Targeted Economic Sanctions and WTO Law: Examining the Adequacy of the National Security Exception

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*Individual states increasingly rely upon targeted economic sanctions to achieve their foreign policy goals. The legality of such unilateral sanctions remains debatable in public international law. However, their proliferation and possible negative repercussions encourage targeted states to question their legality before international tribunals, including the World Trade Organization (WTO) dispute settlement system. Against this backdrop, the article analyses three types of recently enacted unilateral targeted sanctions. In particular, sanctions imposed on human rights grounds ('Magnitsky-style sanctions'), those targeting perpetrators of cyber-attacks, and sanctions impacting trade in information and communications technology and services (ICTS) (*e.g.*,Huawei sanctions) are discussed. The subsequent analysis focuses on the possible WTO-inconsistency of these economic restrictions. Following this, the possibility to justify such sanctions under the national security exception of Article XXI(b)(iii) of the General Agreement on Tariffs and Trade (GATT) is explored. The conclusion emphasizes that the national security exception cannot be used to justify all types of unilateral economic sanctions, even if these measures are introduced to address national security concerns. This conclusion not only demonstrates inevitable boundaries of the national security clause but also reinforces the general tendency of questioning the legality of unilateral economic sanctions.*

Keywords: economic sanctions, national security, WTO, Magnitsky-style sanctions, cyber sanctions, information and communications technology and services, Huawei sanctions

1 INTRODUCTION

Unilateral economic sanctions have garnered much attention in recent years. Their sweeping application and detrimental effects urge individual states to question their legality before international courts, including the World Trade Organization (WTO) dispute settlement system.[1] The WTO is a suitable international forum to scrutinize the

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1 Iran initiated two disputes against the United States before the International Court of Justice (ICJ): *Certain Iranian Assets* and *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights*. Qatar questions the legality of economic sanctions imposed against it before the ICJ (*Application of*

Bogdanova, Iryna, 'Targeted Economic Sanctions and WTO Law: Examining the Adequacy of the National Security Exception'. *Legal Issues of Economic Integration* 48, no. 2 (2021): 171–200.

legality of unilateral sanctions not only because the majority of them entail economic restrictions but also because other alternative fora are either unavailable for states[2] or impractical.[3] In ongoing disputes involving economic sanctions, the states imposing them invoke national security as a justification. This increasing use of unilateral economic sanctions for various policy goals and the growing tendency to invoke national security as a rationale for their application warrant further discussion.

The particular goal of this article is to supply a concise commentary on the recent developments in this area, which comprise targeted sanctions imposed on human rights grounds ('Magnitsky-style sanctions'),[4] those targeting perpetrators of cyber-attacks,[5] and sanctions impacting trade in information and communications technology and services (ICTS) (e.g., Huawei sanctions).[6] As these sanctions imply various types of economic restrictions and raise possible violations of WTO obligations, the analysis here explores their possible justification under the national security exception of Article XXI (b)(iii) of the General Agreement on Tariffs and Trade 1994 (GATT 1994). The conclusion emphasizes that the national security exception of Article XXI(b)(iii) has limited relevance, when used to provide a blanket justification for various types of unilateral economic sanctions, and thus reinforces the general tendency of questioning the legality of unilateral economic sanctions.

This article is structured in three sections. Section 2 sets the stage for subsequent discussion by providing definition, classification, and a short summary of the debate

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the International Convention on the Elimination of All Forms of Racial Discrimination) as well as before the WTO (DS526 is an ongoing dispute and DS567 the panel report was issued, yet it is under appeal).

2 Given that unilateral economic sanctions are introduced based on the domestic legislation of the states imposing them, they might be challenged before the domestic courts. For example, the EU sanctions are often questioned before the EU courts, i.e., EU General Court (at first instance) and the EU Court of Justice (on appeal). *See* C.Portela, *Targeted Sanctions Against Individuals on Grounds of Grave Human Rights Violations – Impact, Trends and Prospects at EU Level*, Study requested by the European Parliament's Subcommittee of Human Rights (2018). Such domestic procedures enable individuals and legal entities to question the legality of particular sanctions as they apply to them. However, right of recourse to the EU courts is not guaranteed to states that suffer as a consequence of the EU's economic sanctions. *See* EGC 20 Sept. 2019, Case T-65/18 *Bolivarian Republic of Venezuela v. Council of the European Union*. Although it should be noted that in the ongoing appeal before the ECJ, Advocate General Gerard Hogan proposes to interpret the relevant provisions of the Treaty on the Functioning of the European Union in a such way as granting standing to Venezuela to question the EU sanctions. Court of Justice of the European Union, *Press Release No 6/21: Advocate General Hogan: A Third State May Have Legal Standing in an Action for Annulment of Restrictive Measures Adopted by the Council Against That State* (20 Jan. 2021), https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-01/cp210006en.pdf.

3 Among the main obstacles that may prevent states from questioning the legality of unilateral economic sanctions before the ICJ are undefined legal status of unilateral economic sanctions under international law as well as the rules on the court's jurisdiction. More specifically, proceedings before the ICJ require establishment of the court's jurisdiction, which should be based either on the states' recognition of the compulsory jurisdiction of the court or on the explicit consent of the parties to litigate a particular dispute between them before the ICJ.

4 *See infra* i. Human rights sanctions ('Magnitsky-style sanctions').

5 *See infra* ii. Cyber sanctions.

6 *See infra* iii. Trade restrictions on information and communications technology and services (Huawei sanctions).

on the legality of unilateral economic sanctions. Following this, section 3 discusses the WTO-consistency of unilateral sanctions imposed on human rights grounds, those targeting perpetrators of cyber-attacks, and sanctions impacting trade in ICTS (e.g., Huawei sanctions). Section 4 explores the possibility to justify these sanctions under the national security exception of Article XXI(b)(iii) of the GATT 1994. Towards this end, the existing jurisprudence on interpretation of national security exception is summarized and three examples of unilateral economic sanctions are analysed.

2 UNILATERAL ECONOMIC SANCTIONS: DEFINITION, CLASSIFICATION AND LEGALITY

Economic sanctions are conventional foreign policy instruments. Indeed, Ancient Greece is credited with being the first to flex its economic muscle in pursuance of political objectives.[7] Despite the long history, both the definition and the legality of unilateral economic sanctions under international law remain unsettled issues.

The use of the term 'sanction' to denote economic restrictive measures (e.g., a complete economic blockade, or selective trade restraints) that are enacted without any prior authorization of the United Nations Security Council (UNSC) is debatable. Distinguished international lawyer Alain Pellet, in his earlier publications, contended that the term 'sanction' should be reserved only for sanctions authorized by the UNSC under Chapter VII of the UN Charter.[8] Recently, Pellet has argued in favour of applying the term to unilateral restrictive measures of individual states.[9] Tom Ruys echoes the latter view[10] and uses the term 'non-UN sanctions',[11] while Devika Hovell defines such sanctions as 'autonomous'.[12] To further complicate the matter, state practice is not consistent: the United States expressly calls its unilateral restrictive measures 'economic sanctions',[13] the

7 Gary Clyde Hufbauer et al., *Economic Sanctions Reconsidered* 9 (3d ed. 2007).

8 A. Pellet & A. Miron, *Sanctions, Max Planck Encyclopedia of Public International Law* (Aug. 2013), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e984 (accessed 28 Sept. 2020).

9 A. Pellet, *Unilateral Sanctions and International Law*, 76 Y. B. Inst. Int'l L., Tallinn Session 723 (2015).

10 Tom Ruys, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework* §2, 21 (Larissa Van den Herik ed., Edward Elgar Publishing 2017).

11 Tom Ruys, *Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions* §34 (Tom Ruys & Nicolas Angelet eds, Cambridge University Press 2019).

12 D. Hovell, *Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions*, 113 AJIL Unbound 140 (2019).

13 For example, the US federal law that imposes unilateral economic sanctions against Iran, Russia and North Korea explicitly uses the term 'sanction'. Countering America's Adversaries Through Sanctions Act (CAATSA), Pub. L. No. 115–144, 131 Stat. 886 (2018).

European Union (EU) uses the term 'restrictive measures',[14] while Canada designates such restrictions as 'special economic measures'.[15] In this article, we use the term 'unilateral economic sanctions' (or interchangeably, unilateral sanctions) and define them as restrictive economic measures imposed by individual states against other states, their bodies, government officials, or legal entities and individuals, without any prior authorization of an international or regional organization, i.e., based on their domestic laws.

Unilateral economic sanctions can be divided into various categories. Depending on the nature of restrictions, five main types of economic sanctions can be distinguished: financial prohibitions (e.g., investment bans), import and export restrictions (complete or partial), sectoral restrictions (e.g., aviation ban), asset freezes (e.g., freezing of Central Bank assets, freezing of individual assets), and travel bans (e.g., applicable to government officials, applicable to individuals). Apart from this classification, unilateral economic sanctions can also be categorized in terms of their scope, being either comprehensive or targeted. As the simple distinction between comprehensive and targeted sanctions does not always capture the whole gamut of such measures in existence, Thomas Biersteker and others introduced a useful grouping of sanctions according to their degree of discrimination.[16] These categories are:

- Comprehensive sanctions (e.g., comprehensive trade embargo);
- Relatively non-discriminating measures (sanctions affecting core economic sectors, e.g., oil sector);
- Moderately discriminating measures (sanctions that target either key export commodities or several large companies, which are crucial for a state's economy);
- Relatively discriminating measures (sanctions that target specific sectors of government or non-government targets, e.g., arms embargo, restrictions on trade in luxury goods);
- Most targeted measures (sanctions against individuals and entities, e.g., asset freezes).[17]

The legality of unilateral sanctions has been analysed from different angles. One such perspective is their compliance with the UN Charter. This is also the most politically salient aspect, as it is frequently debated at the UN.[18] These debates traditionally revolve

14 Council of the European Union, *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy*, Doc. 5664/18 (2018).

15 Special Economic Measures Act, S.C. 1992, c. 17.

16 Thomas J. Biersteker et al., *Thinking About United Nations Targeted Sanctions* §1, 27 (Thomas Biersteker et al. eds, Cambridge University Press 2016).

17 The categorization presented here is slightly changed. *Ibid.*

18 Since the 1970s, a number of the UN Member States have been arguing that unilateral economic sanctions are means of prohibited coercion that breach essential principles of the UN Charter. For more

around two major arguments: either unilateral sanctions violate the prohibition on the use of force enshrined in Article 2(4) of the UN Charter or the principle of non-intervention implicitly embedded in the UN Charter.[19] Since 2014, when the mandate of the Special Rapporteur on the negative impact of the unilateral coercive measures on the enjoyment of human rights was established, the human rights perspective was added to the debate on the unilateral sanctions' legality at the UN level.[20]

Scholars also analyse economic sanctions' legality against the background of various international law obligations. For example, Natalino Ronzitti[21] and Tom Ruys[22] examine whether unilateral economic sanctions that target assets of the Central banks, as well as assets of senior government officials, encroach on the customary international law of state immunity and arrive at contradictory conclusions. Susan Emmenegger scrutinizes the relations between the US unilateral financial sanctions and the established principles of jurisdiction in international law.[23] Emmenegger concludes by affirming that the recent US unilateral financial sanctions 'show a troubling tendency to overstretch the traditional jurisdictional principles'.[24]

From a practical perspective, the debate on the lawfulness of unilateral economic sanctions revolves around the possibility to adjudicate such measures and seek some sort of relief. In this context, the unilateral sanctions' consistency with international investment law[25] and WTO law[26] has been frequently examined in the literature.

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on this debate *see* A. Hofer, *The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?,* 16 Chin. J. Int. L. 175 (2017); M. Doraev, *The 'Memory Effect' of Economic Sanctions Against Russia: Opposing Approaches to the Legality of Unilateral Sanctions Clash Again,* 37 U. Pa. J. Int'l L. 355 (2015).

19 *Supra* n. 18.

20 Human Rights Council, Resolution 27/21, UN Doc. A/HRC/RES/27/21 (3 Oct. 2014). The former Special Rapporteur, Idriss Jazairy, in his report defined unilateral coercive measures as 'measures including, but not limited to, economic and political ones, imposed by States or groups of States to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights with a view to securing some specific change in its policy'. Human Rights Council, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, UN Doc. A/HRC/30/45 (10 Aug. 2015). This definition captures only a subset of unilateral economic sanctions; more specifically, those sanctions that interfere with the *domaine réservé* of a state. The prevailing view in the literature is that there is no independent self-standing right to be from economic coercion and thus only unilateral sanctions that interfere with *domaine réservé* might be illegal. *See* A. Tzanakopoulos, *The Right to be Free from Economic Coercion*, 4 Cambridge Int'l L. J. 616 (2015).

21 Natalino Ronzitti, *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective* §1 (Natalino Ronzitti ed., Brill Nijhoff 2016).

22 Ruys, *supra* n. 11.

23 S. Emmenegger, *Extraterritorial Economic Sanctions and Their Foundation in International Law,* 33 Ariz. J. Int'l & Comp. L. 631 (2016).

24 *Ibid.*, at 659.

25 *See* J. Beess & J. Chrostin, *Unilateral and Multilateral Sanctions in Investment Treaty Arbitration*, 110 Proc. Annu. Meet. Am. Soc. Int. L. 207 (2016); Eric De Brabandere & David Holloway, *Sanctions and International Arbitration* §14 (Larissa Van den Herik ed., Edward Elgar 2017).

26 *See* R. L. Howse & J. M. Genser, *Are EU Trade Sanctions on Burma Compatible with WTO Law*, 29 Mich. J. Int'l L. 165 (2008); R. J. Neuwirth & A. Svetlicinii, *The Current EU/US–Russia Conflict Over Ukraine and the WTO: A Preliminary Note on (Trade) Restrictive Measures,* 32 Post-Soviet Aff. 237 (2016).

The latter analysis is coupled with the exploration of possible justification of such restrictive measures within the established policy space built into the WTO rules.[27] This we discuss below.

3 UNILATERAL ECONOMIC SANCTIONS AND WTO LAW

The frequency of states' recourse to restrictions on goods and/or services trade, as well as access to intellectual property, to implement unilateral economic sanctions is on an upward trend. In the past, economic sanctions were only exceptionally brought to the attention of trade adjudicators. Historical records attest to the accuracy of this statement.[28] In recent years, however, the number of such disputes has drastically increased. In the midst of a military conflict between Ukraine and the Russian Federation, both sides imposed unilateral economic sanctions on each other, as well as challenged the other's measures before the WTO.[29] After the panel report in *Russia – Traffic in Transit* was adopted, the parties did not proceed further with their claims questioning the WTO-compatibility of each other's unilateral sanctions.[30] Another example is economic sanctions established by the neighbouring states against Qatar that have engendered a number of disputes, two of which reached the panel stage.[31] The new wave of the US unilateral economic sanctions urged Venezuela to question their WTO-consistency.[32] This attempt was unsuccessful: the United States did not engage in consultations and, after Venezuela filed its request to establish a panel,[33] refused to approve an agenda of the Dispute Settlement Body

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27 *See* Howse & Genser, *supra* n. 26; R. J. Neuwirth & A. Svetlicinii, *The Economic Sanctions Over the Ukraine Conflict and the WTO: 'Catch-XXI' and the Revival of the Debate on Security Exceptions*, 49 JWT 891 (2015).

28 The most notable examples are: the parallel proceedings before the ICJ and the GATT 1947 panel initiated by Nicaragua against the United States to question the legality of the US trade embargo; an attempt of the European Communities to question the WTO-consistency of the Helms-Burton Act, which enabled imposition of extraterritorial economic sanctions against Cuba.

29 Ukraine – Measures relating to Trade in Goods and Service (DS525); Russia – Measures Concerning the Importation and Transit of Certain Ukrainian Products (DS532).

30 The panel in *Russia – Traffic in Transit* declared that the conflict between Ukraine and the Russian Federation constituted 'emergency in international relations' and that trade-restrictive measures implemented by the Russian Federation were 'taken in time' of such emergency. WTO Panel Report, *Russia – Measures Concerning Traffic in Transit* [*Russia – Traffic in Transit*], WT/DS512/R and WT/DS512/R/Add.1, adopted 26 Apr. 2019, para. 7.126. These findings of the panel might have enabled both states, – Ukraine and the Russian Federation, to invoke the national security exception for justifying other trade restrictions imposed in the course of this military conflict, which were the subject matter of the other pending disputes.

31 United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights (DS526); Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights (DS567).

32 United States – Measures Relating to Trade in Goods and Services (DS574).

33 WTO, *United States – Measures Relating to Trade in Goods and Services*. Request for the Establishment of a Panel by Venezuela, WTO Doc. WT/DS574/2 (15 Mar. 2019).

meeting,[34] thus exerting pressure on the already weakened dispute settlement system. Venezuela withdrew its request.[35] Recently, Korea requested the establishment of a panel to question the WTO-consistency of export restrictions enacted by Japan in 2019.[36] The restrictions came into force amidst rising political tensions between the two countries.[37] In its request for consultations, Korea argues that those restrictions constitute 'politically-motivated, disguised restrictions on trade'.[38] Contrary to the other attempts to use unilateral trade sanctions, such as those prescribed by the section 301 of the Trade Act of 1974 that provides a statutory means for the United States Trade Representative to respond to certain foreign trade practices,[39] the abovementioned sanctions are trade instruments used for non-trade foreign policy goals.

The abovementioned examples are illustrative of the growing tendency to use economic instruments for geopolitical goals.[40] Setting this as a background, the subsequent analysis focuses on three case studies, in which economic sanctions are employed either to enforce international obligations, e.g., human rights obligations, or to respond to harmful conduct that is not regulated under international law, e.g., cyber-attacks. The choice of these case studies is not coincidental: unilateral economic sanctions discussed below are gaining momentum as more states are introducing similar regulations, contributing to a growing need for their analysis. Furthermore, these types of unilateral sanctions might be WTO-inconsistent and thus require justification under the available exceptions. In the next part, new types of unilateral economic sanctions are described and their compatibility with WTO law is analysed. This analysis is followed by a discussion of a possibility to justify these sanctions under the national security exception.

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34 Tom Miles, *US Objection over Venezuela Threatens to Halt WTO Trade Disputes*, Reuters (26 Mar. 2019), https://www.reuters.com/article/us-usa-trade-venezuela-wto/u-s-venuezela-spat-threatens-to-halt-wto-trade-disputes-idUSKCN1R71KJ.

35 The issue was not included in the agenda for the next Dispute Settlement Body meeting, which took place on 11 Apr. 2019. WTO, Dispute Settlement Body, Proposed Agenda. WTO Doc. WT/DSB/W/642 (9 Apr. 2019).

36 WTO, *Japan – Measures Related to the Exportation of Products and Technology to Korea*, Request for the establishment of a panel by the Republic of Korea, WTO Doc. WT/DS590/4 (19 June 2020).

37 Lindsay Maizland, *The Japan-South Korea Trade Dispute: What to Know*, Council on Foreign Relations (5 Aug. 2019), https://www.cfr.org/in-brief/japan-south-korea-trade-dispute-what-know.

38 WTO, *Japan – Measures Related to the Exportation of Products and Technology to Korea*, Request for consultations by the Republic of Korea, WTO Doc. WT/DS590/1, G/L/1325 G/TFA/D3/1, G/TRIMS/D/45 S/L/431, IP/D/42 (16 Sept. 2019).

39 The most recent dispute, in which the WTO-compatibility of the trade sanctions enacted pursuant to the Section 301 of the Trade Act of 1974 was questioned, is the dispute initiated by China. *See* WTO Panel Report, United States – Tariff Measures on Certain Goods from China [US – Tariff Measures], WT/DS543/R and Add1, under appeal since 26 Oct. 2020.

40 *See* Anthea Roberts et al., *Toward a Geoeconomic Order in International Trade and Investment*, 22 JIEL 655 (2019).

3.1 Human rights sanctions ('Magnitsky-style sanctions')

3.1[a] *State Practice*

Since 2012, individual states have been increasingly implementing domestic laws that enable them to punish perpetrators of grave human rights violations abroad, known as 'Magnitsky-style sanctions'.[41] In other words, states operationalize targeted economic sanctions as an instrument of human rights enforcement.

In 2012, the United States enacted the Sergei Magnitsky Rule of Law Accountability Act (Sergei Magnitsky Act), – the law which authorizes the imposition of targeted sanctions against individuals involved in grave human rights violations on the territory of the Russian Federation.[42] These unilateral sanctions entail travel bans, including revocation of any issued visas,[43] freezing of the property and interests in property,[44] as well as a prohibition on transactions with the blocked property.[45]

In late 2016, the Global Magnitsky Human Rights Accountability Act (Global Magnitsky Act) was enacted.[46] This Act empowers the President to impose sanctions against any foreign person responsible for gross violations of internationally recognized human rights as well as any foreign government official responsible for acts of significant corruption and thus expands the scope of the previously implemented Sergei Magnitsky Act.[47] To implement the provisions of the Global Magnitsky Act, the US President issued Executive Order 13818, wherein a national emergency was declared with regard to 'the prevalence and severity of human rights abuse'.[48]

The recent wave of US unilateral economic sanctions against China was imposed on human rights grounds and, in part, pursuant to the Global Magnitsky Act.[49] In July 2020, the Xinjiang Production and Construction Corps (XPCC) – a

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41 Sergei Magnitsky was a Russian lawyer, who uncovered a major corruption scheme implemented by the Russian officials and after reporting it, he was arrested, tortured, denied sufficient medical assistance and died in pre-trial detention. In its decision issued in 2019, the European Court of Human Rights unanimously found that the Russian Federation violated numerous obligations under the convention. ECtHR 27 Aug. 2019, 32631/09 and 53799/12 *Magnitskiy and Others v. Russia*.

42 Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112–208, § 401, 126 Stat. 1502, 1509.

43 *Ibid.*, § 405 Inadmissibility of Certain Aliens.

44 *Ibid.*, § 406 Financial Measures.

45 *Ibid.*

46 Global Magnitsky Human Rights Accountability Act, Pub. L. No 114–328, § 1261, 130 Stat. 2533, 2538.

47 *Ibid.*, § 1263 Authorization of Imposition of Sanctions.

48 Executive Ord. 13818 of 20 Dec. 2017. Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption, 82 Fed. Reg. 60839 (26 Dec. 2017).

49 US Department of the Treasury, *Press releases: Treasury Sanctions Chinese Entity and Officials Pursuant to Global Magnitsky Human Rights Accountability Act* (9 July 2020), https://home.treasury.gov/news/press-releases/sm1055; US Department of the Treasury, *Press releases: Treasury Sanctions Chinese Entity and Officials Pursuant to Global Magnitsky Human Rights Executive Order (31* July 2020), https://home.treasury.gov/news/press-releases/sm1073.

paramilitary-style business as it has been dubbed in media – was targeted by the US human rights sanctions.[50] The XPCC harvest a third of China's cotton, has a significant share in tomato-exporting and other businesses; thus, this particular designation would have far-reaching implications for global supply chains.[51] Besides this, some experts anticipate that further designations might follow.[52]

Canada is among the states that followed the US example and sanctions foreign nationals responsible for gross violations of internationally recognized human rights and acts of significant corruption.[53] Canadian human rights sanctions prescribe a broad spectrum of restrictions.[54] The current list includes seventy foreign nationals.[55]

The European Union, after exploring the possibility of human rights sanctions,[56] adopted a framework to impose restrictive measures against individuals, legal persons, entities or bodies responsible for grave human rights violations.[57]

In January 2020, the United Kingdom (UK) announced its desire to introduce 'the Magnitsky-style mode of human rights sanctions'.[58] On 6 July 2020, the regulation imposing sanctions against persons involved in serious violations of human rights came into force in the UK.[59] The Australian Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade, after conducting public

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50 *Ibid*.; *Forced Labour in China Presents Dilemmas for Fashion Brands*, The Economist (20 Aug. 2020), https://www.economist.com/business/2020/08/20/forced-labour-in-china-presents-dilemmas-for-fashion-brands.

51 *Forced Labour in China presents Dilemmas for Fashion Brands*, *supra* n. 50.

52 J. Palmer & R. Gramer, *US Slaps Sanctions on Xinjiang's Vast Paramilitary Settler Corps*, Foreign Policy (31 July 2020), https://foreignpolicy.com/2020/07/31/us-trump-sanctions-china-new-cold-war-xinjiang-uighurs-human-rights-violations-escalation-washington-beijing-treasury/.

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

54 *Ibid*. The following restrictions are stipulated: restrictions on dealings in any property wherever situated; any financial transaction related to such dealing; the provision of financial services or any other services to, for the benefit of or on the direction or order of the sanctioned foreign national; the acquisition of financial services or any other services for the benefit of or on the direction or order of the sanctioned foreign national; the making available of any property, wherever situated, to the sanctioned foreign national or to a person acting on behalf of the foreign national.

55 Justice for Victims of Corrupt Foreign Officials Regulations, SOR/2017-233, Schedule, s. 1, https://laws.justice.gc.ca/eng/regulations/SOR-2017-233/page-2.html#h-842596.

56 A. Rettman, *Human Rights Abusers to Face Future EU Blacklists,* Euobserver (9 Dec. 2019), https://euobserver.com/foreign/146865; J. Barigazzi, *EU to Prepare Magnitsky-style Human Rights Sanctions Regime,* POLITICO (9 Dec. 2019), https://www.politico.eu/article/eu-to-prepare-magnitsky-style-human-rights-sanctionsregime/.

57 Council Decision (CFSP) No 2020/1999 of 7 Dec. 2020 Concerning Restrictive Measures against Serious Human Rights Violations and Abuses OJ [2020] L 410 I/13 [Council Decision (CFSP) No 2020/1999]; Council Regulation (EU) No 2020/1998 of 7 Dec. 2020 Concerning Restrictive Measures against Serious Human Rights Violations and Abuses OJ [2020] L 410 I/1 [Council Regulation (EU) No 2020/1998].

58 Dominic Raab, First Secretary of State and Secretary of State for Foreign, Commonwealth and Development Affairs, Foreign Secretary's speech at a press conference with the Canadian Foreign Minister (9 Jan. 2020), https://www.gov.uk/government/speeches/foreign-secretary-speech-uk-canada.

59 The Global Human Rights Sanctions Regulations 2020, 2020 No. 680. https://www.legislation.gov.uk/uksi/2020/680/made.

consultations regarding the possibility to enact Magnitsky-style sanctions,[60] has recommended that Australia should introduce legislation that would allow imposition of targeted human rights sanctions.[61]

3.1[b] *Possible Violations of WTO Law*

The existing laws and regulations implementing Magnitsky-style sanctions entail various economic restrictions and thus might violate WTO obligations. The analysis provided below identifies restrictions that may be WTO-incompatible.

The US Magnitsky sanctions are implemented through two parallel regimes – Magnitsky sanctions that target only perpetrators of human rights violations in the Russian Federation[62] and global Magnitsky sanctions.[63] The ambit of both sanctions regimes is broad. First, these sanctions prescribe a complete prohibition on transactions that involve property or interests in property of sanctioned persons. The definition of property and interests in property is comprehensive and includes not only financial assets and real estate but also 'services of any nature whatsoever, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future, or contingent'.[64] Second, the prohibition to deal with sanctioned persons also includes the following restrictions:

> (1) The making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked […]; and (2) The receipt of any contribution or provision of funds, goods, or services from any person whose property and interests in property are blocked […].[65]

Hence, as a matter of fact, US citizens, permanent residents, legal entities incorporated in the United States (including foreign branches), as well as any person in the United States are prohibited from engaging in any transaction with sanctioned persons.[66]

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60 Parliament of Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry Into Whether Australia Should Examine the Use of Targeted Sanctions to Address Human Rights Abuses,* https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/MagnitskyAct.

61 A. Rej, *Australian Parliamentary Committee Recommends Global Magnitsky Type Legislation*, The Diplomat (7 Dec. 2020), https://thediplomat.com/2020/12/australianparliamentary-committee-recommends-global-magnitsky-type-legislation/.

62 Sergei Magnitsky Rule of Law Accountability Act of 2012, *supra* n. 42; 31 C.F.R. § 584, Magnitsky Act Sanctions Regulations.

63 Global Magnitsky Human Rights Accountability Act, *supra* n. 46; 31 C.F.R. § 583 Global Magnitsky Sanctions Regulations.

64 Magnitsky Act Sanctions Regulations, *supra* n. 62, at §584.310 Property; property interest; Global Magnitsky Sanctions Regulations, *supra* n. 63, at § 583.311 Property; property interest.

65 Magnitsky Act Sanctions Regulations, *supra* n. 62, at §584.201 Prohibited transactions involving blocked property; Executive Ord. 13818, *supra* n. 48, at s. 4.

66 Magnitsky Act Sanctions Regulations, *supra* n. 62, at §584.314 United States person; US person; Global Magnitsky Sanctions Regulations, *supra* n. 63, at §583.314 United States person; US person.

Finally, these prohibitions apply not only to sanctioned persons but also to the legal entities, in which sanctioned persons own at least 50% or more, either directly or indirectly.[67] Consequently, any such entity becomes a sanctioned entity.[68]

In order to designate an individual and/or entity under the human rights sanctions regime, the US President should determine that such person was either responsible for 'extrajudicial killings, torture, or other gross violations of internationally recognized human rights' against an individual in any foreign country who attempted (1) to expose illegal activities of government officials or (2) to obtain, exercise, defend, or promote human rights and freedoms; or such person was involved in acts of significant corruption.[69] According to the recently released information, 243 individuals and entities from twenty-eight countries have been designated under the US human rights sanctions regime.[70] Without questioning the significance of economic sanctions targeting human rights abusers, one point requires further clarification. Every designation of an individual or entity involved in human rights violations is discretionary, thus allowing some human rights violations to serve as a ground for imposing sanctions, while others to remain neglected.

The US human rights sanctions, despite being targeted, are ambiguous and prescribe almost a complete economic blockade against sanctioned persons and entities owned by them. Those sanctions imply prohibitions on import and export of goods and services. Such discretional all-encompassing bans that apply to goods of some individuals and entities from certain WTO Members but not to others violate the Most-Favoured-Nation (MFN) principle enshrined in Article I:1 of the GATT 1994. This Article, in the relevant part, reads as follows:

> […] with respect to all rules and formalities in connection with importation and exportation […] any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

To determine a violation of Article I:1, the WTO adjudicators should establish the following four elements:

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67 *Ibid.*, at §584.410 Entities owned by one or more persons whose property and interests in property are blocked; *ibid.*, § 583.406 Entities owned by one or more persons whose property and interests in property are blocked.

68 US Department of the Treasury, *Revised Guidance On Entities Owned By Persons Whose Property And Interests In Property Are Blocked* (13 Aug. 2014), https://home.treasury.gov/system/files/126/licensing_guidance.pdf.

69 Global Magnitsky Human Rights Accountability Act, *supra* n. 46, § 1263 Authorization of Imposition of Sanctions.

70 US Department of State, *Infographics: December 9–10 2020 Global Magnitsky Program Designations* (10 Dec. 2020), https://www.state.gov/wpcontent/uploads/2020/12/Infographic_v1.8-508.pdf.

> (i) that the measure at issue falls within the scope of application of Article I:1; (ii) that the imported products at issue are "like" products within the meaning of Article I:1; (iii) that the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; and (iv) that the advantage so accorded is not extended "immediately" and "unconditionally" to "like" products originating in the territory of all Members.[71]

A WTO Member, whose nationals are targeted by unilateral human rights sanctions, may employ the following reasoning to argue a breach of the MFN treatment. Regarding the first element, the wording 'all rules and formalities in connection with importation and exportation' allows a broad category of measures to fall within the scope of Article I:1.[72] In other words, import and export bans on goods would be covered by Article I:1. Considering the second element – 'likeness' analysis, it should be borne in mind that economic sanctions are directed against generic imported and exported goods, these restrictions are not product-specific and are not related to process and production methods. Given this, 'likeness' can be presumed.[73] The third element – the existence of an 'advantage, favour, privilege, or immunity', was interpreted as creating more favourable import opportunities or affecting the commercial relationship between products of different origins.[74] In case of economic sanctions prohibiting the import of goods from a particular entity or individual, these restrictions allow non-targeted importers from other WTO Members to benefit from market access and hence constitute an 'advantage' in the meaning of Article I:1. Export bans that discriminate between goods' recipients grant an 'advantage, favour, privilege, or immunity' to those goods that are destined for non-targeted persons in other WTO Members. The non-fulfilment of the last element, – the requirement to extend any such advantage 'immediately' and 'unconditionally' to 'like products' of all WTO Members, can be easily established given that the rationale behind economic sanctions is to deprive targets of advantages and privileges. In light of this, economic sanctions that entail import and/or export bans on goods, even if they are targeted, might violate Article I:1 of the GATT 1994.

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71 WTO Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* [*EC – Seal Products*], WT/DS400/AB/R; WT/DS401/AB/R, adopted 18 June 2014, para. 5.86.

72 For an analysis of the WTO jurisprudence on the meaning of 'all rules and formalities in connection with importation and exportation' *see* WTO, *WTO Analytical Index: Guide to WTO Law and Practice*, GATT 1994 – Art. I (Jurisprudence) 1, 6–7.

73 The presumption of 'likeness' was accepted by the WTO adjudicators and was explained as follows: 'where a measure provides for a distinction based exclusively on origin, there will or can be services and service suppliers that are the same in all respects except for origin and, accordingly, "likeness" can be presumed and the complainant is not required to establish "likeness" on the basis of the relevant criteria set out above'. WTO Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services* [*Argentina – Financial Services*], WT/DS453/AB/R and Add1, adopted 9 May 2016, para. 6.38.

74 WTO Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* [*EC – Bananas III*, Complaint by Ecuador], WT/DS27/R/ECU, adopted 25 Sept. 1997, para. 7.239.

Additionally, economic sanctions restricting imports and exports of goods are inconsistent with the prohibition of quantitative restrictions enshrined in Article XI:1 of the GATT 1994. The essence of this obligation is that 'no prohibitions or restrictions [...] shall be instituted or maintained [...] on the importation of any product [...] or on the exportation or sale for export of any product [...]'. This obligation was interpreted broadly: '[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions "other than duties, taxes or other charges"'.[75] Furthermore, in *China – Raw Materials*, it was pointed out that 'Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported'.[76] Restrictions on importation and exportation of goods inevitably imply a limiting effect on imports and exports and thus are incompatible with Article XI:1 of the GATT 1994.

The US human rights sanctions prescribe prohibitions to provide and receive services from sanctioned persons and entities owned by them.[77] Restrictions on the importation of services might violate various obligations under the General Agreement on Trade in Services (GATS). Commitments under the GATS are undertaken for each particular services sector and for each of the four modes of supply.[78] Thus, restrictions on the importation of services may breach GATS obligations, – for example, Articles II:1[79] and XVI:1,[80] only if a WTO Member undertook commitments in a specific services sector and mode of supply. Considering that the United States liberalized trade in some services sectors and imposes a complete ban on trade in services with sanctioned persons and entities owned by them, those restrictions breach obligations under the GATS in various services sectors.

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75 WTO Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* [*India – Quantitative Restrictions*], WT/DS90/R, adopted 22 Sept. 1999, para. 5.129.

76 WTO Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials* [*China – Raw Materials*], WT/DS394/AB/R; WT/DS395/AB/R; WT/DS398/AB/R, adopted 22 Feb. 2012, paras 319–320.

77 *See supra* n. 65.

78 Article I of the GATS, in the relevant part, reads: 'For the purposes of this Agreement, trade in services is defined as the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member'.

79 Article II:1 of the GATS reads as follows: 'With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country'.

80 Article XVI:1 of the GATS reads as follows: 'With respect to market access through the modes of supply identified in Art. I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule'.

The provisions of the Canadian Sergei Magnitsky Law might also be inconsistent with the WTO obligations, in particular commitments under the GATS. For example, the law prohibits any person in Canada from providing financial or any other services to sanctioned foreign individuals.[81] In other words, this prohibition is a restriction on the export of services offered by the Canadian nationals and legal entities. Prohibitions on the export of services are less prone to contestation under the GATS compared to import restrictions: the GATS does not contain an equivalent to Article XI of the GATT and other GATS disciplines (MFN treatment, Market Access and National Treatment obligations) provide guarantees largely to foreign service suppliers and not service recipients.[82]

Notwithstanding this, there is a possibility to question export restrictions on the supply of services as inconsistent with the obligations under Article XVI:1 of the GATS (Market Access). This might be possible if a WTO Member made market access commitments for a particular service sector under mode 3 (provision of services through commercial presence in the territory of another WTO Member) and then restricted exports of these services. To be subject to disciplines of Article XVI:1 of the GATS, specific commitments should be inscribed in the WTO Member's schedule of commitments. Such commitments could be undertaken under four modes of supply: cross-border supply, consumption abroad, commercial presence and presence of natural persons. The definitions of these modes provided in Article I of the GATS do not specify the direction of the trade flows or the location of the consumers/suppliers involved. However, the Guidelines for the Scheduling of Specific Commitments narrow down mode 1 commitments (cross-border supply) to the services that are imported into the territory of the WTO Member; mode 2 commitments (consumption abroad) – to the measures affecting the consumers of the WTO Member that schedules commitments.[83] Thus, these two modes of supply are interpreted in a such way as to provide guarantees to foreign services suppliers and not recipients. To the contrary, according to the WTO jurisprudence, commitments under mode 3

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81 Justice for Victims of Corrupt Foreign Officials Act, *supra* n. 53, Restricted or prohibited activities.

82 The MFN Treatment under Article II:1 of the GATS guarantees no less favourable treatment 'to services and service suppliers of any other Member'. In the same vein, according to the Market Access obligation under Article XVI:1 of the GATS the WTO Members shall accord to 'services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule'. The National Treatment guarantee of Article XVII:1 ensures 'to services and service suppliers of any other Member' treatment no less favourable 'than that it accords to its own like services and service suppliers'. Thus, these substantive obligations provide protection to foreign services and service suppliers, yet not to foreign recipients of services.

83 WTO, Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), adopted by the Council for Trade in Services on 23 Mar. 2001. WTO Doc. S/L/92 (28 Mar. 200).

imply the right to provide services to both recipients in the domestic market and foreign recipients; in other words, right to export services through the commercial entity present in the territory of another WTO Member.[84] In view of this, restrictions on the exportation of services might be GATS-incompatible only if a state imposing them has inscribed market access commitments for a specific service sector under mode 3 and then restricted exports of such services. Thus, if Canada has undertaken market access commitments in any service sector under mode 3, Canadian Magnitsky sanctions might be GATS-incompatible.

3.2 Cyber sanctions

3.2[a] *State Practice*

While negotiations of international norms that should regulate conduct in the cyberspace are still ongoing, cyber-attacks are becoming not only more frequent but also more destructive.[85] States in their efforts to punish and prevent cyber-attacks implement unilateral economic sanctions against individuals, entities and state bodies engaged in such activities.

Following the unprecedented cyber-attack on Sony Pictures Entertainment in 2014,[86] President Obama issued Executive Order 13694, in which a national emergency that emanates from 'the increasing prevalence and severity of malicious cyber-enabled activities' was declared.[87] This Executive Order authorizes imposition of unilateral economic sanctions on individuals or entities either responsible for or engaged in cyber-attacks as well as persons, who have assisted them or benefited from a competitive or commercial advantage obtained as a result of a cyber-attack.[88] These sanctions prescribe the blocking of property and interests in property[89] along with travel bans[90] and a complete prohibition to provide and receive any goods or services to/from sanctioned entities or individuals.[91] In late December 2016, the scope of the US sanctions was expanded by allowing cyber sanctions to punish

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84 WTO Panel Report, *China – Certain Measures Affecting Electronic Payment Services* [*China – Electronic Payment Services*], WT/DS413/R and Add1, adopted 31 Aug. 2012, para. 7.617.

85 M. Milanovic & M. N. Schmitt, *Cyber Attacks and Cyber (Mis)information Operations During a Pandemic*, 11 J. Nat'l Sec. L. & Pol'y 247 (2020).

86 E. VanDerWerff & T. B. Lee, *The 2014 Sony Hacks, Explained,* Vox (3 June 2015), https://www.vox.com/2015/1/20/18089084/sony-hack-north-korea.

87 Executive Ord. 13694 of 1 Apr. 2015. Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities, 80 Fed. Reg. 18077 (2 Apr. 2015).

88 *Ibid*., at s. 1.

89 *Ibid*.

90 *Ibid*., at s. 4.

91 *Ibid*., at s. 3.

malicious cyber-enabled activities that pursue the goal of 'interfering with or undermining election processes or institutions'.[92]

Faced with a need to counter the potentially detrimental effect of cyber-attacks, the EU implemented a legal framework for cyber sanctions immediately before the elections to the European Parliament in 2019.[93] A number of third states expressed their desire to align with the EU cyber sanctions.[94] In a similar vein, the UK announced a regulation to implement the EU cyber sanctions.[95] In July 2020, the EU imposed its first cyber sanctions against individuals and entities responsible for the attempted cyber-attack against the OPCW (Organisation for the Prohibition of Chemical Weapons) and cyber-attacks publicly known as 'WannaCry', 'NotPetya', and 'Operation Cloud Hopper'.[96] The EU cyber sanctions regime prescribes the following restrictive measures: freezing of funds,[97] freezing of economic resources,[98] prohibition to provide funds or economic resources to sanctioned persons.[99]

3.2[b] *Possible Violations of WTO Law*

The US cyber sanctions contain prohibitions similar to the ones imposed on human rights grounds. More specifically, these sanctions take the form of: (1) blocking of property and interests in property, (2) a ban on donations, (3) prohibitions to provide and receive goods and services to/from sanctioned persons, and (4) travel bans.[100] A broad definition of 'property and other interests in property' is adopted by the

92 Executive Ord. 13757 of 28 Dec. 2016. Taking Additional Steps to Address the National Emergency With Respect to Significant Malicious Cyber-Enabled Activities, 82 Fed. Reg. 1 (3 Jan. 2017).

93 Council of the European Union, *Press Release, Cyber-attacks: Council Is Now Able to Impose Sanctions* (17 May 2019), https://www.consilium.europa.eu/en/press/press-releases/2019/05/17/cyber-attacks-council-is-now-able-to-impose-sanctions/.

94 Council of the European Union, *Press release, Declaration by the High Representative on Behalf of the EU on the Alignment of Certain Third Countries Concerning Restrictive Measures Against Cyber-attacks Threatening the Union or Its Member States* (2 July 2019), https://www.consilium.europa.eu/en/press/press-releases/2019/07/02/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-alignment-of-certain-third-countries-concerning-restrictive-measures-against-cyber-attacks-threatening-the-union-or-its-member-states/.

95 The Cyber (Sanctions) (EU Exit) Regulations 2020, 2020 No. 597.

96 Council Decision (CFSP) No 2020/1127 of 30 July 2020 Amending Decision (CFSP) 2019/797 Concerning Restrictive Measures against Cyber-attacks Threatening the Union or its Member States OJ [2020] L 246/12 [Council Decision (CFSP) No 2020/1127]; Council Implementing Regulation (EU) No 2020/1125 of 30 July 2020 Implementing Regulation (EU) 2019/796 Concerning Restrictive Measures against Cyber-attacks Threatening the Union or its Member States OJ [2020] L 246/4 [Council Implementing Regulation (EU) No 2020/1125].

97 Council Regulation (EU) No 2019/796 of 17 May 2019 Concerning Restrictive Measures against Cyber-attacks Threatening the Union or its Member States OJ [2019] LI 129/1 [Council Regulation (EU) No 2019/796], at Art. 3(1).

98 *Ibid.*

99 *Ibid.*, at Art. 3(2).

100 Executive Ord. 13694, *supra* n. 87, at ss 1(a), 2, 3 and 4.

relevant regulation.[101] As a result, not only financial assets but also 'services of any nature whatsoever', 'contracts of any nature', as well as 'any other property' should be blocked.[102] Such trade-restrictive measures face a significant risk of being WTO-inconsistent as it has been discussed before.[103]

The EU cyber sanctions regime prohibits the provision of funds and economic resources to sanctioned persons. More specifically, this prohibition stipulates: 'No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies listed in Annex I'.[104] Annex I prescribes a list of sanctioned individuals and entities. To determine the scope of this prohibition the definitions of 'funds', 'economic resources', and 'made available' ought to be examined. The Council Regulation provides a broad definition of 'funds' as 'financial assets and benefit of every kind' and substantiates it with a list of possible examples.[105] The term 'economic resources' is defined as 'assets of every kind, whether tangible or intangible, movable or immovable, which are not funds, but may be used to obtain funds, goods or services'.[106] The EU Best Practices for the effective implementation of restrictive measures clarify that '[m]aking funds available to a designated person or entity, be it by way of payment for goods and services, […] is generally prohibited'.[107] This clarification suggests an all-encompassing prohibition on trade with sanctioned entities and individuals.

The EU prohibition on making funds and economic resources available is comprehensive and it implies a complete ban on imports and exports of goods and services to/from sanctioned persons. The inconsistency of such prohibitions with the core principles of WTO law has been extensively discussed in the previous section, thus, here only a general conclusion is reiterated. All-embracing restrictions on importation or exportation of goods, even when they target only transactions with designated persons, may constitute a violation of the MFN obligation entrenched in Article I:1 of the GATT 1994 if they are administered in a discretionary way, i.e., they target perpetrators of cyber-attacks in some states but not in others.[108] Given that application of unilateral sanctions is a political decision, the determination of who will be targeted by such restrictions is influenced by many considerations, including political ones.

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101 Office of Foreign Assets Control, *Cyber-Related Sanctions Regulations,* 31 C.F.R. Part 578 (2015).
102 *Ibid.*
103 For more *see* i. Human rights sanctions ('Magnitsky-style sanctions').
104 Council Regulation (EU) No 2019/796, *supra* n. 97.
105 *Ibid.*, at Art. 1.
106 *Ibid.*
107 Council of the European Union, *EU Best Practices for the Effective Implementation of Restrictive Measures*, Doc. 8519/18 (4 May 2018), https://data.consilium.europa.eu/doc/document/ST-8519-2018-INIT/en/pdf, para. 49.
108 For more *see* i. Human rights sanctions ('Magnitsky-style sanctions').

Thus, the process of designation lacks transparency. Moreover, these restrictions target economic operators; they are not product-specific and are not related to process and production methods. In view of this, the presumption of 'likeness' can be potentially invoked by the complaining party. This presumption enables the WTO adjudicators to presume 'likeness' of goods and services if they are discriminated only based on their origin,[109] thus making finding of 'likeness' rather straightforward.

Moreover, an obligation to eliminate quantitative restrictions stipulated in Article XI:1 of the GATT 1994 would be violated if a WTO Member introduces unilateral cyber sanctions that may impact the volumes of goods imports and exports.[110]

Restrictions on the importation of services could violate Articles II:1 and XVI:1 of the GATS only if a WTO Member has undertaken commitments in a particular services sector and mode of supply and then restricted the importation of such services.[111] In case of a complete import ban on services supplied by sanctioned persons, breach of the GATS commitments is almost inevitable. Restrictions on the exportation of services may be GATS-incompatible only if a WTO Member has undertaken market access commitments in a specific services sector and under mode 3, which also covers the right to export services to recipients abroad.[112] The latter claim could be potentially advanced by a foreign entity that established a commercial presence on the territory of a WTO Member with a goal to provide services in this Member's market and export them to other destinations as well. However, unilateral sanctions are constraining such an entity from providing services to foreign services recipients when they are subjects of unilateral cyber sanctions.

3.3 Trade restrictions on information and communications technology and services (Huawei sanctions)

3.3[a] *State Practice*

Since 2019, the United States has been imposing unilateral economic sanctions against Chinese technological companies, mainly Huawei and its affiliates. According to the US agencies engaged in sanctioning efforts, the rationales behind such restrictive measures are manifold: export restrictions that are implemented through a compulsory export licensing scheme were introduced to reinforce previously imposed US unilateral economic sanctions against Iran

109 WTO Appellate Body Report, *Argentina – Financial Services*, *supra* n. 73, para. 6.38.
110 For more *see* i. Human rights sanctions ('Magnitsky-style sanctions').
111 *Ibid.*
112 *Ibid.*

that were allegedly violated by Huawei and its subsidiaries,[113] while import restrictions on the ICTS address cybersecurity concerns related to the vulnerabilities in the ICTS.[114] Regarding cybersecurity, the United States argues that Chinese tech companies such as Huawei are closely cooperating with the Chinese government, including facilitating cyber theft of trade and military secrets,[115] and hand over their customers' personal information to the Chinese government.[116] Similar concerns were cited as a ground for Australia's restrictive measures, which included a ban on Huawei's participation in projects related to critical national infrastructure.[117] However, another potential reason for severe unilateral economic sanctions is the US-China technological rivalry,[118] which according to some analysts is a sign of a looming 'technological de-coupling'.[119]

In May 2019, the United States relied concurrently on various statutory provisions to restrict both imports and exports from/to Chinese entities, mainly Huawei. The US Bureau of Industry and Security (BIS) included Huawei and sixty-eight non-US affiliates of Huawei located in twenty-six destinations to the so-called Entity List.[120] This listing entails that all exports, re-exports and in-country transfers to the listed enterprises became subject to a license requirement.[121] Additionally, President Trump issued Executive Order 13873 that declared a national emergency regarding the unrestricted acquisition and use of the ICTS developed by entities over which

113 US Department of Commerce, Bureau of Industry and Security,15 C.F.R. § 744 Addition of Entities to the Entity List, Final Rule (16 May 2019).

114 Executive Ord. 13873 of 15 May 2019. Securing the Information and Communications Technology and Services Supply Chain, 84 Fed. Reg. 22689 (17 May 2019).

115 F. Bajak & M. Liedtke, *Huawei Sanctions: Who Gets Hurt in Dispute?*, USA Today, https://eu.usatoday.com/story/tech/news/2019/05/21/huawei-why-facing-sanctions-and-who-get-hurt-most/3750738002/.

116 K. O'Flaherty, *Huawei Security Scandal: Everything You Need to Know,* Forbes (26 Feb. 2019), https://www.forbes.com/sites/kateoflahertyuk/2019/02/26/huawei-security-scandal-everything-you-need-to-know/#7cc54d2473a5.

117 S. Peng, *Cybersecurity Threats and the WTO National Security Exceptions*, 18 JIEL 449, 453 (2015).

118 In the recent decade, a technological gap between the United States and China has significantly narrowed down. Despite these recent developments, scholarly research suggests that China's capability to further advance its R&D agenda depends heavily on technological inputs from other states, mainly the United States. McKinsey Global Institute, *China and the World: Inside the Dynamics of a Changing Relationship* (2019).
Recognizing technological supremacy as a part of a broader military strategy the US administration generates strong headwinds against Chinese emerging technological supremacy.

119 Graham Webster et al., *Mapping US – China Technology Decoupling*, White Paper (27 Aug. 2020), https://fsi.stanford.edu/publication/mapping-us–china-technology-decoupling.

120 US Department of Commerce, Bureau of Industry and Security, *supra* n. 113.

121 A wind-down followed almost immediately with a ninety-day temporary general license published on 20 May 2019, which was extended several times. However, the license restored the pre-existing rules only for a subset of transactions. US Department of Commerce, Bureau of Industry and Security, 15 C.F.R. § 744 and 762 Temporary General License, Final Rule (20 May 2019). The temporary general license was extended in 2020. US Department of Commerce, Bureau of Industry and Security, 15 C.F.R. § 744 and 762 Temporary General License: Extension of Validity, Final Rule (10 Mar. 2020).

foreign adversaries can exercise control[122] and in view of this, prohibiting 'any acquisition, importation, transfer, installation, dealing in, or use' of such technology and services.[123] In May 2020, the national emergency thus declared was extended for a year.[124] The US Department of Commerce announced new rules to implement these import restrictions on ICTS in January 2021.[125]

The export licensing requirement introduced in May 2019 was further tightened: first, by including new companies to the list and second, by expanding the scope of this requirement. New non-US affiliates of Huawei were added to the list in August 2019[126] and in August 2020.[127] Furthermore, the scope of the export licensing requirement was expanded. More specifically, the previously enacted regulation de facto prohibited exports of the ICTS originated in the United States to Huawei and its affiliates, yet Huawei was able to replace the US-originated components with supplies from other countries.[128] Following this development, in May 2020, the BIS published a new rule extending the application of the export licensing requirement to foreign-produced goods if such goods are produced using the US technology and if they are destined to Huawei and its non-US affiliates.[129] Further restrictions that completely prevent Huawei from obtaining foreign-produced chips developed or produced from US software or technology were implemented in August 2020.[130]

The implications of these restrictive measures are far-reaching. After the trade-restrictive measures were announced in 2019, Google, for example, terminated contracts with Huawei, including revocation of the right to use Android technology on Huawei smartphones.[131] The most recent US export restrictions announced in

122 Executive Ord. 13873, *supra* n. 114.

123 *Ibid.*

124 US President, *Press release, Notice on the Continuation of the National Emergency on Securing the Information and Communications Technology and Services Supply Chain* (13 May 2020), https://www.whitehouse.gov/briefings-statements/text-notice-continuation-national-emergency-securing-information-communications-technology-services-supply-chain/.

125 US Department of Commerce, 15 C.F.R. § 7 Securing the Information and Communications Technology and Services Supply Chain, Interim final rule (19 Jan. 2021).

126 US Department of Commerce, Bureau of Industry and Security, 15 C.F.R. § 744 Addition of Certain Entities to the Entity List and Revision of Entries on the Entity List, Final Rule (19 Aug. 2019).

127 US Department of Commerce, *Press release, Commerce Department Further Restricts Huawei Access to US Technology and Adds Another 38 Affiliates to the Entity List* (17 Aug. 2020), https://www.commerce.gov/news/press-releases/2020/08/commerce-department-further-restricts-huawei-access-us-technology-and.

128 'Commerce Secretary Wilbur Ross told Fox Business the restrictions on Huawei-designed chips imposed in May "led them to do some evasive measures. They were going through third parties", Ross said'. D. Shepardson, *US Tightening Restrictions on Huawei Access to Technology, Chips*, Reuters (17 Aug. 2020), https://www.reuters.com/article/us-usa-huawei-tech-idUSKCN25D1CC.

129 US Department of Commerce, Bureau of Industry and Security, 15 C.F.R. § 730, 732, 736, and 744 Export Administration Regulations: Amendments to General Prohibition Three (Foreign-Produced Direct Product Rule) and the Entity List, Interim final rule (15 May 2020).

130 US Department of Commerce, *supra* n. 127.

131 A. Moon, *Exclusive: Google Suspends Some Business with Huawei After Trump Blacklist – Source,* Reuters (19 May 2019), https://www.reuters.com/article/us-huawei-tech-alphabet-exclusive/exclusive-google-suspends-some-business-with-huawei-after-trump-blacklist-source-idUSKCN1SP0NB.

May 2020, augmented by the US diplomatic pressure, compelled the UK to ban Huawei from its 5G network.[132]

These events have been unfolding against the background of the Chinese government discussion of possible retaliatory measures. For example, in December 2019 the Chinese Communist party ordered government offices and public institutions to replace foreign computer equipment and software within three years; a move that would potentially have negative implications for such companies as Hewlett-Packard (HP Inc.), Dell and Microsoft.[133] Additionally, other retaliatory measures include adoption of a new Export Control Law[134] and creation of an Unreliable Entity List of foreign enterprises that would be subjected to additional scrutiny.[135]

3.3[b] *Possible Violations of WTO Law*

The export licensing scheme discussed above requires licences for exports, re-exports and in-country transfers for transactions with the designated entities, – Huawei and its affiliates. Such licenses are mandatory for legal entities, their foreign subsidiaries, and individuals in the United States and they are issued under the license review policy of 'a presumption of denial'. This export licensing requirement is an export restriction, which runs afoul of the MFN obligation embedded in Article I:1 of the GATT 1994, since Article I:1 prohibits discriminatory treatment of exports destined for a particular WTO Member.

Furthermore, the export licensing requirement breaches an obligation to eliminate quantitative restrictions of Article XI:1 of the GATT 1994. The panel in *China – Raw Materials* has concluded that: 'a licence requirement that results in a restriction [...] would be inconsistent with GATT Article XI:1. Such restriction may arise in cases where licensing agencies have unfettered or undefined discretion to reject a licence application'.[136] The license review policy that is formulated in the US regulations as 'a presumption of denial' implies that a majority of license requests would be denied. Given this, the US export licensing requirement faces a significant risk of violating Article XI:1 of the GATT 1994.

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132 H. Gold, *UK Bans Huawei from Its 5G Network in Rapid About-Face*, CNN Business (14 July 2020), https://edition.cnn.com/2020/07/14/tech/huawei-uk-ban/index.html.

133 Y. Yang & N. Liu, *Beijing Orders State Offices to Replace Foreign PCs and Software*, Financial Times (8 Dec. 2019), https://www.ft.com/content/b55fc6ee-1787-11ea-8d73-6303645ac406.

134 K. M. Sutter, *China Issues New Export Control Law and Related Policies*, Congressional Research Service INSIGHT (26 Oct. 2020), https://fas.org/sgp/crs/row/IN11524.pdf.

135 *Ibid.*, at 2–3.

136 WTO Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials* [*China – Raw Materials*], WT/DS394/R; WT/DS395/R; WT/DS398/R, adopted 22 Feb. 2012, para. 7.957.

Import restrictions on the ICTS stipulated in the Executive Order 13873 are all-encompassing. The rules implementing them were announced in January 2021 and they demonstrate the potentially sweeping nature of such restrictions.[137] In particular, the rules enable the Secretary of Commerce to review transactions that involve 'acquisition, importation, transfer, installation, dealing in, or use of any information and communications technology or service' if such ICTS has been 'designed, developed, manufactured, or supplied, by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary'.[138] Any determination that a transaction poses undue or unacceptable risks implies that the transaction should be prohibited or alternatively, its negative impact should be mitigated.[139] Either way, such unfettered discretion to prohibit any import transaction may potentially establish a de facto import restriction. Such de facto import restriction would be implemented against the ICTS imported from the states declared to be a 'foreign adversary' and according to the regulation, the People's Republic of China along with several other states is defined as a 'foreign adversary' for the purposes of this regulation.[140]

Any discriminatory treatment of the ICTS based on the origin breaches Article I:1 of the GATT 1994, which protects '"equality of competitive opportunities" between products that are in a competitive relationship'.[141] Furthermore, these de facto import restrictions violate Article XI:1 of the GATT 1994. In particular, a prospective application of the abovementioned rules might violate the prohibition of quantitative restrictions prescribed by Article XI:1 by prohibiting certain transactions based on ambiguous and not well-defined criteria and thus having a limiting effect on the quantity of the ICTS imported.[142]

Going beyond the clear inconsistencies of unilateral sanctions with the WTO obligations, the issue that requires some discussion is the boundaries of national security exception, when deployed to defend unilateral economic sanctions. The salience of the issue is even more manifest when one notes how the current discourse is shifting towards other sources of national security concerns, beyond military threats.[143] The question we must ask: is the national security exception well-equipped to cover novel national security threats while preventing the

137 US Department of Commerce, *supra* n. 125.
138 *Ibid.*
139 *Ibid.*
140 *Ibid.*
141 WTO Appellate Body Report, *Argentina – Financial Services*, *supra* n. 73, para. 6.24.
142 The Appellate Body pronounced that: 'Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported'. WTO Appellate Body Reports, *China – Raw Materials*, *supra* n. 76, paras 319–320.
143 L. K. Donohue, *The Limits of National Security*, 48 Am. Crim. L. Rev. 1573 (2011); J. B. Heath, *National Security and Economic Globalization: Toward Collision or Reconciliation*, 42 Fordham Int'l L. J. 1431 (2019).

exception from being used as a pretext for trade protectionism? To put this in context, the possibility to justify unilateral economic sanctions discussed above under the national security exception is examined. Prior to that, the pertinent WTO jurisprudence on the interpretation of national security exception is briefly summarized.

4 THE NATIONAL SECURITY EXCEPTION AS A POTENTIAL JUSTIFICATION FOR UNILATERAL ECONOMIC SANCTIONS

4.1 The jurisprudence on the national security exception

The national security exception of Article XXI(b)(iii) of the GATT 1994 (and similar exceptions in the GATS and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)) reads as follows:

'Nothing in this Agreement shall be construed: […]

(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests […]

(iii) taken in time of war or other emergency in international relations'.[144]

In *Russia – Traffic in Transit*, the panel introduced a framework to analyse the invocation of the national security justification.[145] First, the panel distinguished between objective and subjective elements of the national security clause. The prerequisite 'taken in time of war or other emergency in international relations' was interpreted as an objective element[146] that operates as a 'limitative qualifying clause'.[147] It was maintained that this element not only requires an objectively established existence of war or other emergency in international relations but also chronological concurrence between trade-restrictive measures and such events.[148] Second, the panel ruled that the subjective elements of the national security exception – a determination of 'essential security interests' and the necessity of such measures ('necessary for the protection'), should be reviewed against the background of the principle of good faith.[149] For this reason, even though a WTO Member could determine its 'essential security interests',[150] such interests should be articulated 'sufficiently enough to demonstrate their veracity'.[151] Moreover, it was pronounced that the element 'necessary for the protection' requires a minimum degree of

144 Article XXI GATT 1994; Art. XIV *bis* GATS; Art. 73 TRIPS Agreement.
145 WTO Panel Report, *Russia – Traffic in Transit*, *supra* n. 30.
146 *Ibid.*, para. 7.101.
147 *Ibid.*, para. 7.65.
148 *Ibid.*, para. 7.70.
149 *Ibid.*, para. 7.132. and para. 7.138.
150 *Ibid.*, paras 7.130–7.131.
151 *Ibid.*, para. 7.134.

plausibility between trade-restrictive measures and their ability to contribute to the protection of declared security interests.[152]

In a nutshell, the WTO adjudicators' right to review the invocation of the national security exception is confined to a determination if the objective element – 'taken in time of war or other emergency in international relations', is fulfilled; whether a WTO Member communicated 'essential security interests' in good faith and if there is a minimum requirement of plausibility between imposed measures and declared national security interests.[153]

The panel in *Saudi Arabia – Protection of IPRs* relied upon the same analytic framework.[154] The panel adjudicated that the tension between Qatar and Saudi Arabia met the threshold of being 'emergency in international relations'[155] along with the finding that violations of Articles 41.1 and 42 of the TRIPS Agreement can be justified under the national security exception.[156] Nonetheless, the panel decided that Saudi Arabia's non-application of criminal procedures and penalties to beoutQ company – a company that was allegedly engaged in pirated broadcasting, violates Article 61 of the TRIPS Agreement and cannot be justified under the national security exception.[157]

In the following part, the possibility to justify unilateral economic sanctions described before under the national security exception is discussed. The analysis will focus on the ability of various sanctions regimes to meet the objective prerequisite, – 'taken in time of war or other emergency in international relations', given that this is the most stringent element of national security exception.[158]

4.2 Human rights violations abroad as a matter of national security

The possibility to justify human rights sanctions under the national security exception is significantly constrained by the objective prerequisite 'taken in time of war or other emergency in international relations'. This requirement was interpreted in two panel reports. In *Russia – Traffic in Transit*, trade-restrictive measures were imposed

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152 *Ibid.*, para. 7.138.

153 *Ibid.*

154 WTO Panel Report, *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights* [*Saudi Arabia – Protection of IPRs*], WT/DS567/R, under appeal since 28 July 2020, paras 7.241–7.242.

155 '[…] the Panel considers that "a situation … of heightened tension or crisis" exists in the circumstances in this dispute, and is related to Saudi Arabia's "defence or military interests, or maintenance of law and public order interests" (i.e., essential security interests), sufficient to establish the existence of an "emergency in international relations" that has persisted since at least 5 June 2017'. *Ibid.*, para. 7.257.

156 *Ibid.*, para. 7.294.

157 *Ibid.*

158 The panel ruled that 'for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision'. WTO Panel Report, *Russia – Traffic in Transit*, *supra* n. 30, para. 7.101.

against the background of a military conflict between the states.[159] To the contrary, in *Saudi Arabia – Protection of IPRs,* the existence of 'emergency in international relations' was established based on a unilateral act of the respondent state to sever diplomatic and consular relations and impose comprehensive sanctions to end all economic and trade relations.[160] Hence, the latter panel report acknowledged that a political crisis between states could constitute 'emergency in international relations' even in the absence of a military component.

In view of this, a WTO Member that is willing to invoke the national security exception to justify its unilateral human rights sanctions should be able to establish several elements. First, it should be demonstrated that a 'war' or 'other emergency in international relations', which was interpreted as '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',[161] exists. This requires a finding that either human rights violations, which provoked imposition of unilateral sanctions, occurred in a situation of armed conflict or such violations caused an emergency in international relations that is equal to 'heightened tension or crisis, or of general instability engulfing or surrounding a state'. Second, this particular emergency should give rise to security interests, – 'i.e., defence or military interests, or maintenance of law and public order interests', for a WTO Member relying upon a national security exception.[162] Considering these requirements, not all grave human rights violations occurring abroad could constitute an 'emergency' for a particular WTO Member. For example, extrajudicial killings, torture and other human rights violations against active members of the civil society and journalists in the Russian Federation could hardly constitute an 'emergency in international relations' for the United States in the meaning of the national security exception. To further reiterate this point, it should be noted that in both panel reports, wherein the invocation of the national security clause was discussed, the situation of emergency not only directly involved a state that relied upon this exception but also occurred in geographical proximity to that state.[163] In light of this, our assumption would be that only unilateral sanctions that are implemented to address grave human rights violations occurring in geographical proximity to a WTO Member and which could potentially trigger other

159 'By Dec. 2016, the situation between Ukraine and Russia was recognized by the UN General Assembly as involving armed conflict'. WTO Panel Report, *Russia – Traffic in Transit*, *supra* n. 30, para. 7.122.

160 WTO Panel Report, *Saudi Arabia – Protection of IPRs*, *supra* n. 154, paras 7.257–7.270.

161 WTO Panel Report, *Russia – Traffic in Transit*, *supra* n. 30, para. 7.76.

162 *Ibid.*

163 In *Russia – Traffic in Transit*, panel noted that Russia had identified that the situation, which it considered as an emergency in international relations, consisted of a number of factors, including 'that it affects the security of Russia's border with Ukraine in various ways'. WTO Panel Report, *Russia – Traffic in Transit*, *supra* n. 30, para. 7.119; WTO Panel Report, *Saudi Arabia – Protection of IPRs*, *supra* n. 154.

negative externalities such as refugee flows, can be acknowledged to constitute 'other emergency in international relations' and give rise to a particular type of security interests, which belong to essential interests and thus, be justified under the national security clause.

4.3 Prevention and punishment of cyber-attacks as a matter of national security

Whether cyber sanctions, – unilateral economic sanctions imposed to prevent and punish cyber-attacks, can be justified under the national security exception is debatable. More specifically, for unilateral sanctions to be justified under the national security exception, cyber-attacks, which are a reason for such sanctions, should be recognized as constituting 'other emergency in international relations'.

Cyber-attacks on critical infrastructure, which may have a devastating effect on the exercise of state functions, might satisfy the criteria for being an 'emergency in international relations'. Indeed, the view that cyber-attacks on critical infrastructure that undermine the functioning of government bodies fall under the definition of 'emergency in international relations' was expressed by legal scholars.[164] The recent examples of such cyber-attacks are an attack against Ukraine's power grid[165] and the 'NotPetya' cyber-attack,[166] for which Russian hackers were responsible.[167] However, the objective element of the national security clause requires that trade-restrictive measures justified under this exception should have been 'taken in time of' any such emergency in international relations.[168] As a rule, the imposition of cyber sanctions does not correspond in time with cyber-attacks that provoked such sanctions.[169] Hence, it might be questionable if cyber sanctions are 'taken in time of' emergency in international relations.

One may even argue that cyber-attacks might fall short of being 'emergency in international relations'. Such 'emergency in international relations' implies that there

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164 For a similar view *see* G. D. Balan, *On Fissionable Cows and the Limits to the WTO Security Exceptions*. SIEL, Sixth Biennial Global Conference, SSRN, https://ssrn.com/abstract=3218513.

165 The aftermath of this attack was described as follows: 'The resulting blackouts – the world's first known successful cyberattack on an energy company at scale – affected about 230,000 Ukrainians for up to six hours'. Laurens Cerulus, *How Ukraine Became a Test Bed for Cyberweaponry*, Politico (20 Feb. 2019), https://www.politico.eu/article/ukraine-cyber-war-frontline-russia-malware-attacks/.

166 'The resulting malware – "NotPetya" – compromised the software of a small tech firm called Linkos Group, providing it access to the computers of utility companies, banks, airports and government agencies in Ukraine'. *Ibid*.

167 *Ibid*.

168 WTO Panel Report, *Russia – Traffic in Transit*, *supra* n. 30, para. 7.70.

169 For example, the EU imposed its first cyber sanctions in July 2020 and targeted individuals and entities responsible for cyber-attacks that occurred before and which were terminated by the time these sanctions were implemented.

is a conflict, tension, or crisis between two states. Yet, non-state actors conduct a majority of cyber-attacks and to attribute such conduct to a state is extremely difficult.[170] This difficulty emanates not only from technical obstacles[171] but also from legal standards of attribution embedded in the rules of state responsibility.[172] This implies that if unilateral sanctions are implemented without severance of relations between states or without any other crisis in inter-state relations, then there is no 'emergency in international relations', which enables a state to invoke the national security exception. Although there might be an internal emergency for a particular state.

4.4 Data protection as a matter of national security

Data protection, i.e., protection of the government, trade and commercial secrets as well as users' personal information, is named among the reasons behind the US unilateral sanctions that restrict trade in the ICTS with the Chinese-based technological companies, mainly Huawei and its affiliates.[173] The United States has expressed these allegations against Huawei at least since 2012.[174]

This novel type of national security concern, which emanates from the significantly increasing digitalization of all aspects of life and over reliance on the ICTS, reinforced by the possibility to install so-called 'back doors' in hardware and software to steal sensitive information as well as the ability to collect massive amounts of users' personal information, poses new challenges for governments. To address this concern, WTO Members have been introducing domestic laws and regulations to protect personal data and restrict cross-border transfers of such data.[175] These laws and their compatibility with the WTO obligations have been

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170 M. N. Schmitt, *Below the Threshold Cyber Operations: The Countermeasures Response Option and International Law,* 54 Va. J. Int'l L. 697 (2014).

171 'Over the years, through the use of deception narratives, nation states have intentionally contrived stratagems cloaking their nexus to attacks by appearing as non-nation state-sponsored organizations'. Cameron H. Malin et al., *Asymmetric Warfare and Psyops: Nation State-Sponsored Cyber Attacks* §8, 214 (Cameron H. Malin et al. eds, Academic Press 2017).

172 K. Mačák, *Decoding Article 8 of the International Law Commission's Articles on State Responsibility: Attribution of Cyber Operations by Non-State Actors*, 21 J. Confl. Secur. Law 405 (2016).

173 Executive Ord. 13873, *supra* n. 114.

174 The US House of Representatives, 112th Congress, *Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE* (8 Oct. 2012), https://republicans-intelligence.house.gov/sites/intelligence.house.gov/files/documents/huawei-zte%20investigative%20report%20(final).pdf.

175 The General Data Protection Regulation (GDPR) which was adopted by the European Union and entered into force in May 2018 is one of the most discussed domestic regulations protecting personal data. Regulation (EU) No 2016/679 of 27 Apr. 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC OJ [2016] L119/1.

amply discussed during the meetings at the WTO[176] as well as in the academic literature.[177] Possible invocation of the national security exception as a justification for such regulations has been also analysed.[178]

Despite the enormous potential of the privately owned technological companies such as Huawei to engage in acts of cyber espionage, cyber theft and to undermine their users' privacy, trade-restrictive measures imposed against such companies might fall short of being justified under the WTO national security exception as it is formulated and applied. Even if an argument can be advanced that companies like Huawei may enable cyber espionage by the Chinese government, the mere possibility of such behaviour is not equal to a heightened tension or crisis in inter-state relations that might constitute 'emergency in international relations'.

In this regard, an interesting question to ponder is whether preventive trade-restrictive measures could be justified by reference to a future 'emergency' that might happen if those measures are not put in place. The possibility of future cyber theft or illegal use of users' personal information could hardly constitute an 'emergency in international relations' as it has been interpreted by the WTO adjudicators. Furthermore, this suggestion is doubtful taking into account the requirement of chronological concurrence, which is formulated as 'taken in time of [...] other emergency in international relations', which hinders the possibility to address forthcoming national security risks that might cause an 'emergency'. Thus, trade restrictions that are preventive in their nature and target suppliers only based on their headquarters' location could face significant challenges in being justified under the national security exception.

Our brief analysis of the national security exception as it has been interpreted and applied by the WTO adjudicators confirms that it is not always capable of delineating states' legitimate conduct in pursuance of their national security interests from the instances of abuse, thus leaving states before a dilemma either to violate WTO obligations or to pursue unconventional national security interests. This conclusion can contribute to a general debate on the ambit and role of the national security exception in a fast-changing world and a need for a new national security paradigm.

5 CONCLUSION

The national security exception was negotiated at times when conventional military threats were the main source of national security concerns. The ambiguous language

176 For example, starting from Oct. 2018 a number of WTO Members expressed their concerns regarding Chinese cybersecurity law and implementing regulations that prescribe restrictions on cross-border transfers of information and data localization requirements. WTO, Council for Trade in Services, *Report of the Meeting Held on 7 Dec. 2018*, WTO Doc. S/C/M/137 (24 Jan. 2019).

177 N. Mishra, *Privacy, Cybersecurity, and GATS Article XIV: A New Frontier for Trade and Internet Regulation?*, 19 WTR 341 (2020).

178 Peng, *supra* n. 117.

and its political nature are the reasons behind states' past hesitation to invoke the WTO national security exception in their trade disputes. Yet, the situation drastically changed and the number of disputes, in which this clause is invoked, has been growing. This change occurred against the background of new emerging threats to national security and proliferation of unilateral economic sanctions imposed to partially redress some of those security concerns.

This article intended to examine the possibility to justify novel types of unilateral economic sanctions under the WTO national security exception and to demonstrate the inevitable boundaries of this clause. Even this preliminary analysis proves that the national security exception cannot be used to justify all types of unilateral economic sanctions, even if some of these unilateral restrictive measures are indeed related to national security concerns, e.g., cyber sanctions. This new reality should spark a debate on the ambit of the national security exception, especially in the present circumstances of overreliance on unilateral economic sanctions, the legality of which is still unsettled, and against the background of their negative impact not only on bilateral trade relations but also on global value chains.