

RECENT U.S. TRADE ACTIONS ON THE GROUNDS OF NATIONAL SECURITY: A BRIEF OVERVIEW OF U.S. SANCTIONS AND THEIR IMPACTS TO NON-U.S. PARTIES

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ABSTRACT

The U.S. administration has been imposing several trade measures justified on the grounds of national security. Besides additional tariffs on specific products, another example is the use of economic sanctions, which impose restrictions on specific targets, such as through travel bans, capital restraints, and trade restrictions. This article provides a brief overview of U.S. sanctions, examining their concept, legal basis, the U.S. government agencies involved in their use and enforcement, and the applicable penalties. It explains the extraterritorial aspect of U.S. sanctions, the so-called secondary sanctions, and how non-U.S. parties are affected, illustrating with recent examples, including with Venezuela and Brazil. Finally, the article alludes to the potential WTO legal challenges to economic sanctions, as well as their arguable

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justification under the national security exception.

KEYWORDS: Sanctions. Secondary sanctions. SDN. OFAC. National security. GATT. WTO. International trade. Trade policy. Trade compliance.

1. INTRODUCTION: TRUMP TRADE POLICY AND TRADE ACTIONS BASED ON NATIONAL SECURITY

President Trump's trade policy starkly shifted its approach to trade actions compared to the predecessor administration, which was more focused on a multilateral approach. Many of the recent trade actions are now unilateral and based on the grounds of national security.

Even before taking office, Trump announced the United States would no longer take part in the Trans-Pacific Partnership ("TPP") agreement aiming to lower tariffs and boost trade with 11 other countries. On the third day of his presidency, Trump signed an Executive Order ("EO") ending the U.S. participation in the TPP and, on January 30, 2017, the Office of the U.S. Trade Representative ("USTR") issued a letter formally withdrawing the United States from the agreement. This move was remarkable as TPP was key for the previous administration, which had engaged significant efforts in its negotiation with traditional U.S. trade allies like Canada, Mexico, Japan, and Australia.

The imposition of additional tariffs on U.S. imports of steel and aluminum was another noteworthy move of Trump's trade policy. Section 232 of the Trade Expansion Act of 1962² authorizes the President to investigate and impose restrictions when the importation of goods threatens U.S. national security. Prior administrations have not used Section 232 to impose tariffs on imports of steel and aluminum in such magnitude³. In March 2018, President Trump announced the

² 19 United States Code ("U.S.C.") § 1862.

³ See Terrence P. Stewart & Shahrzad Noorbaloochi, S. The Repercussions of Section 232 Tariffs, in XIV Symposium of International Trade, 6-7 (2018) (stating that Since 1963, Section 232 had been invoked to conduct only thirty investigations, only nine occurred after 1988, and merely two resulted in significant

imposition of a 25% additional duty on imports of steel products and a 10% additional duty on imports of aluminum⁴, based on the grounds that current import levels threaten to impair national security. Specifically, the Bureau of Industry and Security (“BIS”) of the U.S. Department of Commerce (“Commerce”) concluded that the imports have harmed the U.S. steel industry, which in turn would be unable to satisfy current and future demands from the military and the critical infrastructure sectors⁵. BIS also reported that the global excess capacity of aluminum, notably from China, risks the viability of U.S. downstream aluminum producers who currently supply the defense sector⁶. Besides impacting steel industries from major economies like China and Brazil, these duties affected products from key U.S. trade allies, including Canada, Mexico, and the European Union (EU).

The additional tariffs on billions of dollars of imports from China, based on Section 301 of the Trade Act of 1974, were another key trade action against imports. Section 301 addresses “unreasonable, unjustifiable and discriminatory” trade practices of foreign countries. Following an investigation and a public comment process, the USTR concluded that numerous acts, policies, and practices of the government of China related to technology transfer, intellectual property, and innovation were unreasonable or discriminatory, and burdened or restricted U.S. commerce. It then recommended the imposition of additional tariffs of up to 25% on almost 7,000 tariff lines of products from China, approximately \$250 billion worth of imports⁷.

import relief: one on imports of ball bearings in 1989 and another on machine tool imports that later resulted on voluntary restraint agreements during Reagan Administration).

4 See Presidential Proclamations 9704 and 9705 adjusting Imports of Steel and Aluminum into the U.S., under Section 232 of the Trade Expansion Act of 1962, as amended, providing for additional import duties for steel mill and aluminum articles, effective March 23, 2018. See also the Federal Register (“FR”), 83 FR 11619 and 83 FR 11625, March 15, 2018.

5 Bureau of Industry and Security, U.S. Dep’t of Commerce, *The Effect of Imports of Steel on the National Security: An Investigation* conducted under Section 232 of the Trade Expansion Act of 1962 (2018).

6 Bureau of Industry and Security, U.S. Dep’t of Commerce, *The Effect of Imports of Aluminum on the National Security: An Investigation* conducted under Section 232 of the Trade Expansion Act of 1962 (2018).

7 See 83 FR 28710, effective July 6, 2018 (imposing 25% additional duties on 818 tariff lines, \$34 billion of imports), 83 FR 40823, effective August 23, 2018 (imposing 25% additional duties on 279 tariff lines \$16 billion of imports), and 83 FR 47974, effective September 23, 2018 (imposing 10% additional duties on 5,745 tariff lines, \$200 billion worth of imports).

This illustrates how the trade war between United States and China hinges on technology, and reinforces the Trump administration's view of China as an economic and strategic threat⁸. The United States even identified "China's state-led, market distorting economic model" as a key challenge to U.S. economic and national security interests⁹.

Similarly, U.S. sanctions are being increasingly imposed in furtherance of U.S. foreign policy and national security goals. They act to deter, punish or alter the behavior of targeted countries, individuals, and entities through certain prohibitions and restrictions. Economic sanctions have been used by the United States for a long time, though some were enhanced during the Trump's administration, notably against Iran, Russia, North Korea, and, more recently, Venezuela¹⁰. Although, generally speaking, U.S. sanctions' prohibitions apply to U.S. persons, certain sanctions increasingly extend to foreign entities and persons, including foreign companies. These are often referred to as "extraterritorial" or secondary sanctions. Existing sanctions against Iran include secondary sanctions and affect foreign companies negotiating with that country. More recently, sanctions with Venezuela have the potential of affecting foreign parties as well, as the next section will address.

All of the above measures illustrate national security concerns as the basis for trade actions. These U.S. actions triggered retaliation by the affected countries, such as by China in response to the Section 301 tariffs, and by the European Union, Canada, Mexico, Turkey, and Russia in reaction to the Section 232 duties on steel and aluminum. Virtually all of these measures have been challenged at the World Trade Organization ("WTO"), by countries that have retaliated (or not), and by the United States seeking to address these retaliatory measures as violating WTO law¹¹. The WTO Dispute Settlement Body ("DSB"), in

⁸ See Anthea Roberts, Henrique Choer Moraes, Victor Ferguson, *Geoeconomics: The Variable Relationship Between Economics and Security*, Lawfare. Nov. 27, 2018.

⁹ Id (citing the 2018 U.S. National Defense Strategy and U.S.-China Economic and Security Review Commission's 2018 report to Congress).

¹⁰ Jonathan Masters, *What are Economic Sanctions?*, Council on Foreign Relations. Aug. 7, 2017; and Edward Wong & Nicholas Casey, *U.S. Pummels Reeling Venezuela with Sanctions*, N.Y. TIMES, Jan. 29, 2019, at A1.

¹¹ See WTO complaints against the United States in the context of Section 232 duties in steel and

January 2019, composed panels for most of these cases and a final ruling remains to be seen. But the United States has already communicated that “the tariffs imposed pursuant to Section 232 are issues of national security [that are] not susceptible to review or capable of resolution by WTO dispute settlement”¹².

There has been a recent WTO request for consultations in the sanctions arena. Venezuela requested consultations with the United States on December 28, 2018, challenging several U.S. measures including the Venezuela Sanctions Regulations¹³ and EO blocking property, suspending entry of certain persons and prohibiting certain transactions with respect to Venezuela. Venezuela argues that these measures (i) are discriminatory with respect to Venezuelan goods and gold, and (ii) are discriminatory coercive trade-restrictive measures with respect to the liquidity of Venezuelan debt, transactions in Venezuelan digital currency, and certain nationals (e.g. Specially Designated Nationals and Blocked Persons List)¹⁴.

In light of the several and recent U.S. trade actions based on national security concerns, it is key to understand the relevant U.S. law and policy surrounding them, in order to better assess the consequences in the WTO and potential retaliation by other countries. The next section will lay out an overview of U.S. sanctions, their legal framework, the competent government agencies involved, and their potential impact to foreign individuals and companies.

aluminum in 2018: US – Steel and Aluminium Products, DS544 (China), DS547 (India), DS548 (EU), DS550 (Canada), DS551 (Mexico), DS552 (Norway), DS554 (Russia), DS556 (Switzerland), and DS564 (Turkey). See also WTO complaints initiated by the United States in response to retaliation duties: Canada – Additional Duties, DS557, EU – Additional Duties, DS559, Mexico – Additional Duties, DS-560, Turkey – Additional Duties, DS561, and Russia – Additional Duties, DS566. See also WTO complaints against the United States in the context of Section 301 additional duties on imports from China: US – Tariff Measures on Certain Goods from China I, DS543 and US – Tariff Measures on Certain Goods from China, DS565.

12 Communication from the United States, United States – Certain Measures on Steel and Aluminium products, WT/DS548/13 (Jul. 6, 2019).

13 31 CFR Part 591.

14 See United States – Measures relating to trade in goods and services, DS574, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds574_e.htm

2. ECONOMIC SANCTIONS IN THE UNITED STATES

As the world's largest economy, the United States has notable advantages when it comes to economic sanctions. Because it plays a dominant role in the world financial system, the United States has greater ability to impose sanctions and restrict imports more than any other nation. For instance, the U.S. dollar is the currency with the highest share in foreign exchange reserves in the international monetary system¹⁵. Besides, the United States is the largest importing country in the world¹⁶ (in 2018, it imported over \$3.1 trillions of dollars of goods and services)¹⁷, so it has great room to restrict imports through sanctions¹⁸. To protect national security and to further its foreign policy and strategic goals, the United States implements a broad range of sanctions that apply to U.S. persons wherever located and in many cases reaching the activities of non-U.S. persons.

1.1. What are Economic Sanctions?

Economic sanctions are meant to hinder the economic activity of targeted countries, individuals, and entities through various trade and transactional prohibitions and restrictions in furtherance of foreign policy and national security goals. Sanctions can take a variety of forms, such as travel bans, arms embargoes, capital restraints, and trade restrictions.

U.S. export controls are also used to restrict exports to certain

15 Peter Coy, *The Tyranny of the U.S. dollar*, Bloomberg Businessweek (Oct. 3, 2018, 5:00 AM), <https://www.bloomberg.com/news/articles/2018-10-03/the-tyranny-of-the-u-s-dollar>

16 Jeff Desjardins, *Visualizing the World's Largest Importers in 2017*, Visual Capitalist (Jul. 11, 2018, 12:44 AM), <https://www.visualcapitalist.com/visualizing-the-worlds-largest-importers-in-2017/>

17 Annual Trade Highlights, U.S. Census Bureau, <https://www.census.gov/foreign-trade/statistics/highlights/annual.html>.

18 See e.g. Sebastian Mallaby, *A trade war won't fix Turkey*, The Washington Post, August 15, 2019 ("President Trump is loving trade wars. He hits Iran with sanctions, and European companies as well as American obediently cut ties with the country. He goes toe-to-toe with China, and the Chinese stock market falls. He takes a whack at Turkey, and the country descends into a full-blown currency crisis").

countries on which the United States imposes economic sanctions¹⁹. U.S. export regulations restrict the export and re-export of certain goods, software, and technology as a means to promote national security interests and foreign policy objectives of the United States. While export controls generally apply to the sale of U.S. goods, technology, and software; economic sanctions generally cover transactions with individuals and entities, including the activities of service suppliers such as financial institutions or insurance providers. Although export controls are related to economic sanctions, this article provides an overview of the latter, as well as their impacts to foreign parties.

Sanctions can be comprehensive, prohibiting commercial activity regarding an entire country (e.g., embargoes directed to a whole country), or sectoral or list based, blocking transactions of and with particular businesses, groups or individuals²⁰.

Comprehensive U.S. sanctions apply to the Crimea (i.e., a region of Ukraine), Cuba, Iran, North Korea, and Syria²¹. Recently, the U.S. government has lessened its use of broad countrywide embargoes (or comprehensive), opting for a list-based (or selective) approach.

List-based sanctions are imposed against named individuals and entities engaged in activities that the U.S. has determined to be contrary to its foreign policy and national security interests. They do not apply to the entire country and all its citizens, but only to those designated individuals or entities, wherever they are located. The primary list is the Specially Designated Nationals and Blocked Persons List (“SDN list”). Additional prohibitions are implemented by the Sectoral Sanctions Identification (“SSI list”) under the Russia and Ukraine program. Persons and entities are frequently added or removed from the SDN or SSI lists based on new violations of sanctions or changed circumstances.

This fluid feature of U.S. sanctions programs imposes a due

¹⁹ The U.S. Export Control System and the Export Control Reform Initiative, Congressional Research Service, R41916, Mar. 5, 2019 at 2.

²⁰ See Masters, *supra* note 9.

²¹ See Office of Foreign Assets Control – Sanctions Programs and Information, <https://www.treasury.gov/resource-center/sanctions/pages/default.aspx> (for status of U.S. sanctions programs).

diligence and a compliance burden on all industries engaged in business in territories where U.S. sanctions may apply²², especially in view of the potential extraterritorial application of certain U.S. sanctions prohibitions and penalties.

1.2. Legal Framework

As in most Western democracies, in the United States the Legislative branch creates laws and the Executive implements and enforces them. This is not the typical case with most of U.S. economic sanctions. Sanctions policy may originate in the Executive or Legislative branches. In fact, most of U.S. economic sanctions are imposed by EOs issued by the President, under the authority granted by statute, such as the International Emergency Economic Powers Act (“IEEPA”).

The IEEPA affords the President the power to regulate commerce with regard to an “unusual and extraordinary” foreign threat to the national security or economic security of the United States. The measure adopted pursuant to the IEEPA lasts for a period of one year, unless extended by the President or terminated by a joint resolution of Congress. IEEPA is therefore a grant of authority from Congress to the President to take action. EOs may create, modify, or terminate sanctions. Congress may also pass legislation imposing new or modifying existing sanctions. For instance, in July 2017, Congress passed and President Trump signed a bill into law adding to the sanctions on Russia, Iran, and North Korea²³.

All relevant statutes, EOs and regulations should be considered in the interpretation of U.S. sanctions programs²⁴.

22 Kenneth G. Weigel & James C. Burnett, OFAC Sanctions, in *Aubenwirtschaftsrecht*, 1028 (Hocke/Sachs/ Pelz, C.F. Muller eds., 2017).

23 See Masters, *supra* note 9.

24 See Weigel & Burnett, *supra* note 21, at 1029.

1.3. Role of U.S. Government Agencies

Under the presidential authority, agencies issue regulations to implement the statute and EOs. Most of the U.S. sanctions programs are administered by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC"). Following the issuance of an EO or a specific statute enacted by Congress, OFAC frequently issues regulations setting forth prohibitions and requirements consistent with the EO or statute²⁵.

The U.S. Treasury Department performs a critical and extensive role, implementing economic sanctions. For example, OFAC regularly modifies the SDN list. OFAC also issues "general licenses", carving out exceptions to U.S. sanctions' prohibitions, Frequently Asked Questions ("FAQs"), and interpretative rulings on many of the sanctions programs²⁶. Although these documents do not have the force of law, they provide valuable insight to interpretations of EOs, regulations, and OFAC's policies²⁷.

Other U.S. government agencies such as the Departments of State ("State") and Commerce also play an integral role in administering U.S. sanctions.

State is in charge of implementing U.S. foreign policy; its Office of Economic Sanctions Policy and Implementation ("OESPI") acts in the development and implementation of U.S. economic sanctions programs. For instance, OESPI is often called upon to assist OFAC's reviews of requests for specific licenses, in addition to acting to build international support for economic sanctions programs, providing foreign policy guidance to OFAC, and working with Congress to develop legislation to further U.S. foreign policy goals²⁸.

25 *Id.* at 1030.

26 See OFAC's Frequently Asked Questions (FAQs) Index, U.S. Dep't of the Treasury, https://www.treasury.gov/resource-center/faqs/sanctions/pages/ques_index.aspx, and Interpretative Rulings on OFAC policy, U.S. Dep't of the Treasury, <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/rulings-index.aspx>.

27 See Weigel & Burnett, *supra* note 21, at 1030.

28 See Economic Sanctions Policy and Implementation, U.S. Dep't of State, <https://www.state.gov/e/>

1.4. Penalties

Penalties for the violation of U.S. sanctions programs can be severe and often include monetary fines, the denial of access to the U.S. financial system, or the violator being placed on the SDN list itself.

For those violations of U.S. economic sanctions that result in penalties, current OFAC civil penalties are based on the statute that has been violated²⁹. For instance, under IEEPA, the statutory amount is currently the greater of \$302,584 or twice the amount of the underlying for each violation³⁰.

In assessing the imposition of a civil penalty and in what amount, OFAC reviews several factors, such as the awareness of the conduct at issue, the harm to sanctions program objectives, the existence of a compliance program, remedial response of violator and cooperation with OFAC³¹. If there is a voluntary disclosure of a potential violation to OFAC before OFAC learns of the violation by any other means, there is an automatic mitigation of one half of the applicable penalty amount³².

In addition to civil penalties, OFAC may also refer particularly serious (or “egregious”)³³ cases involving willful violations of U.S. sanctions programs to federal law enforcement agencies. Criminal penalties for sanctions violations are currently set at \$1 million per violation and/or imprisonment for a maximum of 20 years³⁴. Recent cumulated penalties have ranged as high as \$8.9 billion, as we illustrate next.

eb/tfs/spi/.

29 See Weigel & Burnett, *supra* note 21, at 1046.

30 See OFAC Economic Sanctions Enforcement Guidelines, 31 C.F.R. Part 501, Appendix A. See also Civil Monetary Penalty Adjustments for Inflation, 15 CFR Part 6 (FR 84, No. 26, 2445, Feb. 7, 2017) (adjusting IEEPA civil penalty maximum, effective March 1, 2019).

31 See OFAC Economic Sanctions Enforcement Guidelines, 31 C.F.R. Part 501, Appendix A.

32 *Id.*

33 *Id.* at V.b.1.

34 50 U.S.C § 1705(b) (2007).

1.5. Extraterritoriality: How U.S. Sanctions affect non-U.S. parties

In general, U.S. sanctions apply to U.S. persons wherever located. U.S. persons are defined according to the specific sanctions program, but generally include U.S. citizens, permanent resident aliens, any person in the U.S., entities organized under the laws of the U.S. or any jurisdiction within the United States (including foreign branches)³⁵. OFAC jurisdiction extends to the activities of U.S. persons wherever located and, in some cases, to those of foreign persons when dealing with sanctions targets³⁶.

U.S. sanctions programs increasingly apply to foreign entities and persons. These are often referred to as secondary sanctions. In the case of Iran and Cuba³⁷, U.S. sanction prohibitions extend to foreign entities included those owned or controlled by U.S. entities.

Secondary sanctions tighten the noose of conventional primary sanctions by inhibiting non-U.S. citizens and companies from transacting with or supporting a targeted regime or person³⁸. The foreign person may be subject to punishments such as designation as an SDN for providing material or financial support to an SDN. We will examine these situations, as well as some recent illustrative examples in the following sections.

35 31 C.F.R. § 560.314.

36 See Weigel & Burnett, *supra* note 21, at 1040.

37 See e.g. 31 C.F.R. § 560.205 (regarding Iran, pursuant to the Iran Threat Reduction and Syria Human Rights Act of 2012 (“ITSR”), the prohibitions of the ITSR, issued under IEEPA, were extended to certain activities of non-U.S. subsidiaries of U.S. companies involving Iran). See also 50 U.S.C. App § 1-44. (U.S. sanctions against Cuba, set forth by Cuban Asset Control Regulations (“CACR”), based on the Trading with the Enemy Act (“TWEA”), implemented in 1917, apply to the activities of foreign subsidiaries of U.S. companies).

38 Jeffrey A Meyer, *Second thoughts on Secondary Sanctions*, 906 U. PA. Journal of International Law. 30:3 (2009).

1.5.1. SDN and Foreign Persons

Entities and individuals designated as an SDN have their property and property interests subject to U.S. jurisdiction blocked or frozen. Persons subject to U.S. jurisdiction are obligated to block any funds or other interests of an SDN which the U.S. person comes in contact with, so they are generally prohibited from doing business with or dealing in property (including funds) in which an SDN has an interest³⁹.

The SDN list unfortunately is not exhaustive. This is because SDN prohibitions extend to entities that a person (or multiple persons) on the SDN list holds, directly or indirectly, an ownership interest of 50% or more⁴⁰. Under the “50% Rule”, the property and interests in property of entities directly or indirectly owned 50% or more in the aggregate by one or more blocked persons are considered blocked⁴¹. For instance, if SDN X owns 50% of entity A, and entity A owns 50% of entity B, the property of entities A and B is blocked by operation of law, even though they are not listed as SDNs. As SDNs by operation of law are not on any list, any person with obligation to comply with U.S. economic sanctions must exercise due diligence to determine whether an entity is owned by an SDN.

Finally, even foreign persons should avoid transacting business with an SDN. If a foreign entity “materially assists, sponsors, or provided financial, material or technological support” for a person or entity previously sanctioned by the United States like an SDN in many instances, such foreign entity may be subject to penalties by OFAC, including being designated as an SDN. This would result the potential blocking of assets of the person and in the inability to do business in the United States.

³⁹ See Weigel & Burnett, *supra* note 21, at 1033.

⁴⁰ See OFAC FAQs: General Questions, U.S. Dep’t of the Treasury, https://www.treasury.gov/resource-center/faqs/sanctions/pages/faq_general.aspx.

⁴¹ *Id.*

1.5.2. "Causing a Violation or Conspiring to Violate" and the Special Risk to Foreign Financial Institutions and Persons

IEEPA was amended by the IEEPA Enhancement Act of 2007 and now makes it unlawful “for a person to violate, attempt to violate, conspire to violate, or cause a violation of OFAC sanctions.⁴²” Based on this amended provision, OFAC today has authority to penalize any person, including any foreign person not in the U.S., who causes a violation or conspires to violate any OFAC requirement. Though the U.S. may not have official jurisdiction over a non-U.S. person, the threat of being designated as an SDN effectively compels entities to submit to U.S. jurisdiction when they otherwise would not.

Most of the transactions globally are in U.S. dollars. OFAC has pursued foreign financial institutions for removing (or “stripping”) identifying information in SWIFT payment messages from U.S. dollar payments to avoid detection by U.S. bank filters for transactions involving sanctioned parties and countries, like Cuba, Iran and Sudan⁴³. For instance, sanctions applicable to Iranian require U.S. persons, including banks, to freeze property belonging to these sanction targets. Banks use the SWIFT data to determine whether to block or reject a transaction pursuant to U.S. sanctions. Thus, by stripping identifying information from SWIFT messages, foreign financial institutions caused U.S. banks to illegally process funds subject to sanctions restriction or have conspired to violate U.S. sanctions⁴⁴. Simply put, a U.S. dollar denominated transaction generally confers U.S. jurisdiction, exposing foreign financial institutions to U.S. sanctions.

42 IEEPA Enhancement Act, Pub. L. No. 110-96 (2007)

43 See Weigel & Burnett, *supra* note 21, at 1041.

44 *Id.*

1.5.3. Recent Cases Involving Foreign Companies, Venezuela, and Brazil

As stated in item II.d, penalties can be substantial for violations of U.S. economic sanctions. In March 2017, OFAC reached a \$100 million agreement with the giant Chinese technology company, Zhongxing Telecommunications Equipment Corporation (“ZTE”), to settle apparent violations of the Iranian Transactions and Sanctions Regulations. It was OFAC’s largest settlement with a non-financial entity⁴⁵.

In 2014, BNP Paribas SA reached a \$963 million settlement with OFAC as part of a combined \$8.9 billion settlement with federal and state agencies for apparent violation of U.S. sanctions violations related to Sudan, Iran, and Cuba⁴⁶.

Such risks and consequences illustrate why financial institutions have taken actions to prevent violations of U.S. sanctions. Even where U.S. sanctions would not be implicated, foreign financial institutions have opted to decline to do any business with U.S. sanctioned countries, as a recent case involving Brazil and Venezuela shows. Corpolec, a Venezuelan state-owned power company, supplies electricity to the Brazilian northern state of Roraima through Brazilian company Eletronorte. In 2018, Eletronorte owed over \$30 million to Venezuelan Corpolec and was willing to proceed with the payment⁴⁷. However, at the time no bank wanted to proceed with transactions in view of existing U.S. sanctions against Venezuela involving its financial sector⁴⁸.

As alluded in section I, U.S. sanctions against Venezuela

45 Treasury Department Reaches \$100 Million Settlement With Zhongxing Telecommunications Equipment Corporation, U.S. Dep’t of the Treasury (Mar. 7, 2017), <https://home.treasury.gov/news/press-releases/sm0023>

46 Treasury Reaches Largest Ever Sanctions-Related Settlement with BNP Paribas SA for \$963 Million, U.S. Dep’t of the Treasury (Jun. 30, 2014), <https://www.treasury.gov/press-center/press-releases/pages/jl2447.aspx>.

47 See Alex Rodrigues, Venezuela pode suspender repasse de energia elétrica a Roraima, Agência Brasil, (Aug. 31, 2018 7:00 AM), <http://agenciabrasil.ebc.com.br/economia/noticia/2018-08/venezuela-pode-suspender-repasse-de-energia-eletrica-roraima>.

48 Id.

targeted blocking property, suspending entry and prohibiting certain transactions with respect to certain persons of Venezuela, such as those acting directly or indirectly for or on behalf of the Government of Venezuela, including as a member of the Maduro regime⁴⁹. For instance, the big oil company *Petróleos de Venezuela, S.A. (PDVSA)* and several Venezuelan government officials were designated as SDN⁵⁰. The United States also put foreign financial institutions on notice that they would face sanctions for being involved in “facilitating illegitimate transactions that benefit Nicolas Maduro (...)”⁵¹.

The U.S. argued that it “remains committed to holding accountable those responsible for Venezuela’s tragic decline, and will continue to use diplomatic and economic tools to support the Venezuelan people’s efforts to restore their democracy”⁵². In the meanwhile, Venezuela is challenging such measures at the WTO⁵³.

3. WTO LEGAL CHALLENGES TO SANCTIONS AND THE NATIONAL SECURITY EXCEPTION

As seen above, economic sanctions can take the form of a variety of trade and transactional prohibitions and restrictions, such as travel bans, capital restraints, and specific trade restraints. Thus, sanctions are inconsistent with a number of provisions of the WTO agreements, although they could arguably be justified under other provisions as a

49 See EO 13857 of Jan. 25, 2019 (Taking Additional Steps to address the National Emergency with Respect to Venezuela).

50 See Issuance of a New Venezuela-related Executive Order and General Licenses; Venezuela-related Designation, U.S. Dep’t of the Treasury (Jan. 28, 2019), <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20190128.aspx>. See also Venezuela-related Designations, U.S. Dep’t of the Treasury (Feb. 15, 2019), <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20190215.aspx>.

51 See Statement from the National Security Advisor Ambassador John Bolton, The White House (Mar. 6, 2019), <https://www.whitehouse.gov/briefings-statements/statement-national-security-advisor-ambassador-john-bolton/>.

52 See Treasury Targets Venezuela Currency Exchange Network Scheme Generating Billions of Dollars for Corrupt Regime Insiders, U.S. Dep’t of the Treasury (Jan. 8, 2019), <https://home.treasury.gov/news/press-releases/sm583>.

53 See Request for Consultations by Venezuela, United States – Measures Relating to Trade in Goods and Services, WT/DS574/1 (January 8, 2019).

means to promote national security interests. This section examines non-exhaustive potential WTO challenges against economic sanctions.

3.1. Potential GATT and GATS Violations

A trade embargo against goods from a specific country, for instance, violates article I:1 of the General Agreement on Tariffs and Trade of 1994 (“GATT”) (the “most-favored nation” or MFN provision), because it accords products of the country subject to the embargo treatment less favorable than that accorded to products from other WTO member (“Member”) countries not subject to sanctions⁵⁴.

If the prohibition or restriction is not set forth in the Schedule of Concessions of the Member imposing it, it could also be a violation of Article II:1 of the GATT, for according treatment less favorable to the goods from the country subject to the trade restriction than provided for in the appropriate part of the Member’s schedule of Concessions.

A Member subject to a trade restriction based on sanctions could also argue violation of Article III:4 (the “national treatment” provision), as the products from the country subject to the restriction are accorded treatment less favorable than that accorded to products of the country that imposed the trade measure. For instance, products from the country subject to an embargo would face greater regulatory burdens and unfair market opportunities as a result of these coercive trade-restrictive measures⁵⁵.

Prohibitions on imports and restriction on exports to a specific country could also be a quantitative restriction in violation of Article XI, as they operate as specific prohibitions on importation and exportation between the countries, constituting prohibited quantitative restrictions on the importation of products of the territory of a member and on the exportation of products destined for the territory of a member.

As trade-restrictive measures imposed by sanctions also create

⁵⁴ See e.g. Id.

⁵⁵ Id.

constraints in the financial sector⁵⁶, a Member subject to the sanctions could also assert violations of provisions of the General Agreement on Trade in Services (GATS). Article II:1 of the GATS could be claimed as the restrictions to the Member's financial services and financial service suppliers would be according treatment less favorable than to like services and service suppliers of other Members not subject to sanctions. Similarly, the Member could claim a violation of article XVII:1 of the GATS, as the corresponding financial services in the country imposing the sanction would not be subject to the same prohibitions. Also, if the imposing Member did not reserve the right to impose these restrictions in its schedule under its specific commitments of market access and national treatment, the member subject to the measure could also claim a violation of Article XVI:2 of the GATS.

The trade restrictions resulting from sanctions in furtherance of the country's national security goals would arguably be justified under Article XXI of the GATT (or the corresponding Article XIV of the GATS, when dealing with restriction on services).

3.2. The National Security Exception

Article XXI of the GATT sets forth the national security exception, preserving the right of WTO members to undertake actions considered essential to their national security. This provision shows the intentional right of a member State to take actions it considers necessary for the protection of its essential security. The U.S. position has been that this right is not subject to scrutiny of the WTO⁵⁷.

Article XXI(b) allows a Member to adopt or maintain certain measures that it considers necessary for the protection of its essential

⁵⁶ See e.g. EO 13808 of August 24, 2017; EO 13827 of March 19, 2018; EO 13835 of May 21, 2018 (with respect to U.S. sanctions regarding the liquidity of the Venezuelan debt and with respect to transactions in Venezuela digital currency)

⁵⁷ "Communication from the United States, US – Certain Measures on Steel and Aluminum Products, WT/DS548/13, (July 6, 2018) (stating that "Every Member of the WTO retains the authority to determine for itself those matters that it considers necessary to the protection of its essential security interests, as is reflected in the text of Article XXI of the GATT 1994").

security interests⁵⁸. The categories of measures concerned are broadly defined in sub-paragraphs as measures relating to: (i) fissionable materials, (ii) trade in arms or in other materials for military use, and (iii) measures taken in time of war or other emergency in international relations. As many U.S. sanctions are based on IEEPA, which affords the President the power to regulate commerce with regard to an “unusual and extraordinary” foreign threat to the national security or economic security, they could arguably be justified under XXI(b)(iii).

A key term of Article XXI(b) is the word “necessary”⁵⁹. The question arises whether the exceptions of this provision are justiciable (i.e. the application of these exceptions can be reviewed by WTO panels and the Appellate Body) or self-judging (i.e. granting broad discretion to the Member to take national security measures that it considers necessary for the protection of its essential security interests)⁶⁰. A minimum degree of justiciability may be desirable to examine whether Members are using the exception reasonably or as an apparent abuse.

Sanctions could also be arguably justified for reasons of human rights violations.⁶¹ Some sanctions target fundamental human rights violations that are not directly related to any commercial activity⁶². These measures could be justified under the general exceptions of Article XX of the GATT, such as a measure necessary to protect public morals under Article XX(a) or to protect human life and health under Article XX(b).

Both Articles XX and XXI create exceptions to the GATT requirements to promote certain non-trade values, such as human life

58 Peter Van den Bossche & Wernder Zdouc, *The Law and Policy of the World Trade Organization* 596 (Cambridge 3rd ed) (2013).

59 See Article XXI(b) of the GATT (“to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests”).

60 See Bossche and Zdouc, *supra* note 57, at 596.

61 See e.g. E.O 13857 of January 28, 2019 (“Taking Additional Steps to Address the National Emergency with Respect to Venezuela: (...) in order to take additional steps with respect to the national emergency declared (...), and particularly in light of actions by persons affiliated with the illegitimate Maduro regime, including human rights violations and abuses in response to anti-Maduro protests, arbitrary arrest and detention of anti-Maduro protestors, curtailment of press freedom, harassment of political opponents, and continued attempts to undermine the Interim President of Venezuela and undermine the National Assembly, (...), hereby order: (...)”)

62 See e.g. Justin Sink, *US Slaps Sanctions on Uganda for Anti-Gay Law*, *The Hill*, June 19, 2014.

and health, public morals, and national security. Thus, Articles XX and XXI exceptions would likely determine what trade sanctions would be allowed under the WTO⁶³.

Although article XX facially appears to contain the GATT exceptions most closely related to human rights concerns, WTO has a more restrictive approach to the necessity requirement of Articles XX (a) and (b), and to the proportionality requirement of the chapeau⁶⁴. Unlike Article XX, Article XXI does not have a similar chapeau to prevent misuse or abuse of the exceptions⁶⁵. Thus, Article XXI may be more hospitable to authorize sanctions than Article XX.

Since the creation of the WTO, there have been just a handful of disputes invoking article XXI and none of them resulted in a binding ruling with actual recommendations from a panel yet.

The first was a dispute between the United States and the EC over the U.S. Helms-Burton Act seeking to tighten the American Embargo against Cuba, in which the panel was suspended⁶⁶. In 2000, Colombia challenged a Nicaraguan law that imposed sanctions on Colombia and Honduras because of a bilateral treaty delimiting the maritime boundary between the two countries, but the panel was never composed⁶⁷. Another one is the dispute initiated by Ukraine in 2016 against Russia dealing with restrictions on traffic in transit of goods to third countries⁶⁸. It may be the first to have a panel ruling analyzing the national security exception, currently expected for the first quarter of 2019. Qatar also initiated recent disputes involving national security issues against neighboring countries regarding a trade embargo on

63 Sarah H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 133-189 *JIEL* 2002.5.

64 *Id.*

65 See Bossche & Zdouc, *supra* note 57, at 596.

66 United States – The Cuban Liberty and Democratic Solidarity Act (US – Helms Burton), DS38 (May 3, 1996), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds38_e.htm.

67 Nicaragua – Imports from Honduras and Colombia, DS188 (Jan. 17, 2000), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds188_e.htm

68 Russia – Traffic in Transit, DS512 (Sep. 14, 2016), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm

goods and services⁶⁹, and another against Saudi Arabia concerning violations of intellectual property rights⁷⁰. The other recent WTO cases invoking national security grounds are the current disputes against the United States concerning the Section 232 additional tariffs on imports of steel and aluminum (see section I above).

Thus, WTO history suggests that, until very recently, Members have been cautious in challenging the national security exception. Some even claim that the WTO has been successful precisely because it did not rule on nor limited trade actions based on these grounds⁷¹. However, in light of the recent WTO disputes challenging national security measures, a panel ruling providing further guidance on the scope and application of article XXI should probably be issued in the near future.

4. CONCLUSION

The current U.S. administration is increasing the use of trade actions based on national security grounds. Although U.S. sanctions or trade embargos have been used at least since the 19th century, in contemporary times there has been a growing trend to impose U.S. sanctions. These measures can also affect non-U.S. parties, such as foreign financial institutions or potentially any person negotiating with a sanctioned target.

The extraterritorial aspect of U.S. sanctions could also affect the foreign trade policy of other countries. For instance, Brazil's historical

69 See e.g. United Arab Emirates — Goods, Services and IP rights, DS526 (Jul. 31, 2017), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds526_e.htm

70 Saudi Arabia — Measures concerning the Protection of Intellectual Property Rights, DS567 (Oct. 1 2018), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm

71 See e.g. Roger P. Alford, *The Self-Judging WTO Security Exception*, 758 *UT Law Rev.* 597 (2011) (concluding that “In the long history of GATT and the short history of the WTO, that freedom [the security exception] has never been challenged seriously. Member States understand the exception to be self-judging, and presume that it will be exercised in wisdom and in good faith. (...) It certainly has not undermined the effective functioning of the WTO. The overwhelming majority of security measures are unregulated by international trade law, and those few that have been challenged were never reviewed. International trade law, viewed by many as the most effective and intrusive branch of international law, has preserved one enclave of complete national sovereignty”).

trend is generally to use sanctions based on a multilateral approach, following United Nations guidelines. In light of recent events and the proximity between Brazil and U.S. administrations,⁷² there is a chance that Brazil may change its approach, potentially following U.S. recommendations⁷³ and consider cooperating or even imposing unilateral sanctions against specified targets.

Overall, countries have great discretion to “preserve national security”, but there is a concern as to whether this could be broadly used to justify trade actions. For instance, recent U.S. trade actions based on the grounds of national security triggered retaliation from several trade partners, as well as challenges at the WTO.

The national security exception secured by GATT Article XXI has not been much challenged nor specifically scrutinized by a WTO panel report to date. But since 2016 there has been a significant increase of new challenges of trade actions based on the grounds of national security that will necessarily require WTO analysis of this provision.

This may not be desirable for several countries relying on the exceptional yet legitimate aspect of Article XXI. United States and other countries should argue that measures under the national security exception are insulated from WTO scrutiny. States may also seek other, less palatable, unilateral means for asserting such interests⁷⁴. This outcome would not advance the development of the WTO and the international trading system.

The underlying risk is that as more trade actions are used and

72 See Statement by the Press Secretary on the Visit of President Jair Bolsonaro of Brazil, U.S. Embassy & Consulates in Brazil (Mar. 8, 2019) (stating that “President Trump and President Bolsonaro will discuss how to build a more prosperous, secure, and democratic Western Hemisphere. The leaders of the Hemisphere’s two largest economies will also discuss opportunities for defense cooperation, pro-growth trade policies, combatting transnational crime, and restoring democracy in Venezuela. Finally, they will talk about the major role that the United States and Brazil are playing in the effort to provide humanitarian assistance to Venezuela”).

73 See Lucia I. Suarez Sang, Pence meets Guaido, urges allies to freeze Venezuela oil assets as US announces more sanctions, Fox News (Feb. 25, 2019), <https://www.foxnews.com/world/pence-meets-guaido-urges-allies-to-freeze-venezuela-oil-assets-as-us-announces-more-sanctions> (reporting that “Vice President Mike Pence (...) urged a coalition of mostly Latin American countries to freeze the assets of Venezuela’s state-owned oil company in response to violent clashes between security forces and opposition members over blocked humanitarian aid”).

74 See Cleveland, *supra* note 62, at 189.

justified based on the grounds of national security, they are more likely to be potentially limited and challenged, either under the WTO or through unilateral actions from other countries. These effects could curb the use of trade restriction under these grounds, including sanctions and export controls by any country, even when legitimately used.