demonstrate a specific kind or degree of connection between the measure and the objective invoked.[152] This required nexus differs among the subparagraphs of GATT Article XX. Most pertinently to the present inquiry, the measure should be "necessary" for the protection of the objective in paragraph (b) and "relating to" the objectives in paragraphs (e) and (g).

The Appellate Body, interpreting the term "necessary" in accordance with VCLT Article 31, has explained that, in a continuum ranging from "indispensable" to "making a contribution to," a "necessary" measure is "located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".[153] Measures that are "indispensable or of absolute necessity or inevitable" certainly fulfil the necessity requirement, but other measures may also fall within its ambit[154] if their "contribution to the achievement of the objective [is] material, not merely marginal or insignificant."[155] According to the Appellate Body, there is no "generally applicable standard requiring the use of a pre-determined threshold of contribution in [analyzing] the necessity of a measure under Article XX."[156] The greater the contribution, the more easily a measure might be considered as necessary.[157] Actual contribution is important in this assessment, but a Panel may also conclude that a measure is necessary on the basis of its aptness to produce material contribution, based on available evidence.[158] Besides, a measure's contribution to the objective is only one of the components in the necessity calculus.[159] According to case law, the analysis involves "a process of 'weighing and balancing' a series of factors, including the importance of the societal interest or value at stake, the contribution of the measure to the objective it pursues, and the trade-restrictiveness of the measure."[160] In this context, WTO bodies also

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151. *Id.*

152. *US—Gasoline*, *supra* note 139, at 17-18.

153. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 160-61, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan. 10, 2001) [hereinafter *Korea—Various Measures on Beef*].

154. *Id.*

155. Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 210, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007) [hereinafter *Brazil—Retreaded Tyres*].

156. Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 5.213-5.214, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014) (hereinafter *EC—Seal*) [5.213-5.214]; *Colombia—Textiles, supra* note 143, at ¶ 5.72.

157. Appellate Body Report, *Korea—Various Measures on Beef*, *supra* note 151, at ¶ 163; Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 251, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010) [hereinafter *China—Publications and Audiovisual Products*].

158. *Brazil—Retreaded Tyres*, *supra* note 155, at ¶ 151.

159. *Id.*

160. *Colombia—Textiles, supra* note 143, at ¶ 5.70.

examine the availability of less trade-restrictive alternative measures to achieve the desired objective.[161]

On the other hand, the term "relating to" is "more flexible textually than the 'necessity' requirement."[162] Although in *US—Gasoline* it was interpreted as requiring that the measure in question is "primarily aimed at"[163] the stated objective, in later jurisprudence, it seems that the test to meet the requirement became—implicitly—a bit less strict. According to the Appellate Body, the means must be "reasonably related" to the ends.[164] In other words, the relationship between ends and means must be "substantial,"[165] "genuine,"[166] or "observably … close and real."[167]

In view of the above, it seems that whether an economic sanction imposed as a countermeasure in response to a prior wrongful act could meet the required nexus would depend on the circumstances and the terms of the relevant sub-paragraph. It might be easier to prove that there is an "observably close and real" relationship between the means employed and the end pursued under GATT Articles XX(e) and XX(g) in the case of a trade sanction aiming to induce compliance with international environmental or labor law than to prove that a sanction has (or is apt to have) a "material contribution" to the protection of public health in a foreign country. In all cases, the lack of direct causal relationship between the conduct of the invoking State that imposes the trade restriction and the desired result, which is the protection/attainment of one of the enumerated objectives, poses a challenge to the application of the general exceptions. In the case of trade-restrictive countermeasures, it is never the trade restriction itself that serves the enumerated objectives; rather it is a potential future act of the State targeted by the trade restriction that will ostensibly serve one of these objectives, provided that the political and economic pressure exerted by the countermeasure proves successful.

Moreover, in the case of trade-restrictions adopted as countermeasures there is another important obstacle that the respondent will need to sidestep: the interests invoked by the State are primarily extraterritorial. Does GATT Article XX(b) allow a WTO Member to introduce trade restrictions in order to protect "human … life or health" or "exhaustible natural resources" in the territory of *another* WTO Member?[168] Do this kind of "outwardly-directed," "extra-jurisdictional," or "extraterritorial"[169] trade-restrictions fall within the scope of the general exceptions?

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161. *China–Publications and Audiovisual Products, supra* note 157, at ¶¶ 239-242 and examples therein.

162. *Korea—Various Measures on Beef, supra* note 153, at ¶ 161 n.104.

163. *US—Gasoline*, *supra* note 138, at 16.

164. *US—Shrimp (ABR)*, *supra* note 84, at ¶ 141.

165. *US—Gasoline*, *supra* note 138, at 19.

166. *Brazil—Retreaded Tyres*, *supra* note 155, at ¶ 210.

167. *US—Shrimp (ABR)*, *supra* note 84, at ¶ 141.

168. Bartels, *supra* note 146, at 357.

169. *Id.*; Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 Univ. Va. J. Int'l L. 689, 695 (1998); Bartels, *supra* note 146, at 357; Mark Wu, *Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine*, 33 Yale J. Intl. L. 215, 235 (2008).

The issue of the extra-territorial reach of measures sought to be justified under GATT Article XX was encountered in past WTO case law. In *US–Tuna I*, the United States had banned imports of tuna from several countries, on the basis that they were harvested with fishing methods resulting in incidental taking of marine mammals, such as dolphins, that was higher than the acceptable limit set by U.S. legislation. The measure had a clear extra-territorial application as it required that all harvesting of tuna, even when it occurs in non-U.S. waters by non-U.S. citizens, must be done in accordance with U.S. law for the resulting products to enjoy access to the U.S. market. The Panel considered that GATT Articles XX(b) and XX(g), which were invoked by the United States as a justification for their import ban, do not apply extra-jurisdictionally.[170] According to the Panel, if they were to accept an interpretation of these provisions that allows for measures with extraterritorial reach, then "each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the [GATT]. The [GATT] would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations."[171] The Panel considered that such extra-territorial measures would be contrary to the right of each State to adopt its own conservation and public health policies and standards.[172]

A few years later, the matter arose again in the context of the *US–Shrimp* dispute where a similar U.S. conservation measure was under scrutiny. The United States had imposed an import ban on shrimp and shrimp products from WTO members that did not comply with specific requirements under U.S. law relating to the protection of sea turtles from incidental death in the process of shrimp harvesting. Like in *US–Tuna I*, the measure in *US–Shrimp* extended to fishing activities that took place beyond areas of U.S. jurisdiction. In that case, the Panel and the Appellate Body accepted that there was a "sufficient nexus" between the species under protection and the United States, on the basis that sea turtles are migratory species and are known to occur, at least partly, in waters over which the United States exercises jurisdiction.[173] However, they did not expressly diverge from the reasoning of the Panel in *US–Tuna I*. The Appellate Body stipulated that this finding was specific to the circumstances of that case and that they did not "pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation."[174]

In view of the finding in *US–Shrimp* it seems that some countermeasures aiming at inducing compliance with obligations relating to the environment or exhaustible natural resources could fit within the scope of GATT Articles XX(b) or XX(g) even if they target activities that take place outside the territorial jurisdiction of the imposing State. This is because the effects of such

170. Panel Report, *United States—Restrictions on Imports of Tuna*, at ¶¶ 5.27-5.27, 5.32, DS21/R – 39S/155 (Sept. 3, 1991) [hereinafter *US—Tuna I*].

171. *Id.* at ¶ 5.27.

172. *US—Tuna I*, *supra* note 170, at ¶¶ 5.27, 5.32.

173. *US—Shrimp (ABR)*, *supra* note 84, at ¶ 133; *US—Shrimp*, *supra* note 139, at ¶ 7.53,.

174. *US—Shrimp (ABR)*, *supra* note 84, at ¶ 133.

activities are often transboundary or global.[175] For example, a violation of obligations relating to carbon emissions can have global effects that reach beyond the jurisdiction of the offending State. Thus, there is "sufficient nexus" between the measure and the protection of public health or the conservation of an exhaustible natural resource *within* the jurisdiction of the imposing State, as well as beyond. But this argument has clear limitations. For example, if the species under conservation was not encountered at all within the jurisdiction of the State imposing the trade restriction, the reasoning of the *US–Shrimp* would not apply. Similarly, the violation of the human rights of foreign citizens, by a foreign State, within its own territorial jurisdiction, does not have any demonstrable effects on the human health or life in any other State. The intended effects of a countermeasure that aims at inducing compliance with human rights obligations in a foreign State are exclusively extra-territorial.

There are some arguments that could be made in support of extending the protective scope of these sub-paragraphs of GATT Article XX to countermeasures despite their clear extra-jurisdictional scope. As acknowledged already in the *US–Tuna I* report, the text of these provisions refers to life and health protection and natural resources conservation "generally without expressly limiting that protection to the jurisdiction of the contracting party concerned."[176] The negotiating history of the clause also does not seem to point to any clear jurisdictional limitations, although it reveals that drafters had primarily in mind sanitary measures (i.e., measures with a pure internal reach and protection objective) when drafting the relevant exception clauses.[177] Therefore, it seems that the reasoning for excluding extra-jurisdictional measures from the scope of the general exceptions results from general international law rather than the provision itself. Specifically, it seems that at the core of this argument is the principle of State sovereignty: you cannot force a State to comply with policies to which it has not consented.[178] Even if one could argue that the measure does not really force a foreign State to do anything but simply conditions market access on the basis of adopting certain practices, still the measure interferes with a foreign State's right to select its domestic policies and leads to the selective application of the WTO Agreements, as cautioned by the Panel in *US–Tuna I*. However, in the case of trade-restrictions imposed as countermeasures the issue of consent does not present any limitations: the target State has indeed consented to certain rules under international law and the breach of said rules results in its international responsibility. Accordingly, one could argue that the adoption of countermeasures with extra-territorial reach under the general exceptions does not present any problems in such circumstances. Besides, extraterritorial concerns are already present to some extent in the text of the general exceptions: GATT Article XX(e) on products of prison labor

175. Condon, *supra* note 26, at 170–172. Condon also discusses the difficulties of identifying whether a particular environmental issue has transboundary or global effects.

176. *US—Tuna I*, *supra* note 170, at ¶ 5.25.

177. *Id.* at ¶ 5.26.

178. Condon, *supra* note 26, at 166. This is also implied in the reasoning of *US—Shrimp (ABR), supra* note 84, at ¶¶ 170-171.

explicitly applies to production-based trade restrictions[179] and has clear extra-territorial scope.[180] Following this reasoning would allow certain countermeasures to be justified under GATT Articles XX(b) or XX(g) despite the lack of clear jurisdictional nexus between the imposing State and the targeted activity.

In sum, the analysis above highlights the challenges that a State would need to side-step in seeking to justify a trade sanction imposed as a countermeasure in response to a prior internationally wrongful act under GATT Articles XX(b), (e), or (g). First, while such sanctions might satisfy the initial threshold examination of the two-tier test by establishing a general relationship with the enumerated objectives, it would be difficult to prove they are "designed" to serve those objectives directly. Countermeasures are designed to compel a State to comply with obligations, rather than to directly protect public health or the environment. Second, the deeper analysis required to establish the requisite nexus between the measure and the enumerated objective, especially the necessity test required under Article XX(b), presents further difficulties. A countermeasure would need to be shown as "necessary," requiring a substantial contribution to the objective, which is often hard to demonstrate in the context of countermeasures. In contrast, the less stringent "relating to" requirement in Articles XX(e) and (g) might provide a more feasible path for justifying relevant sanctions. Still, the absence of a direct causal link between the countermeasure and the result it seeks remains a key challenge. Last, an important hurdle in justifying trade sanctions under the general exceptions is their extraterritorial nature. Previous WTO case law indicates that these provisions were not intended to extend beyond the territory of the imposing State unless a sufficient nexus between the protected interest and its jurisdiction can be demonstrated. In this vein, some environmental countermeasures could potentially fit within the scope of Articles XX(b) or (g) due to the transboundary effects and global impact of the relevant violations. However, applying the same reasoning to other types of trade-restrictive countermeasures, such as those responding to human rights violations in a foreign country, remains problematic. In principle, such measures with extra-territorial reach would impinge on the foreign States' sovereignty. However, this sub-section offered some arguments in favor of justifying trade restrictions with extra-jurisdictional effects under GATT Article XX when they are imposed as countermeasures. This is because the target State has already consented to the international rules that it violates and thus, the sovereignty argument is weaker when the imposing State simply aims at implementing the offending State's international responsibility.

2. *Countermeasures as an Issue of Public Morals Under GATT Article XX(a)*

Another trend witnessed in recent jurisprudence is an attempt to justify trade-restrictive sanctions adopted in response to prior illegal acts under the "public morals" exception in GATT Article XX(a).

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179. Nicola Wenzel, *Article XX Lite GATT*, 5 *in* WTO—Trade in Goods 537 (Rüdiger Wolfrum, Peter-Tobias Stoll, & Holger Hestermeyer eds., 2011).

180. Stirling, *supra* note 26, at 37–38.

The oft-cited report of the Panel in *US–Gambling* found that "the term "public morals" denotes standards of right and wrong conduct maintained by or on behalf of a community or nation,"[181] However, "WTO Members are afforded a certain degree of deference in defining the scope of public morals with respect to the values prevailing in their societies at a given time."[182] Thus, "public morals" is a rather flexible concept. In *US–Tariff*, which examined the legality of the additional duties imposed by the US to products from China at the early stages of the US–China trade war,[183] the US asserted that its measures "protect[ed] public morals within the meaning of Article XX(a) because they have been adopted to "obtain the elimination" of conduct that violates US standards of rights and wrong, namely China's unfair trade acts, policies, and practices."[184] According to the US, these unfair trade acts related to the acquisition of "intellectual property, trade secrets, technology, and confidential business information from US companies" through coercion and theft.[185] The US submitted evidence from domestic instruments to show that the Chinese practices are contrary to prevailing standards of public morals in the US. In the first step of a measure's provisional justification under the subparagraphs of GATT Article XX,[186] the Panel found "that the "standards of right and wrong" invoked by the US (including norms against theft, misappropriation and unfair competition) could, at least at a conceptual level, be covered by the term "public morals" within the meaning of Article XX(a)."[187] This finding shows that the threshold for a measure to be considered as protective of public morals—at least in this initial step of analysis—is set exceedingly low.[188] Under this broad understanding of the term "public morals." several sanctions imposed as a countermeasure in response to prior illegal acts could, at least *prima facie*, fall within the scope of the public morals exception. Indeed, as pointed out in *US–Tariff*, past WTO case law has found a very broad range of policies as pertinent to WTO members' public morals, from gambling regulations, prohibition of certain content in cultural goods, and protection of animal welfare, to combatting money laundering and promoting social inclusion.[189]

However, not all economic sanctions imposed in response to violations of international law can be considered relevant to "public morals." Despite the deference afforded to WTO members to define the public morals prevailing in their communities, the customary rules of treaty interpretation suggest that there are outer limits to the scope of the term. The Panel's approach in

181. *US—Gambling, supra* note 138, at ¶ 6.465.

182. *US—Tariff, supra* note 86, at ¶ 7.131. Members" discretion in defining their own public morals has been consistently reaffirmed in relevant case law. *See e.g., US–Gambling, supra* note 138, at 6.461; *China–Publications and Audiovisual Products, supra* note 157, at ¶ 7.759; *Brazil–Taxation, supra* note 147, at ¶ 7.520; *EC–Seal, supra* note 156, at ¶ 5.199.

183. *See generally* a brief overview of the trade war prior to 2025 developments under the second Trump administration in Yoon Heo, Free Trade and the US–China Trade War: A Network Perspective 6, 7 (2022).

184. *US—Tariff, supra* note 86, at ¶ 7.113.

185. *Id.* at ¶ 7.128.

186. See analysis in *supra* notes 142-147.

187. *US—Tariff, supra* note 86, at ¶ 7.140.

188. Ming Du, *How to Define Public Morals in WTO Law? A Critique of the Brazil-Taxation and Charges Panel Report*, 13 Glob. Trade & Cust. J. 69, 73 (2018).

189. *See US—Tariff, supra* note 86, at ¶ 7.118 and references therein.

US–Tariff that conceded to the inclusion of economic values within the meaning of public morals was criticized as a "moral stretch" that allows for disguised restrictions on international trade to be presented in the guise of a legitimate public morals' consideration.[190] Such approach is contrary to the contextual interpretation of public morals in view of the provision's *chapeau* and to the object and purpose of the WTO Agreements. It this vein, it is debatable whether trade sanctions adopted in response to violations of international economic law (other than WTO law) could be classified as measures protective of public morals as, depending on their nature, they may stumble upon the same interpretative hurdle. Moreover, there is an important issue here relating to the plain ordinary meaning of the term public morals: countermeasures in response to prior wrongful acts in fields of international law such as freedom of commerce, navigation, aviation, transportation, space regulation, and so on so forth, seem like a far cry from the traditional understanding of the term "public morals" which has a clear ethical connotation and does not seem to entail compliance with just any form of law or regulation in a particular society.

Nonetheless, at least some countermeasures, especially those adopted in response to prior violations of human rights or humanitarian law, have a strong connection to public morality.[191] Principles of international human rights law are strongly entrenched in the moral fiber of most societies. Moreover, most States are bound by several multilateral conventions such as the International Covenants on Civil and Political Rights (ICCPR), and on Economic Social and Cultural Rights (ICESCR), the Conventions on the Elimination of Discrimination Against Women (CEDAW), Racial Discrimination (CERD), and the Convention on the Rights of the Child.[192] Similarly, the Geneva Conventions enjoy universal participation and several principles of international humanitarian law have acquired the status of international customary law. These are "relevant rules of international law applicable between the parties" under VCLT Article 31(3)(c) and inform the interpretation of the term "public morals."[193] These rules are also reflected, often, in the domestic legal orders of WTO member States. It would thus be hard to argue that the protection of rights stemming from such instruments does not relate to the "standards of right and wrong conduct" prevailing in most States.

However, a State must demonstrate that the measure is *designed* to protect public morals. As elaborated above, this initial, threshold examination is not particularly demanding as the State must simply demonstrate that its measure

190. Christian Delev, *A Moral Stretch? US—Tariff Measures and the Public Morals Exception in WTO Law*, 21 World Trade Rev. 249, 252 (2022).

191. Howse and Genser, *supra* note 26, at 185–186.

192. On the relevance of Members' participation in human rights treaty for the purposes of determining the scope of the public morals exception see also Charnovitz, *supra* note 167, at 742; Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 Eur. J. Int'l L. 753, 791 (2002); Nicolas Diebold, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11 J. Int'l Econ. L. J. Int'l Econ. L. 43, 63–65 (2008); Delev, *supra* note 190, at 258.

193. *See* controversy on the scope of the term "applicable between the parties" *supra* at n. 84. In any event, several rules of international human rights or humanitarian law are of customary character and thus, unambiguously relevant to the interpretation of the term "public morals" under VCLT, *supra* note 49, at art. 31(3)(c).

is "not incapable" of protecting public morals.[194] Yet, economic sanctions aiming to induce compliance with international human rights law are not designed "*to protect* public morals." They are designed to pressure States to comply with international law; to implement international responsibility; to hold States accountable. This is a first possible challenge in the justification of such measures under the public morals exception.

Moreover, under GATT Article XX(a) the measure must be "*necessary* to protect public morals." For the purposes of this necessity test we need to establish "a genuine relationship of ends and means between the measures at issue and the public morals objective pursued" by the adopting State.[195] The Panel in *US–Tariff* found that the US measures, although relevant—according to their reasoning—to the invoked US public morals, failed to meet the requirements of the necessity test.[196] In the relevant parts of the report the Panel states that the United States failed to explain how "a genuine relationship of ends and means exists between *the products* subject to additional duties and the public morals objective as invoked by the United States."[197] Although the Panel's analysis on this matter is quite brief and does not offer any further guidance, the reasoning seems to suggest that the invoking State must demonstrate a link between the products subject to trade restrictions and the societal values or interests at stake. Put simply, if the public morals invoked are those relating to child labor, the State could argue that banning the importation of products *resulting* from child labor is a necessary trade restriction under GATT Article XX(a). On the contrary, imposing quantitative limitations or increasing duties on *other* products originating from the same country, which are unrelated to the public moral concern of child labor, would not be easily regarded as a necessary trade restriction. Understandably, the importation and offering for sale in the domestic market of products that resulted from child labor would constitute on offense to the public morals of the relevant society. Such measure would be necessary in order to protect domestic consumers "from suffering a moral taint from serving as a market for such products."[198] However, in situations where the violations of international human rights law are unrelated to the products that are subject to the trade restrictions there is an important hurdle in the application of the necessity test.[199] Arguing that restricting trade in order to put pressure on a third State to comply with its international obligations within its own jurisdiction, without being able to demonstrate any extraterritorial effects of the relevant State practices that would offend public morals in the importing country, is putting the necessity test under stress. The claim that the mere exposure to *any* product from the offending State would be morally objectionable is a bold claim. This kind of "outwardly directed" trade-restrictions that essentially seek to promote moral values in *foreign* countries do not fit very comfortably within the scope of the public morals exception. The same concerns

194. *Colombia—Textiles, supra* note 143, at ¶¶ 5.68–5.70.
195. *US—Tariff, supra* note 86, at ¶ 7.228.
196. *Id.* at ¶¶ 7.228-7.231.
197. *Id.* at ¶¶ 7.230.
198. Charnovitz, *supra* note 167, at 695.
199. *See also* Bogdanova, *supra* note 26, at 272.

regarding extraterritoriality, which were discussed earlier,[200] also apply in this case with the additional challenge that public morality is a very subjective and State-specific notion. Thus, its extra-jurisdictional application is particularly awkward. It is one thing to argue that your measure protects life and health in another State and another to argue that your measure protects your own public morals within another State's jurisdiction.

However, there are counterarguments to this approach. For example, it has been argued that "any formal association with an abusive foreign government can violate a Member's public morals" or that "the act of trading with an abusive regime raises concerns of complicity."[201] In this sense, it would be easier to demonstrate that a full trade embargo is "necessary" to protect public morals than to justify specific targeted trade restrictions, leading to the same "all or nothing" approach discussed in previous sections. This approach would also entail the risk of abuse: it would allow States to selectively exclude certain WTO members from the benefits accrued under the WTO Agreements on the basis that they engage in some sort of violation of human rights. The *chapeau* of GATT Article XX may be able to prevent some instances of abuse, but if this approach to necessity is adopted then it would be very hard to strike a balance between a *bona fide* public-morals-related economic sanction and a disguised restriction on trade.

In conclusion, applying the public morals exception to sanctions imposed in response to prior internationally wrongful acts poses significant challenges. While past case law has broadly interpreted the concept of public morals, its ordinary meaning and context limits its applicability to trade restrictions that address specific ethical concerns. Thus, this exception can, in principle, justify sanctions responding to violations with a strong moral dimension, such as human rights or humanitarian law breaches, but it cannot extend to countermeasures for violations in fields like non-WTO economic relations, aviation law, or space law, which lack a clear moral connection. Moreover, the necessity test presents a substantial hurdle. States must not only demonstrate that the measure is necessary to protect public morals, but also that the specific trade-restricted products are directly linked to the moral concern at issue. The extraterritorial application of the public morals exception further complicates matters. Arguing that trade restrictions are needed to enforce moral values in another State risks overextending the exception's scope and infringing on State sovereignty. While the argument that any trade relations with a regime engaging in serious violations of international law might be offensive to a State's public morals has some merit, it would be most compelling if the invoking State is willing to cease all trade relations. Otherwise, this reasoning could enable selective trade restrictions masked as moral concerns. Striking a balance between legitimate moral concerns and the risk of disguised trade restrictions is crucial. The *chapeau* of GATT Article XX may help prevent abuses, but the broad application of the public morals exception remains contentious and must be approached cautiously.

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200. *See* analysis *supra* in notes 166–176.
201. Howse & Genser, *supra* note 26, at 186.

3. Countermeasures Under GATT Article XX(d)

Reading through GATT Article XX, one of the sub-paragraphs, seems, at least at first sight, the most pertinent to measures aiming at the implementation of international responsibility. Article XX(d) allows for the adoption or enforcement of measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement." The provision is followed by a non-exhaustive list of such laws or regulations "including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of [GATT] Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices." Isn't a trade-restrictive countermeasure a measure "to secure compliance" with international laws and regulations? And what is the meaning of the term "not inconsistent with the provisions of this Agreement?" Are other multilateral treaties such as those on the protection of human rights or the environment in conflict with the WTO Agreements?

This matter has only been examined once in WTO case law. In the case of *Mexico–Soft Drinks*, Mexico had adopted a series of measures aiming to protect its domestic sugar industry, including a 20% tax on soft drinks using sweeteners primarily used by US companies. In response to US claims that the tax was in breach of its WTO obligations, Mexico argued that its measure was lawfully introduced as a response to prior US breaches of its NAFTA obligations regarding access of Mexican-produced sugar to the US market and dispute settlement. In its submissions, Mexico argued that the term "laws and regulations" in GATT Article XX(d) includes international obligations of WTO members and thus, it can be invoked to justify measures designed "to secure compliance" with such obligations, in that case the US obligations under NAFTA. In other words, Mexico argued that GATT Article XX(d) GATT incorporates the defense of countermeasures under general international law.

Both the Panel and the AB rejected this understanding of the provision. They found that GATT Article XX(d) refers to "enforcement action within a particular domestic legal system, and [does] not extend to international action of the type taken by Mexico."[202] However, the reasoning in their reports is not particularly strong. They argued that the ordinary meaning and context of the term "to secure compliance" point to the notion of "enforcement" through the authorities of a State.[203] The analysis is largely based on this notion of enforcement, which, as the Panel explained, "contains a concept of action within a hierarchical structure that is associated with the relation between the state and its subjects, and which is almost entirely absent from international law."[204] According to the reports, countermeasures under international law cannot be considered as an "enforcement instrument" and as such, they do not constitute measures designed "to secure compliance" within the scope of

202. Appellate Body Report, *Mexico—Tax measures on soft drinks and other beverages*, 75, WT/DS308/AB/R (Mar. 6, 2006) (hereinafter *Mexico—Soft Drinks (ABR)*). Panel Report, *Mexico—Tax measures on soft drinks and other beverages*, ¶ 8.194, WTO Doc. WT/DS308/R (Oct. 7, 2005) (hereinafter *Mexico—Soft Drinks (PR)*).

203. *Mexico–Soft Drinks (PR), supra* note 202, at ¶ 8.175.

204. *Id.* at ¶ 8.178.

GATT Article XX(d).[205] This argument is not persuasive for several reasons. First, the provision itself does not really talk about "enforcement instruments" but rather about measures "to secure compliance." The Panel itself referred to the ITO Charter as *travaux préparatoires* of the GATT and explained that earlier drafts of the provision referred to measures "to induce compliance," a fact that weakens rather than supports its conclusion as it mirrors the language used later by the ILC to describe the defense of countermeasures under general international law.[206] Second, and most importantly, in the decentralized system of international law, countermeasures can indeed be regarded as a form of enforcement action, even if this is not explicitly stated in the ARSIWA.[207] The rules on countermeasures are codified in Chapter II of Part Three, titled "The *implementation* of the international responsibility of a State."[208] Thus, the exclusion of countermeasures from the scope of "measures . . . to secure compliance" is ill-substantiated. As to the term "laws and regulations," the reports concluded that this "refer[s] to the rules that form part of the domestic legal order of the WTO Member invoking the provision and do not include the international obligations of *another* WTO Member."[209] As Mavroidis pointed out, "this is an odd statement to say the least: what if Mexico had invoked a Mexican law incorporating its rights and obligations under NAFTA?"[210] This is a very apt question in this context, especially considering that in dualist States, every international obligation is translated into domestic legislation in order to have legal effects.[211] Moreover, as the Panel itself acknowledged, in monist States international agreements have direct effects and are immediately considered part of national law.[212] Thus, international obligations of another State that are owed towards the State taking the countermeasure and invoking the exception under GATT Article XX(d) will normally be incorporated into both States" domestic legislation in one way or another. Thus, the distinction of domestic versus international "laws and regulations" drawn by the Panel is not particularly convincing. In sum, the arguments of the Panel and AB did not provide any clear analytical reason why the term "to secure compliance with laws and regulations" cannot encompass measures taken to induce compliance with international obligations.

However, the list of "laws and regulations" in GATT Article XX(d), which refers to customs, monopolies, patents, trademarks, copyrights, and deceptive practices, indeed suggests that the drafters had in mind enforcement action relating to particular types of trade-related commercial practices. The provision seems to refer, for example, to restrictions imposed on the importation or sale

205. *Id.* at ¶¶ 8.175-8.179.

206. *Id.* at ¶ 8.176.

207. The "dominant perspective" in international law is that unfriendly unilateral actions such as countermeasures are primarily used as an enforcement tool, *see* Hakimi, *supra* note 7, at 115 and references therein.

208. ARSIWA, *supra* note 24, at Part Three (emphasis added).

209. *Mexico–Soft Drinks (ABR), supra* note 202, at 69, 70, 72, 75; *Mexico–Soft Drinks (PR)*, *supra* note 202, at ¶ 8.195.

210. Mavroidis, *supra* note 138 at 413–498, fn. 42.

211. Eileen Denza, *The Relationship between International and National Law*, *in* International Law 388 (5th ed. 2018).

212. *Mexico–Soft Drinks (PR), supra* note 202, at ¶ 8.196.

of products that violate intellectual property rights or have false marking of origin or violate consumer law. Still, the list is only illustrative, and its significance should not be "overestimated or misplaced."[213] Nothing in the provision prevents a re-interpretation of the scope of the exception to incorporate trade-restrictive measures adopted as countermeasures.

The *Mexico-Soft Drinks* reports also referred to the requirement that the measures in question are "designed" to secure compliance with the laws and regulations invoked in order to meet the first sub-step for provisional justification under GATT Article XX(d).[214] The Panel concluded that countermeasures under international law cannot be considered as measures designed to secure compliance because their effectiveness in achieving their stated goal, i.e., in bringing about a change in the behavior of the target State, is "inescapably uncertain" and "inherently unpredictable."[215]

Indeed, as discussed in the analysis above, a countermeasure is one step removed from the final objective, which is the protection of the rights established under the rules of international law with which compliance is sought.[216] But in the case of GATT Article XX(d), this argument is not persuasive because the provision covers precisely measures designed "to secure compliance" and not designed to protect human rights, for example, so the lack of direct causal link does not present as much of a challenge as it did in the context of other subparagraphs. On the element of uncertainty that was raised by the Panel, the AB disagreed and conceded that "a measure can be said to be designed 'to secure compliance' even if the measure cannot be guaranteed to achieve its result with absolute certainty."[217] This is consistent with past case law on the issue of a measure's contribution to the stated objective: a measure is only required to be suitable or capable to make a material contribution.[218] A measure's aptness to contribute can be demonstrated through "qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence."[219] The Panel and AB did not elaborate further on the necessity test under this provision as they had already rejected Mexico's defense on other grounds. But it is important to note that if we were to re-interpret GATT Article XX(d) to encompass trade restrictions taken as a countermeasure, the "weighing and balancing test" of necessity could accommodate considerations akin to the customary requirement of proportionality, thus bringing this defense closer to the general law on countermeasures than the security exceptions discussed above. It would thus limit, to a certain extent, the potential for abuse.

In conclusion, the interpretation of GATT Article XX(d) in relation to trade-restrictive countermeasures raises several complex issues. While this

213. Susanne Reyes-Knoche & Katrin Arend, *Article XX Litd GATT*, 5 *in* WTO—TRADE IN GOODS 530 (Rüdiger Wolfrum, Peter-Tobias Stoll, & Holger Hestermeyer eds., 2011).

214. *Korea–Beef*, *supra* note 151, at ¶ 157; reaffirmed in Appellate Body Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc. WT/DS302/AB/R, ¶ 65 (adopted Apr. 25, 2005); and *Mexico–Soft Drinks (PR)*, *supra* note 2020, at ¶ 8.182

215. *Mexico–Soft Drinks (PR)*, *supra* note 202, at ¶¶ 8.185-8.186.

216. *See* analysis *supra* in notes 151–166.

217. *Mexico–Soft Drinks (ABR)*, *supra* note 202, at 74.

218. *Brazil-Tyres*, *supra* note 155, at ¶ 151.

219. *Id.*

provision appears, at first glance, to be relevant to measures aimed at securing compliance with international obligations, WTO jurisprudence has narrowly construed its applicability to countermeasures. The *Mexico–Soft Drinks* case clarified that Article XX(d) applies to domestic enforcement actions rather than to countermeasures under international law, rejecting the argument that measures designed to enforce compliance with international obligations fall within its scope. Thus, based on the current understanding of the provision, it cannot provide a viable avenue for States to justify trade sanctions imposed as countermeasures. However, as demonstrated above, the reasoning in the *Mexico–Soft Drinks* reports is not fully persuasive. The analysis provided arguments for a possible re-interpretation of the provision to encompass countermeasures as a form of enforcement action in the decentralized system of international law and suggested ways to use the necessity test to limit potential abuse.

4. Countermeasures and the Chapeau of GATT Article XX

Any measure provisionally justified under the enumerated sub-paragraphs discussed in the previous sub-sections would also need to satisfy the requirements of the second tier of the GATT Article XX analysis: it would need to be further appraised under the introductory clauses of the provision, also known as *chapeau*.[220] The *chapeau* requires that 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." These requirements are not concerned with the specific content of the measure under consideration but rather with the manner in which the measure is applied.[221] They are an expression of the principle of good faith and aim to prevent an abuse or misuse of the right to invoke the exceptions.[222] Presumably, a *bona fide* countermeasure aiming to induce compliance with international law would not be applied in a manner that "frustrates or defeats the legal obligations" of the WTO member States.[223] But, yet again, the application of the *chapeau* to trade-restrictive sanctions imposed as countermeasures is not without challenges.

The first requirement of the *chapeau* is that the measure does not amount to "arbitrary or unjustifiable discrimination." The standard of discrimination in this context goes beyond the standard for an inconsistency with the substantive non-discrimination provisions of the GATT.[224] It involves an analysis that relates primarily to "the cause of the discrimination, or the rationale put forward to explain its existence."[225] For a measure to be found inconsistent with the *chapeau*, the discriminatory application of the measure must not be simply an inadvertent or unavoidable aspect of a provisionally justified legitimate

220. *US—Gasoline, supra* note 138, at 22.
221. *Id.*
222. *US–Shrimp (ABR), supra* note 84, at ¶¶ 158, 160.
223. *US–Gasoline*, *supra* note 139, at 22.
224. *Id.* at 23; On the challenges of defining the relevant standard see Lorand Bartels, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction*, 109 Am. J. Int'l L. 95, 109–112 (2015).
225. *Brazil–Tyres, supra* note 155, at ¶¶ 225-226.

action but should rather be seen as a deliberate differentiation among countries that points to abusive invocation of the exception clause.[226] In the case of sanctions, their discriminatory nature is inherent as they target specific States that are responsible for internationally wrongful acts. This discrimination cannot be seen as "arbitrary or unjustifiable" in view of the targeted character of such action.

However, some interesting considerations arise in this context: what if a State imposed economic sanctions in response to certain international law violations against a specific State whilst failing to take similar action against other States responsible for the very same internationally wrongful acts? Wouldn't this amount to arbitrary or unjustifiable discrimination between counties where the same conditions prevail? Of course, a State, in the decentralized system of international law, has the sovereign right to decide whether to exercise its right to take countermeasures to implement the international responsibility of another State. It can do so with respect to some internationally wrongful acts whilst refraining from taking any action with respect to others. But in the context of the WTO exception clauses, the *chapeau* may restrict States' right to take such targeted action if the State is seen to be cherry-picking its trade partners by selectively applying trade countermeasures.

Moreover, the standards of the *chapeau* also entail procedural considerations. According to the AB, an otherwise fair and just measure, may still be applied in an "arbitrary or unjustifiable" manner if it fails to meet certain procedural conditions.[227] WTO case law has repeatedly confirmed the importance of good faith negotiations and efforts for cooperative arrangements in determining whether the requirements of the *chapeau* have been met.[228] This corresponds to the procedural requirements of countermeasures under general international law. As enshrined in Article 52 ARSIWA before taking countermeasures a State must call upon the responsible State to fulfil its international obligations, notify the State of any decision to take countermeasures, and offer to negotiate.[229]

As for the second requirement of the *chapeau*, which is that the measure should not amount to a "disguised restriction on international trade," it is generally acknowledged that its scope is not clearly defined.[230] The Panel in *EC–Asbestos* pointed out that the ordinary meaning of the term "to disguise" is to "conceal beneath deceptive appearances, counterfeit," "alter so as to deceive," "misrepresent," or "dissimulate."[231] Accordingly, a disguised restriction on trade would be a measure that "is in fact only a disguise to conceal the pursuit of trade-restrictive objectives."[232] This entails a case-by-case examination of the "design, architecture and revealing structure" of the measure,[233] to discern whether it is a *bona fide* restriction imposed to serve one of the enumerated objectives. The WTO adjudicative bodies need to "locate and mark out a line of

226. *US–Gasoline, supra* note 139, at 28.
227. *US–Shrimp (ABR), supra* note 84, at ¶ 160.
228. *US—Gasoline, supra* note 139, at 27; *US–Shrimp (ABR), supra* note 84, at ¶ 166.
229. ARSIWA, *supra* note 24, at art. 52(1).
230. *EC–Asbestos, supra* note 144, at ¶ 8.233.
231. *Id.* at ¶ 8.236.
232. *Id.*
233. *Id.* by reference to *Japan–Alcoholic Beverages*, *supra* note 145, at 29.

equilibrium" between the right of States to pursue legitimate objectives under the exception clauses and the rights of States under the WTO Agreements.[234] In view of the inherently discriminatory and targeted nature of trade-restrictive economic sanctions, striking this balance is particularly important as States may attempt to conceal protectionist measures or measures pursuing a broader economic agenda incompatible with the multilateral trading system under the guise of countermeasures.

C. Residual Applicability of the General Defense of Countermeasures in WTO Disputes

The analysis in the previous sections demonstrates that while some trade-restrictive sanctions imposed as countermeasures in response to internationally wrongful acts may potentially be justified under WTO security and general exceptions, doing so presents significant challenges. Navigating these exceptions requires constructing creative legal arguments to address the complexities and limitations discussed extensively earlier. The application of WTO exceptions to trade sanctions is far from straightforward, with numerous nuances that complicate their use in this context.

Moreover, an important consideration arises regarding the broader purpose of these exceptions and whether expanding their scope to encompass a wider range of trade sanctions is desirable. Unless GATT Article XX(d) is reinterpreted to include international actions aimed at securing compliance with international law, the WTO exceptions and the law on countermeasures remain distinct in their objectives. Countermeasures are intended to implement state responsibility for internationally wrongful acts and compel compliance with international obligations,[235] while the WTO security and general exceptions primarily aim to allow member states flexibility in protecting their essential security interests or specific public policy concerns. Therefore, even if certain trade-restrictive countermeasures can be argued to fit within the scope of these exceptions under particular circumstances, it becomes clear that these clauses were not originally designed with such measures in mind.

Furthermore, even with well-crafted legal strategies, certain trade-restrictive countermeasures may still struggle to fall within the scope of the WTO exception clauses even if they are adopted in accordance with the conditions under general international law. Under general international law, a State is entitled to take countermeasures as an "injured State" in all instances codified in ARSIWA Article 42: when the obligation breached is owed to that State individually; when it is owed to a group of States, including the State in question, and it is specially affected by the breach; or when the performance of that obligation by the responsible State is a necessary condition of its performance by all the other States to which the obligation is owed.[236] Moreover, under ARSIWA Article 48 a non-injured State is also entitled to invoke a State's responsibility when the obligation breached is established for the protection of a collective interest or

234. *US–Shrimp (ABR)*, *supra* note 84, at ¶ 159.

235. *See* ARSIWA, *supra* note 24, at art. 49. The rules on countermeasures are set forth in Part Three, Chapter II, on the Implementation of the International Responsibility of a State.

236. *See Id.* at arts. 42, 49.

owed to the international community as a whole. ARSIWA Article 54 suggests that in cases of such collective interests third parties may also take "lawful measures against [the responsible State] to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached."[237] In view of these provisions, it seems that the range of circumstances in which a State is entitled to take countermeasures under general international law is significantly broader than the types of measures that could be potentially justified under the WTO security and general exceptions, as outlined above. Thus, the important question that arises in this context is whether countermeasures that do not fall within the scope of the WTO exceptions are prohibited under WTO law or whether the defense of countermeasures under the general law on State responsibility is residually available to WTO member States.

From an analytical perspective there are two possible approaches to the availability of the defense of countermeasures under general international law in the context of WTO disputes. The first approach is to assume that, indeed, any trade-restrictive countermeasure that does not meet the requirements of the general or security exceptions is prohibited under WTO law. The State interests that can be addressed under the WTO exception clauses are specifically enumerated therein and countermeasures, in general, do not seem to be amongst them, except if we re-interpret the scope of GATT Article XX(d). Moreover, GATT negotiating history suggests that the security exceptions were considered as "an overriding authorization for sanctions."[238] Thus, the drafters of the GATT had in mind the possibility that the security exceptions may be used to justify at least some unilateral trade sanctions. It can thus be inferred that they purposely excluded other types of countermeasures from the scope of the exception clauses. The second approach is to interpret the lack of specific reference to countermeasures in the WTO Agreements as implicit recognition of the residual applicability of the defense under general international law. The analysis below demonstrates that the second approach is more consistent with the rules of general international law on treaty interpretation and the rules on conflict resolution.

1. *Residual Applicability of General International Law and the Lex Specialis Principle: Whether the WTO Agreements Reveal an Intention to Exclude Countermeasures*

As discussed above, the rules on countermeasures under general international law do not regulate the same subject matter as the WTO exception clauses. The WTO Agreements do not regulate at all the right of States to

237. Note the controversy on whether this provision recognizes the right of third-States to take countermeasures. *E.g.,* Denis Alland, *Countermeasures of General Interest*, 13 Eur. J. Int'l L. 1221 (2002). On the legality of third-party countermeasures, *see generally* Martin Dawidowicz, Third-Party Countermeasures in International Law (2017). *See also* a legal assessment of collaborative countermeasures in Miles Jackson & Federica Paddeu, *The Countermeasures of Others: When Can States Collaborate in the Taking of Countermeasures?*, 118 Am. J. Int'l L. 231 (2024).

238. Michael Hahn, *Vital Interests and the Law of GATT: Analysis of GATT's Security Exception*, 12 Mich. J. Intl. L. 558, 567, 569 (1991).

temporarily refrain from performing their international obligations to respond to a prior internationally wrongful act and implement the international responsibility of an offending State. Thus, even though there is a degree of overlap with respect to some countermeasures that may also fall within the protective scope of the WTO exception clauses, these exceptions do not displace the customary defense of countermeasures in the context of WTO disputes.

According to the *lex specialis derogat legi generali* principle, "a matter governed by a specific provision, dealing with it as such, is . . . taken out of the scope of a general provision dealing with the category of subject to which that matter belongs, and which therefore might otherwise govern it as part of that category."[239] In the context of State responsibility, the *lex specialis* principle is enshrined in ARSIWA Article 55, which recognizes that general international law does not apply where and to the extent that the same subject-matter is governed by special rules reflecting the common intentions of the States concerned. However, the application of *lex specialis* requires the juxtaposition of two norms that meet a certain degree of "sameness."[240] This sameness is primarily assessed by reference to their subject-matter: both rules should be able to be invoked in regard to the matter under discussion.[241] For the application of the *lex specialis* principle as a conflict-resolution tool, the two rules must also "point to different directions," i.e., the State in question must be unable to follow both rules at the same time (a "genuine conflict" of norms).[242]

In accordance with this rule, to the extent that there is an overlap between countermeasures and the WTO Agreements the test under the WTO prevails over the general international law of countermeasures. For example, WTO law excludes recourse to unilateral countermeasures consisting in the nonperformance of WTO obligations as a response to breaches of the WTO Agreements. Articles 22 and 23 DSU[243] are a *lex specialis* on this matter, specifying the consequences of a breach of WTO law and providing the means to induce compliance through the DSU.[244] Similarly, in cases of measures that aim at inducing compliance with international obligations, but *also* aim at protecting essential security interests or one of the objectives enumerated in the general exceptions there is an overlap in the regulatory scope of the WTO exceptions and the general law on countermeasures. A State would, in principle, be able to invoke both rules with respect to the same situation.

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239. Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 236 (1957).

240. Fragmentation Report, *supra* note 52, at ¶¶ 21-26; *See* ARSIWA with Commentary, *supra* note 8, at art. 55, cmt. 4; Anastasios Gourgourinis, *Lex Specialis in WTO and Investment Protection Law*, 53 GER. Y.B. INT'L L. 579, 610 (2010).

241. Fragmentation Report, *supra* note 52, at ¶¶ 23-24.

242. *Id.*

243. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Annex 2 (adopted 15 April 1994, entered into force 1 January 1995) 1869 U.N.T.S. 401 [hereinafter DSU].

244. See to this effect the argument of the AB in *Mexico–Soft Drinks (ABR)*, *supra* note 202, at 77 that if we were to accept that Article XX(d) GATT includes countermeasures then it could be used to circumvent the compulsory procedures of the DSU. This argument was not persuasive. In view of the *lex specialis* principle, the WTO provisions on implementation of responsibility for breaches of WTO law would always be governed exclusively by the DSU.

Thus, the special rule (i.e. WTO law) would take precedence over general international law to resolve the conflict.

Nonetheless, with respect to the rest of the countermeasures, WTO law does not offer guidance on their legality. The subject matter of implementing international responsibility and inducing compliance with international law is not regulated under the WTO Agreements and thus, no genuine conflict can be identified for the application of the *lex specialis* principle. Accordingly, the rules on countermeasures under general international law remain residually applicable.

Of course, this argument assumes that the defense of countermeasures under general international law was applicable in WTO disputes in the first place and is simply *not displaced* by the *lex specialis* principle. The direct applicability of general international law in WTO disputes is far from uncontroversial and has attracted attention in academic literature.[245] Although it is plainly clear that WTO bodies shall apply the provisions of the covered agreements,[246] the DSU has no applicable law clause explicitly mandating the *exclusive* application of the WTO Agreements. Nonetheless, in treaty-based disputes, as in the WTO, the interplay between jurisdiction and applicable law dictates that the substantive law to be applied stems primarily from the treaty under which the dispute has arisen.[247] WTO bodies would necessarily exceed the limits of their subject-matter jurisdiction, which only entails claims arising out of the WTO covered agreements,[248] by making findings in relation to the application of non-WTO substantive rules to the conduct in question.

However, WTO bodies enjoy certain inherent jurisdictional powers that derive directly from their nature as judicial bodies.[249] They have "a margin of

245. *See* indicatively Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings*, 35 J. World Trade 499 (2001); Pauwelyn, *supra* note 27; Ventouratou, *supra* note 27.

246. DSU, *supra* notes 243, at arts. 3.4, 7, 11; David Palmeter & Petros Mavroidis, *The WTO Legal System: Sources of Law*, 92 Am. J. Int'l L. 398, 398 (1998) (explaining that the text of the covered agreements is the "fundamental source of law in the WTO" and all legal analysis begins there but arguing that they are only the "first of all" and do not exhaust the sources of relevant rules.)

247. Enzo Cannizzaro & Beatrice Bonafé, *Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ in the Oil Platforms Case*, 16 Eur. J. Int'l L. 481, 484 (2005); Matina Papadaki, *Compromissory Clauses as the Gatekeepers of the Law to Be "Used" in the ICJ and the PCIJ*, 5 J. Int'l Disp. Settlement 1, 8 (2014) and references therein.

248. DSU, *supra* note 243, at arts. 1(1), 6(2), 7, 11, 23.

249. Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 Am. J. Int'l L. 535, 555 (2001). Note that, although they are often characterized as "quasi-judicial," "WTO bodies are indeed international adjudicative bodies as their constituent instrument is governed by international law, they have the power to issue legally binding decisions, they decide cases on the basis of international law and they comprise individuals serving in their own professional capacity." *See* definitions in Chiara Giorgetti, *Introduction*, *in* The Rules, Practice, and Jurisprudence of International Courts and Tribunals 1–3 (Chiara Giorgetti ed., 2012); Cesare Romano, Karen Alter & Yuval Shany, *Mapping International Adjudicative Bodies, the Issues, and Players*, *in* The Oxford handbook of international adjudication 5–8 (Cesare Romano, Karen Alter, & Yuval Shany eds., 2014). Although their reports do not constitute a decision *per se* and must be adopted by the Dispute Settlement Body (DSB), the DSB can only reject them by consensus (Arts. 16.4, 17.14 DSU). Thus, their adoption is, in reality, semi-automatic and the "quasi-judicial" character of the system is "more form than substance," *see* Valerie Hughes, *Settlement of Disputes: The Institutional*

discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated" in the covered agreements.[250] In the exercise of their inherent powers, WTO bodies can apply certain rules of international law other than the covered agreements, and can make relevant findings, which are not *per se* findings on the claims of alleged inconsistency with the WTO provisions cited by the parties but are indispensable for the purposes of addressing such claims. The radical view of the WTO Agreements as a so-called "self-contained system,"[251] whose rules alone are sufficient to regulate any dispute arising thereunder is now largely discredited.[252]

The general law on State responsibility, as enshrined in the ARSIWA, seems to be amongst the rules of international law that are directly applicable to WTO disputes.[253] WTO bodies have often had recourse to rules enshrined in the ARSIWA to rule on specific legal issues relating to State responsibility not explicitly regulated by the WTO Agreements such as the rules regarding legal interest and attribution.[254] These findings confirm that the WTO is not a "hermetically closed regime impermeable to other rules of international law,"[255] but was rather created within, and under the influence of, the wider corpus of public international law.

One could argue that the law on State responsibility is not a homogenous group of rules and that the approach of the WTO bodies, which have treated some general rules on State responsibility as directly applicable to WTO disputes, is not necessarily warranted with respect to all rules enshrined in the ARSIWA. The fact that the WTO bodies resort to the general rules on attribution of conduct, for example, does not necessarily mean that they can or should *also* resort to the general rules on circumstances precluding wrongfulness. Yet, the inclusion of these circumstances in Part I, Chapter V ARSIWA

Dimension, *in* The Oxford Handbook of International Trade Law 278 (Daniel Bethlehem et al eds., 2009).

250. Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 152, n. 138, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R, (adopted Jan. 16, 1998).

251. Pieter Jan Kuijper, *The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law?*, 25 Neth. Y.B. Int'l L. 227 (1994).

252. Peter van den Bossche & Werner Zdouc, The Law and Policy of the World Trade Organization: Text, Cases, and Materials 66 (4th ed. 2017).

253. For an extensive discussion on the relevance of the rules on State responsibility as enshrined in ARSIWA in WTO disputes see Ventouratou, *supra* note 27.

254. *See e.g.*, Panel Report, *European Communities—Regime for the Importation, Sale, and Distribution of Bananas*, ¶ 7.50, WTO Docs. WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, WT/DS27/R/GTM, WT/DS27/R/HND, (adopted May 22, 1997); Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, ¶¶ 9.42–9.43 & n. 276, WTO Doc. WT/DS34/R (adopted May 31, 1999); Panel Report, *Korea—Measures Affecting Government Procurement*, WTO Doc. WT/DS163/R, ¶ 6.5 (adopted May 1, 2000); Panel Report, *United States—Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WTO Doc. WT/DS491/R, ¶ 7.179, n. 334 (adopted Dec. 6, 2017); *US—Gambling*, *supra* note 138, at ¶¶ 6.128–6.130.

255. Gabrielle Marceau, *A Call for Coherence in International Law: Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement*, 33 J. World Trade 87, 95 (1999).

was considered part of the ILC's "permanent contribution to general international law,"[256] As the ILC stipulated, all rules enshrined in ARSIWA apply, in principle, to the whole field of the international obligations of States regardless of their content and their source[257] (generality *ratione materiae*). Moreover, although the customary character of all normative propositions contained in ARSIWA is not uncontested,[258] international practice seems to suggest that their undeniable weight and authority[259] creates a presumption of binding character[260] (generality *ratione personae*). Specifically with respect to the defense of countermeasures, several instances in international adjudication, including WTO case law, have explicitly confirmed its customary character.[261] All rules enshrined in ARSIWA possess this dual generality, which is the common element that binds them together as a distinct group of rules. In accordance with the normative distinction between "secondary" and "primary" rules, which is the central organizing idea of the ARSIWA,[262] primary rules are those "which in one sector of inter-State relations or another, impose particular obligations on States," whilst secondary rules are those "concerned with determining the consequences of failure to fulfil obligations established by the primary rules."[263] The secondary rules on State responsibility have no autonomous substantive content[264] and are not assessed independently: they assist in determining whether the primary rules applicable in each case have been breached, what are the consequences of such breach, and how the ensuing responsibility is implemented. The defenses enshrined in Part I, Chapter V are

256. Int'l L. Comm'n, Record of the 2587th Meeting, ¶ 46.

257. *See* ARSIWA, general commentary ¶ 5; James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 Am. J. Int'l L. 874, 879 (2002).

258. David Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, 96 Am. J. Int'l L. 857, 873 (2002).

259. Martins Paparinskis, *Investment Treaty Arbitration and the (New) Law of State Responsibility*, 24 Eur. J. Int'l L. 617, 618 (2013). *Cf.* Caron, *supra* note 256.

260. Or, "*présomption de positivité*" in Alain Pellet, *L'adaptation Du Droit International Aux Besoins Changeants de La Société Internationale*, 329 Rev. Droit Comparé 9, 40 (2007).

261. Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, ¶¶ 259–60, WTO Doc. WT/DS202/AB/R (adopted Feb. 15, 2002); *Archer Daniels Midland Co. & Tate & Lyle Ingredients Ams., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, ¶¶ 120–121 (Nov. 21, 2007); *Corn Prods. Int'l, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, ¶ 145 (Jan. 15, 2008); *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, ¶ 420 (Sept. 18, 2009).

262. James Crawford, The International Law Commission's Articles on State Responsibility 15 (2002).

263. Roberto Ago, *Second Report on State Responsibility*, 2 Y.B. Int'l L. Comm'n 179, U.N. Doc. A/CN.4/233 (1970).

264. Characterization borrowed from Andrew Mitchell & David Heaton, *The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function*, 31 Mich. J. Int'l L.561, 577 (2010). Pauwelyn refers to these rules as the "toolbox" for the creation, operation, interplay, and enforcement of other rules in Pauwelyn, *supra* note 247, at 536. *See also* Papadaki, *supra* note 245, at 21, 26, (characterizing such rules as "Meta-Norms" or "Constructive-Norms"). Similarly, Lorand Bartels, *Jurisdiction and Applicable Law Clauses: Where Does a Tribunal Find the Principal Norms Applicable to the Case before It?*, *in* Multi-Sourced Equivalent Norms in International Law 29, 119 (Tomer Broude & Yuval Shany eds., 2011) suggests a distinction between "principal and incidental norms" and refers to the "meta-normative function" of the latter.

general rules that assist in determining whether despite a *prima facie* breach of a primary rule, the State may nonetheless not be internationally responsible for a wrongful act. As such, they form part and parcel of the application of the primary rules applicable in each case.

In sum, in view of the general applicability of the defense of countermeasures under general international law both in terms of its scope *ratione materiae* and in terms of its scope *ratione personae*, it seems that it is available to respondents in all international disputes to the extent that the rules applicable to the dispute in question do not reveal the intention of the parties to exclude such defence. An interpretation of the WTO Agreements in accordance with the customary rules of treaty interpretation does not reveal such intention. The WTO Agreements are silent on the matter of countermeasures imposed in response to non-WTO violations. The WTO exception clauses do not seem to regulate the same subject matter as countermeasures and thus, the *lex specialis* principle does not exclude reliance on the general defense of countermeasures in the context of WTO disputes. As stipulated in *ELSI* ". . . an important principle of customary international law [cannot] be held to have been *tacitly* dispensed with, in the absence of any words making clear an intention to do so."[265]

2. *A Normative Perspective: Residual Applicability of the Defense of Countermeasures in the WTO as More Practical and Desirable*

On top of the analytical reasons described above, accepting the residual applicability of countermeasures in WTO disputes seems also more practical and desirable from a normative perspective.

Rejecting the direct applicability of the defense of countermeasures under general international in WTO disputes would have important practical implications both for the WTO and for international law more generally. Given that a considerable proportion of current trade relations operate within the framework of the WTO, trade sanctions would have to be justified, primarily, based on WTO law. If the defense of countermeasures is not residually applicable, then States would no longer be able to justify unilateral trade restrictions taken in circumstances that do not meet the requirements of the WTO exceptions, as analyzed above. Thus, an important means for the implementation of international responsibility under general international law would be rendered unavailable or would necessarily entail a breach of WTO obligations.

Moreover, this approach increases the risk of abuse of the WTO exception clauses, especially the security exceptions, which have a more lenient compliance test. Respondents will attempt to justify trade sanctions under the WTO security exceptions, whether there is a genuine security concern or not. If there is no other defense available in this context, States will attempt to stretch the limits of the security exceptions to accommodate a broader range of circumstances which may, overtime, result in lowering the threshold for their successful invocation.[266] The drafters of the GATT left a significant margin of

265. Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), Judgment, 1989 I.C.J. 15, ¶ 50 (July 20) (emphasis added).

266. Azaria, *supra* note 27, at 419.

discretion to States in cases that involve essential security interests because of their sensitive character and intimate connection to State sovereignty. At the same time, general international law establishes specific and quite strict requirements for the adoption of countermeasures to minimize the possibility of abuse. As discussed above, there is considerable disparity between the test applied to assess a measure's consistency with GATT Article XXI, as elaborated in case law so far, and the test for a lawful countermeasure under general international law.[267] Shoehorning a broader range of measures, including alleged countermeasures, into the WTO security exceptions will have the undesirable effect that States will be able to justify unilateral trade sanctions under very loose conditions, largely dependent on the unilateral assessment of the invoking State. Overstretching the scope of the "public morals" exception under GATT Article XX also entails the same danger. Although the necessity test of the provision renders its successful invocation harder than the invocation of the partly self-judging security exceptions, the test is still less stringent and does not require evidence of illegal acts as the test for countermeasures under general international law. Reinterpreting GATT Article XX(d) to incorporate trade restrictions as countermeasures would pose a similar challenge.

In view of the above, accepting the residual applicability of countermeasures in the WTO is not only analytically appropriate in view of the residual applicability of general international law in treaty relations, but is also more practical and desirable. When faced with a case resembling a countermeasure, WTO bodies will need to discern whether the measure at hand genuinely falls within the scope of the WTO exceptions or whether the general international law on countermeasures should be applied instead. If the State can demonstrate in good faith a plausible link between the measure at issue and an essential security interest in the context of war or other emergency in its international relations, then the WTO security exceptions and their relatively lower threshold would apply. Similarly, the State can make a claim under the WTO general exceptions when the measure has a genuine relationship of ends and means with the protection or promotion of one of the enumerated objectives. In all other cases, the WTO bodies should be able to test the measure in question against the requirements for a permissible countermeasure under general international law. If the measure meets such requirements, then it will be justified, i.e., WTO consistent. This approach would protect both the WTO system from the possibility of abuse and the special place that trade sanctions have in international law as a means of implementing States" international responsibility.

3. *Addressing the Jurisdictional Consideration: The Power of WTO Bodies to Make Incidental Findings in the Context of Countermeasures*

Lastly, if we accept the residual applicability of countermeasures in WTO disputes, we also need to address the jurisdictional considerations that may arise if the defense of countermeasures is invoked in the context of WTO adjudicative proceedings.

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267. *See* analysis *supra* in notes 124-137.

In *Mexico–Soft Drinks*, the AB pointed out that to examine whether a measure is justified as a countermeasure in response to a prior violation of a non-WTO obligation, WTO bodies would have to determine first whether such prior violation has indeed taken place. Thus, according to its reasoning "WTO Panels and the Appellate Body would . . . become adjudicators of non-WTO disputes," which is not their function as intended by the DSU.[268]

However, an incidental finding in the context of the defense of countermeasures does not amount to "adjudicating a non-WTO dispute." An adjudicative body "is fully empowered to make whatever findings may be necessary" in order "to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated" and "to provide for the orderly settlement of all matters in dispute."[269] The jurisdiction of WTO bodies to examine all indispensable issues that arise in the context of an applicable defense is part of their inherent powers[270] deriving from their "mere existence . . . as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded."[271]

The function of Panels, according to the DSU, is to "make an objective assessment of the matter before [them], including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, *and make such other findings* as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."[272] Findings on the applicability of a defense are certainly within the mandate of the Panel to make an objective assessment and to assist the DSB. Besides, the legal effects of such findings are limited "to the four corners of the covered agreements" since the WTO dispute settlement system would not be able to accompany these incidental findings with appropriate remedies.[273] This results from the principle of *non ultra petita*,[274] which dictates that the object of the dispute on which an adjudicative body can award executory rights is limited by the main claims presented by the Complainant and any counter-claims properly introduced to the proceedings.[275] Incidental findings are not independent rulings but rather form integral part of the reasoning of the WTO body in deciding the matter properly brought before it under the relevant terms of reference.[276] he DSB in adopting the reports would only be able to make recommendations with respect to the performance of the WTO obligations that were challenged in accordance with the DSU and does not

268. *Mexico—Soft Drinks (ABR), supra* note 202, at 78, 56.

269. Nuclear Tests (Austl. v. Fr.), Judgment (Jurisdiction and Admissibility), 1974 I.C.J. 253, ¶ 23 [hereinafter Nuclear Tests].

270. *See supra* note 247.

271. *Nuclear Tests, supra* note 269, at ¶ 23.

272. Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), art. 11.

273. Gourgourinis, *supra* note 27 at 209.

274. For an overview of the principle in H. Thirlway, *see The Law and Procedure of the International Court of Justice 1960-1989: Part Ten*, 70 Brit. Y.B. Int'l L. 1, 21 (2000); Robert Kolb, *General Principles of Procedural Law*, *in* The Statute of the International Court of Justice: a commentary 893–903 (Andreas Zimmermann et aleds., 3rd ed. 2019).

275. Kolb, *supra* note 272 at 895.

276. Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 Cornell Int'l L.J. 101 (2009).

have the power to make recommendations or authorize action relating to the performance of non-WTO obligations.

The power of international adjudicative bodies to make such incidental findings was confirmed by the ICJ in its 2020 *ICAO Council* judgments. The ICJ found that the jurisdiction *ratione materiae* of the ICAO Council, a specialized dispute settlement body with limited competence on matters of civil aviation, extends to the examination of issues "outside matters of civil aviation for the exclusive purpose of deciding a dispute which falls within its jurisdiction." such as the requirement for a prior internationally wrongful act in the context of countermeasures.[277] This finding may be applied *mutatis mutandis* to other specialized dispute settlement bodies such as the WTO bodies, confirming that despite the limitations in their subject-matter jurisdiction and competence[278] they can properly examine the defense of countermeasures and its customary requirements.

Concluding Remarks

This Article provided a comprehensive evaluation of the defenses available to justify trade-restrictive economic sanctions under WTO law. It focused on two broad categories of economic sanctions: those imposed in the context of or in response to an ongoing armed conflict, whether international or non-international; and those aimed at inducing compliance with the target State's international obligations. While these two categories are not exhaustive, they encompass the majority of sanctions imposed today, and the analysis in this Article offers valuable insights into the applicability of legal defenses across a wide range on circumstances.

Under general international law, economic sanctions imposed under these two sets of circumstances that are *prima facie* inconsistent with a State's international obligations could, in principle, be justified under the defenses of self-defense or countermeasures, subject to the customary requirements established in the general international law on State responsibility. This Article explored whether such sanctions could also be justified under WTO law. It examined to what extent they could be accommodated within the scope of the WTO security and general exceptions and further investigated the role of the defenses under the law on State responsibility in the context of WTO disputes.

277. ICAO Council, *supra* note 126, at ¶ 61.

278. For scholars that support the distinction between jurisdiction and competence, the term competence (also known as "foundational jurisdiction") describes the outer limits of an adjudicative body's powers in the general field or class of cases that is entitled to hear. By contrast, jurisdiction refers to the power to decide the particular case before it with final and binding force. See Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice: International Organizations and Tribunals*, 29 Brit. Y.B. Int'l L. 1, 40–42 (1952); Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 Rev. Droit Comparé 331, 351 (1973); Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989: Part Nine*, 69 Brit. Y.B. Int'l L. 1, 4 (1998); Yuval Shany, *Jurisdiction and Admissibility*, *in* The Oxford Handbook of International Adjudication 780, 782 (Cesare Romano, Karen Alter, & Yuval Shany eds., 2013).

The core argument of this Article is that the WTO exception clauses can accommodate only a limited subset of trade-restrictive sanctions, and even then, doing so would not be a straightforward legal exercise. However, this is not the end of the discussion: WTO law forms part of and operates within the broader corpus of public international. As Trachtman explains, "no institution is an island: each exists in a broader institutional setting. This setting penetrates the institutions at various points, to complete contracts and to supply broader institutional rules where appropriate."[279] The Article argued in favor of the residual applicability of the defense of countermeasures under the general law on State responsibility in the context of WTO disputes. Integrating WTO rules within the broader system of international law is necessary to effectively address the complex legal challenges posed by economic sanctions and ensure that international trade law remains adaptable and responsive to the evolving realities of global governance.

Overall, the Article demonstrated that the justification of several trade-restrictive economic sanctions under the WTO exception clauses requires a significant degree of legal creativity to overcome the interpretative challenges posed by the conventional reading of these provisions. States seem to be acutely aware of these challenges and the possible limitations that they may face in trying to justify trade sanctions under the WTO exceptions. For example, the EU, which has one of the most sophisticated sanctions" regimes internationally, in its Sanctions Guidelines, last reviewed and updated in 2017, seems to concede that although some of its restrictive measures could fall under the protective scope of the WTO exceptions, "in some cases [they] could be incompatible with WTO rules."[280]

If there is a collective consensus among States that certain sanctions aiming to ensure the international rule of law should be considered legal—even if they fall outside the purview of the WTO exceptions—then two paths are available. One is the explicit acknowledgement of the availability of the defense of countermeasures under general international law in WTO disputes. The other is the radical re-interpretation of clauses such as GATT Article XX(d) to accommodate trade restrictions imposed as countermeasures within the terms of the existing exception clauses.

Clarifying the legal basis on which trade-restrictive economic sanctions are justified is certainly preferable to the current approach which allows potential inconsistencies between current State practice and WTO rules to remain hidden under the carpet. The lack of clear legal foundations for imposing sanctions, particularly when they do not easily fit within the existing WTO exceptions, creates legal ambiguity and unchecked discretion. This is especially problematic at a time when the WTO dispute settlement system, with the paralysis of the Appellate Body, is no longer able to function effectively as a guarantor of security and predictability in the multilateral trading system. Ignoring

279. Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 346 (1999).

280. Council of the European Union, "*Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy,*" Doc 15598/17, 11 (Dec. 8, 2017).

the need for clarity on these matters risks perpetuating a system where regulatory actions are undertaken in an environment of legal uncertainty, potentially undermining the WTO's foundational principles of transparency, accountability, and fairness.

Furthermore, a comprehensive understanding of how trade-restrictive sanctions fit within WTO law will help ascertain the broader role the WTO can play in the international legal order. The WTO, as a cornerstone of global trade governance, has the potential to act as a critical interface between international trade law and other domains, such as human rights, environmental law, and the law of State responsibility. Given the increasingly interconnected nature of international law, the WTO can play a vital role in ensuring that trade rules complement, rather than contradict, broader efforts to maintain the international rule of law.

In this context, sanctions serve as more than just trade restrictions; they are a key mechanism for enforcing compliance with international obligations and addressing violations of international law. Clarifying the relationship between WTO rules and sanctions will contribute to the system's credibility and reinforce the legitimacy of international trade law as part of the broader global governance framework. Ultimately, the WTO can help ensure that trade remains a tool for promoting not only economic cooperation but also the implementation of international legal norms and the maintenance of a rules-based international order.