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Où est votre chapeau?
Economic Sanctions and Trade Regulation*
Michael P. Malloy**

This article seeks to determine whether US economic sanctions can be maintained consistently with the obligations of the international trade regime. In Part I, it will consider the extent to which the current prevalence of economic sanctions may create tension with international trading rules. In Part II, the article will assess arguments that sanctions are inconsistent with applicable principles of customary international law. Part III will consider whether sanctions are inconsistent with international trading regimes and consequently are impermissible. In Part IV, the article concludes that while sanctions are legally permissible in the face of indeterminate legal obligations and international trading rules, imposition of sanctions may nevertheless have adverse consequences for a sanctioning state.

I. INTRODUCTION

Economic sanctions have become an increasingly prevalent feature of US international economic and foreign policy.¹ The general impermissibility of the use or threat of armed force has to some degree increased the relative importance of economic sanctions, a form of economic warfare. This is not necessarily a fortuitous development. The less obvious costs of economic sanctions,² as compared to those of armed force, may encourage a facile resort to economic sanctions that would have been intolerable in the case of armed

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¹ See Michael P. Malloy, *United States Economic Sanctions: Theory and Practice* 31–142 (Kluwer Law International 2001) (discussing historical developments with respect to US sanctions policy).

² For a suggestive economic analysis of costs of economic sanctions, see Thomas O. Bayard, Joseph Pelzman, and Jorge Perez-Lopez, *Stakes and Risks in Economic Sanctions*, 6 *World Economy* 73 (1983).

force. We may see something of this result in the increased frequency of use of economic sanctions in US practice over the past twenty years.³

Understanding the place of economic sanctions within the institutions of international trade can be a complicated undertaking for several reasons. First, while “economic sanctions” may have intuitive meaning as a descriptive term, there is continuing scholarly debate over the technical scope of the term.⁴ Second, “emergency” sanctions, when continued over a long period of years (such as is the case with sanctions against Cuba), may be assimilated into “normal” trade and foreign policy. Third, sanctions often blur into ordinary trade penalties in ways that make it difficult to distinguish between the two. For example, ordinary penalties available for violations of settled trade policy may reach such critical proportions that they metamorphose into aggressive sanctions in a burgeoning “trade war.”⁵ Similar problems exist when we consider the denial of favorable or preferential trade treatment—itsself a feature of trade policy—on the basis of criteria other than those appurtenant to that policy. Thus, economic sanctions may be viewed as occurring within a spectrum in which related governmental actions may blend into “sanctions” at their outer edges.

In some situations, we may be able to differentiate sanctions from ordinary trade policy in terms of their respective policy objectives. However, consideration of these contrasting policies may actually underscore the tension inherent in the relationship between economic sanctions and US trade policy. Typically, economic sanctions are effective to the extent that they *frustrate* the normal expectations of the trade and financial systems. Thus, in a narrow sense, economic sanctions are not a part of US trade policy and are antithetical to the basic rubrics of that policy.⁶ The imposition of economic sanctions does not, in

³ See, for example, Malloy, *United States Economic Sanctions* at 35 (cited in note 1) (noting increase in sanctions programs). See also *id.*, Figure 2.1 (providing graphic presentation of historical progression).

⁴ See *id.* at 10–11 (contrasting differing definitions of the term). In the vocabulary of public international law, the term “countermeasure” is often used as the preferred term when referring to economic sanctions. See, for example, *United States Diplomatic and Consular Staff in Tehran (US v Iran)*, 1980 ICJ 3, 27 (May 24) (using term “countermeasure”). See generally Omer Yousif Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* 3–4 (Oxford 1988) (discussing terminology).

⁵ See, for example, Raj Bhala, *The Bananas War*, 31 McGeorge L Rev 839 (2000) (analyzing trade war over bananas between United States and European Union); Derek Devgun, *International Fiscal Wars for the Twenty-First Century: An Assessment of Tax-Based Trade Retaliation*, 27 L & Poly in Intl Bus 353 (1996) (analyzing “tax wars” resulting from international friction between allies).

⁶ For example, in the Omnibus Trade and Competitiveness Act of 1988, Congress made a specific finding that “there has arisen a new global economy in which trade, technological development, investment, and services form an integrated system[,] and in this system these activities affect each other and the health of the United States economy.” Pub L No 100-418, § 1001(a)(1), 102 Stat 1107, 1120, codified at 19 USC § 2901 note (2000). In light of this

the short term, reinforce stability in external trade. As a prima facie matter, then, the use of economic sanctions creates tension within international trade regimes.

II. POSSIBLE INCONSISTENCIES WITH GENERAL PRINCIPLES OF PUBLIC INTERNATIONAL LAW

A. PROBLEM OF INDETERMINACY

Customary and even conventional principles of public international law have not had any readily discernible, practical effect on US practice with respect to economic sanctions. In part this may be due to the apparent indeterminacy of international law in this regard. Typical of the indeterminate nature of the principles invoked is the recent attempt by Marc Bossuyt to construct a set of limitations on the use of sanctions under international law.⁷ Commissioned by the UN Economic and Social Council, his working paper concludes that economic sanctions are often ineffective and illegal, but it relies on vague authority and questionable assumptions in reaching this sweeping conclusion. Bossuyt advances legal arguments based exclusively on aspirational or hortatory language derived from selective passages of the UN Charter, General Assembly resolutions, and pronouncements of humanitarian organizations.⁸ His assumptions about economic sanctions theory and practice are at best skewed,⁹

situation, Congress found it to be essential "to ensure future stability in external trade of the United States." Id § 1001(a)(4)(B).

⁷ Marc Bossuyt, *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights*, Sub-Commission on the Promotion and Protection of Human Rights, Commission on Human Rights, Economic and Social Council Working Paper No E/CN.4/Sub.2/2000/33 (June 2000).

⁸ See, for example, id at 8 (discussing legal limitations "implied" by UN Charter art 1); id at 10–11 (invoking humanitarian sources). But see Tom J. Farer, *Political and Economic Coercion in Contemporary International Law*, 79 Am J Intl L 405 (1985).

⁹ See, for example, Bossuyt, *The Adverse Consequences of Economic Sanctions* at 13 (cited in note 7) (asserting incorrectly that sole basis for sanctions is "that economic pressure on civilians will translate into pressure on the [target] Government for change"). In fact, the basis and objectives of sanctions are varied and multi-directional. See Malloy, *United States Economic Sanctions* at 18–20 (cited in note 1):

In general, it has been said that economic sanctions "are an instrument of economic policy designed to serve several, not necessarily mutually exclusive, foreign policy, military or strategic objectives."

. . . [O]ne generic policy objective behind economic sanctions can be said to be "directive": to create economic pressure calculated to alter behavior of a target state. Another generic policy objective may be termed "defensive": in the trade embargo context, for example, this might be expressed as an objective "to reduce or slow development of an adversary's military or strategic capabilities by raising the economic cost of acquiring imports or import substitutes."

. . . Other objectives may be more impressionistic and hence less susceptible to measurement. One such generic category that is often cited may be termed "communicative": in this sense, sanctions may be imposed "to send a symbolic

and his factual assertions are often dubious.¹⁰ Thus, this approach amounts to little more than a disingenuous polemic providing scant guidance for analysis of the legality of sanctions under international law.

B. CONCEPT OF NONFORCIBLE COUNTERMEASURE

Arguably, the concept of “nonforcible countermeasure”¹¹ may provide a more useful analysis. Viewed as a nonforcible countermeasure, an economic sanction—and particularly a unilateral sanction—may be evaluated as state action invoked in response to the actions of another state, permissible only in situations in which the target state has breached some obligation or duty owed to the invoking state. Under this principle, there should first be a demand for redress by the invoking state and a refusal of the demand on the part of the target state, prior to the invocation of countermeasures.¹² In addition, the countermeasure invoked should be proportional to the violation or breach suffered.¹³

There are two difficulties with this approach to the analysis of economic sanctions. First, it is not evident what customary principle of public international law requires a countermeasure justification when a state decides to interdict commercial or financial intercourse with another state. That there is such a *customary* principle (that is, aside from any *conventional* obligations of the invoking

message of displeasure with another country's behaviour (which may also be for internal political purposes or directed at allies).”

(Footnotes omitted). Another “end game” objective of sanctions may be “to retain a pool of blocked assets, or an array of other economic sanctions, as ‘bargaining chips’ for any future negotiations with the target country in resolution of the broader directive or defensive policy objectives.” *Id.* at 29.

¹⁰ See, for example, Bossuyt, *The Adverse Consequences of Economic Sanctions* at 18–19 (cited in note 7) (accepting argument that purpose of Iraqi sanctions is “deliberate infliction on the Iraqi people” of life-threatening conditions). Bossuyt naively ignores clear evidence of the responsibility of the Iraqi Government for then current living conditions in Iraq. See, for example, Barbara Crossette, *Iraq Won't Let Outside Experts Assess Sanctions' Impact on Lives*, *NY Times* A1 (Sept 12, 2000) (detailing effect of Iraqi Government policies on availability of humanitarian relief).

¹¹ See Elagab, *Non-Forcible Counter-Measures* at 47–51 (cited in note 4). See also Restatement (Third) of the Foreign Relations Law of the United States § 905(1) (1987) (concerning resort to unilateral countermeasures in response to violation of international obligation by another state).

¹² See Elagab, *Non-Forcible Counter-Measures* at 64–65, 77–79 (cited in note 4). See also Restatement § 905(1)(a) (cited in note 11) (countermeasure necessary to terminate, prevent or remedy violation); *id.*, comment c (“necessity” as when accused state denies violation or its responsibility therefor, and rejects or ignores requests).

¹³ See Elagab, *Non-Forcible Counter-Measures* at 83–86 (cited in note 4). See also Restatement § 905(1)(b); *id.*, reporters’ note 5 (discussing proportionality). In a different but comparable context, the American Law Institute has taken the position, for example, that the exercise of jurisdiction, otherwise legal, with extraterritorial effect should not be “unreasonable.” See *id.* at § 403(1).

state in favor of the target state) is often tacitly assumed but rarely discussed in the secondary literature. Analysis of the actual practice of states throughout the last century suggests that the prevalence of sanctions is not constrained by such a norm.¹⁴

Second, even accepting *arguendo* that such a customary principle exists, a difficulty remains in identifying situations, particularly retrospectively, in which a state has imposed sanctions in violation of this principle. States normally construct at least a colorable justification for the imposition of sanctions. Independent and definitive assessment of sanctions is infrequent.¹⁵

C. SPECIALIZED ISSUES

Other, more specialized issues about economic sanctions are frequently raised. These include such questions as the legality of secondary boycotts and the permissibility of extraterritorial application of sanctions.¹⁶ The two issues are often intertwined.

1. Secondary Boycotts

A boycott is a systematic refusal to deal with a business enterprise because of an action or position it has taken; it may be a privately organized effort or a government-sponsored or government-mandated program. A *secondary* boycott is a boycott directed at a third party for its dealing with the primary target of a boycott. The long-standing official US policy is to oppose the use of secondary boycotts, particularly against US allies and trading partners.¹⁷ Anti-boycott rules are sometimes employed in an attempt to neutralize the effects of a primary or secondary boycott. However, the United States itself in recent years has imposed secondary boycotts in a number of situations, which naturally throws into doubt

¹⁴ See Barry E. Carter, *International Economic Sanctions* 5 n 6 (1988) ("The frequent use of [economic] sanctions by the United States and many other countries constitutes persuasive evidence that no clear norm exists against them in customary international law."). See also Michael P. Malloy, *Economic Sanctions and U.S. Trade* § 10.3.1 and Figure 10.1 at 593–607 (Little, Brown 1990) (analyzing customary practice of states); Malloy, *United States Economic Sanctions* § 5.2.2 and Figure 3.3 at 306–14 (cited in note 1) (updating analysis).

¹⁵ But compare *Military and Paramilitary Activities (Nicar v US)*, 1986 ICJ 14, 127 (June 27) (holding unjustifiable the countermeasures, including use of force, taken by the United States against Nicaragua).

¹⁶ On secondary boycotts, see generally David J. Santeusano, *Extraterritoriality and Secondary Boycotts: A Critical and Legal Analysis of United States Foreign Policy*, 21 Suffolk Transnatl L Rev 367 (1998); Joseph V. Walker, *The Legality of the Secondary Boycotts Contained in the Helms-Burton Act under International Law*, 3 DePaul Dig Int L 1 (1997). On extraterritorial application of sanctions generally, see Richard W. Edwards, Jr., *Extraterritorial Application of the U.S. Iranian Assets Control Regulations*, 75 Am J Int L 870 (1981); Santeusano, 21 Suffolk Transnatl L Rev 367 (cited above).

¹⁷ See, for example, 50 USC app § 2402(5)(A)–(B) (2000) (congressional declaration of policy under Export Administration Act of condemning boycotts).

the credibility of the US policy. Such situations include the application of traditional asset blocking programs like the Foreign Assets Control Regulations (“FACRs”) to the assets of any person acting or purporting to act for or on behalf of North Korea or any national thereof, and any other person determined by the Secretary of the Treasury to be a designated national.¹⁸ These sanctions also frequently have extraterritorial effects, since the affected “nationals” may in fact be individuals or companies that are citizens or nationals of third countries, subjected to sanctions essentially because they are or have been dealing with North Korea or its nationals.

There is, however, an important distinction to be maintained between the broadened sanctions against such nationals and a traditional secondary boycott. In a secondary boycott, the secondary target is being sanctioned directly for dealing with the primary target, even though such dealings have no jurisdictional relationship to the sanctioning state. However, in the case of the FACRs, the Cuban Assets Control Regulations (“CACRs”),¹⁹ and many other US programs using similar concepts,²⁰ the “specially designated national” is sanctioned to the extent the person is or has been acting “for or on behalf of the Government or authorities exercising control over any designated foreign country,”²¹ and then only to the extent the prohibited transaction also involves property or a person subject to US jurisdiction.²² In this sense, one could argue, such a person’s exposure to sanctions is not secondary, but vicarious.

This justification would fail to explain the blatantly secondary effects of the controversial episode known as the gas pipeline incident of 1981–82.²³ US sanctions in response to the declaration of martial law in Poland included extraterritorial sanctions against the construction of the Yamal pipeline, attempting to bar European firms from using previously licensed US technology in the production and sale of equipment for the pipeline project.²⁴ The sole jurisdictional basis for the extraterritorial effect of those sanctions was the US origin of technology already legitimately in the control of non-US nationals.

The pipeline sanctions were, as a practical matter, unenforceable and are generally judged to have been a failure.²⁵ Yet since then, the United States has

¹⁸ See 31 CFR § 500 (2000) for FACRs generally. See also id § 500.306(a)(1) (providing for Secretary’s determination that a person is a “specially designated national”).

¹⁹ Id § 515.

²⁰ See, for example, the Libyan Sanctions Regulations, id § 550.304.

²¹ Id § 500.306(a)(2) (FACRs definition of “specially designated national”). See also id § 515.306(a)(2) (corresponding CACRs provision).

²² See, for example, id §§ 500.201(a)(1), (b)(1)–(2), 515.201(a)(1), (b)(1)–(2).

²³ See Homer Moyer and Linda Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 L & Poly in Intl Bus 1, 60–92 (1983).

²⁴ See 15 CFR § 390 (1982) (establishing Commerce Department controls, effective Dec 30, 1981).

²⁵ See Moyer and Mabry, *Export Controls* (cited in note 23).

occasionally—usually pursuant to congressional mandate—imposed questionable secondary sanctions with broad extraterritorial reach.²⁶

2. Extraterritorial Applicability of Sanctions

The extraterritorial implications of US economic sanctions programs have been a continuing source of controversy and vexation. The problem is particularly acute for US-based multinational enterprises, which often find themselves caught in the middle of conflicts of public policy between a sanctions mandate of the United States and the hostility to sanctions exhibited by the host governments and courts of their off-shore establishments. In private litigation in host jurisdictions, US multinational enterprises may find themselves in a defensive posture, serving as proxies for the US government in attempting to uphold the validity of US sanctions.²⁷ In US jurisprudence, there are no meaningful legal limits to the extraterritorial application of economic sanctions.²⁸ Nevertheless, several recent economic sanctions programs have evidenced some hesitancy in applying prohibitions extraterritorially, though this forbearance has sometimes been achieved by licensing certain categories of transactions out from

²⁶ See, for example, Cuban Liberty and Democratic Solidarity Act (“Helms-Burton Act”), Pub L No 104-114, Mar 12, 1996, 109 Stat 826 (1996), codified at scattered sections of 22 USC (2000) (targeting third-country nationals that trade with Cuba, with broad extraterritorial implications); Iran and Libya Sanctions Act of 1996, Pub L No 104-172, 110 Stat 1541 (1996) (hereinafter ILSA), as amended by ILSA Extension Act of 2001, Pub L No 107-24, 115 Stat 199 (2001), to be codified at 50 USC § 1701 (imposing economic sanctions on third-country persons engaging in specified transactions with Iran or Libya). The Helms-Burton Act has prompted extensive critical commentary by scholars. See, for example, S. Kern Alexander, *Trafficking in Confiscated Cuban Property: Lender Liability under the Helms-Burton Act and Customary International Law*, 16 Dickinson J Intl L 523 (1998); Stephen V. Iglesias, *The Legality of the Helms-Burton Act under NAFTA: An Analysis of the Arguments the United States, Canada, and Mexico May Present to a Chapter 20 Dispute Resolution Panel*, 3 Spg NAFTA: L & Bus Rev Am 116 (1997); Walker, 3 DePaul Dig Intl L 1 (cited in note 16); Jeannette M.E. Tramhel, *Helms-Burton Invites a Closer Look at Counter-Measures*, 30 Geo Wash J Intl L & Econ 317 (1996–97).

²⁷ See, for example, *Fruehauf Corp v Massardy*, Cours D’Appel Paris, May 22, 1965, Gaz Pal 1965, 2, 86 (France), note translated in 5 ILM 476 (1966) (involving US-based firm defending US sanctions against China); *Libyan Arab Foreign Bank v Bankers Trust Company*, 1 Lloyd’s L Rep 259 (QB 1987) (UK) (involving US-based bank defending blocking of off-shore Libyan deposits); *Libyan Arab Foreign Bank v Manufacturers Hanover Trust Co.*, 2 Lloyd’s L Rep 494 (QB 1988) (UK). See generally *Timberlane Lumber Co v Bank of America*, 749 F2d 1378 (9th Cir 1984) (adopting seven-factor analysis of jurisdictional assertion); *Trugman-Nash, Inc v New Zealand Dairy Board*, 954 F Supp 733, 736–37 (SDNY 1997) (citing *Timberlane*).

²⁸ See, for example, Restatement (Third) of the Foreign Relations Law of the United States §§ 403(1) (jurisdiction not to be exercised where exercise is “unreasonable”), 414 (exercise of jurisdiction over foreign branches and subsidiaries) (1987). For a vigorous critique of the Third Restatement’s approach to the legality of extraterritoriality, see Kathleen Hixson, *Extraterritorial Jurisdiction under the Third Restatement of Foreign Relations Law of the United States*, 12 Fordham Intl L J 127 (1988).

the impact of the prohibitory provisions, rather than by exempting them from coverage.²⁹

III. WTO CONSISTENCY

A. PRIMA FACIE CHALLENGES

Given the uncertainty of analysis under general principles of customary international law, it is natural that attention should be turning increasingly to the consistency of US economic sanctions under conventional obligations, such as the Charter of the International Monetary Fund ("IMF Charter") or the World Trade Organization ("WTO") and the General Agreement on Tariffs and Trade ("GATT").³⁰ Thus, certain forms of unilateral trade sanctions imposed by one WTO member state on another member state arguably constitute prima facie violations of the GATT.³¹ Similar analysis would apply under the IMF Charter in the case of unilateral financial sanctions involving currency restrictions.³²

²⁹ See, for example, 44 Fed Reg 65956 (1979), codified at 31 CFR § 535.901 (authorizing withdrawals or other transfers from any account held by US bank in name of non-Iranian bank located in foreign country under specified circumstances).

³⁰ Articles of Agreement of the International Monetary Fund and Articles of Agreement of the International Bank for Reconstruction and Development, 64 Stat 1401, TIAS No 1501, 2 UN Treaty Ser 39 (1945), as amended (hereinafter IMF Charter); General Agreement on Tariffs and Trade, GATT BISD 39 (1969), 61 Stat pts 5, 6, TIAS No 1700 at 639, 55 UN Treaty Ser 194 (1950), as amended (hereinafter GATT). For analysis of US economic sanctions under WTO obligations, see, for example, Riyaz Dattu and John Boscariol, *GATT Article XXI, Helms-Burton and the Continuing Abuse of the National Security Exception*, 28 Can Bus L J 198, 202–03 (1997); Alexander, 16 Dickinson J Intl L 523 (cited in note 26); Dapo Akande and Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 Va J Intl L 365 (2003).

³¹ It cannot be seriously contended that multilateral sanctions mandated by the UN Security Council are limited by WTO obligations. See GATT art XXI § (c) (cited in note 30): "Nothing in [the GATT] shall be construed . . . to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

³² See, for example, IMF Charter art VIII, § 2(a). See generally C.H. de Pardieu, *The Carter Freeze: Specific Problems Relating to the International Monetary Fund*, 9 Intl Bus Law 97 (1981). No explicit exception exists comparable to the GATT or GATS national security exceptions. See Richard W. Edwards, Jr., *International Monetary Collaboration* 415–20 (Transnational 1985) (discussing national security restrictions in IMF practice). However, a 1952 decision of the IMF Executive Board established a procedure for the granting of IMF approval of restrictions imposed on security grounds. IMF Executive Board Decision No 144 (52/51) (Aug 14, 1952), reprinted in *IMF Selected Decisions* 235 (IMF 10th ed 1983). The impetus for this decision was, among other things, US imposition of economic sanctions against the People's Republic of China in December 1950. Edwards, *International Monetary Collaboration* at 415 n 159 (cited above). The procedure has been invoked in a variety of situations, including, for example, the imposition of US sanctions against Iran in connection with the hostage crisis of 1979–1981. See id at 416. See also Edwards, 75 Am J Intl L at 873–76 (cited in note 16) (discussing IMF procedures); de Pardieu, 9 Intl Bus Law at 99 (cited above).

Regional arrangements may also forbid the use of coercive measures, short of force, intended to “force the sovereign will of another state and obtain from it advantages of any kind.”³³

Focusing on the GATT, a member state that is the primary or secondary target of unilateral sanctions could challenge the WTO consistency of the sanctions on several grounds: that sanctions constitute a denial of most-favored-nation (“MFN”) treatment,³⁴ since other member states’ goods are not so affected; that they constitute a failure to apply GATT tariff bindings to the importation of such goods;³⁵ that sanctions involve a denial of national treatment,³⁶ since goods and other assets of the target state are subject to restrictions not applicable to other goods and assets within the jurisdiction of sanctioning state; or, that sanctions are an impermissible imposition of a non-tariff barrier to trade.³⁷ While these challenges may be subject to a defense based on a national security exception,³⁸ a target state would also have available to it the nullification and impairment provisions of the GATT, which do not necessarily depend upon proof of a violation of the GATT by the sanctioning state.³⁹

B. THE NATIONAL SECURITY EXCEPTION

Arrangements under conventional law do not appear to have presented any significant practical impediments to the implementation of US economic sanctions policies. The GATT contains a self-judging national security exception that arguably covers the matter.⁴⁰ There are a number of instances in which

³³ Charter of the Organization of American States art 19, 2 UST 2394, TIAS No 2361 (1948) (hereinafter OAS Charter). Of course, economic sanctions properly invoked in accordance with the rubrics of customary international law concerning nonforcible countermeasures would not in principle violate this provision of the OAS Charter.

³⁴ GATT art I (cited in note 30).

³⁵ Id art II, § 1(a).

³⁶ Id art III.

³⁷ Id art XI.

³⁸ Id art XXI.

³⁹ Id art XXIII, § 1(b)–(c). These provisions allow for GATT-consistent countermeasures against a sanctioning state where the target state:

should consider that any benefit accruing to it directly or indirectly under [the GATT] is being nullified or impaired or that the attainment of any objective of [the GATT] is being impeded as the result of . . .

(b) the application by another contracting party of any measure *whether or not it conflicts with the provisions of this Agreement*, or

(c) the existence of any other situation

(emphasis added).

⁴⁰ See id art XXI, § (b)(iii). For an excellent review of the application and implications of the GATT for US economic sanctions practice, see Carter, *International Economic Sanctions* at 5 n 6 (cited in note 14), id at 95–98 (referring to export controls); id at 131–40 (referring to import

GATT contracting parties have invoked the national security exception as a self-judging justification for the imposition of sanctions that might otherwise be viewed as GATT-inconsistent.⁴¹ With the establishment of the WTO in 1994 after the successful conclusion of the Uruguay Round of GATT multilateral trade negotiations,⁴² the WTO Agreement continued the GATT in force,⁴³ including the national security exception of Article XXI.

The Uruguay Round also finalized the General Agreement on Trade in Services ("GATS").⁴⁴ The GATS establishes "a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization,"⁴⁵ by applying GATT non-discrimination principles to trade in services.⁴⁶ The GATS specifically applies to financial services.⁴⁷ Under the GATS, each WTO member is required to accord MFN treatment to services and service suppliers of other WTO members.⁴⁸ Current restrictions on trade in services of each member must be transparent.⁴⁹ Members are also required to administer current restrictions "in a reasonable, objective and impartial manner."⁵⁰ The requirements of non-discriminatory treatment do not, however, prevent WTO member states from enforcing domestic regulations for "prudential reasons, including for the protection of . . . [depositors] or persons to whom a fiduciary duty is owed by a

controls). Akande and Williams make an elegant series of arguments for the proposition that GATT Article XXI should not be considered "entirely self-judging." Akande and Williams, 43 *Va J Int'l L* at 381-402 (cited in note 30). However, their arguments ultimately rest on their initial observation that "a self-judging obligation is not a legal obligation at all," which is an apodictic proposition but nevertheless a mischaracterization of Article XXI. By its own terms, Article XXI expresses a rule of construction, not an obligation. See below, text and accompanying note 68.

⁴¹ See, for example, Dattu and Boscarol, 28 *Can Bus L J* at 204-05 (cited in note 30) (discussing 1961 Ghanaian boycott of Portuguese goods, 1975 Swedish global import quota system for footwear, 1985 US embargo of Nicaragua).

⁴² General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Agreement Establishing the World Trade Organization, Dec 15, 1993, art I, reprinted in 33 *ILM* 13 (1994) (hereinafter *WTO Agreement*).

⁴³ *Id* at Annex 1A (incorporating GATT 1947).

⁴⁴ General Agreement on Trade in Services, 15 Apr 1994, *WTO Agreement*, Annex 1B, 33 *ILM* 1167 (1994) (hereinafter *GATS*).

⁴⁵ *Id* at preamble.

⁴⁶ See, for example, *id* art II, § 1 (applying most-favored-nation treatment to services and service suppliers); *id* art XVII, § 1 (applying national treatment to services and service suppliers of other WTO member states).

⁴⁷ *Id* at Annex on Financial Services.

⁴⁸ *Id* art II, § 1.

⁴⁹ See *id* art III (requiring publication and reporting of restrictive measures).

⁵⁰ *Id* art VI, § 1. Compare *id* art X, § 1 (requiring that any emergency safeguard measures be administered in a non-discriminatory manner).

financial service supplier, or to ensure the integrity and stability of the financial system.”⁵¹

A series of general exceptions applies to GATS obligations, similar to the general exceptions under the GATT.⁵² More importantly for present purposes, the GATS includes a self-judging special exception for essential security interests of member states, similar to the special security exception contained in the GATT.⁵³ Presumably, this exception would shield US economic sanctions imposing financial restrictions from the requirements and strictures of the GATS.

Many academic critics have argued that the national security exception has been abused by the United States, particularly as a justification for long-standing sanctions like the Cuban embargo.⁵⁴ Note, however, that Article XXI makes the decision to employ sanctions on the basis of national security a decision for the invoking state, not for the WTO—nor even for academics. The fact that debate continues to swirl around the national security exception may simply be an indication of differences in geopolitical styles, rather than substantive legal concerns. As one commentator has noted:

While the Europeans may believe the United States is “too quick to pull the sanctions trigger,” . . . Americans believe that too often the United States “takes the heat for dealing with difficult issues while others take the contracts—that our willingness to take responsibility for peace and security makes it easier for others to shirk theirs.”⁵⁵

In the one clear challenge to US sanctions under the GATT, the United States was successful in excluding the “national security” character of the 1985

⁵¹ Id at Annex on Financial Services § 2(a).

⁵² Compare, for example, GATT art XX (excepting from GATT requirements measures undertaken for morals, life or health, precious metals, compliance with certain regulatory laws, products of prison labor, national treasures or patrimony, conservation, certain commodity agreements, world-price adjustment, and short-supply materials) with GATS art XI (excepting from GATS requirements measures undertaken for morals or public order, life or health, compliance with certain regulatory laws, and taxation) (cited in note 30) (cited in note 44).

⁵³ Compare GATT art XXI, § (b) (cited in note 30) (providing exceptions from GATT obligations with respect to any measure undertaken that a member “considers necessary for the protection of its essential security interests”) with GATS art XIV *bis* § 1 (providing exceptions from GATS obligations with respect to any measure undertaken that a member “considers necessary for the protection of its essential security interests”). But compare GATS art XIV *bis* § 2 (requiring reporting of certain excepted measures and of their termination to WTO Council for Trade in Services).

⁵⁴ See, for example, Dattu and Boscariol, 28 Can Bus L J at 198 (cited in note 30); Walker, 3 DePaul Dig Intl L at 1 (cited in note 16); Andreas F. Lowenfeld, *Agora: The Cuban Liberty and Democratic Solidarity (Libertad) Act: Congress and Cuba: The Helms-Burton Act*, 90 Am J Intl L 419 (1996).

⁵⁵ Kinton W. Alexander, *The Helms-Burton Act and the WTO Challenge: Making a Case for the United States under the GATT National Security Exception*, 11 Fla J Intl L 559, 574 (1997), quoting William Drozdiak, *US Pushes NATO on Arms Proliferation*, Wash Post A1 (Dec 17, 1997).

Nicaragua embargo from challenge before an Article XXIII panel.⁵⁶ Nevertheless, commentators have argued that Article XXI(b) has never been explicitly relied upon to except imposition of extraterritorial sanctions against secondary targets, as is the case under the Helms-Burton Act or the ILSA.⁵⁷ There are two possible responses to this argument. First, one could respond that, on the merits, sanctions against secondary targets are “entirely consistent” with the GATT and other US commitments under the WTO, since “the United States reserved the right to protect its security interests.”⁵⁸ Second, as a textual matter, the national security exception does not appear to differentiate between primary and secondary targets, but focuses rather upon the sanctioning state’s declared motivation in imposing sanctions.⁵⁹

A separate problem is the factual question of whether or not a national security rationale can remain credible over an extended period of time, as in the case of the forty-year Cuban embargo.⁶⁰ However, given the explicit continuation of these emergency authorities by presidential determination from year to year,⁶¹ analytically this situation would seem to be indistinguishable from a fresh declaration of an emergency for purposes of GATT Article XXI (b)(iii).

⁵⁶ Contracting Parties on General Agreement on Tariffs and Trade, *GATT Activities 1986* at 58–59 (1987) (noting that GATT panel examining complaint by Nicaragua concerning US embargo not authorized to examine US invocation of GATT Article XXI).

⁵⁷ See, for example, Dattu and Boscariol, 28 *Can Bus L J* at 209 (cited in note 30).

⁵⁸ Richard W. Stevenson, *Canada, Backed by Mexico, Protests to U.S. on Cuba Sanctions*, *NY Times* A7 (Mar 14, 1996) (quoting remarks by former US Trade Representative Mickey Kantor).

⁵⁹ See GATT art XXI, § (b)(iii):

Nothing in [the GATT] shall be construed

...

(b) to prevent any contracting party from *taking any action which it considers necessary for the protection of its essential security interests*

...

(iii) taken in time of war or other emergency in international relations. . .

(emphasis added). The only appreciable substantive limitation on this exception would seem to be that it is not intended to apply to actions taken “under the guise of security . . . which really have a commercial purpose.” UN Doc No EPCT/A/PV/33 at 20–21 and Corr 3, cited in *GATT, Analytical Index: Guide to GATT Law and Practice* 600 (WTO 1995) (quoting remarks by one drafter of original GATT text). See Dattu and Boscariol, 28 *Can Bus LJ* at 204 (cited in note 30) (discussing remarks); Alexander, 11 *Fla J Intl L* at 576–77 (cited in note 55) (discussing implications of remarks). In addition, a 1982 Decision of the GATT Contracting Parties required that contracting parties (in other words, “member states”) taking measures under Article XXI notify other contracting parties. *Decision concerning Article XXI of the General Agreement*, L/5426 GATT BISD (29th Supp) at 23–24 (1983).

⁶⁰ See, for example, Alexander, 11 *Fla J Intl L* at 571–72 (cited in note 55) (noting fading credibility of national security rationale for Cuban embargo, and emergence of new rationales after enactment of Helms-Burton Act).

⁶¹ See Pres Determination No 02-31, 67 *Fed Reg* 58681 (2002) (continuing exercise of emergency authorities under Trading with the Enemy Act, 50 USC app § 5(b) note (2000), for one year, including Cuban Assets Control Regulations, 31 CFR § 515).

If that is the case, then the self-judging application of the national security exception remains a formidable bar to WTO review of the merits of these unilateral sanctions.

IV. CONCLUSIONS

Given the breadth and flexibility of the self-judging national security exception, it would seem to be a difficult project to argue successfully to a WTO panel that US economic sanctions are impermissible under the GATT. Yet, in the case of other GATT exceptions—the general exceptions of GATT Article XX—the applicability of an exception is moderated by the scope limitations of the *chapeau* of Article XX itself.⁶² Exceptions are “[s]ubject to the requirement that [member state] measures are not applied in a manner which constitute a means of arbitrary or unjustifiable discrimination between countries . . . or a disguised restriction on international trade.”⁶³ Thus, action “provisionally justified” under an exception may nevertheless constitute an abuse or misuse of the exception “in the light of the *chapeau* of Article XX.”⁶⁴ This approach to the interpretation of provisions of the GATT—and specifically of the general exceptions of Article XX—is a well-established principle in GATT practice. In effect, many of the criticisms raised against the WTO-consistency of US economic sanctions implicitly reflect this principle; in other words, US invocation of the national security exception constitutes an abuse or misuse of the exception. The problem, however, is that there is no *chapeau* in the text of Article XXI and its national security exception. In context, then, the national security exception should be read in a manner faithful to its own terms.

Assuming, as we must, that the self-judging exception is to be applied as invoked by a sanctioning state,⁶⁵ we need not conclude that member states that are affected as primary or secondary targets of US sanctions are without redress under the WTO system. It remains open for an applicant before a WTO panel to argue that US sanctions nullify or impair reasonable expectations of benefits under the GATT or other WTO undertakings, “whether or not [the sanctions]

⁶² The term *chapeau* refers to the opening or introductory text of a provision that then breaks out separately identified subheadings or provisions. See, for example, World Trade Organization, Report of the Panel, *United States—Sections 301-310 of the Trade Act of 1974* at ¶ 7.27, WTO Doc No WT/DS152/R (Dec 22, 1999) (discussing significance of *chapeau*) (hereinafter Trade Act Report).

⁶³ GATT art XX (cited in note 30).

⁶⁴ Trade Act Report ¶ 7.27, citing World Trade Organization, Report of the Appellate Body *United States—Import Prohibition of Certain Shrimp and Shrimp Products* ¶¶ 160, 186, WTO Doc No WT/DS58/AB/RW (Nov 6, 1998).

⁶⁵ But compare note 59 (suggesting that exception is not available for situation of disguised commercial advantage).

conflict[] with the provisions of [the GATT].”⁶⁶ It is by no means unreasonable to anticipate that “a panel might come to the conclusion that the reasonable expectations as to their trade opportunities both with the target country and with the country taking [the secondary] boycott action have been disappointed and that compensation should be granted in such a situation.”⁶⁷ In this regard it is important to note that the national security exception of GATT Article XXI does not provide *immunity* for a sanctioning member state, but is only a *rule of construction* barring other states from construing the GATT to prevent the sanctioning state from taking action in “protection of its essential security interests.”⁶⁸ Ultimately, the reconciliation of unilateral sanctions authority and the reasonable expectations of the WTO system may occur in redressing the nullification or impairment of benefits of a target state, by authorizing it to withhold concessions from a sanctioning state. In effect, the target state can take its *chapeau* and go home.

⁶⁶ GATT art XXIII § 1(b) (cited in note 30). For explication of the “nullification or impairment” argument, see Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Agreement Annex 2 art 26, § 1 (hereinafter DSU) (providing for “non-violation complaints” pursuant to GATT Article XXIII, § 1(b)). See generally Dattu and Boscardi, 28 Can Bus L J at 208 (cited in note 30) (so arguing); Alexander, 11 Fla J Intl L at 578–79 (cited in note 55) (discussing possible non-violation complaint with respect to secondary targets).

⁶⁷ Ambassador Hugo Paeman, Head of the Delegation of the European Commission, Remarks at American Society of International Law (Mar 27, 1996), in 90 Proc Am Soc Intl L 3, 7 (1996).

⁶⁸ GATT art XXI, § (b) (cited in note 30). Akande and Williams capture this distinction succinctly when they distinguish, for purposes of WTO dispute resolution under the DSU, between “the jurisdiction of the panel to consider a complaint raising issues of national security and . . . the justiciability of the validity or legality of any invocation of national security considerations.” Akande and Williams, *International Adjudication on National Security Issues*, 43 Va J Intl L at 379 (cited in note 30).