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Secondary Sanctions under General and Security Exceptions

Geraldo Vidigal and Celia Challet

14.1 INTRODUCTION

Secondary sanctions, understood as measures adopted jointly with or in connection to already imposed primary sanctions, operate by ‘weaponizing interdependence’.¹ As a matter of politics, secondary sanctions are a means for certain states – those ‘with political authority over the central nodes in the international networked structures through which money, goods, and information travel’ – to ‘leverage interdependent relations to coerce others’.² As a matter of international law, secondary sanctions are a means for a sanctioning state to reinforce its own sanctions against another state. They enable a sanctioning state to go beyond the ‘primary sanctions’ that restrict economic relations between its own nationals, or those in its territory, and the nationals or those in the territory of the targeted state. Secondary sanctions are thus trade, financial, or other restrictions directed at, or applicable to, nationals of third states – and those based in the territory of third states – that engage in economic relations with nationals or those based in the territory of the targeted state.³

Though secondary sanctions are traditionally identified with laws and policies adopted by the United States (US),⁴ the European Union (EU) sanctions against Russia, in response to its invasion of Ukraine, demonstrate that their use is widening.⁵ The unprecedented effort dedicated by the EU, since the start of Russia’s invasion, to limit the circumvention of sanctions culminated in a significant amendment

¹ D. Drezner, H. Farrell, and A. L. Newman, *The Uses and Abuses of Weaponized Interdependence* (Brookings Institution, 2021).

² H. Farrell and A. L. Newman, ‘Weaponized Interdependence: How Global Economic Networks Shape State Coercion’ (2019) 44 *International Security* 42, 45.

³ T. Ruys and C. Ryngaert, ‘Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions’ (2020) *British Yearbook of International Law* 1, 7. See also Chapter 2.

⁴ Ruys and Ryngaert (n. 3).

⁵ Council Decision (CFSP) 2023/1217 of 23 June 2023 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia’s actions destabilizing the situation in Ukraine, [2023] OJ L 159I. See also Chapter 19.

to the EU's restrictive measures in June 2023.⁶ The current sanctions allow the EU to prohibit, in essence, the export of sensitive dual goods and military-related goods and technologies to specific third countries if 'they have been identified ... as having systematically and persistently failed' to prevent their export to Russia.⁷

These EU sanctions, which have now been applied to companies in seven third countries,⁸ provide yet another illustration of the legal challenges and interrogations that surround the adoption (and implementation) of secondary sanctions. As underlined in previous chapters in this volume, secondary sanctions are likely to contravene commitments contained in the World Trade Organization (WTO) Agreements, regional trade agreements, and other economic agreements, and they may also violate investment commitments.⁹ Since their direct targets are not based in, or nationals of, the state with which the sanctioning state has a conflict or geopolitical dispute, the justifiability of these sanctions has specific features. In particular, 'territoriality' and 'extraterritoriality' are concepts that have come to apply differently in international trade law, in which the key questions concern the required nexus between the sanctions applied, the targeted products or services, and the situation which has motivated the sanctions.

In WTO law and international trade law more broadly, the seemingly strict obligations imposed by agreements are usually modulated by 'exceptions'. Contrary to what this label would suggest, exceptions have come to constitute a pervasive element in the assessment of the legality of measures under the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), and similarly formulated agreements, permitting the justification, subject to certain conditions, of trade-restrictive measures adopted in pursuit of a variety of legitimate objectives.

The centrality of exceptions in legal arguments under trade agreements has led authors to label these agreements 'safety valves' and 'permissions to act'.¹⁰ Most relevant for present purposes are the 'general exceptions' of Article XX of the GATT, which allow, measures to safeguard public morals, protect public health, or preserve the environment, and the 'security exceptions' of Article XXI of the GATT, which

⁶ See, for instance, European Parliament, Resolution, 'One Year of Russia's Invasion and War of Aggression against Ukraine', 16 February 2023, 2023/2558(RSP), para. 22.

⁷ Council Decision (CFSP) 2023/1217 (n. 5).

⁸ Council Decision (CFSP) 2024/745 of 23 February 2024 amending Regulation(EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2024] ST/5716/2024/INIT, Annex I (the third countries are China, Kazakhstan, India, Serbia, Sri Lanka, Thailand and Türkiye).

⁹ See Chapters 11 and 12.

¹⁰ W. Guan, 'How General Should the GATT General Exceptions Be? A Critique of the "Common Intention" Approach of Treaty Interpretation' (2014) 48 *Journal of World Trade* 219; C. Henckels, 'Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law' (2020) 69 *International & Comparative Law Quarterly* 557.

allow measures to protect a Member's essential security interests. For ease of reference, we will refer to the WTO's security exceptions – formulated exactly the same in the GATT, GATS, and TRIPS Agreement and reproduced in a number of other agreements – as 'the WTO Security Exceptions'.¹¹

This chapter considers whether key exceptions in international economic agreements, in particular but not only as formulated in the WTO Agreements, could justify the adoption of secondary sanctions. Section 14.2 examines whether and to what extent such sanctions could be justified under the security exceptions, including but not restricted to Article XXI of the GATT. Section 14.3 considers whether, in some circumstances, secondary sanctions might be justified under the general exceptions of Article XX of the GATT. Section 14.4 concludes by reflecting upon the interpretative challenges involved in seeking to apply a legal framework geared at economic cooperation, non-discrimination, and reciprocal market openness to instruments whose core objective is to restrict, in an openly discriminatory manner, the economic opportunities available to specific targets.

14.2 SECONDARY SANCTIONS AND SECURITY EXCEPTIONS

Security exceptions, which have in common the safeguarding of measures to protect essential security interests, are not monolithic. After all, economic agreements being agreements between sovereigns, the parties may always design security exceptions to match their specific interests and relationship. Despite the many differences in their formulation, security exceptions may nonetheless be divided into three main types: explicitly self-judging, thematically constrained, and open-ended. The justifiability of secondary sanctions will depend to a large extent on the type of security exception.

14.2.1 *Explicitly Self-Judging Exceptions*

It has become a common diagnosis that, over the past five years, we have witnessed a 'securitisation of international economic law',¹² translated in an unprecedented number of disputes in which national security is explicitly invoked, both at the

¹¹ These are in Article XIV *bis* of the General Agreement on Trade in Services, 15 April 1994, in force 1 January 1995, 1869 UNTS 183, and in Article 73 of the General Agreement on Trade-Related Aspects of Intellectual Property, 15 April 1994, in force 1 January 1995, 1869 UNTS. 299. For ease of reference, we will refer primarily to Article XXI of the General Agreement on Tariffs and Trade, 30 October 1947, in force 1 January 1948, 55 UNTS 194 (hereinafter GATT).

¹² L. Mola, 'The Securitization of International Economic Law and "Global Security": An Analysis of the EU Law Approach through the Prism of the Common Commercial Policy' (2023) 12 *Cambridge International Law Journal* 106; G. Vidigal and S. Schill, 'International Economic Law and the Securitization of Policy Objectives: Risks of a Schmittean Exception' (2021) 48 *Legal Issues of Economic Integration* 109.

WTO and in investment law.¹³ At the WTO, this provision was rarely invoked before 2016, and its previous invocations never led to a panel report. Perhaps for this reason, prior to the interpretation of the WTO Security Exceptions by the panel in *Russia – Measures concerning Traffic in Transit*, it was common for commentators to assign to the self-judging element in their text (‘which it considers’) significant and sometimes determinative weight.¹⁴ The International Court of Justice (ICJ) itself referred to Article XXI of the GATT, in *Military and Paramilitary Activities in and against Nicaragua*, to conclude that a differently worded exception was justiciable.¹⁵ When the WTO Security Exception was submitted to litigation, however, a careful reading of this wording led a number of WTO panels to conclude that its invocation was subject to certain requirements – examined later in the chapter. In the same vein, the Investment Tribunal in *Devas v. India* responded to the argument that the security exception in the relevant treaty was self-judging by stating that, ‘unless a treaty contains specific wording granting full discretion to the State to determine what it considers necessary for the protection of its security interests, national security clauses are not self-judging’.¹⁶

In part in reaction to panel reports and arbitral awards finding security exceptions to be not only justiciable but limited in scope, some recent treaties, in particular those involving the US and India (examined later in the chapter), seek to fully curtail the ability of adjudicators to adjudicate upon states’ invocation of this exception. Two main techniques are used for this purpose: declaring in the treaty text that the

¹³ For WTO, see M. Pinchis-Paulsen, ‘Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions’ (2020) 41 *Michigan Journal of International Law* 109, 111. For investment law, see J. García Olmedo, ‘The Legality of EU Sanctions under International Investment Agreements’ (2023) 28 *European Foreign Affairs Review* 95.

¹⁴ See, for instance, R. Bhala, ‘National Security and International Trade Law: What the GATT Says and What the United States Does’ (1998) 19 *University of Pennsylvania Journal of International Law* 263, 268–269; H. P. Hestermeyer, ‘Article XXI Security Exceptions’, in R. Wolfrum, P. T. Stoll, and H. Hestermeyer (eds.), *WTO: Trade in Goods* (Martinus Nijhoff, 2011), pp. 578–579. The rationale seemed to be, in particular, that the words ‘it’ and ‘considers’ would allocate a high (if not complete) level of discretion to the state concerned. This position was also re-emphasized in the US Statement by Ambassador María L. Pagán at the WTO Dispute Settlement Body Meeting, 27 January 2023 (<https://geneva.usmission.gov/2023/01/28/us-statements-by-ambassador-maria-pagan-at-the-wto-dispute-settlement-body-meeting-january-27-2023/> ‘For over 70 years, the United States has held the clear and unequivocal position that issues of national security cannot be reviewed in WTO dispute settlement and the WTO has no authority to second-guess the ability of a WTO member to respond to a wide range of threats to its security.’).

¹⁵ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, para. 222 (‘That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within [the security] exception, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade.’).

¹⁶ *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, Award on Jurisdiction and Merits, PCA Case No. 2013-09, 25 July 2016, para. 219.

exception is self-judging and establishing a procedural bar to the continuation of the dispute in case it is invoked.

Recent US agreements, such as the US–Korea and US–Peru Free Trade Agreements, feature not only express wording aimed at making the security exception substantively self-judging but also additional clarification, imposing on adjudicators a certain action whenever the provision is invoked. The exception itself provides that the treaty does not prevent each party from ‘applying measures it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests’.¹⁷ The footnote adds that, ‘[f]or greater certainty, if a Party invokes Article 23.2 [the security exception] in an arbitral proceeding initiated under Chapter Eleven (Investment) or Chapter Twenty-Two (Institutional Provisions and Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies’.¹⁸

The India–Belarus bilateral investment treaty (BIT) takes a different route.¹⁹ Article 33.1(ii) (Security Exceptions) provides that the treaty is not to be construed ‘to prevent a Party from taking any action which it considers necessary for the protection of its essential security interests including but not limited to’ a number of topics. The expression ‘not limited to’ makes the exception, other than self-judging, thematically open in the sense discussed in Section 14.2.2. Clause (ii) of the Annex on Security Exceptions takes the matter one step further, establishing the understanding that

where the Party asserts as a defence that conduct alleged to be a breach of its obligations under this Treaty is for the protection of its essential security interests protected by Article 33, any decision of such Party taken on such security considerations and its decision to invoke Article 33 at any time, whether before or after the commencement of arbitral proceedings shall be non-justiciable. It shall not be open to any arbitral tribunal constituted under Chapter IV or Chapter V of this Treaty to review any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to such arbitral tribunal.²⁰

¹⁷ Article 23.2(b) of the Free Trade Agreement between the United States of America and the Republic of Korea, 30 June 2007, in force 15 March 2012, as amended by the 2018 Protocol between the Government of the United States of America and the Government of the Republic of Korea, 24 September 2018, https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file476_12722.pdf; Article 22.2(b) of the United States–Peru Free Trade Agreement, 12 April 2006, in force 1 February 2009, https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file841_9542.pdf, is worded substantively the same.

¹⁸ Free Trade Agreement between the United States of America and the Republic of Korea (n. 17), Article 23.2(b), footnote 2; United States–Peru Free Trade Agreement (n. 17), Article 22.2(b), footnote 2 (worded substantively the same in both instruments).

¹⁹ Treaty between the Republic of Belarus and the Republic of India on Investments, 24 September 2018, in force 5 March 2024, <https://docs.pca-cpa.org/2016/01/Belarus-India-BIT-2018-2.pdf>.

²⁰ *Ibid.*, Annex: Security Exception, 41, para. (ii).

The technique favoured by the US would demand from anyone arguing that the exception can be assessed by an adjudicator a very bold interpretation of this provision – one might have to argue that there is a distinction between the exception ‘applying’ and the exception justifying otherwise unlawful conduct, so that the exception ‘applies’ but does not justify the measure at hand.²¹ The phrasing in the India–Belarus BIT is more constraining and would seem to leave little room for tribunals to consider even whether the exception is invoked in good faith or its invocation is minimally plausible.²² Although some courts and tribunals have, in similar situations, interpreted self-judging provisions as subject to a requirement of invocation in good faith,²³ there must be a limit to the ability of adjudicators to set aside the specific wording of provisions in favour of general principles.

14.2.2 *Exceptions with Thematic Constraints*

Some exceptions are open-ended and refer generically to a state’s entitlement to protect its essential security interests. Others specify certain circumstances in which the exception is available – we term them ‘thematically constrained’. In the former case, the justification of a measure under the exception depends essentially on the existence of an essential security interest and on the action taken to protect it being logically related to this interest (see Section 14.2.3). If the exception is thematically constrained, on the other hand, a measure is justifiable under the security exception only insofar as it concerns or relates to the applicable theme.

The most used formulation of the thematically constrained security exception is the one found in the three core WTO agreements: GATT Article XXI, GATS Article XIV *bis*, and TRIPS Article 73. All of them contain the same text (referred to as ‘the WTO Security Exception’). This formulation has not only inspired other agreements but is often reproduced to the letter within them. The key provision of the WTO Security Exception that might be invoked to justify unilateral secondary sanctions is Article XXI’s paragraph (b), which reads:

Nothing in this Agreement 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

²¹ See, in this respect, S. Schill and R. Brieze, “‘If the State Considers’: Self-Judging Clauses in International Dispute Settlement” (2009) 13 *Max Planck Yearbook of United Nations Law* 61.

²² At the same time, other provisions might create the opportunity for debate. For example, there is no clarity on the relationship between the procedural provision in clauses (i) and (ii) of the Annex of the Treaty between the Republic of Belarus and the Republic of India on Investments (n. 19), which impose certain requirements on the adoption of measures under Article 33.3.

²³ See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* (Merits) [2008] ICJ Rep 177, paras. 145–147; *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, Final Award, PCA Case No. 2005-03/AA226, 18 July 2014, para. 1407.

- (i) relating to fissionable materials or the materials from which they are derived;
- (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
- (iii) taken in time of war or other emergency in international relations[.]²⁴

We label this exception ‘thematically constrained’ because, besides the principal clause, it features subparagraphs (i)–(iii) defining a scope of application. Although some WTO Members have argued that the three subparagraphs are subject to the self-judging element in the principal clause, all WTO panels to have considered this provision have found that resort to the exception is limited thematically by the subparagraphs. Panels faced with an invocation of the exception are thus not only able but required to assess whether the circumstances in one of the subparagraphs are present. Thus, the panel in *United States – Origin Marking Requirement* found that the subparagraphs ‘circumscribe (and limit) the circumstances in which the invoking Member may take action which it considers necessary for the protection of its essential security interests’.²⁵ And, as the panel in *United States – Certain Measures on Steel and Aluminium Products* put it, the WTO Security Exception ‘explicitly enumerates conditions in the subparagraphs that are an integral part of that right’,²⁶ so that ‘the subparagraphs are exhaustive in establishing the circumstances’ in which Members may justify a measure under the security exception.²⁷

The panel in *Russia – Measures concerning Traffic in Transit* found that the three subparagraphs, interpreted as part of a whole, suggest that they all concern issues relating to ‘defence and military interests, as well as maintenance of law and public order interests’.²⁸ However, only the last of the three subparagraphs, referring to ‘war or other emergency in international relations’, has been interpreted by WTO panels, and only in relation to the expression ‘other emergency in international relations’.

Third-party interpretations of the term ‘emergency’ have sometimes been seen as problematic, on grounds that determining what constitutes an ‘emergency’ might be subjective.²⁹ Panels, however, have disagreed. The panel in *United States – Certain Measures on Steel and Aluminium Products* noted that the expression ‘in

²⁴ Article XXI of the GATT (n. 11).

²⁵ WTO, Dispute Settlement Body, *United States – Origin Marking Requirement*, Panel Report, WT/DS597/R, 21 December 2022, para. 7.89.

²⁶ WTO, Dispute Settlement Body, *United States – Certain Measures on Steel and Aluminium Products*, Panel Report, WT/DS544/R, 9 December 2022, para. 7.125.

²⁷ *Ibid.*, para. 7.113.

²⁸ WTO, Dispute Settlement Body, *Russia – Measures concerning Traffic in Transit*, Panel Report, WT/DS512/R, 5 April 2019, para. 7.74.

²⁹ See, for instance, R. Bismo, J. Priyono, and N. Trihastuti, ‘The Problems of Interpreting GATT Article XXI(b) (iii) in *Russia – Traffic in Transit*’ (2022) 21 *Journal of International Trade Law and Policy* 66.

international relations’ serves to exclude ‘emergency in purely domestic or national affairs’.³⁰ The panel noted that the context of the expression ‘or other emergency in international relations’ is the immediately preceding word ‘war’ – which it defined as ‘a state of conflict characterized by the use of force’.³¹ The panel also found that the ‘other emergency’ that a national measure intends to address ‘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’.³² The panel in *Russia – Measures concerning Traffic in Transit* concluded that the expression ‘emergency in international relations’ does not cover mere ‘political or economic conflicts with other Members or states’, even when they could be considered ‘urgent or serious in a political sense’.³³ It requires 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 ... giv[ing] rise to ... defence or military interests, or maintenance of law and public order interests’.³⁴

As applied to secondary sanctions, the thematic constraints in the WTO Security Exception serve to delimitate the circumstances in which these sanctions might in principle be justifiable. Thus, a Member may be able to adopt ‘any action which it considers necessary for the protection of its essential security interests’, but such action can be adopted only if it is ‘relating to fissionable materials or the materials from which they are derived’, ‘relating to the traffic in arms, ammunition and implements of war’, or ‘taken in time of war or other emergency in international relations’. In other words, under thematically constrained exceptions the invocation of essential security interests does not allow Members to adopt secondary sanctions (or any sanctions) in circumstances other than the ones prescribed.

Thus, under thematically constrained security exceptions, a required step for justifying secondary sanctions is to demonstrate the applicability of one of the relevant circumstances in the subparagraphs. With regard to fissionable materials, arms and ammunition, and the supply of military establishments, prohibiting the exportation and re-exportation of fissionable materials, or of military equipment and technology, might justify the employment of secondary sanctions. With respect to paragraph (iii), the party invoking the exception should demonstrate the existence of a war or emergency in international relations to which the sanctions are connected. The latter would require what the panel in *United States – Origin Marking Requirement* termed ‘a state of affairs, of the utmost gravity, which represents a breakdown or near-breakdown in the relations between states or other participants in international relations’.³⁵

³⁰ *United States – Certain Measures on Steel and Aluminium Products* (n. 26), Panel Report, para. 7.137.

³¹ *Ibid.*, para. 7.138.

³² *Ibid.*, para. 7.139.

³³ *Russia – Measures concerning Traffic in Transit* (n. 28), Panel Report, para. 7.75.

³⁴ *Ibid.*, para. 7.76.

³⁵ *United States – Origin Marking Requirement* (n. 25), Panel Report, para. 7.315.

14.2.3 Required Nexus

Some security exceptions feature no thematic restrictions. In these cases, adjudicators assessing the applicability of security exceptions have considered that their successful invocation nonetheless requires a degree of connection – a *nexus* – between the protection of the essential security interests invoked by a state and the measure that is justified under the exception. The Arbitral Tribunal in *Devas v. India* reasoned that a party in invoking the security exception, which textually permitted each party ‘to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests’, was still required ‘to establish that the measure related to its essential security interests; it cannot therefore be any security interest but it has to be an “essential” one’.³⁶ The Arbitral Tribunal in *Deutsche Telekom v. India* found that ‘there was a mix of reasons for the annulment of the [contract between the investor and the state] and only some of those can, on an objective analysis, be said to relate to “essential security interests” within the meaning of Article 12 of the BIT’.³⁷ In other words, the defendant should be required to demonstrate an objective nexus between an articulated and objectively ascertainable essential security interest and the measure that was justified under the security exception.

Similarly, under the WTO Security Exception, panels have considered that a second step is required to justify resorting to the exception, emerging from the text of paragraph (b), which operates as a *chapeau* for the three subparagraphs. Paragraph (b) permits a Member to take ‘any action which it considers necessary for the protection of its essential security interests’. In *Russia – Measures concerning Traffic in Transit* and *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, the panels found that the self-judging element in this expression gives each Member full discretion to consider which measures are *necessary* for the protection of its essential security interests. However, it only protects measures adopted for this specific purpose, that is ‘for the protection of a Member’s essential security interests’.

The panel in *Russia – Measures concerning Traffic in Transit* inferred from this interpretation a twofold requirement for the Member invoking the exception. First, it would be ‘incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity’.³⁸ Although Members enjoy significant leeway in establishing their essential security interests, the panel concluded that this

³⁶ *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India* (n. 16), para. 243.

³⁷ *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, para. 284.

³⁸ *Russia – Measures concerning Traffic in Transit* (n. 28), Panel Report, para. 7.134.

leeway is limited, on the one hand, by the term ‘essential’, which suggests ‘a narrower concept than “security interests”’ and is limited 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’, and, on the other hand, by the ‘obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith’.³⁹ Second, there must be a certain nexus between the measures adopted by the Member and the essential security interest invoked. Although this requirement is not subject to particularly high scrutiny, the measures must still ‘meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests’.⁴⁰

This interpretation was applied, on the basis of direct quotations from the panel report in *Russia – Measures concerning Traffic in Transit* and by the panel in *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*. Contrary to the former panel, however, the latter panel concluded that some measures adopted by Saudi Arabia lacked a relationship to the objective of its measures as articulated by Saudi Arabia. This objective, in the context of a relationship with Qatar that the panel agreed amounted to an ‘emergency in international relations’ for Saudi Arabia, was to implement an ‘umbrella policy of ending or preventing any form of interaction with Qatari nationals’.⁴¹ Although this panel agreed that there was an ‘emergency in international relations’ between Qatar and Saudi Arabia, in the meaning of subparagraph (iii), it failed to see how some measures adopted by Saudi Arabia contributed to its stated objective. In particular, Saudi Arabia was in violation of its TRIPS commitments by failing to apply any criminal procedures and penalties against a Saudi company. Preventing violations of intellectual property rights by this company, which the panel defined as a ‘commercial-scale broadcast pirate’ (the company, beOutQ, was transmitting content owned by the Qatari company beIN),⁴² would not have required Saudi Arabia to interact with Qatari nationals.⁴³

The panel in *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights* also referred to comments by third parties intervening in the dispute. It noted that the TRIPS obligations violated by Saudi Arabia, which it sought to justify under the TRIPS security exception owing to the emergency in international relations arising between Saudi Arabia and Qatar, affected ‘not only Qatar or Qatari nationals, but also a range of third-party right holders’.⁴⁴ The panel reproduced comments by third parties to the dispute – Brazil and the EU – highlighting

³⁹ *Ibid.*, paras. 7.130–7.132.

⁴⁰ *Ibid.*, para. 7.138.

⁴¹ WTO, Dispute Settlement Body, *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, Panel Report, WT/DS567/R, 16 June 2020, para. 7.286.

⁴² *Ibid.*, para. 7.291.

⁴³ *Ibid.*, para. 7.289.

⁴⁴ *Ibid.*, para. 7.291.

the violation of copyrights of their nationals by beOutQ.⁴⁵ Noting also the lack of temporal coincidence between the non-application of Saudi criminal procedures and penalties to beOutQ and the ‘comprehensive measures’ adopted by Saudi Arabia at the moment of its tensions with Qatar, the panel concluded that the former measures had ‘no rational or logical connection [to] the comprehensive measures aimed at ending interaction with Qatar and Qatari nationals’.⁴⁶ They were thus ‘so remote from, or unrelated to, the “emergency in international relations” as to make it implausible that Saudi Arabia implemented these measures for the protection of its “essential security interests”’.⁴⁷

This suggests that security exceptions, in the case of an emergency in international relations between two states, would allow these states to cease to apply economic obligations to a counterpart with which there has been a breakdown or near-breakdown in relations. However, it would not automatically permit a derogation of commitments towards states other than that specific counterpart – and could thus fail to justify secondary sanctions. In these cases, to justify the secondary sanctions under the security exception, the state applying them may have to either (a) demonstrate, still under the security exception, how blocking trade from its economic partners is itself a measure ‘for the protection of its essential security interests’, in the sense that this blocking of trade is connected to the emergency invoked, or (b) resort to another manner of justification. Within the framework of trade agreements,⁴⁸ this justification may come in the form of the general exceptions of GATT Article XX (or GATS Article XIV or one of the limited exceptions under TRIPS). It will be tempting to states to invoke the security exception, given the seemingly lower standard for a nexus requirement compared to the necessity requirement under Article XX, examined in Section 14.3. However, a right to cease economic relations with a trade agreement counterpart, in response to a unilaterally declared threat which does not involve that trade partner, would widen the scope of the security exception to the point where it would be difficult to distinguish it from a fully self-judging provision – a point discussed in Section 14.4.

14.3 SECONDARY SANCTIONS AND GENERAL EXCEPTIONS

Beyond the security exception, the GATT features in its Article XX a number of general exceptions, transposed or incorporated by reference in virtually all

⁴⁵ Ibid.

⁴⁶ Ibid., para. 7.292.

⁴⁷ Ibid., para. 7.293.

⁴⁸ Outside the framework of trade agreements, a state could seek to justify its measures under general international law. It is beyond the scope of this chapter to consider the complex question of whether, how, and to what extent a state can invoke, before a trade agreement panel, public international law to justify a measure unlawful under the agreement itself. See D. Azaria, ‘Trade Countermeasures for Breaches of International Law outside the WTO’ (2022) 71 *International & Comparative Law Quarterly* 389.

contemporary trade agreements, which permit WTO Members to contravene their ordinary WTO commitments in order to pursue certain objectives falling short of the array of security objectives envisaged in Article XXI. These provisions may also be relevant to investment law, since, like in Article XXI of the GATT, Article XX has been transposed to a number of regional trade agreements with an investment chapter and bilateral investment treaties.⁴⁹

The jurisprudence of WTO panels and the Appellate Body on Article XX has been open to the possibility that Members might devise legitimate policies with trade-restrictive effects. In *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, the Appellate Body disavowed the panel's teleological reasoning that WTO law 'only allows Members to derogate from GATT provisions so long as, in doing so, they do not undermine the WTO multilateral trading system'.⁵⁰ The Appellate Body found instead that 'conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX'.⁵¹

The various subparagraphs of Article XX refer to measures 'necessary' to attain a given objective, or 'relating to' this objective. The wording is thus different from Article XXI of the GATT, which allows a state to take measures 'which it considers necessary' for the protection of its essential security interests. This suggests a higher standard for the nexus requirement under Article XX than for Article XXI, as explored in this section. Although more than one general exception contained in Article XX could be relevant with respect to secondary sanctions, the one that could most plausibly be invoked to justify them is Article XX(d). This provision safeguards the right of Members to adopt measures 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the relevant agreement]'.⁵²

Nonetheless, it is worth considering first the issue with regard to Article XX(a), according to which WTO Members may adopt measures 'necessary to protect public morals'. This subparagraph was invoked by the US in a dispute concerning alleged (primary) sanctions on China for conduct that the US considered wrongful, leading to the 2020 WTO panel report in *United States – Tariff Measures on Certain Goods from China*. This panel report has been appealed and, in the absence of a

⁴⁹ A. D. Mitchell, J. Munro, and T. Voon, 'Importing WTO General Exceptions into International Investment Agreements', in L. Sachs, L. Johnson, and J. Coleman (eds.), *Yearbook on International Investment Law & Policy 2017* (Oxford University Press, 2017), pp. 305–355.

⁵⁰ WTO, Dispute Settlement Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Panel Report, WT/DS58/R, 15 May 1998, para. 7.44.

⁵¹ WTO, Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, 6 November 1998, para. 121.

⁵² Article XX(d) of the GATT.

functioning Appellate Body, is now ‘in limbo’.⁵³ However, it contains developments which, building upon the pre-existing case law on Articles XX(a) and XX(d), provide guidance for analyses and debates surrounding sanctions, including secondary sanctions.

14.3.1 Secondary Sanctions as ‘Public Morals’ Measures?

A state might argue that secondary sanctions are measures ‘necessary to protect public morals’ within the meaning of Article XX(a) of the GATT. As it will be examined in this section, previous panel and Appellate Body reports have found that a measure may be justified under this provision if it pursues an objective of ‘public morals’, is ‘designed’ to protect it, and if a sufficient nexus (i.e. the necessity of the measure) is established between the measure and the objective. The case law has been flexible on the scope of the ‘public morals’ exception, while setting limits to states’ discretion.

As regards the notion of ‘public morals’, panel reports have stressed that the term refers to ‘standards of right and wrong conduct maintained by, or on behalf of, a community or nation’.⁵⁴ This means that the concept can vary from one state (or international organization) to another, depending on various factors such as prevailing social, cultural, ethical, and religious values.⁵⁵ An issue without a public morals dimension in a particular state or international organization can be of significant importance in another. For instance, in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, which concerned restrictions imposed by the EU on the import of seal products from various states, the panel considered that the EU’s legislative history ‘demonstrate[d] the existence of the EU public’s concerns about seal welfare’.⁵⁶ In *United States – Tariff Measures on Certain Goods from China*, the US argued that the additional tariffs imposed

⁵³ This makes WTO, Dispute Settlement Body, *United States – Tariff Measures on Certain Goods from China*, Panel Report, WT/DS543/R, 15 September 2020, one of the various cases whose adjudication on appeal is paralysed by the absence of a functioning Appellate Body. See, for instance, P. van den Bossche and S. Akpofure, ‘The Use and Abuse of the National Security Exception under Article XXI(b) (iii) of the GATT 1994’, World Trade Institute Working Paper No. 03/20, 15 September 2020, www.wti.org/research/publications/1299/the-use-and-abuse-of-the-national-security-exception-under-article-xxibiii-of-the-gatt-1994/, 3.

⁵⁴ See, inter alia, WTO, Dispute Settlement Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, Panel Report, WT/DS400/R and WT/DS401/R, 18 June 2014, para. 7.380; WTO, Dispute Settlement Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, 20 April 2005, para. 6.465; WTO, Dispute Settlement Body, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Panel Report, WT/DS363/R, 19 January 2010, para. 7.759.

⁵⁵ WTO, Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS401/AB/R, 22 May 2014, paras. 5.200–5.201.

⁵⁶ *Ibid.*, para. 5.135.

on certain Chinese products were a response to China's practices which 'violate[d] US "standards of right and wrong", in particular the prohibition of theft, extortion, cyber-enabled theft and cyber-hacking, economic espionage and the misappropriation of trade secrets, anti-competitive behaviour, as well as the regulation of governmental takings of property'.⁵⁷ While China alleged that the US was seeking to 'stretch the narrow parameters of Article XX(a) to encompass blatantly coercive economic objectives',⁵⁸ the panel did not rule out the possibility, in principle, that the US measure was pursuing a 'public morals' objective.

The degree of flexibility adopted by previous WTO panels with regard to the term 'public morals' could, in fact, make this exception all-encompassing, in turn making it conceivable for a sanctioning state to argue that any violation of public international law – or maybe any action by another state other than the behaviour that the sanctioning state would like to see – is a violation of its public morals. Some have pointed to the challenges that this flexibility can raise if WTO Members may impose their own morality standards on other states.⁵⁹ WTO panels' resistance to second-guess Members' own definition of their public morals nonetheless suggests that this exception could be invoked to justify secondary sanctions.

The second requirement is that the measure be 'designed' to protect the professed public morals. This means that, considering 'the design of the challenged measure, including its content, structure and expected operation', the measure must not be 'incapable' of protecting the values considered by the state as public morals.⁶⁰ Since they are often designed and advertised as a means to combat circumvention of primary sanctions adopted in response to a threat to peace or international security, or to violations of fundamental rights in a given state, secondary sanctions might be considered 'measures designed to protect public morals'. This defence might seem plausible, for example, in the case of the EU's prohibition to export weapons to (potential) third countries that would re-export them to Russia, thereby allowing it to keep pursuing its invasion of Ukraine. If their 'design' logically reinforces the efficacy of primary sanctions adopted under the same 'public

⁵⁷ *United States – Tariff Measures on Certain Goods from China* (n. 53), para. 7.113.

⁵⁸ *Ibid.*, para. 7.101.

⁵⁹ See, in this respect, M. Du, 'Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organization' (2016) 50 *Journal of World Trade* 675, 676; H. Andersen, 'Protection of Non-trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions' (2015) 18 *Journal of International Economic Law* 398. Andersen alludes, in particular, to the scenario in which a WTO Member would impose import bans on products by reason of their process of production rather than due to the characteristics of the products. Such criticism could theoretically apply to secondary sanctions: what would be at stake would perhaps not so much be the products concerned as their (re)-export towards a primarily targeted state.

⁶⁰ *United States – Tariff Measures on Certain Goods from China* (n. 53), para. 7.145. See, for instance, WTO, Appellate Body, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, Report of the Appellate Body, WT/DS461/AB/R, 22 June 2016, para. 5.68.

morals' objective, they might conceivably be defensible as also meaning to protect public morals.

Article XX(a), though, requires the stronger nexus condition of necessity between the measure and its objective, which might prove to be more difficult to fulfil by secondary sanctions than the two previous ones (and is, in any event, stricter than the nexus requirement entailed by Article XXI's security exception). In a strict assessment, a measure is a 'necessary' contravention of trade commitments only if it is the least-trade restrictive among the measures reasonably available to that Member to fulfil the legitimate objective pursued by the Member to the degree of fulfilment selected by that Member. Put otherwise, if a less trade-restrictive measure is available to the Member which allows it to pursue its proposed objective to the degree it seeks to pursue it, then the more trade-restrictive measure is not necessary to fulfil that objective.

Nonetheless, under existing jurisprudence, panels have stressed that the condition that the measure be 'necessary', too, is characterized by a certain degree of flexibility to the benefit of the state adopting the measure. Canonically, in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, which concerned Article XX(d), the Appellate Body stressed that the intensity of the nexus for the purpose of the word 'necessary' could vary:

Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to". We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".⁶¹

This reasoning was directly alluded to in the *United States – Tariff Measures on Certain Goods from China* panel report in the context of Article XX(a). The panel stated that establishing that a measure is 'necessary' to protect public morals requires weighing the various interests at stake in order to 'maintain a balance between the right of a WTO member to invoke an [Article XX exception], and the duty of that same Member to respect the treaty rights of the other WTO Members'.⁶² The panel also recalled its 'preference for a holistic approach',⁶³ which would take into account a series of factors such as

⁶¹ WTO, Appellate Body, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WT/DS161/AB/R and WT/DS169/AB/R, 10 January 2001, para. 161.

⁶² *United States – Tariff Measures on Certain Goods from China* (n. 53), para. 7.106.

⁶³ *Ibid.*, para. 7.152.

- (1) the relative importance of the pursued policy objective (the more important the societal value pursued by the measure, the more ‘necessary’ it might appear);⁶⁴
- (2) the restrictive impact of the measure on trade (the less restrictive the effects, the more likely the measure can be considered as ‘necessary’);⁶⁵
- (3) the contribution of the measure to the realization of the objective pursued.⁶⁶ The panel in *United States – Tariff Measures on Certain Goods from China* recalled that such contribution is construed as the existence of a ‘genuine relationship of ends and means between the objective pursued and the measure at issue’.⁶⁷

This approach would also be followed by an assessment of whether potential WTO-consistent or less restrictive trade measures could be applied in pursuit of the same objective. Flexibility in the assessment of the various factors was emphasized in the *United States – Tariff Measures on Certain Goods from China* panel report with respect to the requirement of a ‘genuine relationship of ends and means between the objective pursued and the measure at issue’. The panel recalled that the level of contribution by the challenged measure to the objective pursued could be assessed by verifying the extent to which it is ‘apt to’ contribute to the objective, either quantitatively or qualitatively.⁶⁸ This does not mean, however, that panels will not set limits as to what can be considered a sufficient nexus for the purpose of the protection of ‘public morals’. As stressed by the Appellate Body in *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ‘if a Member chooses to adopt a very restrictive measure, it will have to ensure that the measure is carefully designed so that the other elements to be taken into account in weighing and balancing the factors relevant to an assessment of the “necessity” of the measure will “outweigh” such restrictive effect’.⁶⁹ In *United States – Tariff Measures on Certain Goods from China*, the panel found that

⁶⁴ WTO, Appellate Body, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, Report of the Appellate Body Report, WT/DS135/AB/R, 5 April 2001, para. 172; *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (n. 61), Report of the Appellate Body, para. 162.

⁶⁵ WTO, Appellate Body, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Report of the Appellate Body, WT/DS363/AB/R, para. 310.

⁶⁶ *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (n. 61), Report of the Appellate Body, para. 163.

⁶⁷ *United States – Tariff Measures on Certain Goods from China* (n. 53), para. 7.159.

⁶⁸ *Ibid.*, para. 7175. In that regard, the panel referred, inter alia, to *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (n. 54), para. 5.213, and WTO, Appellate Body, *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body, WT/DS332/AB/R, 17 December 2007, para. 145.

⁶⁹ *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (n. 65), Report of the Appellate Body, para. 310.

the US had not adequately explained how there was a genuine relationship of ends and means between the imposition of additional duties on certain products and the public morals objective invoked.⁷⁰ Considering the various products affected by US sanctions and their lack of relationship to the objective pursued by the US, the panel concluded, there was a ‘strong indication that the challenged measures ha[d] exceeded the limits acceptable under Article XX (a) GATT 1994’.⁷¹

Against that background, the manner in which the argument supporting the ‘necessary’ nature of secondary sanctions to protect public morals would be made would be crucial. How would a panel assess the societal value of measures which aim to affect the rights of third states with which the sanctioning state or international organization has no conflict or geopolitical dispute? Where to draw the line between the secondary sanctions’ restrictive effects on trade that can be tolerated and those that cannot? One could envisage that a scenario in which only the export of sensitive dual-use or military-related goods and technologies would be affected by the secondary sanctions (which is, as of now, the solution chosen by the EU) would not be considered as excessively restricting trade. However, this might not necessarily be the case if the secondary sanctions affect wider and/or additional categories of products, technologies, or services.⁷²

Could a panel go as far as to consider that there is a genuine relationship of ends and means between the imposition of secondary sanctions and public morals, that the measures are apt to contribute to the public morals objective, and that no less restrictive trade measures could have been adopted? The delicate exercise of argumentation that would surround the assessment of the necessity of secondary sanctions, combined with their geopolitical sensitivity, might explain the precautions taken by the EU in designing the eleventh package’s prohibition to export sensitive dual-use or military-related goods and technologies to (listed) third states. The relevant legal instruments specify that the EU shall only list ‘third countries that have been identified by the Council as having systematically and persistently failed to prevent the sale, supply, transfer or export to Russia of [listed goods and technologies], exported from the Union despite the Union’s prior outreach and assistance to the country in question’.⁷³ The recitals of these instruments also insist on the efforts of

⁷⁰ *United States – Tariff Measures on Certain Goods from China* (n. 53), para. 7.237.

⁷¹ *Ibid.*

⁷² See *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)* (Order on the Request for Indication of Provisional Measures) [2018] ICJ Rep 2018, 623, paras. 68–70. While the ICJ acknowledged that the challenged sanctions might affect some of the rights of the targeted State in so far as they relate to fissionable materials or essential security interests, they could not affect certain other rights. For instance, the importation and purchase of humanitarian goods or products required for the safety of civil aviation ‘cannot plausibly be considered to give rise to the invocation of [the security exceptions]’ (para. 69). While the case revolved around security exceptions, it seems reasonable to assume that this reasoning could apply in the case of general exceptions and, in particular, those relating to public morals.

⁷³ Council Decision (CFSP) 2023/1217 (n. 5).

dialogue and bilateral or multilateral cooperation which should first be undertaken by the EU towards the third state concerned,⁷⁴ before resorting to these ‘exceptional last-resort measures’.⁷⁵ Would this gradual approach in the implementation of the prohibition be taken into account in the assessment of its necessity? There is some precedent for modulating the necessity requirement in *Brazil – Measures Affecting Imports of Retreaded Tyres*, in which both the panel and the Appellate Body concluded that a measure could be found to be necessary for its objective if it is part of a ‘comprehensive policy comprising a multiplicity of interacting measures’ and, in itself, ‘brings about a material contribution to the achievement of its objective’.⁷⁶

Overall, therefore, a resort to Article XX(a) to justify secondary sanctions could be a relevant option to contemplate in light of the extreme flexibility adopted by previous panels in relation to the content of ‘public morals’, but its use would not be devoid of challenges from the perspective of the sanctioning state (or international organization). A more fitting alternative could be found in Article XX(d), discussed in Section 14.3.2. In the case of this provision too, however, secondary sanctions would create specific legal interrogations and challenges.

14.3.2 *Secondary Sanctions as Enforcement Measures?*

The second general exception that could be of potential relevance with respect to secondary sanctions are enforcement measures within the meaning of Article XX(d) of the GATT. While this subparagraph tends to ‘receive less attention’ than the other exceptions provided in Article XX,⁷⁷ it remains an important provision which could very well play a growing role in the future. Article XX(d) of the GATT provides that a measure may be justified if it is ‘necessary to ensure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of [certain monopolies], the protection of patents, trade marks and copyrights, and the prevention of deceptive practices’.

To the extent that a law or regulation imposing primary sanctions is a legitimately adopted measure, one could contemplate the possibility of justifying (certain) secondary sanctions, aiming to limit the circumvention of the primary sanctions or ensure their efficacy, on the basis of Article XX(d). The argument could indeed be made that (certain) secondary sanctions are necessary to ensure compliance with laws or regulations relating to customs enforcement and/or the prevention of deceptive practices. This would be particularly true, for instance, of secondary sanctions

⁷⁴ *Ibid.*, Recitals 4–10.

⁷⁵ *Ibid.*, Recital 13.

⁷⁶ *Brazil – Measures Affecting Imports of Retreaded Tyres* (n. 68), Report of the Appellate Body, para. 151.

⁷⁷ S. Zleptnig, *Non-economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements* (Martinus Nijhoff, 2010), p. 179.

linked to import or export restrictions of nuclear materials or weapons and military equipment. The question remains, however, how such secondary sanctions would be assessed against the criteria of Article XX(d) as interpreted and developed in the relevant case law.

A key question is whether, through Article XX(d), a Member could argue that its otherwise WTO-inconsistent measure is justified insofar as it aims to 'ensure compliance' by other Members with international obligations. This interpretation of Article XX(d) was proposed by Mexico in *Mexico – Tax Measures on Soft Drinks and Other Beverages*, in which it justified its WTO-inconsistent measures against the US as a response to the latter's violation of its obligations towards Mexico under the North American Free Trade Agreement (NAFTA). The Appellate Body found that the term 'laws and regulations' is generally employed to refer to legal norms in national legal systems rather than international legal norms.⁷⁸ Equally importantly, the Appellate Body reasoned that, in the absence of a ruling by a NAFTA panel, its alternatives in the face of Mexico's proposed justification would be either (a) to accept at face value Mexico's contentions regarding the violation by the US of its NAFTA obligations, thus committing to accept at face value any Member's claim that its WTO-inconsistent measures are aimed at enforcing an international obligation, or (b) to go beyond its treaty-determined jurisdiction and adjudicate the NAFTA dispute in order to determine whether Mexico was rightfully entitled to enforce its NAFTA obligations.⁷⁹

The Appellate Body's refusal to accept either alternative embodies a broader issue of principle of relevance for (secondary) sanctions: in the absence of any form of multilateral decision-making, WTO panels are likely to resist claims that certain WTO-inconsistent measures are justified as aimed at enforcing non-WTO international legal norms.⁸⁰ Accepting otherwise would inevitably put WTO panels before the same dilemma faced by the panel and Appellate Body in *Mexico – Tax Measures on Soft Drinks and Other Beverages*. Either it would require WTO panels to accept uncritically any Member's claim to be enforcing any international obligation or it would put WTO panels in a position where they would become universal international adjudicators – becoming, through their adjudication of trade sanctions, the de facto final interpreters of, among others, human rights treaties, environmental agreements, *ius cogens* norms, and the customary law of armed conflict,

⁷⁸ WTO, Appellate Body, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the Appellate Body, WT/DS308/AB/R, 24 March 2006, para. 75.

⁷⁹ *Ibid.*, para. 56.

⁸⁰ From the vast literature on the relationship between WTO norms and other norms, see L. Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35 *Journal of World Trade* 499; G. Marceau, 'Conflicts of Norms and Conflicts of Jurisdiction: The Relationship between the WTO Agreement and MEAs and Other Treaties' (2011) 35 *Journal of World Trade* 1081; J. Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard International Law Journal* 333; J. Pauwelyn, *Conflicts of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003).

as well as the adjudicators of which (trade) sanctions are appropriate to respond to which violations. Besides the colossal and unintended jurisdictional expansion that this would entail, it is open to question whether those entrusted with administering, interpreting, or applying these non-WTO norms, usually in very specific settings and subject to carefully crafted constraints and compromises, would consider their de facto final adjudication by WTO panels a desirable development.

Considering Article XX(d) in its more limited sense of a provision aimed at permitting the enforcement of domestic law, panels and the Appellate Body have expanded on the conditions entailed by that provision in a manner that relates, to some extent, to the approach developed with respect to Article XX(a). As clarified by the Appellate Body in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, the WTO Member imposing the measure must establish that (a) it is ‘designed to secure compliance’ with GATT-consistent laws or regulations and (b) the measure is ‘necessary’ to ensure such compliance.⁸¹ Similar to what has been explained earlier with respect to Article XX(a), these conditions have been interpreted in a manner that has preserved a rather significant margin of discretion for WTO Members. However, the question of the existence of a nexus of ‘necessity’ remains present under Article XX(d).

On the one hand, the condition that a measure be ‘designed to secure compliance’ with an otherwise GATT-consistent measure has benefitted from a rather flexible approach in the panel reports. While it has been clarified from the outset that the terms ‘secure compliance with laws or regulations’ cannot solely encompass the objectives of these laws or regulations,⁸² but must seek their enforcement,⁸³ the manner in which such enforcement ought to occur may vary. For instance, a measure can be considered as ‘designed to secure compliance’ even if it cannot be guaranteed to achieve its result with absolute certainty or even if the use of coercion is not entailed in the measure.⁸⁴ In addition, and similarly to what has been observed with respect to Article XX(a), the term ‘designed’ is understood as referring to a measure that is not ‘incapable’ of securing compliance with the relevant GATT-consistent laws or regulations.⁸⁵ Applied to secondary sanctions, therefore, it seems

⁸¹ *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (n. 61), Report of the Appellate Body, para. 157.

⁸² GATT, Panel Report, European Economic Community – *Regulation on Imports of Parts and Components*, L/6657, 16 May 1990, paras. 5.16–5.17.

⁸³ See, for instance, WTO, Dispute Settlement Body, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, Panel Report, WT/DS366/R, 20 May 2009, para. 7.538; WTO, Dispute Settlement Body, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, Panel Report, WT/DS461/R, 22 June 2016, paras. 7.482–7.483.

⁸⁴ *Mexico – Tax Measures on Soft Drinks and Other Beverages* (n. 78), Report of the Appellate Body, para. 74.

⁸⁵ *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear* (n. 83), Report of the Appellate Body, para. 5.126; WTO, Appellate Body, *India – Certain Measures Relating to Solar Cells and Solar Modules*, Report of the Appellate Body, WT/DS456/AB/R, 14 October 2016, para. 5.58.

that the condition of ‘measures designed to secure compliance’ could be fulfilled. Secondary sanctions are clearly aimed at enforcing legally binding primary sanctions, and it does not seem likely that they would be considered ‘incapable’ of securing such compliance. The question could perhaps be raised as to whether there is any limit to what the term ‘compliance’ can encompass, particularly with respect to the addressees of the measures, in a scenario where secondary sanctions are aimed at achieving compliance by and within third states with some of the sanctioning state’s rules and decisions. Overall, however, and provided that the primary sanctions are GATT-consistent, it seems that the first condition entailed by Article XX(d) could be fulfilled by secondary sanctions.

On the other hand, the condition of the existence of a sufficient nexus under Article XX(d) might prove to be more problematic for secondary sanctions in the same manner as it might be under Article XX(a). The assessment of the criterion of necessity under Article XX(d) seems to mobilize factors that are very similar to Article XX(a). The Appellate Body stressed, in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, that attention should be drawn to

- (1) the ‘relative importance of the common interests or values that the law or regulation to be enforced is intended to protect’.⁸⁶ While panels do not seem to have provided a definition of what is meant by ‘common interests or values’, the features of the cases and the arguments of the parties have led to an assessment by reference to the society and population of the state concerned, rather than the international community as a whole. For instance, in *Indonesia – Measures concerning the Importation of Chicken Meat and Chicken Products*, the panel acknowledged ‘the importance of halalness for [Indonesia’s] population which is predominantly Muslim’, and that therefore halalness ‘represents a societal value of considerable weight’;⁸⁷
- (2) the extent to which the measure contributes to the realization of the end pursued; and
- (3) the extent to which the compliance measures produce restrictive effects on international commerce.⁸⁸ This should also be followed by an assessment of whether potential WTO-consistent or less restrictive trade measures could be applied in pursuit of the same objective.

While, once again, all these conditions have been approached with a certain degree of flexibility on the part of the panels, this does not mean that WTO

⁸⁶ See, for instance, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (n. 61), Report of the Appellate Body, paras. 162–163 and 165.

⁸⁷ See, for instance, WTO, Dispute Settlement Body, Panel Report, *Indonesia – Measures concerning the Importation of Chicken Meat and Chicken Products*, Panel Report, WT/DS484/R, 22 November 2017, paras. 7.138–7.139.

⁸⁸ *Ibid.*

Members have enjoyed an open-ended exception regime under Article XX(d). For instance, while the panel in *Colombia – Indicative Prices and Restrictions on Ports of Entry* found that combating money laundering (associated with drug trafficking) was ‘a relatively more important reality for Colombia than for many other countries’,⁸⁹ and that ‘the objective of securing compliance with the Colombian anti-money laundering legislation reflects social interests that can be characterised as vital and important in the highest degree’,⁹⁰ Colombia could not simply adopt any measure in order to attain that objective. In *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, the panel ruled that Colombia had not demonstrated with sufficient clarity the extent of the contribution made by the challenged measure (i.e. a compound tariff) to secure compliance with Colombia’s anti-money laundering legislation.⁹¹ This also provided an opportunity for the panel to clarify that the contribution-related condition entailed by Article XX(d) requires to ‘assess, in a qualitative or quantitative manner, the extent of the measure’s contribution to the end pursued, rather than merely ascertaining whether or not the measure makes any contribution’.⁹² With respect to the assessment of whether less restrictive trade measures would allow the pursuit of the same objective of securing compliance, in *Indonesia – Measures concerning the Importation of Chicken Meat and Chicken Products* the panel ruled that the state had not sufficiently established that no less restrictive measures were at its disposal.⁹³ Indonesia had not established why, in order to secure compliance with halal requirements, it could not have set up a certification procedure for imported chicken cuts instead of an import ban.⁹⁴

Overall, therefore, the design and implementation of secondary sanctions will shape the assessment of their ‘necessity’ text under Article XX(d). Assuming that a state would establish that fighting the alleged circumvention of primary sanctions by third states or their nationals is of relative importance to its common interests or values pursued by the primary sanctions, it would also have to demonstrate with sufficient clarity that the extent to which the secondary sanctions actually contribute to that objective justifies the trade-restrictiveness of the measures adopted. In the case of export bans on certain products against third countries, such as the one envisaged by the EU’s sanctions packages since June 2023, one can also wonder whether a panel would not consider that less restrictive measures could have been explored.

⁸⁹ *Colombia – Indicative Prices and Restrictions on Ports of Entry* (n. 83), Panel Report, paras. 7.551–7.566.

⁹⁰ *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear* (n. 83), Panel Report, para. 7.524.

⁹¹ *Ibid.*, para. 5.149.

⁹² *Ibid.*, para. 5.103.

⁹³ *Indonesia – Measures concerning the Importation of Chicken Meat and Chicken Products* (n. 87), Panel Report, para. 7.155.

⁹⁴ *Ibid.*

14.3.3 *The Chapeau and Secondary Sanctions:
Extraterritoriality and Coercion*

A measure found ‘necessary’ to attain an objective under one of the subparagraphs of Article XX must still be applied in conformity with the rules of the chapeau – that is it must not ‘constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail’ or a ‘disguised restriction on international trade’. In *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, the Appellate Body sought in the chapeau the limits for the ability of Members to justify, under Article XX, unilateral prescriptions imposing on other Members the adoption of specific policies. In assessing compliance by the US measure – a requirement that all shrimp imported into the US be caught using a particular technique to avoid killing turtles – the Appellate Body found that ‘the most conspicuous flaw in this measure’s application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments’.⁹⁵ The measure was found to be, ‘in effect, an economic embargo which requires all other exporting Members, if they wish to exercise their GATT rights, to adopt essentially the same policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers’.⁹⁶

Without undertaking detailed analysis of decades of Article XX jurisprudence, the challenge that secondary sanctions pose is that their very objective is to limit the relations between other states (which, if exceptions are being discussed, by definition have an economic agreement with the state adopting the measures) and a state target of primary sanctions, with which these other states have no heightened tension justifying exceptional measures. They amount, then, almost by definition, to ‘us[ing] an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member’s territory, without taking into consideration different conditions which may occur in the territories of those other Members’.⁹⁷ The Appellate Body went on to note how the lack of transparency, the lack of dialogue with many of the affected countries, and the absence of a procedure for considering the specificities of each country and situation made the application of the US measure ‘arbitrary or unjustifiable’. At the same time, when Malaysia challenged the US mode of compliance with the original report – the establishment of negotiations with all countries and the replacement of technical requirements with effectiveness requirements – the Appellate Body noted that the ‘serious, good faith efforts’ made by the US to negotiate an agreement with the various countries affected by

⁹⁵ *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (n. 51), Report of the Appellate Body, para. 161.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, para. 164.

its turtle-protecting rules were sufficient to eliminate the unjustifiable and arbitrary discrimination and achieve compliance with the chapeau requirements.⁹⁸

One may seek to apply a similar reasoning to the justifiability of secondary sanctions. In particular, if justified under Article XX(d), non-discriminatory secondary sanctions might potentially pass the chapeau test, if applied and enforced in an even-handed manner to all states, including limits to a country's domestic industry, through a transparent mechanism, subject to the rule of law and considerations of the specific conditions prevailing in each country. At the same time, this permission at the very least alters significantly the scope of the underlying bargain, replacing mutually negotiated legal limits with the ability of a party – at least one that has established a central position in global economic networks – to unilaterally determine the extent and manner of trade relations that its economic partners may have with its geopolitical adversaries, as long as it does so without discrimination (other than the discrimination against the targeted state). This might mean that secondary sanctions could be the instance in which the rarely discussed, and never specifically interpreted, second requirement of the Article XX chapeau – the prohibition on measures, even those that pursue a legitimate objective and are applied without discrimination, but which constitute 'a disguised restriction on international trade' – is finally mobilized.

14.4 CONCLUDING REMARKS

It is no secret that unilaterally determined sanctions put a strain on the ability of international economic agreements to regulate economic relations between states. They amount almost by definition to what the Appellate Body in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* stated was unjustifiable, that is to 'us[ing] an economic embargo' to impose on other Members the adoption of certain measures.⁹⁹ This suggests that if, where, and to the extent that these sanctions are applied, the very objective of mutually negotiated, predictable, and stable economic relations that economic agreements pursue is set aside.

Within WTO law or agreements that employ the same phrasing, security exceptions may provide a cover for secondary sanctions that target fissionable materials, arms, and ammunition of military equipment or are applied vis-à-vis states with which the sanctioning state has had a breakdown or near-breakdown of relations. For other states and products, Article XX of the GATT still offers a possibility to justify secondary sanctions under GATT general exceptions. However, the requirement that these sanctions be 'necessary' for the attainment of the relevant objective could be a significant impediment to the availability of this justification.

⁹⁸ Ibid., para. 123.

⁹⁹ Ibid., para. 164.

Combined with the requirement that secondary sanctions also fulfil the conditions contained in Article XX's chapeau (i.e. being non-discriminatory and not constituting a disguised restriction to trade),¹⁰⁰ this limits the ability of states to justify under WTO rules secondary sanctions not covered by the security exceptions. In this regard, both the design and the practical implementation of these sanctions will be crucial.

¹⁰⁰ In this section, we assumed, for the sake of the argument and brevity, that secondary sanctions would apply equally to all third states. Given the chapeau requirements, secondary sanctions that include exemptions or are enforced blatantly unevenly would be more difficult to justify under Article XX. Uneven or discriminatory application of otherwise legitimate policies is usually responsible for WTO Members being unable to fully justify their measures under a general exception.

